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Editorial

Dear readers,

We are proud to present our last issue of 2011. Looking back on a successful year, GoJIL can now – with a small delay – turn to its new exciting projects of 2012!

Moreover, we are honored to introduce to you a new member of our Advisory Board. Professor Dr. Dr. h.c. Angelika Nußberger M.A. is Judge at the European Court of Human Rights and Professor at the University of Cologne where she also heads the Institute of Eastern European Law. Her expertise in international law and her academic experience will provide substantive support for the GoJIL. Along with Thomas Buergenthal and Bruno Simma, Nußberger is now the third Judge from a renowned international court on the Journal's Advisory Board.

In Vol. 3 No. 3, *Cedric Ryngaert* examines "The Legal Status of the Holy See" in his article. Observing that the Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy, like the participation in various intergovernmental organizations, in a substantial number of bilateral and multilateral treaties, the sending and receiving of diplomatic representatives, immunity from jurisdiction, and a permanent observer status at the United Nations, he further analyses the legal status and comes to the conclusion that although the Holy See is, unlike the Vatican City State, not to be characterized as a State, due to its global spiritual remit and the lacking territorial base, it is a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the centre of the Catholic Church.

As the events of the past year were by no means without impact for various fields of public international law, the section "Current

Developments" could be filled with an exuberant amount of short analyses. Nevertheless, one of the predominating and most passionately perceived topics was the Arab Spring. Therefore *Marie-José Domestici-Met* analyses the role of R2P during the Arab Spring in her article "Protecting in Libya on Behalf of the Internal Community … and in the Name of Humanity?" Her article is the third and last part in a series under the global title "Humanitarian Action – A Scope for the Responsibility to Protect?" which began in 2009. Although the future developments in the Arab world, especially in Syria are difficult to foresee, this article takes stock of some trends.

With the death of Osama bin Laden another question rising high again in public debate is the legality of targeted killings. Starting from the recent discussion about the regulation of combat drones in current conflicts *Sebastian Wuschka* claims in his article "The Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem?" that, contrarily to misinterpretations in the media the legal framework regarding today's drone systems is settled. He first provides an assessment of unmanned combat drones as a new technology from the perspective of international humanitarian law to then proceed to the vital point of the legality of targeted killings with remotely operated drones. Further, he discusses the preconditions for applicability of humanitarian law and human rights law to such operations. In conclusion, the author holds the view that the legal evaluation of drone killings depends on the execution of each specific strike. He argues that assuming that targeted killings with drones will generally only be legal under the law of armed conflict, states might be further tempted to label their fights against terrorism as 'war'. *Wuschka* is the winner of our Student Essay Competition which takes place every spring/summer. We invite all interested students to have a look on our homepage www.gojil.eu for further information.

Despite the abundance of current issues, most of this issue is dedicated to an event in the future: In 2013, the International Criminal Tribunal for the Former Yugoslavia will finally close its doors. This raises questions about whether there is an ICTY legacy; if so what does it contain? That is the topic of our second GoJIL:Focus under the headline "The Legacy of the ICTY".

First, *Donald Riznik* analyses the way the Security Council and the ICTY have chosen to bring the Tribunal to an end by implementing the Completion Strategy in his article "Completing the ICTY Project Without Sacrificing its Main Goals. Security Council Resolution 1966 – A Good

Decision?”. *Riznik*’s article contemplates issues the Security Council faced before adopting Resolution 1966, especially with regard to its main goal of ending impunity for serious breaches of international law, and to bring justice and peace to the people living on the territory of the former Yugoslavia. His article addresses pressing matters such as the implementation of the International Residual Mechanism for Criminal Tribunals (IRMCT), which was adopted while two remaining fugitives, Ratko Mladic and Goran Hadzic were still at large. Only a few months ago, the two were caught and transferred to the Tribunal. Riznik argues that not shutting the institutional doors entirely until all remaining fugitives have been arrested, was a complex situation in a legal and practical sense which was, at the time, best solved through Resolution 1966. He then proceeds to outline the practical impact of the IRMCT on the ICTY´s further work and the relation between these two organs during their coexistence.

Then, *Gabrielle McIntyre* examines the International Residual Mechanism for Criminal Tribunals as the legal successor of the ICTY and the ICTR in her article “The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda”. She argues that in the creation of the Residual Mechanism, the Security Council appears to have intended to ensure the continuation of the work of the Tribunals and thereby safeguard their legacies. Accordingly, the Statute of the Residual Mechanism continues the jurisdiction of the Tribunals, mirrors in many respects the structures of the Tribunals, and ensures that the Residual Mechanism’s Rules of Procedure and Evidence are based on those of the Tribunals. However, the Statute of the Residual Mechanism is silent with regard to the significance the Judges of the Residual Mechanism must accord to ICTY and ICTR judicial decisions. She analyses that while there is no doctrine of precedent in international law or hierarchy between international courts, this omission by the Security Council does have the potential to negatively impact the legacies of the Tribunal by allowing for departures by the Residual Mechanism from the jurisprudence of the Tribunals, which lead to similarly situated persons being dissimilarly treated. She underlines that even if the Residual Mechanism does adopt the jurisprudence of the Tribunals as its own, as a separate legal body it will nevertheless still have to answer constitutional questions regarding the legitimacy of its establishment by the Security Council. McIntyre assumes that it can be anticipated that the Residual Mechanism will find itself validly constituted. The wisdom of the Security Council’s decision to artificially end the work of the Tribunals by the establishment of the Residual Mechanisms will, however, ultimately turn upon the question of whether any inherent unfairness could be occasioned to

persons whose proceedings are before the Residual Mechanism. She suggests that the Security Council has provided the Residual Mechanism with sufficient tools to ensure that its proceedings are conducted in *para* passu with those of the Tribunals and that the responsibility of ensuring the highest standards of international due process and fairness falls to the Judges of the Residual Mechanism.

Not focusing on the legitimacy of the Residual Mechanism but on that of the ICTY, *Mia Swart* argues in her article "Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY" that the reasoning of the Tadic Appeals Chamber when deciding that the establishment was legitimate was not sufficiently strong or persuasive but has nevertheless been replicated or repeated in the trials of Saddam Hussein and Charles Taylor. She points out that the legitimacy question is crucial since it affects the very foundations of the ICTY. Therefore, the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY. Her article considers the difference between the ICTY's self perception as well as the way the work of the Tribunal over the last sixteen years has been perceived from the outside. Moreover she focuses on the question whether legitimacy can also be acquired after the initial establishment and considers whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.

Frédéric Mégret explores the legacy of the ICTY through the experience of some of its actors and observers in his article "The Legacy of the ICTY as Seen Through Some of its Actors and Observers". It is based on material provided by a dozen interviews and written in the spirit of understanding the tribunal's "legacy" as a collection of complex individual narratives of what the tribunal stands for, what it did well, and what it might have done better. His collection considers the ICTY's legacy both as an international tribunal and as a device for transnational justice. He argues that although a tension is found to exist between a more "forensic" and a more "transitional" view of its role which is particularly manifest in determining the tribunal's constituencies and policies, the two are also linked. He underlines the broad consensus about the tribunal's importance, but on the eve of its closing, also a sense of the limits of what international criminal justice can aspire to.

Focusing on the defence counsel's point of view, *Michael G. Karnavas* examines the legacy of the ICTY in his article "The ICTY

Legacy: a Defence Counsel's Perspective". He argues that the achievements of the ICTY are as impressive as they are irrefutable. He complains about the uneven quality of procedural and substantive justice that the Tribunal has rendered. Karnavas highlights several shortcomings at the Tribunal, including the appointment of unqualified judges, excessive judicial activism, its disparate application of law, procedure, and prosecutorial resources to different ethnic groups, and its tinkering with the rules of procedure to promote efficiency but which erode the fundamental rights of the Accused. Drawing on specific examples, from the approach adopted to the admissibility of testimonial evidence to specific areas of substantive law where judicial activism has been pronounced - the development of joint criminal enterprise and the requirements for provisional release at a late stage of the proceedings - this article is one defence counsel's perspective of some of the most unfortunate shortcomings of the ICTY, which regrettably form part and parcel of the Tribunal's legacy.

In her article "The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims", *Giovanna Maria Frisso* examines the effects of the completion strategy of the ICTY on the victims of the crimes under its jurisdiction. Initially, she considers the impact of the completion strategy on the victims who participated- as witnesses- in the proceedings before the ICTY. She argues that the pressure to comply with the time frame established by the Security Council has resulted in the reduction of the victims to their forensic usefulness. The victims were considered primarily in light of their instrumental relevance to the proceedings. She then suggests, through the analysis of the measures related to the transferal of cases to the national courts and the archives of the ICTY, that the completion strategy may have a positive effect on the implementation of the rights of the victims who have not had direct contact with the ICTY. In this context, this article argues that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished.

We hope that all these articles in this issue provide a worthwhile read to our readership.

The Editors

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The Legal Status of the Holy See

Cedric Ryngaert*

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Abstract

The Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy: it has joined various intergovernmental organizations, it is a party to a substantial number of bilateral and multilateral treaties, it sends and receives diplomatic representatives, is said to enjoy immunity from jurisdiction, and has been granted permanent observer status at the United Nations. However, unlike the Vatican City State, the Holy See is not to be characterized as a State, given that it has a global spiritual remit and that it can act internationally without a territorial base. Instead, it is a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the center of the Catholic Church.

A. Introduction

The Holy or Apostolic See (*Sancta Sedes*) is the seat of the bishops of Rome, and the governmental center of the Catholic Church. The Holy See is headed by the Supreme Pontiff or the Pope, who, in his administration of the Church, is assisted by the Roman *Curia*.

Since mediaeval times, the Holy See has been considered as enjoying international legal personality. At the time, however, the Supreme Pontiff was also the temporal sovereign of the Pontifical (or Papal) States in Italy, so that the question of the legal status of the Holy See as a non-State international religious organization rarely arose. Only after the Holy See lost its territorial base in 1870 was this question brought into starker relief: could its international activities, such as sending and receiving legations, be explained by the enjoyment of a certain measure of international legal personality? The answer to this question was complicated by the Holy See regaining a tiny territorial basis in Rome, an enclave of 110 acres called the 'Vatican City', pursuant to the 1929 Lateran Treaties with Italy (which eventually solved the 'Roman Question').

In the first section of this contribution, an attempt is made at disentangling the relationship between the Holy See and the Vatican. Being headed by the same (absolute) monarch, these entities have seemingly entered into an almost personal union with each other. Still, for international legal purposes, they can be said to remain two separate international legal persons, with the Vatican qualifying as a (mini-)State and the Holy See as a

sui generis non-State actor which nevertheless enjoys a panoply of rights that possibly no other non-State actor enjoys.

The precise rights enjoyed by the Holy See in the international legal order are the subject of the second section of this contribution. This section examines in particular the Holy See's participation in (and influence on) intergovernmental organizations, multilateral treaties and conferences, and its right of legation.[1]

The Holy See's bilateral treaty-making power will be discussed in the third section, which studies in particular the 'concordats' concluded between the Holy See and various (Catholic) States. Concordats are treaties that regulate the position of the Catholic Church in the temporal order of the State. This section will specifically address the exact relationship between, on the one hand, the concordats and the canonical legal order to which they refer, and, on the other, the constitutional and human rights protections that are applicable in the temporal order of the State and that may clash with the provisions of the concordat.

A fourth section addresses the Holy See's role in international dispute settlement. This section will not so much tackle the question of whether the Holy See has been, or can be, a party to an international dispute and whether it can bring a case before a dispute-settlement mechanism. After all, the Lateran Conciliation Treaty obliges the Holy See to distance itself from temporal rivalries. Rather, it will be ascertained whether the Holy See has served as a dispute-settlement mechanism in its own right. In particular, its role as an international mediator will be explored, a role that may suit the Holy See rather well in its capacity as a supposedly neutral religious organization that stands above temporal rivalries.

A fifth section examines a last indication of an entity's international legal personality: its immunity from legal process. On the basis of an analysis of a number of domestic court decisions, it will be shown that a determination of the immunity of the Holy See hinges either on the qualification of the Holy See as a State or at least a State-like entity, or, in the specific case of Italy (the Holy See being 'headquartered' in Rome) on the interpretation of the Lateran Conciliation Treaty. Also, as the Holy See ultimately remains a non-State actor, it is likely that the constitutionally and internationally guaranteed individual right to a remedy may play a greater

[1] Our approach will be legal. See for a more policy-oriented approach: Fondazione La Gregoriana & F. Imoda (eds), *The Catholic Church and the International Policy of the Holy See / L'Église catholique et la politique internationale du Saint-Siège* (2008).

role in restricting any immunities to which it might be entitled under international law.

Section G concludes by emphasizing how the Holy See has successfully carved out a legal position for itself, as a non-State actor, in an international legal order dominated by States.

B. The Vatican v. the Holy See

There is a considerable amount of confusion as to the exact legal characterization of the Holy See and the Vatican. Although most scholars would agree that the Holy See and the Vatican are different legal persons,[2] legal opinion on their, in the words of Crawford, "unique and complex"[3] interrelationship, differs widely.

At one end of the spectrum are those who equate the Vatican and the Holy See. As will be set out in the section on immunity, U.S. courts in particular have broadly treated the Vatican and the Holy See as one legal person, and have even considered both of them as 'States' for purposes of the U.S. Foreign Sovereign Immunities Act (FSIA).[4]

There is however a substantial amount of agreement on the lesser international status of the Vatican City *vis-à-vis* the Holy See. Duursma and Martinez observed that the Vatican City is subordinated to the Holy See,[5] while Arangio-Ruiz even went as far as to state that the Vatican "qualifies *de facto*, for international legal purposes, not as a separate person", and that from the "viewpoint of international law, the status of the Vatican City does not differ from the status of a province or any other subdivision of a State"[6].

[2] J. Duursma, *Fragmentation and the international relations of micro-states* (1996), 387; L. C. Martinez, 'Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?', 44 *Texas International Law Journal* (2008) 123, 144-155.

[3] J. Crawford, *The Creation of States in International Law* (2006), 223 (also characterizing this relationship as the "chief peculiarity of the international status of the Vatican City").

[4] The Holy See and the Vatican themselves have influenced this identification with a view to having the Holy See fall within the scope of application of the FSIA.

[5] Duursma, *supra* note 2, 386.

[6] G. Arangio-Ruiz, 'On the Nature of the International Personality of the Holy See', 29 *Revue Belge de droit international* (1996), 354, 354.

The Vatican City was indeed only created by the Lateran Treaty in 1929[7] to provide a territorial basis for the Holy See – which predates the Vatican City by many centuries – that could guarantee its independence.[8] This independence was compromised due to the Roman Question: after having exercised temporal powers in the Pontifical States since the 8th century,[9] the Holy See lost its territory to the Italian State in 1870. Only in 1929 did the Italian State, by virtue of the Lateran Treaties, return a portion of this territory to the Holy See, at which time the Holy See also received financial compensation as reparation for the "immense damage sustained by the Apostolic See through the loss of the patrimony of S. Peter constituted by the ancient Pontifical States, and of the Ecclesiastical property"[10]. It is noted, in passing, that this financial settlement could be seen as an indication of the Holy See's international legal personality in two ways: the treaty-making capacity of the Holy See as well as the right to bring a claim against another international legal person.

The Vatican City State as created in 1929 could duly be characterized as a State, as it satisfies the three *Montevideo* criteria for statehood: territory, population, government.[11] Possibly, as Harris observed, it is the "only state that is generally recognised by the international community that

[7] *Lateran Conciliation Treaty*, 11 February 1929, Art. 3, 130 BSP 791, Gazzetta Ufficiale, Suppl Ord, 5 June 1929, No. 130, reprinted in S. Berlingò & G. Casuscelli (eds), *Codice del diritto ecclesiastico*, 3rd ed. (1993), 211.

[8] Lateran Conciliation Treaty, *supra* note 7, Art. 4: "The sovereignty and exclusive jurisdiction over the Vatican City, which Italy recognizes as appertaining to the Holy See, forbid any intervention therein on the part of the Italian Government, or that any authority other than that of the Holy See shall be there acknowledged."; *Fundamental Law of the Vatican City State*, 26 November 2000, preamble: "the State, which exists as an appropriate guarantee of the freedom of the Apostolic See and as a means of assuring the real and visible independence of the Roman Pontiff in the exercise of his mission in the world".

[9] T. F. X. Noble, *The Republic of St. Peter: The Birth of the Papal State 680-825* (1984), xxix, 374.

[10] *Financial Convention annexed to the Lateran Treaty* (1929), preamble. Article 1 of the Convention stipulated that "Italy, on the exchange of ratifications of the Treaty, shall pay to the Holy See the sum of Italian lire 750,000,000". According to the preamble, the Pope "taking into consideration the present financial condition of the State and the economic condition of the Italian people, especially after the war, has deemed it well to restrict the request for indemnity to the barest necessity".

[11] *Montevideo Convention on Rights and Duties of States*, 26 December 1933, 165 L.N.T.S. 19. See M. N. Bathon., 'The Atypical International Status of the Holy See', 34 *Vanderbilt Journal of Transnational Law* (2001), 597, 608-615.

is not a member of the United Nations"[12]. The Vatican has a fixed territory (however small it may be) with fixed boundaries,[13] a small population of clerics[14] (that may however not have the capacity for self-perpetuation),[15] and a government.

The government of the Vatican City is regulated by the Fundamental Law of Vatican City State, promulgated by Pope John Paul II on 26 November 2000, which entered into force on 22 February 2001, and replaced the Fundamental Law of Vatican City of 7 June 1929. This Fundamental Law can be considered as a constitution that was, in the words of its preamble, adopted "to give a systematic and organic form to the changes introduced in successive phases in the juridical structure of Vatican City State" and "to make it correspond always better to the institutional purposes of the State". It vests all power exercised in the Vatican City State in the Pontiff,[16] and reaffirms or establishes a number of governmental institutions, such as the College of Cardinals,[17] the Secretariat of State,[18] the

[12] D. J. Harris, *Cases and Materials on International Law* (2004), 99.

[13] This territory consists of the Vatican City (cf. Article 3, para. 2 of the Conciliation Treaty: "The boundaries of the said City are set forth in the map called Annex I of the present Treaty, of which it is forms an integral part.") and a number of extraterritorial possessions, including the Castel Gandolfo (Articles 13-14 of the Conciliation Treaty).

[14] Lateran Conciliation Treaty, *supra* note 7, Art. 9, para. 1: "In accordance with the provisions of International Law, all persons having a permanent residence within the Vatican City shall be subject to the sovereignty of the Holy See. Such residence shall not be forfeited by reason of the mere fact of temporary residence elsewhere, unaccompanied by the loss of habitation in the said City or other circumstances proving that such residence has been abandoned". See also Holy See Press Office, 'Vatican Citizenship' (31 December 2005) available at http://www.vatican.va/news_services/press/documentazione/documents/sp_ss_scv/informazione_generale/cittadini-vaticani_en.html (last visited 3 January 2012): "As of December 31st 2005, there were 557 persons having the Vatican citizenship, of which 58 Cardinals, 293 of the Clergy having status as members of the Pontifical Representations, 62 other members of the Clergy, 101 members of the Pontifical Swiss Guard and 43 other lay persons. The persons authorized to reside in the Vatican City maintaining their original citizenship were 246, of the aforementioned numbers. The persons residing in buildings outside of the Vatican City in buildings exempt from expropriation and taxation were 3,100 on the above mentioned date".

[15] Bathon, *supra* note 11, 611.

[16] Art. 1, para. 1 Fundamental Law of the Vatican City State: "The Supreme Pontiff, Sovereign of Vatican City State, has the fullness of legislative, executive and judicial powers".

[17] This institution has the same powers as the Pontiff during an interregnum. Cf. Art. 1, para. 2 of the Fundamental Law.

Pontifical Commission[19] and its President,[20] the Secretary General,[21] the Council of Directors,[22] the Councilor General and the Councilors of the State,[23] a number of judicial institutions,[24] and a Labor Office.[25]

The Fundamental Law of the Vatican City State also provides for the representation of the Vatican City State in relations with foreign nations and other subjects of international law, for the purpose of diplomatic relations and the conclusion of treaties. Pursuant to Article 2, this representation is reserved to the Supreme Pontiff himself, who exercises this right by means of the Secretariat of State. On the basis of this article, the Vatican participates in international relations, but to a lesser extent, or at least in a different fashion, than the Holy See.

The Vatican acts internationally in the field of more technical matters that are closely tied to the practical needs of the Vatican City State. In contrast, the international competence in spiritual and value-laden matters, e.g., human rights and peace and security, belongs rather to the Holy See. This explains why the Vatican State rather than the Holy See is a member of the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Telecommunications Satellite Organization (INTELSAT), EUTELSAT, UNIDROIT, the World Intellectual Property Organization (WIPO) and the International Grain Council, whereas the Holy See rather than the Vatican is a member of the Organization for Security and Co–operation in Europe (OSCE), the United Nations Conference on Trade and Development (UNCTAD), the International Atomic Energy Agency (IAEA), the Comprehensive Nuclear Test Ban Treaty Organization, the Preparatory Commission for the Comprehensive Test Ban Treaty, the Organization for the Prohibition of Chemical Weapons and – also – the

[18] Which can be considered as the Pontiff's foreign ministry pursuant to Art. 2 of the Fundamental Law.

[19] Which exercises legislative power pursuant to Art. 3 of the Fundamental Law.

[20] Who exercises executive power pursuant to Art. 5 of the Fundamental Law, and emergency legislative powers pursuant to Art. 7.

[21] Who exercise administrative power pursuant to Art. 9.

[22] Which has a role in the preparation and the study of accounts and other affairs of a general order concerning the personnel and activity of the Vatican, pursuant to Art. 11.

[23] Who have the responsibility to offer their assistance in the drafting of Laws and in other matters of particular importance, pursuant to Art. 13.

[24] Art. 15 Fundamental Law of the Vatican City State.

[25] Which hears controversies concerning labor relations between the employees of the State and the Administration, pursuant to Art. 18.

WIPO.[26] As the example of WIPO membership illustrates, the distinction between technical and non-technical matters is not watertight, however, and in any event, the Holy See construes its spiritual mandate rather broadly, by including the non-proliferation of weapons of mass destruction therein.[27]

The Holy See plays the more important role in international affairs. This was already reflected in the 1929 Conciliation Treaty, which stipulated in Article 12 that "Italy recognizes the right of the *Holy See* to passive and active Legation, according to the general rules of *International Law*"[28]. The diplomatic activity of the Holy See predates the diplomatic activity of the Vatican by many centuries. In fact, the Pontiff's legations were among the first diplomatic missions in the world.[29] The autonomous character of the Holy See's international activities is further reflected by the fact that in the period of the territorial interregnum (1870-1929), the Holy See did not stop sending diplomatic representatives to a number of States (active legation) and States continued to be represented at the Holy See (passive legation).[30] As of this writing, the diplomatic representatives of the Holy See represent both the Vatican City State *and* the Holy See,[31] but they formally maintain diplomatic relations in the name of the Holy See and not in the name of the Vatican State,[32] thereby illustrating the pre-eminent role of the Holy See in international relations, as compared to the role of the Vatican.

The international and transnational role of the Holy See, which serves the adherents of the Roman Catholic faith spread over the entire world, complicates the quest for a precise legal characterization of the Holy See. What is clear is that the Holy See is not simply the government of the territorially delimited Vatican City, but the governance center of the Roman Catholic Church, or as the U.S. Court of Appeals for the Second Circuit

[26] G. Westdickenberg, 'Holy See', *Max Planck Encyclopaedia of Public International Law* (June 2006) available at http://www.mpepil.com/subscriber_article?script=yes &id=/epil/entries/law-9780199231690-e1052&recno=1&author=Westdickenberg%20 %20Gerd (last visited 3 January 2012), paras 10-11.

[27] *Id.*, para. 11.

[28] Emphasis added.

[29] Martinez, *supra* note 2, 149.

[30] T. Maluwa, 'The Holy See and the Concept of International Legal Personality: Some Reflections', 19 *Comparative and International Law Journal of Southern Africa* (1986) 1, 3; Crawford, *supra* note 3, 226.

[31] Maluwa, *supra* note 30, 3.

[32] K. Martens, 'De positie van de Heilige Stoel in het volkenrecht', 55 *Ars Aequi* (2006) 2, 104. Conversely, foreign diplomats are accredited with the Holy See and not with the Vatican.

stated in 2009 the "Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. Defendant Holy See is the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church"[33].

While the Holy See has been characterized as a State, although perhaps an unusual or anomalous one (e.g., in an immunities context),[34] the better view is that it is a *sui generis* entity that enjoys far-reaching international legal personality, but that falls short of statehood. It would indeed be a stretch to consider the Holy See as having a territory. If one were to affirm that the Vatican City State is the Holy See's territory, then *a contrario* the disappearance of this territory would imply the loss of statehood and thus a transformation of its international legal personality. However, as became clear after the Pontiff's loss of the Papal States, during the territorial interregnum between 1870 and 1929, the Holy See continued to exercise the powers it had, but without a territorial base. This suggests the existence of an international legal personality that is independent of territory. Obviously, the existence of a territorial base may safeguard the independence of the Holy See *vis-à-vis* existing States – which was precisely the goal of the Lateran Treaties in 1929 – but it is not constitutive of the Holy See's international legal personality. Secondly, while it can be argued that the inhabitants of the Vatican City State constitute the population of the Holy See, and that dual nationality (of both the Vatican State and the Holy See) is not prohibited under international law, it appears rather odd that the citizenship of two States would be wholly identical. In addition, the "population" served by the Holy See may be said to extend well beyond the tiny number of 500 clerics located at the Vatican. After all, Catholics make up a population of almost 1.2 billion souls (if all criteria for statehood were met, this would make the Holy See the second most populous nation in the world after China)[35]. Thirdly, and related to the criterion of population, the governmental institutions of the Holy See, such

33 *Doe v. Holy See*, CV-02-00430 MWM, United States Court of Appeals for the Ninth Circuit, 3 March 2009, 2551.

34 E.g., M. Black, 'The Unusual Sovereign State: The Foreign Sovereign Immunities Act and Litigation Against the Holy See for Its Role in the Global Priest Sexual Abuse Scandal', 27 *Wisconsin International Law Journal* (2009), 299, 299: "The Holy See is the word's [*sic!*] smallest nation-state".

35 According to the Vatican Statistical Yearbook 2008, there were 1,166 million Catholics in the world.

as the Congregations and Tribunals (including the Roman Rota), do not administer the territorially delimited entity of the Vatican but instead the religious affairs of the worldwide Catholic Church's members, who are residents and nationals of foreign nations.

Thus, the Holy See's governance, jurisdiction or authority is not based on territorial sovereignty but rather on *spiritual sovereignty*.[36] The dominant conception of statehood does not accommodate such a manifestation of sovereignty, although in the literature the older statehood theory of 'dynastic succession' has been invoked so as to buttress the Holy See's authority and sovereign status in international law.[37] The international legal personality of the Holy See can however best be conceived as 'unique', *sui generis*, and based on a spiritual mandate that knows no borders. The Holy See shares this unique status with perhaps only one other entity widely recognized as enjoying international legal personality: the Sovereign Military Order of St. John of Jerusalem, of Rhodes, and of Malta (the Order of Malta), which, like the Holy See, also has the right of legation and has observer status at the UN General Assembly (although, unlike the Holy See, it lacks a territorial basis).[38]

[36] See also A. D. Hertzke, 'The Catholic Church and Catholicism in Global Politics', in J. Haynes (ed.), *Routledge Handbook of Religion and Politics* (2009), 48 (naming the Holy See's "spiritual sovereignty" an important power base that should not be underestimated). Compare the Great Commission, Matthew: 28:16-20 (New International Version): "Then the eleven disciples went to Galilee, to the mountain where Jesus had told them to go. When they saw him, they worshiped him; but some doubted. *Then Jesus came to them and said, 'All authority in heaven and on earth has been given to me. Therefore go and make disciples of all nations*, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you. And surely I am with you always, to the very end of the age.'" (emphasis added).

[37] Martinez, *supra* note 2, 149, arguing that "[t]he role of the Holy See at the apex of the worldwide Catholic Church is dependent on the special authority of the apostle Peter, an authority which Catholic doctrine and canon law asserts is passed on through an unbroken line of succession of the popes".

[38] Cf. F. Gazzoni, 'Malta, Order of', *Max Planck Encyclopaedia of Public International Law* (January 2009) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e958&recno=1&author=Gazzoni%20%20 Francesco (last visited 3 January 2012). Since 1834, the Order is based in Rome (para. 4).

C. The Holy See in International Relations

In the previous section, to illustrate the distinct personality of the Holy See and the Vatican City State, it has been argued that, compared with the Vatican City State, the Holy See has the upper hand in conducting international relations. It was noted that the Holy See is a member of a number of international organizations and that it sends and receives legations. Importantly, the Holy See also has treaty-making capacity, as is epitomized by its practice of concluding 'concordats' with various States (see the next section), by its conclusion of the Lateran Treaties with Italy in 1929, and by its accession to a number of multilateral conventions, such as the Geneva Conventions on the Law of War (1949), the Convention relating to the Status of Refugees (1951),[39] the Vienna Convention on Diplomatic Relations (1961), the Vienna Convention on Consular Relations (1963), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),[40] the Convention on the Rights of the Child (1989) and its Optional Protocols, and the Convention on Cluster Munitions.[41]

One of those multilateral conventions, the Vienna Convention on Diplomatic Relations (VCDR), makes two special references to the Holy

[39] It is noted, however, that the Holy See has declared with respect to this Convention that "the application of the Convention must be compatible in practice with the special nature of the Vatican City State". Cf. *Convention Relating to the Status of Refugees*, 28 July 1951, reservation by the Holy See, 189 U.N.T.S. 137. This may suggest that where the Holy See becomes a party to a treaty, the Vatican will also be bound by that treaty, even though it is technically a separate legal person.

[40] Also with respect to this Convention has the Holy See made a declaration: "The Holy See, in becoming a party to the Convention on behalf of the Vatican City State, undertakes to apply it insofar as it is compatible, in practice, with the peculiar nature of that State". Cf. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Declaration by the Holy See. It may seem that this declaration points to the same peculiarity as the earlier declaration with respect to the Convention relating to the Status of Refugees, inasmuch as the Holy See would appear to be the contracting party, but the Vatican is assumed to be bound as well. Thanks to the reviewer for drawing my attention to both declarations.

[41] As regards other conventions, it has been observed that the Holy See "endorses the aims of these international conventions in principle, but that they either do not suit the specific status of the Holy See in international law or that these conventions do not allow for reservations". See Westdickenberg, *supra* note 26, para. 12.

See's legation practice in Articles 14 and 16. Article 14(1) VCDR equates apostolic nuncios (the Holy See's diplomatic representatives) with ambassadors, i.e., the first class of heads of mission. Article 16, which deals with the precedence of diplomatic representatives, provides in paragraph 3 that it "is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See"[42]. Thereby, it affirms the continued application of existing customary (law) practices between the Holy See and the receiving State.

The Holy See has accreditation as a permanent observer at the United Nations, at many of its specialized agencies, and at a number of regional intergovernmental organizations.[43] It is, as noted above, a member of other international organizations, but it has never pressed its case to join the UN as a full-fledged member (neither has the Vatican for that matter, although it is a State).[44] However, the Holy See has not excluded that in the future it may request UN membership instead of permanent observer status.[45]

[42] According to Article 16 VCDR, "1. Heads of mission shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with article 13. 2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence".

[43] See for an overview notably the fourth preambular paragraph of UN Doc A/58/314 (16 July 2004) on the Participation of the Holy See in the work of the United Nations (listing the Food and Agriculture Organization of the United Nations, the International Labour Organization, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the United Nations Industrial Development Organization, the International Fund for Agricultural Development and the World Tourism Organization, as well as the World Trade Organization, the Council of Europe, the Organization of American States and the African Union).

[44] See on joining the League of Nations: Duursma, *supra* note 2, 399. On the Holy See/Vatican joining the UN, the following statement of Cordell Hull (1944) is illuminating: "It would seem undesirable that the question of the membership of the Vatican State be raised now. As a diminutive state the Vatican would not be capable of fulfilling all the responsibilities of membership in an organization whose primary purpose is the maintenance of international peace and security. [...] Membership in the organization would not seem to be consonant with the provisions of Article 24 of the Lateran Treaty, particularly as regards spiritual status and participation in possible use of force. Non-membership would not preclude participation of the Vatican State in social and humanitarian activities of the organization nor impair its traditional role in promotion of peace by its usual influence", quoted in Crawford, *supra* note 3, 156.

[45] See notably the statement of Archbishop Migliore, the Holy See's UN representative, on the occasion of the adoption of UN Doc A/58/314 (16 July 2004), the UNGA resolution reaffirming the Holy See's permanent observer status at the UN: "We have no vote because this is our choice". But this resolution "is a fundamental step that does not close any path for the future. The Holy See has the requirements defined by

The Holy See was granted permanent observer status at the UN in 1964.[46] The rights that flow from that status were strengthened by UN General Assembly Resolution 58/314 (2004). This resolution provides that "the Holy See, in its capacity as an Observer State, shall be accorded the rights and privileges of participation in the sessions and work of the General Assembly and the international conferences convened under the auspices of the Assembly or other organs of the United Nations, as well as in United Nations conferences as set out in an annex"[47]. It is conspicuous that the UN General Assembly does not characterize the Holy See as a non-State actor, but as an observer *State*.[48]

In practice, the Holy See has the right to participate in the general debate of the UN General Assembly (GA), the right of inscription on the list of speakers under agenda times at any plenary meeting of the GA, the right to make interventions, the right of reply, the right to have its communications circulated as official documents relating to the sessions and work of the GA or international conferences issued and circulated directly as official documents of the GA or those conferences, the right to raise points of order relating to any proceedings involving the Holy See, and the right to co-sponsor draft resolutions and decisions that make reference to the Holy See.[49] However, not being a member State, it does not have the right to vote or to put forward candidates in the GA.[50]

The Holy See also enjoys rights of participation at other principal UN organs. At the United Nations Economic and Social Council (ECOSOC), it has the right to attend all meetings and to make proposals and policy

the UN statute to be a member state and, if in the future it wished to be so, this resolution would not impede it from requesting it", quoted in 'Vatican's Role at UN Unanimously Endorsed by General Assembly', 7 *Catholic Family and Human Rights Institute* (9 July 2004).

46 See for the activities of the Holy See's mission at the United Nations: http://www.holyseemission.org (last visited 3 January 2012).

47 UN Doc A/58/314 (16 July 2004), para. 1.

48 This characterization may be confirmed by the Holy See's rate of assessment for its financial contribution to the general administration of the UN: this is the rate of assessment for a non-member *State*. GA Res. 58/1 B (3 March 2004). That being said, the fact that the UN set the Holy See's financial contribution parallel to that of a non-member State need not necessarily mean that the UN really referred to the Holy See as a non-member State; analogous use is equally plausible. And even if the UN considered the Holy See to be a state, this may only reflect the UN's inability to adequately deal with 'irregular' entities like the Holy See.

49 GA Res. 58/314 16 July 2004, paras 1-9.

50 *Id.*, para. 10.

statements regarding all issues that are of its concern. It can also attend the sessions of ECOSOC's regional commissions on an equal footing with those State Members of the United Nations which are not members of those regional commissions.[51] To coordinate its activities at ECOSOC, the Holy See has established a permanent mission in Geneva.[52] At the UN Security Council, the Holy See has occasionally made a statement, e.g., on the situation between Iraq and Kuwait,[53] on the regulation and reduction of armaments,[54] and on the protection of civilians in armed conflicts.[55]

The Holy See's rights of participation at the UN go well beyond the rights that are granted to NGOs as UN observers. An NGO, Catholics for Choice, denounced this state of affairs, and, between 1999 and 2004, lobbied in favor of downgrading the Holy See's status at the UN to regular NGO status, a status enjoyed by other religious organizations and bodies, such as the World Council of Churches.[56] This lobbying effort failed, however. In 2004, the Holy See's participation rights at the UN were even upgraded (see above for the details).

The Holy See typically uses its participation rights to press a moral agenda at the UN. For instance, the Holy See was instrumental in the adoption of the UN Declaration banning all forms of Human Cloning in 2005,[57] and in the *prevention* of the adoption of a proposed resolution on sexual orientation and gender identity.[58] In a 2010 speech to the Diplomatic Corps, the Pontiff emphasized the protection of the environment as one of the Holy See's major global points of interest.[59] So far, three Popes have addressed the General Assembly.[60]

51 ECOSOC decision 244 (LXIII) (1977).

52 This mission has an up-to-date website: http://www.holyseemissiongeneva.org (last visited 3 January 2012).

53 UN Doc S/PV.4709 (Resumption 1), 19 February 2003, 33-34.

54 UN Doc S/PV.6017 (Resumption 1), 19 November 2008, 12-13.

55 Statement of 14 January 2009, UN Doc S/PV.6066 (Resumption 1), 14 January 2009, 36-37.

56 Catholics for Choice, *See Change: the Catholic Church at the United Nations*, 2001. See for a similar argument, Y. Abdullah, 'The Holy See at United Nations Conferences: State or Church?', 96 *Columbia Law Review* (1996) 7, 1835, 1875.

57 GA Res. 59/280, 23 March 2005. See UN Doc A/C.6/59/SR.11, 15 January 2005, 10-11

58 See UN Doc A/63/PV.71, 18 December 2008, 2 for the statement of the Holy See delegation at the 63rd session of the General Assembly of the United Nations on the Declaration on Human Rights, Sexual Orientation and Gender Identity.

59 Address of his Holiness Pope Benedict XVI, 'To the Members of the Diplomatic Corps for the Traditional Exchange of new Year Greeting' (11 January 2010)

The Holy See has also actively used its participation rights at international *conferences*. At the Rome Conference for the establishment of an International Criminal Court (1998), where the Holy See was accredited, it successfully lobbied, amongst other things, for the inclusion of sexual crimes in the Statute. At the Rome Conference, the contribution of the Holy See may have been labeled as rather 'positive',[61] but the contribution of the Holy See to other conferences was decidedly more critically received, e.g., its contribution to the 1994 United Nations International Conference on Population and Development held in Cairo, or to the 1995 Fourth World Conference on Women held in Beijing.[62]

At the bilateral level, the Holy See entertains diplomatic relations with an impressive 176 States, the European Union, and the Sovereign Military Order of Malta. It has relations of a special nature with the Russian Federation and the PLO.[63]

available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/january/documents/hf_ben-xvi_spe_20100111_diplomatic-corps_en.html (last visited 3 January 2012).

60 Address of Paul VI to the UN General Assembly, UN Doc A/PV.1347, 4 October 1965, 2-5; Address of John Paul II to the UN General Asseмby, UN Doc A/34/PV.17, 2 October 1979, 349-353 (as delivered), A/34/566 (full printed version); Address of John Paul II to the UN General Assembly, UN Doc A/50/PV.20, 5 October 1995, 2-6; Address of Benedict XVI to the General Assembly, UN Doc A/62/PV.95, 18 April 2008, 3-6.

61 See J. van der Vyver, 'Contributions of the Holy See to the refinement of the Rome Statute of the International Criminal Court', in C*anonical Testament: Mgr W. Onclin Chair 2004* (2004), 46. Its role in the addition of Article 7 (3) to the Rome Statute on the definition of gender has provoked some criticism in interested circles, however. See V. Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', 18 *Harvard Human Rights Journal* (2005), 55, 65. See below note 62 on the Holy See's views on gender.

62 Abdullah, *supra* note 56, 1875. See for the Holy See's views: Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, *Addendum*, Annex IV, U.N. Doc. A/CONF.177/20/Rev.1, U.N. Sales No. 96.IV.13 (1996), 164 (Holy See understanding the term 'gender' 'as grounded in biological sexual identity, male or female' and thus excludes 'dubious interpretations based on world views which assert that sexual identity can be adapted indefinitely to suit new and different purposes.').

63 See for an overview provided by the Holy See Press Office: http://www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico_index_en.html (last visited 3 January 2012).

D. Concordats

The treaty-making power of the Holy See is not only exemplified by its accession to major multilateral treaties, but also by its practice of concluding 'concordats' with various States. A concordat is a specific bilateral treaty entered into between the Holy See and a State, which regulates the religious affairs and activities of the Catholic Church in that State.[64] Typically, it governs individuals' right to exercise the Catholic religion, financial and property matters, confessional teaching, the civil effects of marriages under canonical law, State subsidies to the Church, and the Pontiff's right to appoint bishops.

In the past, there was a lively doctrinal discussion as to the exact legal characterization of concordats. Some authors claimed that a concordat was a unilateral act done by the State, which thereby granted certain rights and privileges to the Catholic Church, while others claimed that a concordat had no legal value at all.[65] As we write, however, a consensus has crystallized that concordats are binding international agreements – treaties – that are concluded between equal parties.[66]

While some treaties may be concluded by the Holy See on behalf of the Vatican, the 'technical' treaties in particular, this does not hold true for concordats. If concordats were concluded on behalf of the Vatican, the disappearance of the latter as the territorial base of the Holy See would result in the concordat no longer being in force between the Holy See and States, a result which cannot be considered as acceptable. Accordingly, the provisions of the Vienna Convention on the Law of Treaties (VCLT) cannot as such be applied. While the Holy See has ratified the VCLT, it can only have done so on behalf of the Vatican State, not for itself, as it lacks statehood. That said, the provisions of the VCLT can be applied to concordats to the extent that they reflect customary international law.[67]

64 See also H. Köck, *Die völkerrechtliche Stellung des Heiligen Stuhls* (1975), 316-318. It is noted that the Holy See also entered into a concordat with two (other) non-state actors: the Palestine Liberation Organization (PLO) and the African Union.

65 S. Ferrari, 'Concordats', *Max Planck Encyclopaedia of Public International Law* (July 2006) available at http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1382&recno=1&author=Ferrari%20%20Silvio (last visited 3 January 2012), para. 4.

66 *Id.*

67 R. Haule, *Der Heilige Stuhl/Vatikanstaat im Völkerrecht* (2006), 196.

The Holy See has not concluded concordats with all States with which it maintains diplomatic relations.[68] Also, while all concordats address the same subject-matter (the position of the Church in the contracting State), the Church's rights and privileges that are stipulated in the various concordats differ. The exact scope of these rights and privileges is in the final analysis dependent on the actual bargaining power of the Holy See *vis-à-vis* the contracting State. The relativity of the Holy See's bargaining power also explains why, for political reasons, concordats may bear other names, such as 'agreement'.[69] The term 'concordat' may indeed be objected to by States with a strong secular tradition. Also, in some quarters it may have received a negative connotation after the conclusion of concordats with Nazi Germany (*Reichskonkordat* of 20 July 1933)[70] and Franco's Spain (27 August 1953). In the absence of a concordat, the affairs of the Catholic Church are regulated by domestic law. This is the case in most States.

But even concordats have become subject to the writ of domestic law, or to international law as it plays out in the domestic legal order. Technically, this issue may be foreign to the issue of the standing of the Holy See, but a brief discussion of it appears justified in that it nicely illustrates the interplay between the concordats, as treaties with a particular relevance to domestic affairs, with domestic law.

In particular, the application of concordats has been challenged on constitutional or human rights grounds in various States, e.g., in Spain,[71]

[68] See for an overview: www.concordatwatch.eu (last visited 3 January 2012). See for a discussion of concordats concluded between 1963 and 2004: P. Petkoff, 'Legal Perspectives and Religious Perspectives of Religious Rights under International Law in the Vatican Concordats (1963-2004)', 158 *Law and Justice: the Christian Law Review* (2007), 30.

[69] See, e.g., the 'Agreement between the Holy See and the Federal Republic of Brazil on the legal status of the Catholic Church in Brazil' (13 November 2008) available at http://www.concordatwatch.eu/topic-37261.843 (last visited 3 January 2012). The recent concordats with Portugal (18 May 2004) and Poland (28 July 1993) bear the name 'concordat', however.

[70] Online available at http://www.ibka.org/artikel/ag97/reichskonkordat.html (last visited 3 January 2012). See for a discussion: J. J. Hughes, 'The Reich Concordat 1933: Capitulation or Compromise?', 20 *Australian Journal of Politics & History* (1974) 2, 164.

[71] J. Bastante, 'Un juez cuestiona la legalidad del Concordato ante el TC', *Publico*, (9 May 2009) available at http://www.publico.es/espana/224345/un-juez-cuestiona-la-legalidad-del-concordato-ante-el-tc (last visited 3 January 2012): lower judge raising the constitutionality of the concordat's provisions on religious education before the Spanish Constitutional Court, which had not yet issued a ruling at the time of writing.

Germany,[72] and in the Dominican Republic, where, as early as 1961, the Supreme Court of Justice, sitting as the Court of Cassation, ruled that a judge could defy the 1954 Concordat of the State with the Holy See by refusing to give civil effect to a decree of annulment of marriage issued by ecclesiastical tribunals.[73] The Court admitted that canonical marriages did have civil effects under the Concordat and that the Concordat granted jurisdiction to canonical tribunals to pronounce on the annulment of canonical marriages, but emphasized that "[n]o provision of the Concordat which infringed the principles that formed the basis of the Constitution could be applied by Dominican courts"[74]. Relying on the Constitution, it ruled that "the jurisdictional power of the state could not be delegated", and "only civil courts had jurisdiction to pronounce on the civil aspects of an annulment of marriage".[75]

Rulings that declare provisions of concordats inapplicable on constitutional grounds, could be considered as giving rise to a breach of the concordat as, pursuant to Article 27 VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Yet undoubtedly, they bring pressure to bear on the Holy See and the contracting State to ensure that the substantive provisions of the concordat are in accordance with constitutional protections.

That being said, the text of most concordats already bears out that no islands of unfettered ecclesiastical power within the contracting State are carved out. In respect of a number of issues, concordats assert the primacy of the temporal order, or at least provide for mechanisms of State control and review in case, on the basis of the concordat, canonical decisions can be

[72] Bayerischer Verwaltungsgerichtshof, 4 May 2009, 7 CE 09.661 und 7 CE 09.662. In this case, a number of non-Catholics complained that they were being discriminated against in that, on the basis of the concordat between Bavaria and the Holy See, they could not apply for a Concordat Chair at the University of Erlangen-Nürnberg. The tribunal dismissed the complaint on a technicality, on the ground that the hiring decision – in which the bishop participated – had not yet been taken and could thus not be challenged. See for an indirect challenge before the Federal Constitutional Court, judgment of 26 March 1957, published in BVerfGE 6, 309 available at http://www.servat.unibe.ch/dfr/bv006309.html: court denying that the Constitution imposed any obligation on the German states (Länder) *vis-à-vis* the federation to comply with the Concordat, and holding that the only obligation of compliance was one under international law.

[73] *Re Polanco and Brito*, Appeal judgment, (1961) BJ 606.49; ILDC 1205 (DO 1961).

[74] ILDC 1205 (DO 1961), H3; para. 16.

[75] ILDC 1205 (DO 1961), H2; para. 14.

enforced in the temporal order. In turn, these temporal mechanisms are subject to their own review mechanisms, e.g., to the jurisdiction of the European Court of Human Rights (ECHR). As a result, while the Holy See, as a non-State actor, is not a party to the European Convention on Human Rights (ECHR), the canonical decisions of its administration and courts can indirectly be reviewed by the ECHR. This is exemplified by the case of *Pellegrini v. Italy*, decided by the ECHR in 2001.[76]

The applicant, Ms Pellegrini, had married her husband in a religious ceremony which was also valid in the eyes of Italian law pursuant to Article 8.1 of the concordat between Italy and the Holy See. The civil effect of the religious marriage is a typical privilege that States grant to the Holy See in concordats. This privilege is logically accompanied by the privilege of State enforceability of ecclesiastical courts' judgments *annulling* the marriage, a privilege that, as regards Italy, was provided for in Article 8.2 of the concordat. This article stipulates that an Italian court of appeal could make the ecclesiastical marriage annulments enforceable in the Italian legal order, but requires that the court of appeal, amongst other things, ascertain that 'during the proceedings before the ecclesiastical court the parties had been assured the right to sue and to defend themselves in court in a way which does not differ from the fundamental principles of Italian law'.[77]

In 1987, an Italian ecclesiastical court had annulled Ms Pellegrini's marriage on the ground that it was within the prohibited degrees of consanguinity. The judgment was upheld in 1988 by the Roman *Rota* (the superior ecclesiastical review body of the Roman Curia), which subsequently referred the case to the Florence Court of Appeal for a declaration that the judgment could be enforced under Italian law.[78] The Court of Appeal declared the judgment enforceable in 1988. An appeal by the applicant with the Italian Court of Cassation was dismissed in 1995, upon which Ms Pellegrini filed an application against Italy with the European Court of Human Rights. She claimed that Italy had violated Article 6.1 of the ECHR, by insufficiently satisfying itself that, before authorizing the enforcement of the decision annulling the marriage, the

[76] *Pellegrini v. Italy*, ECHR (2002) Application no. 30882/96. It is observed that the ECHR speaks throughout of the Roman *Rota* as a court of the Vatican, whereas that it is actually a court of the Holy See. See also Lord Carswell (*Government of the United States of America v. Montgomery (No 2)* [2004] UKHL 37, [2004] 1 WLR 2241, para. 19.

[77] Article 8.2(b) of the concordat between Italy and the Holy See.

[78] *Pellegrini v. Italy*, *supra* note 76, paras 11-23.

proceedings before the ecclesiastical tribunals fulfilled the guarantees for a fair trial. In particular, she complained that, in the proceedings before the ecclesiastical tribunals, she had not been informed in detail of her ex-husband's application to have the marriage annulled, had not had access to the case file, and was not assisted by a lawyer.[79]

The ECHR duly noted that "[t]he Vatican has not ratified the Convention and, furthermore, the application was lodged against Italy", and "[t]he Court's task therefore consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention".[80] The Court instead proceeded to review whether the Italian courts had complied with Article 6 ECHR when examining whether the proceedings before the ecclesiastical courts 'fulfilled the guarantees' of Article 6.[81] But indirectly, of course, the ECHR claimed review powers over ecclesiastical proceedings, insofar as the temporal enforcement of these proceedings depends on a decision of an ECHR Contracting State. It appears that these review powers are absolute, and thus that the ECHR does not review the Article 6 compatibility of ecclesiastical proceedings with a light touch: the Court needed only a few lines to find that Italian courts had breached their duties under the ECHR by insufficiently satisfying themselves that the applicant knew what the case before the ecclesiastical courts was about and that she was informed of the possibility of being assisted by a lawyer.[82]

The ECHR did not apply the standard of mere 'equivalent protection', which it employs as regards proceedings before domestic courts against international organizations (another category of non-State actors).[83] This may be explained by the direct reference in Article 8.2(b) of the concordat with Italy to a right to a fair trial in ecclesiastical proceedings that "does not differ from the fundamental principles of Italian law", combined with the direct effect of the ECHR in the Italian legal order. Set agreements with international organizations typically exclude State review powers over

79 *Id.*, paras 24-29, 42.
80 *Id.*, para. 40.
81 *Id.*
82 *Id.*, paras 44-47.
83 *Beer and Regan v. Germany*, ECHR (1999), Application no. 28934/95, para. 59; *Waite and Kennedy* v. *Germany*, ECHR (1999), Application no. 26083/94, para. 68; *Bosphorus v. Ireland*, ECHR (2005), Application no. 45036/98, 30 May 2005, para. 155.

decisions of organizations, and do not tie this grant of immunity to the compliance of those decisions with the right to a fair trial.

Clearly, judicial proceedings under the Holy See's authority are less insulated from State and international review powers than quasi-judicial proceedings conducted by dispute-settlement mechanisms of international organizations. This differential treatment between two categories of non-State actors may be explained by the waning political power of the Holy See *vis-à-vis* the State since the early 20th century, as contrasted with the steep ascendancy of international organizations and their attendant emancipation from the State. Be that as it may, domestic case law indicates in any event that, at least in some jurisdictions, concordats, and the canonical law and practice to which they refer, are considered as reviewable in light of constitutional and human rights protections.

E. International Dispute Settlement

International dispute-settlement is concerned with the enforcement of international law. An entity's role in international dispute-settlement is therefore an important attribute or indication of its international legal personality.

Since the loss of the Papal States, and especially since the Lateran Conciliation Treaty, the Holy See is no longer expected to become involved in disputes with or between States. However, the Conciliation Treaty allowed the Holy See to continue to play its historical role as a prominent neutral arbitrator of international disputes between States.[84]

Just like the Holy See was one of the first entities to send and receive legations, it was also one of the first mechanisms of peaceful international dispute settlement. An early manifestation of its mediation powers was its role in resolving the dispute between Spain and Portugal over the division of the newly discovered Americas. That dispute, which had in fact been exacerbated by earlier, hardly neutral papal interventions, was finally resolved by the Treaty of Tordesillas, and sanctioned by the papal bull *Ea*

[84] Cf. Lateran Conciliation Treaty, *supra* note 7, Art. 23:"In regard to the sovereignty appertaining to it also in the international realm, the Holy See declares that it desires to remain and will remain outside of any temporal rivalries between other states and the international congresses to settle such matters, unless the contending parties make a mutual appeal to its mission of peace; it reserves to itself in any case the right to exercise its moral and spiritual power".

quae in 1506.[85] But it was especially after the Holy See lost its temporal powers in 1870 that it became widely solicited as a mediator. In a remarkable appeal, an editorial comment in the *American Journal of International Law* of 1915 called on the Catholic nations "to accept that standard of conduct which substitutes spirituality for materialism and which prefers settlements of international disputes according to law and justice to the settlement of disputes by the brutal arbitrament of the sword"[86]. In the period before the First World War, the Holy See's intervention was sought by such Catholic States as Spain, Portugal and various Latin American States, and even States with only a Catholic minority, such as the United Kingdom, the United States, and Germany.[87] After the First World War, however, the Holy See lost its prominent role as a mediator.

More recently, however, the Holy See mediated successfully in the *Beagle Channel* dispute between Chile and Argentina after Argentina had rejected the 1977 arbitral award, and both parties requested Holy See mediation in 1979.[88] Pio Laghi, the Holy See's nuncio in Argentina at the time, and one of the Holy See's mediators in the *Beagle Channel* dispute, later went on to become the first papal nuncio in the U.S. after the U.S. established diplomatic relations with the Holy See. In that capacity, he pled,

85 F. Gardiner Davenport & C. O. Paullin (eds), *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (1917), 107–111. H. Harrisse, *The Diplomatic History Of America: Its First Chapter 1452-1493-1494* (1897).

86 Editorial Comment, 'The British Mission to the Vatican', 9 *American Journal of International Law* (1915), 206, 208. See also Martinez, *supra* note 2, 146.

87 See for a fine overview: Köck, *supra* note 64, 459-478; Westdickenberg, *supra* note 26, para. 15.

88 Cf. Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile, Report and Decision of the Court of Arbitration, 18 February 1977; *Act of Montevideo by which Chile and Argentina request the Holy See to act as a mediator with regard to their dispute over the Southern region and undertake not to resort to force in their mutual relations (with supplementary declaration)*, 8 January 1979, 1088 U.N.T.S., 135; *Papal proposal of 12 December 1980*; *Joint Declaration on Peace and Friendship between Argentina and Chile of 23 January 1984*, *Treaty of Peace and Friendship signed between the Republic of Chile and the Republic of Argentina*, 29 November 1984, 1399 U.N.T.S., 23392. All these materials are reproduced in *Reports of International Arbitral Awards*, Dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, *R.I.A.A.* XXI, 53-264.

unsuccessfully however, with U.S. President George W. Bush to reconsider his decision to go to war with Iraq in 2003.[89]

Apart from serving as a mediator, the Holy See also has a tradition of condemning the persecution of Catholics, or even Christians of other denominations, in States where these form a minority. This has occasionally led to accusations of meddling in the internal affairs of States or other religions. Recently, for instance, the Grand Sheikh of Al-Azhar, an Egyptian cleric, termed the Pope's call for world leaders to defend Christians after a car bomb killed scores of Egyptian Copts in Alexandria, an "unacceptable interference in Egypt's affairs"[90]. Criticism of the Pope's calls for world leaders to express solidarity with persecuted Christians in Iraq was much more muted, however.[91]

F. Immunity

As explained in the third section, the Holy See's power of concluding concordats has diminished. Only a limited number of States have entered into a concordat with the Holy See, and States that have concluded concordats claimed review powers of their own as regards ecclesiastical practices. As is explained in this section, the diminishing autonomy of the Holy See *vis-à-vis* States is also exemplified by domestic courts' reluctance to grant the Holy See immunity from jurisdiction.

Immunity cases do not only arise in Italy, where the Holy See has its seat. In various States, and in particular the United States, sex abuse scandals in the Church have recently given rise to legal proceedings against the Holy See on the basis of the latter's vicarious liability for the Catholic clergy or its negligence in the face of the abuses.[92]

89 'Vatican to Bush: Iraq war would be 'disaster'', *CNN* (5 March 2003) available at http://articles.cnn.com/2003-03-05/politics/sprj.irq.bush.vatican_1_vatican-envoy-iraq-war-cardinal-pio-laghi?_s=PM:ALLPOLITICS (last visited 3 January 2012).

90 'Azhar Top Cleric Accuses Pope Benedict XVI of Meddling', *Daily News Egypt* (3 January 2011) available at http://www.thedailynewsegypt.com/azhar-top-cleric-accuses-pope-benedict-xvi-of-meddling.html (last visited 3 January 2012).

91 R. Donadio, 'Pope blesses Christians in Iraq, peace in Mideast', *New York Times* (26 December 2010) available at http://articles.sfgate.com/2010-12-26/news/26287049_1_urbi-orbi-pope-benedict-xvi (last visited 3 January 2012).

92 It is noted that in late 2010, two Belgian lawyers announced that they planned to file suit in the Belgian courts against the Pope for his role in keeping the abuses in the Church secret. Cf. 'Waarom de paus nog niet veroordeld is', *De Standaard*

The immunity of the Holy See in Italy is purportedly regulated by Article 11 of the Lateran Conciliation Treaty (1929), which provides that "[a]ll central bodies of the Catholic Church shall be exempt from any interference on the part of the Italian State (except as provided by Italian law with regard to acquisition of property made by recognized public bodies (*corpi morali*), and with regard to the conversion of real estate)"[93]. Italian courts have traditionally given this provision a broad interpretation. In a 1987 case, for instance, the Italian Court of Cassation granted immunity from criminal jurisdiction to three high officials of the Vatican Bank accused of complicity in the fraudulent bankruptcy of the Banco Ambrosiano, on the basis of Article 11 of the Conciliation Treaty.[94] Along similarly liberal lines, the Court of Cassation held in 1982 that the Vatican Radio enjoyed immunity from jurisdiction as it was a central body of the Catholic Church.[95]

The liberal interpretation of Article 11 of the Conciliation Treaty was rejected in 2003, however. In the *Tucci* case, the Court of Cassation, drawing on Article 31 of the VCLT (which lays down the rules of treaty interpretation), held that the Holy See's immunity from jurisdiction could not be inferred from the obligation of non-interference enshrined in the Lateran Treaty:

> "The obligation set out in Article 11 of the Lateran Treaty not to interfere with activities of the central bodies of the Catholic Church could not be considered in any way as equivalent to immunity from jurisdiction. Indeed, while the latter would have required the Italian State to waive its jurisdictional authority, no such limitation was implied when abiding by the obligation of non-interference. The obligation in question was not tantamount to a general waiver by Italy of its sovereignty and, in particular, to the exercise of jurisdiction. It only aimed at protecting the independent performance of the activities connected with the Magisterium of the Catholic Church.

(24 December 2010) available at http://www.standaard.be/artikel/detail.aspx?artikelid =NR347176 (last visited 3 January 2012).

93 Lateran Conciliation Treaty, *supra* note 7.

94 Decision of the Court of Cassation, fifth criminal section, decision no 3932, 17 July 1987, *Marcinkus*. A Constitutional Appeal was rejected by Sentenza N.609, 6 June 1988.

95 Decision of the Court of Cassation, all civil sections, 5 July 1982, no 4005.

> The right to invoke immunity from jurisdiction must be stated expressly and could not be inferred from a provision dealing with non-interference. As the immunity imposed heavy limitations on state sovereignty, it had to be provided for by special rules not subject to an extensive interpretation. The fact that immunity from jurisdiction could not be inferred from the obligation of non-interference, was confirmed by Article 31(1) of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980, which considered the textual criterion to be the general rule of interpretation of treaty provisions.
>
> While undertaking the obligation not to interfere, and recognizing the absolute sovereignty and independence of the Catholic Church, the Italian State had, at the same time, maintained its own sovereignty in the *temporal* order."[96]

Importantly, the Court of Cassation considered the Lateran Treaty as a self-contained *régime* concerning the relationship between the Italy and the Holy See; only in passing did it note that the Holy See did not enjoy immunity from jurisdiction under customary international law.[97]

As regards the particular facts of the *Tucci* case, in which private citizens and environmental organizations sought redress from three managers of the Vatican Radio for alleged damage sustained as a consequence of electro-magnetic radiation emanating from plants situated on the territory of the Holy See, the Court's rejection of the Holy See's immunity reinstated the full sovereignty of Italy over (environmental) crimes of which the effects were felt in Italian territory:

> "Italy could fully exercise its competence to punish criminal offences that, although committed on the territory of the Holy See, caused harmful effects within the national territory. The exercise of Italian jurisdiction was subject to the sole condition

[96] Public prosecutor, *Rome Tribunal v. Tucci and others*, Appeal judgment, Decision on Preliminary Question, no 22516; 295 ILDC (2003), 86 *Rivista di diritto internazionale* (2003) 3, 821 (in Italian), 21 May 2003, ILDC H1-H3, paras 5, 7 and 9 of the judgment.

[97] *Id.*, ILDC H4, para. 4.

of a causal link between those harmful effects and the illicit act committed on the territory of the Holy See."[98]

It is of note that, in the Court's view, human rights, constitutional protections, and the individual's right to an (effective) remedy corroborated the restrictive interpretation of Article 11 of the Lateran Treaty, and the resulting rejection of immunity.[99] It was precisely the Court's failure to consider such protection in its 1980s case law that led to fierce criticism of the Court's interpretation of Article 11 at the time.[100]

Regardless of the restrictive interpretation of Article 11 of the Lateran Treaty and the Court's unwillingness to equate the principle of non-interference with the notion of immunity, also after the *Tucci* case immunity continues to flow *de facto* from Article 11 to the extent that harmful acts emanate from a 'central body' of the Catholic Church, i.e., a body of the Roman Curia (which the Vatican Radio was not according to the Court).[101] It would indeed be difficult to fathom how a jurisdictional assertion over the Roman Curia on the part of Italian courts could not amount to interference with the (spiritual) activities of the Holy See.

In States that have not entered into a bilateral agreement with the Holy See – indeed the great majority of States – any immunity that could accrue to the Holy See is to be derived from domestic law, international law, or a combination of both. In practice, while States have enacted legislation regulating the affairs of the Catholic Church, they have not enacted legislation addressing the legal status of the Holy See within their territory or before their courts. Nor may there be a clear principle that the Holy See,

98 *Id.*, ILDC H3, para. 7 of the judgment.

99 *Id.*: "This conclusion also respected the right of individuals, provided for both by statutory and constitutional rules, to receive full judicial protection of their rights and interests in civil as well as in criminal matters".

100 *Id.*, Comment M. Iovane, A1.

101 *Id.*, ILDC H5, para. 3 of the judgment: "The Vatican Radio was not a 'central body' of the Catholic Church. This expression referred only to the entities constituting the Roman Curia, namely those taking part in the supreme and universal government of the Catholic Church and carrying out its spiritual mission worldwide. The Vatican Radio did not directly participate in the governmental organization of the Holy See. In fact, its main activity of propagating the evangelical message was only instrumental to the universal mission. Moreover, canon law itself expressly excluded the Vatican Radio from the central bodies of the Catholic Church. Article 186 of the Constitution, 1988 (Apostolic) (Holy See) considered the Radio as an institution which was 'only connected' to the Holy See without being part of the Roman Curia. (paragraph 3)".

as a *sui generis* international legal person that differs from States, is entitled to immunity under general international law in ways similar to the immunity of States.

Still, U.S. courts have treated the Holy See as a sovereign for purposes of applying the U.S. Foreign Sovereign Immunities Act (FSIA), although, technically speaking, the act only applies to foreign *States* and their political subdivisions, agents, and instrumentalities.[102] This may be explained by the fact that the U.S. and U.S. courts consider the Holy See and the Vatican City State as interchangeable, or the Holy See as representing the Vatican City State.[103]

Plaintiffs suing the Holy See have made the most forceful argument against the characterization of the Holy See as a State for purposes of FSIA application in the case of *O'Bryan v. Holy See* (2009), which concerned the Holy See's liability for sex abuses committed by U.S. Catholic clergy in Kentucky. They asked a Kentucky District Court, and on appeal the Court of Appeals for the 6th Circuit, to conceive of the Holy See as two separate entities: one being identifiable with the Vatican as a foreign sovereign recognized as such by the U.S. Government, and another being the 'unincorporated head of an international religious organization', namely the Roman Catholic Church, which "has no defined territory and no permanent population, and thus does not satisfy the definition of 'foreign state' under the Restatement's [Third, of U.S. Foreign Relations Law 1987] standard", and that is "wholly distinct and separate from its role and activities as a sovereign".[104]

The plaintiffs' argument in *O'Bryan* was rejected by the courts, however. The District Court held that the plaintiffs "cite no authority for the proposition that the Holy See may be sued in a separate, non-sovereign function as an unincorporated association and as head of an international religious organization"[105]. The Court of Appeals affirmed, citing other U.S. courts' case law, and held that the status of the Holy See as a "parallel non-

102 28 U.S.C. § 1603 (a)-(b).

103 *Dale and ors v. Colagiovanni and ors*, Appeal judgment, 443 F3d 425 (5th Cir 2006); ILDC 714 (US 2006); *O'Bryan v. Holy See*, 556 F.3d 361, 369 (6th Cir. 2009): "The Holy See is both a foreign state and an unincorporated association and the central government of an international religious organization, the Roman Catholic Church. The United States has recognized the Holy See as a foreign sovereign since 1984".

104 Plaintiffs' arguments as related in *O'Bryan v. Holy See*, 556 F.3d 361, 373 (6th Cir., 2009).

105 *O'Bryan v. Holy See,* 490 F.Supp.2d 826, 830 (W.D. Ky. 2005).

sovereign entity" was "conjured up by the plaintiffs".[106] This determination did not come as a surprise, as the U.S. Government had intervened as an *amicus curiae* in the case supporting the position of the Holy See regarding its status as a foreign sovereign for purposes of the FSIA.[107] In our view, however, plaintiffs' argument *was* convincing, since, as argued above, the Holy See should not always be considered as representing its territorial base, the Vatican State. When supervising priests, it acts in its capacity as a non-State religious organization rather than as a State.

In any event, since U.S. courts have considered the Holy See as a State for purposes of the FSIA, immunity disputes involving the Holy See have not revolved around the question of whether the FSIA is applicable in the first place, but around the question of whether exceptions to the FSIA were triggered in specific cases pending before the U.S. courts. For instance, in the case of *Dale v. Colagiovanni*,[108] the latter being an agent of the Holy See who was sued for having participated in an international insurance fraud scheme,[109] the Court ruled that the commercial activity exception did not apply, on the ground that the agent had only acted with 'apparent' and not the 'actual' authority of the Holy See.[110] In the recent sexual abuse cases of *O'Bryan* and *Doe v. Holy See*, the question was whether the tortious and commercial activity exceptions to the FSIA applied. Various courts came to divergent conclusions on the application of these exceptions, and the

[106] *O'Bryan v. Holy See*, 556 F.3d 361, 373 (6th Cir. 2009), citing *Dale,* 337 F.Supp.2d at 832; *English v. Thorne,* 676 F.Supp. 761, 764 (S.D.Miss.1987); *Doe v. Holy See,* 434 F.Supp.2d 925, 933 (D.Or.2006).

[107] *O'Bryan v. Holy See*, 556 F.3d 371.

[108] *Id.*

[109] Colagiovanni was a Roman Catholic 'monsignor', a judge *emeritus* of the *Tribunal della Rota Romana* (the 'Rota'), one of the Vatican's three appellate courts, and a professor at the *Studio Rotale*, a graduate programme connected to the Rota. Colagiovanni was also a senior member of the 'Curia', the Vatican's government, and was the President of the *Monitor Ecclesiasticus* Foundation (the 'MEF'), an autonomous entity that published a journal of canon law. Cf. para. 2 of the judgment, as renumbered by ILDC 714 (US 2006).

[110] It is noted that the immunity of the sovereign extends to his agents and instrumentalities pursuant to 28 U.S.C., para. 1603(a). The outcome of the case was well received in the literature. Cf. B. Borsare, ILDC 714 (US 2006), A3: "The opposite conclusion would broaden the commercial activities exception considerably by subjecting a foreign sovereign to suit whenever anyone purported to act with the authority of that state—whether authorized or not".

exceptions to the exceptions,[111] but the U.S. Supreme Court refused to grant certiorari on 28 June 2010.[112] U.S. case law regarding the exceptions to the application of the FSIA is not further discussed here, as it has no particular relevance for the subject of our study (the legal status of the Holy See under international law).

In the author's view, consistent State practice in favor of granting immunity to the Holy See may be lacking (it may be observed that U.S. courts have conferred immunity on the Holy See under the FSIA, a domestic law instrument, rather than under international law). Furthermore, in light of the increasing importance of individuals' right to access to a court, immunities ought to be interpreted restrictively, all the more so if the beneficiary of the immunity is not a State but a non-State actor.[113] It is recalled in this respect that international organizations, another category of non-State actors, do not enjoy immunity under general international law, but only on the basis of particular treaties. Even if treaties confer immunity on international organizations, domestic courts, at least in the ECHR area, will only uphold such immunity if it is compatible with the right to access to a court (Article 6(1) ECHR).[114] Finally, as far as the immunity from jurisdiction of *functionaries* of the Holy See (possibly including every Catholic cleric) is concerned, the immunity *ratione personae* of the Pope and possibly the Cardinal Secretary of State, representatives of the Vatican City State, appears as self-evident, at least if one accepts the statehood of

111 *O'Bryan v. Holy See,* 490 F.Supp.2d 826 (W.D. Ky. 2005); *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009); *Doe v. Holy See,* 434 F.Supp.2d 925, 933 (D.Or.2006); *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009). See for a discussion: Martinez, *supra* note 2; Black, *supra* note 34.

112 *Holy See v. John Doe*, Case nos. 06-35563, 06-35587.

113 See with respect to States: *Al-Adsani v. United Kingdom*, Appl ECHR (2001) Application No. 35763/97, para. 54: "The Court must first examine whether the limitation [on access to a court, based on the law of sovereign immunity] pursued a legitimate aim. It notes in this connection that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The Court considers that the grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.".

114 See for an overview of recent trends, with a particular focus on the tension between immunities and the right to a remedy: C. Ryngaert, 'The Immunity of International Organizations before Domestic Courts: Recent Trends', 7 *International Organizations Law Review* (2010) 1, 121.

the Vatican.[115] A more difficult question, however, is whether functionaries of the Catholic Church (or possibly every bishop or Cardinal) enjoy immunity *ratione materiae* for acts that were committed in sufficient proximity to the culprit's office, i.e. 'under color of authority' or by use of official resources.[116] All charges of abuse, or of covering up cases of abuse, would then be covered by immunity *ratione materiae*. Against this it may be argued that offences committed in the forum State may *not* attract immunity.[117] But more importantly, if the view is taken that the Holy See (unlike the Vatican City State) does not enjoy immunity under general international law, then logically its functionaries cannot enjoy immunity either, as in international law, the immunity of officials is derived from the immunity of the entity which they serve.

G. Concluding Observations

This contribution has not only discussed the legal personality of a non-State actor – the Holy See – but also the *statehood* of another, closely related, actor, the Vatican. This mini-State, however, has a *status aparte* in international law, as in fact it merely exists as a territorial basis guaranteeing the independence of a *non-State* actor, the Holy See. The Holy See is to be conceived of as a *sui generis* non-State international legal person which borrows its personality from its 'spiritual sovereignty' as the center of the Catholic Church, one of the world's major religious organizations.

The Holy See enjoys rights under international law that few, if any, non-State actors (excluding intergovernmental organizations) enjoy. It has joined various intergovernmental organizations, it is a party to a substantial number of bilateral and multilateral treaties, it sends and receives diplomatic representatives, is said to enjoy immunity from jurisdiction, and has been

[115] See, however, G. Robertson, 'The Case against Vatican Power', *New Statesman* (8 September 2010) available at http://www.newstatesman.com/law-and-reform/2010/09/vatican-rights-state-italy (last visited 3 January 2012), and the lively discussion to which this gave rise: D. Akande, 'Geoffrey Robertson Responds on the Statehood of the Vatican' (13 October 2010) available at http://www.ejiltalk.org/geoffrey-robertson-responds-on-the-statehood-of-the-vatican/ (last visited 3 January 2012).

[116] Thanks to the reviewer for pointing this out to me.

[117] *Bat v. Investigating Judge of the German Federal Court,* [2011] EWHC 2029 (Admin), para. 70, holding that "there is a dearth of cases which have decided that an official acting on behalf of a State is entitled to immunity from criminal prosecution in respect of an offence committed in the forum state".

granted permanent observer status at the United Nations that has come with rights that are normally reserved to (non-member) States only. Still, it is notable that in some jurisdictions, domestic courts have attempted to restrict these rights: some concordats have been reviewed in light of constitutional protections, and some immunity claims have been rejected.

Given the peculiar relationship between the Vatican and the Holy See – two international legal persons that share some institutions, the Supreme Pontiff himself to begin with – and the rights under international law accruing to the Holy See, it is understandable that in some quarters the Holy See is considered as a State in its own right. This is an idea that is in fact propagated by the Holy See itself, in its quest to strengthen its immunity claims in domestic courts and to reserve its rights for a future application for full-fledged UN membership.

It is the author's view, however, that the Holy See is not to be characterized as a State, given that it has a global spiritual remit and that it can act internationally without a territorial base, as was made clear in the period between 1870 and 1929. The implications thereof are few, however, as there may be few legal institutions left that are wholly reserved for States, not even membership of international organizations. The Holy See has demonstrated that it is a master at navigating the waters of the international legal order, which has in turn accommodated its rights and interests remarkably well. If anything, this account of the Holy See's participation in international law shows that a non-State actor, drawing on its moral authority, can easily manipulate the at first sight inflexible features of the State-centered international legal system to its own advantage.

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Protecting in Libya on Behalf of the International Community

Marie-José Domestici-Met*

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Abstract

Here is the third issue of a series of three, under the global title "Humanitarian Action – A Scope for the Responsibility to Protect?". The first issue dealt with "Humanitarian Assistance Looking for a Legal Regime Allowing its Delivery to Those in Need under any Circumstances" and ended with the conclusion that humanitarian action protagonist had hitherto failed to find the adequate regime. The second issue questioned whether R2P was a legal tool ready to use; it ended with the conclusion that it was not yet really the case.

But soon after this second issue was published, the first armed reaction to events threatening populations occurred, being carried out under a UN mandate. This paper has been written while the 2011 events developed in the Arab world. The last semester of the year 2011 has been marked by a very strong acceleration of the process of change in the name of R2P. The publication was purposely postponed twice.

When putting an end to the paper, we cannot know which future is to be awaited. However, it is already possible to do more than storytelling and to take stock of some trends.

A. Introduction

No expert seems to have foreseen the "Arab spring". And it could not sensibly have been foreseen that the first real implementation of the responsibility to protect – "R2P" – would have been in the Arab world, so demanding in terms of respect for sovereignty. And, yet, on 17 March 2011 in New York, the United Nations Security Council (UNSC) adopted Resolution 1973, providing the following:

> "Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of civilians [...]
>
> Considering that the widespread and systematic attacks currently taking place in Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity [...]

> 3. Demands that the Libyan authorities comply with their obligations under international law. [...]
>
> 4. Authorizes Member States that have notified the Secretary General […] to take all necessary measures […] to protect civilians and civilian populated areas under threat of attacks in Libyan Arab Jamahiriya […] while excluding a foreign occupation force of any form on any part of Libyan territory. [...]
>
> 6. Decides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians. [...]
>
> 8. Authorizes Member States that have notified the Secretary General […] to take all necessary measures to enforce compliance with the ban on flights imposed."[1]

Thus, the R2P is put forward as the true legal basis for military operations, which have lasted for nearly seven months. The reference to R2P is clear-cut, clearer perhaps than the very type of event it is about to protect from.[2] Indeed, while the UNSC had already suggested, in Resolution 1970, that "the widespread and systematic attacks currently taking place in Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity",[3] it has not felt the necessity to confirm this qualification before authorizing a militarily implemented no-fly-zone in its Resolution of 17 March.

Is this the starting point of a new era? And if so, is our reference to humanitarian action as a scope for R2P (the common title of our three issues in this Journal) somehow outdated and lacking ambition?

It does not seem to be so. Surely, the on-going Libyan case is a perfect case study (B.I.). But what kind of lasting consequences can be expected for R2P? Could there be exact repeats? (B.II.).

[1] SC Res. 1973, 17 March 2011.

[2] With times, the situation of the opponents to Gaddafi appears to have been assessed very hastily early March.

[3] SC Res. 1970, 26 February 2011.

B. Libya in Focus: the First Military UN-Mandated Reaction to a State's Failure to Protect its Population

I. A Case Study

Unlike the Rwanda or Srebrenica cases, the Libyan State's failure to protect the population was acknowledged in a timely fashion (1.) and, unlike the Kosovo case, the operation occurred as the International community's reaction to this failure (2.).

1. Libya's Failure to Protect its Population

Framing Libya's conduct towards its citizens as a "failure" is euphemistic, since the Government of Libya itself caused their suffering. According to the World Summit Outcome Document, however, citizens' sufferings had to fall within specific categories. Genocide, War Crimes, Crimes against Humanity and Ethnic Cleansing can be considered the contemporary "four horsemen of the Apocalypse".[4] The motto "never again" has become popular since World War II, and the Rwandese genocide inspired a desire for vigilance eventually enshrined in the World Summit Outcome, although not without difficulties.[5] In Libya's case, the shadow of these past events remained in other States' consciences (a)), which led to mobilization (b)).

a) The Shadow of the Four Horsemen of the Apocalypse

Gaddafi's Libya was not considered as a regime at risk, neither was its evolution toward a genocide foreseen in any of the existing risk assessment frameworks.[6]

[4] The four horsemen whose ride is said in the Book of the Apocalypse to be the forerunner of the end of the world (Revelation 6:2-8). This book, the last of the Bible, is attributed to St John, the evangelist, and it takes elements from Old Testament prophecy.

[5] See M.-J. Domestici-Met, 'Humanitarian Action – A Scope for the Responsibility to Protect: Part II: Responsibility to Protect – A Legal Device Ready for Use?', 2 *Goettingen Journal of International Law* (2010) 3, 951, 961.

[6] The 'Mass Atrocity Crime Watch List' did not include Libya in its list of 33 'at risk' countries: Genocide Prevention Project, 'Mass Atrocity Watch List 2008-2009', available at http://www.preventorprotect.org/images/documents/mass_atrocity_watchlist.pdf (last visited 31 December 2011); nor did Barbara Harff's list of 27

The Libyan revolution began with some street protests in mid–January, following the success of the Tunisian revolution. Zined Ben-Ali fled from Tunisia on 14 February 2011. The following day, during a protest in Tripoli, street demonstrators asked for Muammar Gaddafi's 41-year "reign" to come to an end. The regime reacted forcibly, with the army rather than the police. However, some defections provided the opposition with the beginnings of a small army, which led to the creation of an Interim Council.

In the wake of the Tunisian and Egyptian revolutions, there was a feeling of rapid global change in the Arab world which was by no means to be hindered by any attempt at resistance by States. This led to a specific sensitivity to Gaddafi's crimes, later on described as such:

> "[C]ivilians were attacked in their homes; demonstrations were repressed using live ammunition, heavy artillery was used against participants in funeral processions, and snipers placed to kill those leaving the mosques after the prayers."[7]

Certainly, Gaddafi himself worsened the situation by threatening his enemies of a terrible fate: "officers have been deployed in all tribes and regions so that they can purify all […] from these cockroaches" and "any Libyan who takes arms against Libya will be executed."[8]

On 26 February the Interim opposition government was renamed the Transitional National Council, which was recognized by France as the

countries, available at http://globalpolicy.gmu.edu/genocide/CurrentRisk2008.pdf (last visited 31 December 2011). Minority Rights Group International did not list Libya among the 68 countries posing a risk to minorities in 2010, (Minority Rights Group International, 'Peoples under Threat' (2010) available at http://www.minorityrights.org/9885/peoples-under-threat/peoples-under-threat-2010.html [last visited 31 December 2011]), and Libya was not an 'area of concern' for the Genocide Intervention Network (available at http://www.genocideintervention.net/ [last visited 31 December 2011]).

7 ICC, 'ICC Prosecutor: Gaddafi used his absolute authority to commit crimes in Libya' (16 May 2011) available at http://www.icc-cpi.int/NR/exeres/1365E3B7-8152-4456-942C-A5CD5A51E829.htm (last visited 31 December 2011).

8 'Defiant Gaddafi issues chilling call', *ABC (Australia)* (23 February 2011), quoted in A. Bellamy & P. D. Wiliams, 'The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect', 87 *International Affairs* 4 (2011), 825, 838, note 53.

representative of Libya as early as 10 March 2011,[9] following a secret mission of the human rights activist Bernard-Henry Lévy.[10] The same position was taken by the Council of the European Union on 11 March 2011.[11]

While all Arab dictatorial regimes seemed close to being toppled by an overwhelming wave of popular revolt, things went particularly quickly with Libya. For the second time, the international community as a whole expressed its feeling of its subsidiary responsibility to protect. But for the first time, it also decided on a military response, going far further than had resolution 1706 in the Darfur case.[12]

Faced with repression in the streets of Tripoli, public opinion developed an emotional approach to the events in Libya expressed by transnational civil society (b)), eventually reaching institutional bodies.

b) Calls for Protection Coming From Transnational Civil Society

On 20 February 2011, representatives from 22 NGOs subscribed to a call to stop atrocities in Libya. They reminded world leaders of their Responsibility to Protect. Starting from 20 February, Human Rights Watch released many urgent communiqués, the first of which provided "Libya: Governments Should Demand End to Unlawful Killings".[13] International Crisis Group (ICG) issued a number of reports, among them "Immediate International Steps Needed to Stop Atrocities in Libya"[14] (22 February 2011). The same

9 'Libya: France recognises rebels as government', *BBC News* (10 March 2011) available at http://www.bbc.co.uk/news/world-africa-12699183 (last visited 31 December 2011).

10 He was sent by the French President in order to report on the situation in Benghazi.

11 EP Res., 11 March 2011, P7_TA(2011)0095.

12 See Domestici-Met, *supra* note 5, 968-970.

13 Human Rights Watch, 'Libya: Governments Should Demand End to Unlawful Killings. Death Toll Up to at Least 233 Over Four Days' (20 February 2011), available at http://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings (last visited 31 December 2011); see also Human Rights Watch, 'Libya: Africa's Rights Body Should Act Now' (25 February 2011) available at http://www.hrw.org/news/2011/02/25/libya-africa-s-rights-body-should-act-now (last visited 31 December 2011) and Human Rights Watch, 'End Violent Crackdown in Tripoli' (13 March 2011) available at http://www.hrw.org/news/2011/03/13/libya-end-violent-crackdown-tripoli (last visited 31 December 2011).

14 International Crisis Group, 'Immediate International Steps Needed to Stop Atrocities in Libya' (22 February 2011), available at http://www.crisisgroup.org/en/publication-

day, Genocide Alert issued a press release calling upon the German government to advocate in favor of sanctions as well as a no-fly zone declared by the Security Council and European Union.[15] On 24 February 2011 Amnesty International issued a press release, "Fears Grow for Libya Migrants as Thousands flee" and released a report, "Libya: Detainees, disappeared and missing".[16]

The emotion dramatically escalated when on 26 February, the Permanent Representative of Libya to the UN sent a letter to the President of the Security Council calling for a referral of the situation to the ICC, and defended this position in front of the Council.[17] This was an appeal for the latter to overcome any hesitation and to adopt resolution 1970.[18] After this vote, the pressure went on, and led to resolution 1973.[19]

Under these circumstances, the international community was strongly called upon to react.

2. The International Community's Reaction

This reaction was in line with the World Summit Declaration, which does not avoid strong wording when it comes to subsidiary responsibility, without, however setting as precise conditions as outlined in the ICISS:[20]

> "The international community, through the United Nations, also has the responsibility […] to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against

type/media-releases/2011/immediate-international-steps-needed-to-stop-atrocities-in-libya.aspx (last visited 31 December 2011).

15 'Bürgerkrieg in Libyen: EU sollte militärische Flugverbotszone einrichten' (22 February 2011) available at http://www.genocide-alert.de/htdocs/contenido/cms/front_content.php?idcat=72&idart=294 (last visited 31 December 2011).

16 Amnesty International, 'Fears Grow for Libya Migrants as Thousands flee' (2 March 2011) available at http://www.amnesty.org/en/news-and-updates/fears-grow-libya-migrants-thousands-flee-2011-03-02 (last visited 31 December 2011) and Amnesty International, 'Libya: Detainees, disappeared and missing' (29 March 2011) available at http://www.amnesty.org/en/library/info/MDE19/011/2011/en (last visited 31 December 2011).

17 Before the Security Council, the Libyan Representative pleaded for "a swift, decisive and courageous resolution to put an end to the bloodshed and killing of innocent people", UN Doc. S/P.V.6490.

18 SC Res. 1970, 26 February 2011.

19 SC Res. 1973, 17 March 2011.

20 See Domestici-Met, *supra* note 5, 966-967.

> humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[21]

Thus only two conditions must be respected:

- the manifest failure of the state to protect, in spite of the commission of one of the specified four crimes;
- and the fact that peaceful means are inadequate.

The first point was asserted in both resolutions 1970 and 1973 with the sentence "the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity"[22]. And the second could be deduced from the fact that violence had not stopped following to the SC Resolution 1970, even though some remarks could be made regarding the evolving situation in Libya: on the one hand, there were fewer demonstrators – and therefore less repression – in Tripoli; on the other hand, the second largest city in the country was held by an organized rebellion.[23]

The Libyan case provided the opportunity for a scenario of military-led protection to unfold. The first step was taken by the UN alert bodies, followed by the Human Rights Council, the "relevant regional organizations", and, finally, the Security Council. Step by step, it appeared that the conditions required by paragraph 139 were both met.

a) The UN Watch and Alert Bodies

Since 2004, the UN Secretary-General (UNSG) receives the advice of a Special Adviser on the Prevention of the Genocide. The World Summit

[21] GA Res. 60/1, 24 October 2005, para. 139 (emphasis added by the author).
[22] SC Res. 1970, 26 February 2011 and SC Res 1973, 17 March 2011.
[23] See *infra*, C.I.1.

Declaration paid special tribute to him.[24] A few years later, in 2008, a position was created for a UNSG Special Adviser for Responsibility to Protect. A Joint Bureau was recently created as a common Secretary for both.

Both Special Advisers had been very active about Côte d'Ivoire with two statements: one adopted on 29 December 2010 and one on 19 January 2011.[25] On 22 February, they tackled the Libyan case, issuing a common press release reminding the Libyan Government of its responsibility to protect its citizens.

b) The First UN Decisions: Human Rights Council and General Assembly

On 25 February 2011, the Human Rights Council met in a special session devoted to "the situation of human rights in the Libyan Arab Jamahiriya". In its Resolution S-15/2 it called upon the Libyan government to cease all human rights violations, and recommended Libya's suspension by the General Assembly.[26] The latter suspended Libya from the Human Rights Council on 1 March2011.[27] From member state, Libya then became a State under review.[28] On 11 March the Human Rights Council named the members of an International Commission of Inquiry, entrusted with the responsibility of gathering testimonies and evidence and listing them in a report to the Council to be submitted by 1 June 2011.[29]

c) The Relevant Regional Organizations

The expression "relevant" stems from Paragraph 139 of the World Summit Outcome Document.[30] It can be construed in the following sense: the organizations that the State under review belongs to; and obviously the Arab League and the African Union had a strong influence upon the

[24] "We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide", GA Res. 60/1, 24 October 2005, para. 140.

[25] See *infra* C.II.

[26] UN Doc. A/HRC/RES/S-15/1 (25 February 2011).

[27] Press Release GA/11050, available at http://www.un.org/News/Press/docs/2011/ga 11050.doc.htm (last visited 22 November 2011).

[28] *Id.*

[29] The report was submitted on 1 June. See A/HRC/17/44 (1 June 2011).

[30] GA Res. 60/1, 24 October 2005, para. 139.

Security Council's position. However, another organization played a major role: the European Union.

The European Union was the first to act after SC Resolution 1970. On 28 February, it adopted a decision[31] in order to implement the latter, by imposing a travel ban and freezing the financial assets of Libyan Government members. The Transitional Council, located in Benghazi, recognized by France on 10 March 10, was in turn recognized on 11 March by the European Parliament as officially representing the Libyan opposition.[32] In the same Resolution, the Parliament stressed that "the EU and its Member States must honor their Responsibility to Protect, in order to save Libyan civilians from large-scale armed attacks",[33] asking them not to rule out any option provided for in the Charter, and calling on the High Representative and the Member States to stand ready for a UNSC decision, including a possible no-fly zone. It was a strong invitation for a robust response to Libya's failure to protect.

In the last days before SC Resolution 1973 was adopted, the African Union, the Organization of Islamic States, the Gulf Cooperation Council and the Arab League took positions upon the situation. The strongest was the Arab League's. On 3 March, it decided to suspend Libya and began considering a no-fly zone. To that end, it convened an Extraordinary session for 12 March' where it

> "call[ed] on the Security Council to bear its responsibilities towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States"[34].

31 Council Decision 2011/137/CFSP, L 58/53.
32 EP Res., 11 March 2011, P7_TA (2011) 0095.
33 EP Res., 11 March 2011, P7_TA (2011) 0095, para. 10.
34 'The outcome of the League of Arab States meeting at the Ministerial Level in its extraordinary session on the implications of the current events in Libya and the Arab position' (12 March 2011) available at http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english%281%29.pdf (last visited 2 January 2012), para. 1.

In between the two Arab League meetings mentioned above, the Gulf Cooperation Council, had, on 7 March, expressed its hope to see the "UN Security Council take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya", and also condemned the "crimes committed against civilians, the use of heavy arms and the recruitment of mercenaries"[35] by the Libyan regime. On 28 March, Qatar took an even more political position by recognizing the NTC.

The African Union was more aligned with a peacekeeping approach, stating that violence in Libya posed "a serious threat to peace and security in that country and in the region as a whole, as well as to the safety and dignity of Libyans and of the migrant workers, notably the African ones, living in Libya"[36]. While AU Member States called for the creation of a High-Level Committee on Libya to engage with all parties and facilitate dialogue, they expressly rejected any form of foreign military intervention.[37]

d) The UN Security Council

The wording "responsibility to protect" belongs to both SC Resolutions 1970 and 1973, even though the measures adopted are quite different.

On 26 February, the Security Council used article 41 of the Charter to impose smart sanctions, together with referring the situation to the Prosecutor of the ICC. But the decision of the Council to use article 41 is not grounded on threat to peace:

> "Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.
>
> Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

[35] Cited by 'Gulf States back Libya for no-fly-zone' (7 March 2011) available at http://www.france24.com/en/20110307-gulf-states-back-libya-no-fly-zone?quicktabs_1=0 (last visited 31 December 2011).

[36] Communiqué of the 265th meeting of the Peace and Security Council, PSC/PR/COMM.2 (CCLXV), para. 3.

[37] *Id.,* para. 6.

> Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,
>
> 1. Demands an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;
>
> 2. Urges the Libyan authorities to: [...]"[38]

Thus the motives listed in the preamble of the SC Resolution 1970 were close to those in the SC Resolution 1973 preamble, with a noticeable difference: SC Resolution 1973 goes back to the "threat to peace scheme", through the theme of protection.

The resolution 1970 did not remain unimplemented. The European Union answered to the call immediately, on 26 February. The Prosecutor of the ICC launched an investigation as early as 2 March.

However, faced with the on-going events and growing pressure,[39] the Security Council adopted, Resolution 1973 on 17 March 17 with the approval of Nigeria, South Africa, Gabon and Lebanon. It was the first coercive action taken in the name of responsibility to protect and "against the wishes of a functioning State"[40].

The progress since SC Resolution 1706 is striking. The latter referred indirectly to R2P:

> "Recalling […] its previous resolutions […] and 1674 (2006) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome"[41].

The historical signification of Resolution 1973 was specially highlighted. For Secretary General Ban Ki-Moon, Resolution 1973 "affirms

38 SC Res. 1970, 26 February 2011.

39 International Crisis Group on 10 March 2011, Human Rights Watch on 13 March 2011. And even after the SC Resolution 1973 of 17 March, Human Rights Network-Uganda (HURINET), in an open letter dated 28 March 2011, called for up scaling the Responsibility to Protect Mechanism.

40 Bellamy & Williams, *supra* note 8, 825. The authors add that "[t]he closest it had come to crossing this line previously was in Resolutions 794 (1992) and 929 (1994)" (Somalia and Rwanda).

41 SC Res. 1706, 31 August 2006, preamble.

clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government"[42]. A wide support to this Resolution was perceptible.[43]

The European Council welcomed Resolution 1973[44] and the Prosecutor of the ICC issued warrants for the arrest of Muammar Gaddafi and his close aids.[45]

Thus the International community, for the first time, reacted to a failure to protect; and it has been able to do so within the institutional framework set up by paragraph 139 of the World Summit Outcome. For R2P it is an important step forward. And, in spite of some nascent fault lines in international unanimity – namely regarding the way of putting an end to the crisis[46] – a NATO-led military operation, on 23 March. It has since put an end to Gaddafi's 42-year rule.[47]

II. A Success Story?

At first glance, the outcome seems positive. Tribal membership has not – at least for the time being – fuelled the "long, long war" Gaddafi promised on 20 March.[48] The endangered Benghazi is safe and victorious. Moreover, the success lies in the very composition of the Security Council when it adopted the resolution (1.). But equally interesting is the outcome of the "timely response", which has – up to now – proven to be more political than humanitarian in nature (2.).

[42] UN Doc. SG/SM/13454, Statement by the United Nations Secretary General, 17 March 2011.

[43] In the wake of SC Resolution 1973, a meeting of 35 governments was organized in London on 29 March 2011. The NATO itself held a meeting in Paris.

[44] Council of the European Union, EU Priorities for the 66th Session of the General Assembly of the United Nations, Doc 11298/11, 10 June 2011.

[45] ICC Pre-Trial Chamber I, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, Doc ICC-01/11-13, Warrant of Arrest for Saif Al-Islam Gaddafi, Doc ICC-01/11-14, Warrant of Arrest for Abduullah Al-Senussi, Doc ICC-01/11-15, all issued 27 June 2011 with the charge of crimes against humanity.

[46] See, *infra,* C.I.

[47] See U. Laessing & M. Ryan, 'Rebels enter Tripoli, crowds celebrate in streets' (21 August 2011) available at http://www.reuters.com/article/2011/08/21/us-libya-idUSTRE77A2Y920110821 (last visited 31 December 2011).

[48] See 'Libya air strikes: Gaddfi vows 'long war'', *BBC* (20 March 2011) available at http://www.bbc.co.uk/news/world-africa-12798568 (last visited 31 December 2011).

1. The Fruit of an Exceptional Security Council Membership

It is commonly asserted that the veto power makes it impossible for the Security Council to adopt strong resolutions. It has been proven not only throughout decades of cold war, but even after the fall of the Berlin wall.[49] Why were Resolutions 1970 and – in particular – 1973 possible? It is all the more surprising given that many non-permanent members of the Council, without any veto power, would have been expected to be strong opponents to any interference in a Southern State's affairs.

At this precise moment, the Security Council, politically speaking, appeared similar to a "G 20". Among the non-permanent members of the Council were the most famous "emerging States", with the result that the Council encompassed the four members of BRIC – Brazil, Russia, India and China – reinforced by the presence of the two bigger powers in Africa: South Africa, the GDP of which is half of whole Sub-Saharan Africa, and Nigeria, the most populated African State. A R2P-grounded resolution adopted under such circumstances is a particularly strong proof of success.[50]

But other no less extraordinary elements, played in favor of the Resolutions' adoption. One is the presence among non-permanent members of a witness of what might happen in the absence of R2P: Bosnia-Herzegovina, still mourning the Srebrenica slaughter. Moreover, the State that was failing to protect its population was quite isolated on the international stage. Gaddafi was commonly considered as a somehow ridiculous tyrant, with a difficult history of conflicts with all its neighbors. After missed "marriages" and a war of conquest,[51] he had attempted more pacific means of imperialism through an international organization, the Union of Arab Maghreb (UMA). Self-proclaimed interpreter of the Koran,[52] he nevertheless behaved in ways that didn't fit with this pretension.[53]

Is SC Resolution 1973 a real milestone, a solid ground for a true precedent? And if the population of Benghazi has been saved, is it purely a protection success story?

49 E.g. the Chinese veto on 25 February 1999 leading to the withdrawal of the UNPREDEP in Macedonia.

50 In the opposite sense, one could argue that this very membership of the Security Council was responsible for the lack of unanimity.

51 On Tchad about the Aouzou strip (1973-1987).

52 In his Green Book, first published in 1975.

53 E.g. his female praetorian guard.

2. Protection, the Triggering Mechanism of a Political Outcome

Even though officially based upon the concept of “protection”, Bernard-Henry Lévy’s alert in favor of Benghazi[54] was deliberately aimed at helping the “good” ones against the “evil” ones. When the operation began, the idea of saving the civilian opponents stood first. And after Tripoli’s fall and Gaddafi’s death, Alain Juppé, French Foreign Minister declared that the operations had avoided thousands and thousands of additional victims.[55]

However, during the protracted crisis – if not war – the official objective quickly shifted to removing Gaddafi from power.[56] Establishing a no-fly zone required inflicting severe damage to the Libyan air force and the destruction of SAMs (Surface to Air Missiles). Yet French and British strikes went beyond, namely up to shelling Gaddafi’s palaces.

In any case, this remains the first UN-mandated military reaction to protect a population threatened by its government. Will this example guide the next case? Or does its analysis presage difficulties with finding an exact repeat?

C. Libya in Context

The wording “R2P’s life” was put forward by Ban Ki Moon in its major contribution to R2P: “Implementing the responsibility to protect”[57]. To implement the Responsibility to Protect, he writes, is to “give a doctrinal, policy and institutional life to the responsibility to protect”.[58] The Libyan case gives operational life to R2P, and it is therefore worth exploiting the lessons learnt.

[54] See e.g B.-H. Lévy, ‘Sarkozy, Libya and Diplomacy of Extreme Urgency’ (3 December 2012) available at http://www.huffingtonpost.com/bernardhenri-levy/sarkozy-libya-diplomacy_b_834951.html (last visited 31 December 2011).

[55] ITELE, ‘La France est fière d'avoir aider les Libyens’ (20 October 2011) available at www.dailymotion.com/video/xltky8 (last visited 31 December 2011).

[56] N. Sarkozy, B. Obama & D. Cameron, ‘Sarkozy, Obama Cameron: ‘Kaddhafi doit partir’’ (14 April 2011) available at http://www.lefigaro.fr/international/2011/04/14/01003-20110414ARTFIG00772-sarkozy-obama-cameron-kadhafi-doit-partir.php (last visited 31 December 2011).

[57] Report of the Secretary General, Implementing the responsibility to protect, UN Doc A/63/677, 12 January 2009.

[58] *Id.*, para. 2.

However, focusing on the sole Libyan case would possibly amount to losing a part of the story, since the first months of 2011 have been rich in events which have or might have induced international actors to invoke the Responsibility to Protect. A comparison between Ivory Coast (Côte d'Ivoire), Libya, Bahrain, Yemen, Syria, a look at the increase in references made to protection could enable us to assess whether the Libyan case, together with its context have brought a decisive contribution to R2P.

And, regarding some failures of the operation; do they necessarily prove a global failure for R2P? And could even "failed" episodes of R2P help taking stock of the true evolution?

One major reproach made in relation to the Libyan no-fly zone and strikes is the "double standard" of Syria's treatment by the international community when contrasted with the treatment of Libya (I.). Beyond this point, one can discover some interesting lessons which seems to progressively arise from such events (II.).

I. A Lasting Impression of Double Standard

The possibility of 'double standards' cannot be reduced to a mere comparison between the treatment of Syria and Libya. The protection of civilians has often been on the forefront of international attention during the last ten to eleven months, even though all cases differ from one another. A rich context is made of several cases where the fate of civilians has drawn actors of the international community to warn of possible violations of human rights. Indeed, not all victims have been shielded by the international community. Before the Libyan case, the post-electoral crisis in Côte d'Ivoire already created public concern over the fate of civilians; and after Resolution 1973, the same concern arose in relation to Syria, and – to a lesser extent – Bahrain and Yemen.

1. Many Populations are Less Protected Than Libya's

Without asserting that the Libyan case is excessively celebrated, we shall as briefly as possible go beyond these events and consider other examples of the approach to R2P. In the wake of Resolution 1973, the question is: has the strong reaction opposed to Libya's failure open a new era? The context of the "Arab awakening" offered the perfect opportunity for a series of coherent precedents.

However, the cases of Bahrain, Syria and Yemen are not consistent with the Libyan one. Facts are different; and fates, too.

a) Populations Experiencing a Lack of Protection

The Bahrain case is totally opposed to the Libyan one. It shows an intervention in favor of the authorities by an outside State, in a context marked by ethnic divisions. The majority of the population is made of Shiites; and the power belongs to a Sunni king, surrounded by Sunni ruling elites. On 14 March 2011, the Sunni Kingdom of Saudi Arabia sent in troops to help the King of Bahrain. R2P was not explicitly taken into account.

The Syrian case can be compared both to Libya's and Bahrain's ones. Ethnically speaking, Syria is the reverse of Bahrain: a large majority of Sunnis, a small ruling elite of Alaouite Shiites. Politically, the conflict in Syria was characterized up to early August by the lack of any global reaction, either in favor of the authorities, or in favor of protecting the population. Iran is considered to support Assad's regime: here, together with the proximity of Israel, lies the probable reason for the international community's long abstention. The fear of a major destabilization has globally long prevailed over the responsibility to protect, even if things seem to be moving.

b) Populations Experiencing Political Limits of Armed Protection

This was the case with Côte d'Ivoire, where the management of the protracted, nearly ten–year-old crisis reached a new acuteness with the post-electoral crisis (November 2010 - April 2011). In this context, the theme of protection of civilians is worth analyzing. Indeed, two kinds of civilians were targeted and their situation was approached in different ways, which is relevant to our analysis.

Gbagbo's supporters targeted those of Ouattara in Abidjan's Abobo neighborhood in March; whereas Gbagbo's ethnically-related civilians had been undergoing hardships in Douekoué since January. There was room for protection and for responsibility to protect, all the more so, given that the UNOCI and the French army had the mandate for so.

Yet for months, R2P stood behind the problem of elections, legitimacy and power devolution. As a result, the pro-Ouattara party, i.e. that of the internationally-recognized President, seemed to be treated as the "good"

side. After the latter's victory, and the defeat of the other side, this shocking double standard came to an end.

Once again, political patterns had covered up the problem of protection of civilians. The same occurred in Syria.

2. Syria: From Non-Protection to a Growing Interference

With time, and thanks to information gathered through social networks, the above-mentioned situation in Syria was deemed unbearable. Upon a request from the Human Rights Council, a fact-finding mission headed by Deputy High Commissioner for Human Rights Kyung-wha Kang, has been tasked with investigating "all alleged violations of international human rights law […]".[59] In spite of practical difficulties, and nevertheless thanks to first-hand information,[60] a report covering events from 15 March to 15 July evokes "a pattern of human rights violations that constitutes widespread or systematic attacks against the civilian population, which may amount to crimes against humanity", and the disproportionate use of force by Syrian security forces, stating the figure of 2000 victims over up to then five months and many precise details of the modus operandi.[61]

On 3 August, the situation came to a turning point with a Presidential Declaration by the Security Council.[62] At first glance, there is one obvious thing lacking: the words "responsibility to protect". The notion is, however, disguised behind other elements of language, meaning that the formulation says much of what lies behind "R2P", but without explicitly using those terms. In the statement under review, the very conception of "sovereignty as

59 Human Rights Council, Resolution S-16/1, UN Doc A/HRC/RES/S-16/1, 4 May 2011.

60 The Government of Syria denied any access to its territory to the Commission members. They however managed to/in interview(ing) victims and witnesses. And they have viewed more than 50 videos.

61 Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, UN Doc A/HRC/18/53, 15 September 2011, III. Patterns of Violations.
Killing of civilians was run/achieved by, both, forces on the ground, snipers on the rooftops and airpower, a clear shot-to-kill policy being made obvious by the use of live ammunitions and wounds systematically located in the head and chest of victims. Eyewitnesses have corroborated summary executions -allowing certitude for 353 named victims- as well as at least 98 acts of torture.

62 Statement by the President of the Security Council, UN Doc S/PRST/2011/16, 3 August 2011.

responsibility" lies in the conjunction of a) the reaffirmation of a "strong commitment to sovereignty, independence and territorial integrity of Syria" and b) the call for respect of Syria's "obligations under international law, including [full] respect [of] human rights". Furthermore, as to failures the declaration mentions "the use of force against civilians by the Syrian authorities"[63].

Two preliminary remarks have to be made:

- First: the International community acts through a Presidential statement, rather than a resolution. The difference is twofold. On the one hand, a resolution is binding. On the other one, a resolution is the result of a vote. Reaching a consensus is easier than reaching the majority required for a Resolution (not to speak of the risk of veto, since when such a risk does exist, there is no Presidential Declaration).

- Secondly, there is no reference in the Declaration to an *obligation* for the International community to take a step such as the given Declaration, or any other step.

And, coming to the contents, there was a kind of balance:

- as to the authorities: "The Security Council condemns the widespread violations of human rights and the use of force against civilians by the Syrian authorities"[64];

- as to the demonstrators/insurgents: "The Security Council calls […] to refrain from reprisals, including attacks against state institutions", while "urg[ing] all sides to act with utmost restraint."[65]

Since then, the level of concern in the international community has increased. In a report made public on 18 August and High Commissioner Navy Pillay recalled the R2P 2005 agreed principle, underlining that "when

63 *Id.*
64 *Id.*
65 *Id.*

a State is manifestly failing to protect its population from serious international crimes, the international community has the responsibility to step in by taking protective action in a collective, timely and decisive manner"[66]. The High Commissioner went further, recommending that the Human Rights Council urge the Security Council not only to call for an immediate cessation of attacks against civilian populations, but also to consider referring the situation in Syria to the ICC.[67] The same day, 18 August, saw concerted declarations of Presidents Obama and Sarkozy, of British Premier David Cameron, of German Chancellor Angela Merkel, EU High Representative for Foreign Affairs and Security Policy, Catherine Ashton, and Secretary of State Hillary Clinton called for President Assad's resignation, before a new wave of smart sanctions.[68]

3. A "Double Standard" or a New Bipolar Era?

But, with these bold – and mainly Western – Declarations, and the wave of sanctions on 29 August,[69] the consensus previously reached on Libya seemed to be lost. And there could have been a fear for a –once again- split international community, opposing the Western States and the major other ones. On October 4, a Western-supported[70] draft resolution,

66 Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, *supra* note 66, IV. Recommendations, para. 92.

67 *Id.*, IV. Recommandations, para. 94 (c).

68 Statement by Barack Obama: M. Phillips, 'President Obama: 'The future of Syria must be determined by its people, but President Bashar al-Assad is standing in their way.'' (18 August 2011) available at http://www.whitehouse.gov/blog/2011/08/18/president-obama-future-syria-must-be-determined-its-people-president-bashar-al-assad (last visited 30 December 2011); 'Germany, France and UK Call on Syria's Assad to Step Aside: Joint Statement by Chancellor Angela Merkel, French President Nicolas Sarkozy, and British Prime Minister David Cameron on Syria' (18 August 2011) available at http://www.germany.info/Vertretung/usa/en/__pr/P__Wash/2011/08/18__Syria__State__PR.html (last visited 30 December 2011); Statement by High Representative Catherine Ashton on Behalf of the EU on EU Action Following the Escalation of Violent Repression in Syria, Doc EU/NR 29/11, all 18 August 2011.

69 Non armed coercive measures are foreseen in paragraph 139 of the World Summit Outcome, *supra* note 19.
Regarding Syria, the latter measures have not up to date/day been decided by the UN. However, the US were forerunners in 2004, boycotting some Syrian exports and in 2006, the Commercial Bank of Syria. In 2011, the EU and the US compete in banning any travel of Syrian civil servants.

70 Proposed by France, Germany, Portugal and UK and voted by the USA.

build upon the scheme of R2P, recalling the Syrian Government's "primary responsibility to protect its population" was vetoed by Russia and China[71], which were supporting a weaker text. And, since then, the major western countries, and mainly France, have increased the level of criticism. The Declarations of the French Ambassador to the Security Council on December 12, proved, once again, a very high level of tension upon the situation: "le silence du Conseil de Sécurité est un scandale. Il est scandaleux que le Conseil de Sécurité, du fait de l'opposition de certains membres, du fait de l'indifférence des autres, n'ait pas pu agir pour exercer une pression sur les autorités syriennes"[72].

Is there a Human rights-based diplomacy opposed to a sovereignty-driven one? Would it be the new "Clash of civilizations?"[73] It seems fortunately not, in the light of the lessons to be learnt.

II. Some Lessons to be Learnt

When putting an end to this paper, on 27 December 2011, after 5000 persons have been killed in Syria,[74] we cannot say whether Bashar El Assad will – in addition to monitors[75] – accept real changes, and how long the regime will survive. Yet, already, two elements can be assessed. There is a growing and spreading conviction of States having a say in other States' behavior regarding their own population (1.); however this does not mean that the presently developing conception is fully in line with "R2P" (2.).

71 The resolution was approved by nine countries (the sponsors plus United States, Bosnia-Herzegovina, Colombia, Gabon and Nigeria); four States abstained (South Africa, Brazil, India and Lebanon).

72 "It is an outrage that the Security Council was not able to act and put the pressure upon Syrian authorities, due to the opposition of some members, and the indifference of other ones" (translated by the author), France at the United Nations, 'Human Rights situation in Syria: Remarks to the press by Mr. Gérard Araud, Permanent Representative of France to the United Nations, with the Representatives of the United Kingdom, Germany, Portugal and the United States' (12 December 2011) available at http://franceonu.org/spip.php?article5952 (last visited 31 December 2011).

73 Cf. S. Huntington, *The Clash of Civilizations* (1993). The reference to this title does not mean that there is a similarity between the civilizations referred to in this paper and those identified by Huntington. The French Minister for Foreign Affairs put very strongly forward its human rights-based diplomacy.

74 'Syria: 5,000 dead in violence, says UN human rights chief', *The Guardian* (12 December 2011) available at http://www.guardian.co.uk/world/2011/dec/12/syria-5000-dead-violence-un (last visited 2 January 2012).

75 He has accepted Arab monitors on December.

1. The "Arab Spring Acquis": a Growing Feeling of Having a Say About Fellow States' Population Fate

The specific role played in the Libyan case by regional organizations seems about to become the norm: the have a kind of lead, or, at least, they are considered as providing legitimacy to universal decisions.

a) At the Regional Level

A few days after the above mentioned veto, the Gulf Cooperation Council and the Arab League opened a new era in the Syrian case, by showing their indignation at the events.

The GC-Council had proposed an Initiative, at last accepted by President Saleh. This lead the UNSC to adopt resolution number 2014 on October 21. Some two weeks later, the Arab League tackled the Syrian case with a renewed energy, joining the lasting efforts of some Western States.

Thus, the non-interference-concept is receding in front of the idea that fellow States are entitled to put pressure to the one which fails in protecting its own population.

After a mediation for a Peace plan, encompassing the cessation of repression, and after the failure of Syrian government to implement it, the Arab League, on Nov 12th decided to suspend Syria, exactly as it had done on March 3 for Libya.

On 27 November, the Arab League the League adopted sanctions against Syria.[76] On 17 December, Arab League gave a last and final delay to allow in observers or else it could take the issue to the UN.

Thus, after these regional undertakings in favor of R2P in Yemen and Syria, fewer topics can be seen as domestic affairs.

b) At the Universal Level: a Nascent Universal Concern

A strong impulse has been given by the West with the bold above mentioned Declarations. But a large support has been given by Colombia, Gabon and Nigeria, and the States showing approval are numerous.

[76] Arab League Res. 7442, 27 November 2011: League of Arab States, 'Full text of the Arab League resolution against Syria' (28 November 2011) available at http://www.openbriefing.org/regionaldesks/middleeast/resolution7442/ (last visited 31 December 2011).

Moreover, there is a global evolution towards a shared interest in what happens domestically about human rights, in spite of the traditional reluctance of some States in this regard. The Russian and Chinese approaches, such as expressed in the voting explanations of their respective vetoes to the 4 October draft resolution, do not show a frontal opposition. Both States express hostility towards crackdown on civilians. There is no visible consensus, but perhaps a kind of silent coming together.[77]

2. A Conception of Protection to be Further Fine-Tuned

The Libyan case, in itself, shows that a certain amount of conceptual work has to be made upon R2P's implementation (a), whereas the other cases under review help singling out what R2P really means (b).

a) Being Responsible While Protecting

This is the formula through which Brazil has expressed its reservations towards the implementation of resolution 1973 it had – yet – voted. The expression seems justified; however its fostering agent has not yet given it all the necessary precision.

Anyhow, the Libyan case is disappointing from a humanitarian law point of view, even though NATO's forces have been attentive not to infringe upon it, during their operations. Even if the resolutions which have singled out Gaddafi's regime and open the way to the air strikes aimed at protecting civilians, they -at last- resulted in making out of the weak the new power, and out of the torturer a slaughtered victim.

About the (primarily) "weak", much could be said, and namely why to call it "civilians" from the beginning, when there were not yet any combatant? Another paper would be necessary on that topic.[78] Therefore, the present analysis will be limited to what is the most obvious: the former "victims" – the NTC troops — have committed many crimes, which can be summarized as follows:

- attacks against civilians, when they began conquering and besieging cities,

[77] One might as well notice that within the meetings of the Arab league. It has been clearly stated that this stance is motivated by the desire of avoiding any new Libyan-like operation.

[78] It is underway

- disregard for the immunity of people *hors de combat,* namely Gaddafi (no matter the seriousness of the crimes he had committed, he was no longer a commander in a conflict, the latter being over),

- breach of the dignity of persons, by exposing Gaddafi's corpse,

- ethnic cleansing, namely against Sub Saharian Africans who were employed in Libyan industry, and later used as mercenaries in the civil war.

No doubt, the perpetrators should not be immune from punishment.[79] Moreover, one future campaign aimed at protecting demonstrators/ insurgents should be more cautious in front of the risk of such an overturned action, going far beyond protection and finally against it. This leads us to a broader issue: how are protection and R2P linked?

b) Protecting Through R2P and/or Outside R2P

Throughout the year 2011, the vocabulary concerning the Arab crises has shifted many times, which is worth taking a closer look at.

One turning point could have been the August Presidential Declaration, which has put an end to the silence in the Syrian case, together with introducing a new "standard", a kind of "Syrian" formula. The latter was more or less based upon the international community's responsibility, since the Security Council, through its President, interfered in Syria's affairs and called for a range of precise behaviors. But, in the same time, this "Syrian doctrine" stood a level below the Libyan one, be it only for a kind of balance kept by this Statement between authorities and protesters, both called upon to renounce to violence.

Since then and notwithstanding the difference between France and Russia statements for example, the protagonists are likely to come together one next day, upon new bases, the nature of which could partly be foreseen through recent elements.

One first assessment relates to a kind of back flow of the very expression R2P, clearly shown by the following list:

[79] On 27 October 2011, the resolution 2016 put this clearly, among other elements regarding the end of the strikes.

- in resolution 1970, R2P is the only ground for Security Council measures under Chapter VII, without any reference to "threat to peace";

- in resolution 1973, R2P is the main ground for Security Council measures under Chapter VII, but through the channel of "threat to peace";

- the August Declaration depicts sovereignty as a responsibility, but avoids the wording R2P;

- the October European draft, itself, puts forward State's responsibility to protect without mentioning the International Community's substitutive responsibility;

- the October resolution on Yemen, in turn, points out the primarily State's responsibility to protect, but far behind and without mentioning the International Community's substitutive responsibility.

A second assessment refers to the increasing place of human rights law in the relevant documents. In order to describe situations akin to the former Libyan one, the recent documents

- use more scarcely the word "civilians", which means the Human rights law touch taking precedence over the IHL one, probably due to the growing activity of High Commissioner Navy Pillay and the Human Rights Council;

- give more place to the freedoms of expression and demonstration which, anyhow, were already at stake from the onset of the Arab "spring";
- do not disregard violence committed by opponents.

It was even clear in the draft resolution vetoed 4 October, which could however be considered as being, among the recent documents, the closest to resolution 1973, due to its reference to Syria's responsibility to protect its population:

> “2. Demands an immediate end to all violence and urges all sides to reject violence and extremism;
>
> 3. Recalls that those responsible for all violence and human rights violations should be held accountable;
>
> 4. Demands that the Syrian authorities immediately:
>
> (a) cease violations of human rights, comply with their obligations under applicable international law, and cooperate fully with the office of the High Commissioner for Human Rights;
>
> (b) allow the full exercise of human rights and fundamental freedoms by its entire population, including rights of freedom of expression and peaceful assembly, release all political prisoners and detained peaceful demonstrators, and lift restrictions on all forms of media;
>
> (c) cease the use of force against civilians;
>
> (d) alleviate the humanitarian situation in crisis areas, including by allowing expeditious, unhindered and sustained access for internationally recognized human rights monitors, humanitarian agencies and workers, and restoring basic services including access to hospitals;
>
> (e) ensure the safe and voluntary return of those who have fled the violence to their homes […].”[80]

The December Russian draft – supported by all BRICs – is curiously close to the August Presidential Declaration,[81] which is a proof of a possible coming together we referred to previously.

One more assessment comes out of the examination of the different documents and statements issued during the second half of 2011. It relates

80 UN Doc. S/2011/612, 4 October 2011.

81 See ‘Russia offers tougher draft resolution on Syria to UN security council’, The Guardian (16 December 2011) available at http://www.guardian.co.uk/world/2011/dec/16/syria-russia (last visited 31 December 2011).

to the place of humanitarian access, the importance of which is highlighted, not only by the French-British-German-Portuguese Draft of 4 October,[82] but also by the presidential Declaration dated 3 August, and by resolution 2014 on Yemen. Moreover, it was previously present in resolution 1973 itself. Thus, protection, through its different avatars, from the boldest R2P formulation to some shyer or softer ones is linked with field humanitarian action. When devising an *ad hoc* protection, humanitarian action is part of the game.

And, in order to close these considerations upon the on-going trends, it is worth mentioning documents with sentences mixing protection and human rights, without mentioning the responsibility to protect. A good example lies in a General Assembly resolution on Syria passed on December 19.[83] Its paragraph 2 calls upon Syrian authorities to immediately put an end to all Human rights violations, to protect their population and to fully comply with their obligations under International law.

When approaching the end of the present paper, one cannot help thinking of a change in atmosphere. The Libyan 1973 resolution was emergency and emotion-driven. Today, there is no quick answer when the US Department of State special coordinator on Middle East affairs asserts that "the International community's duty to the Syrian people transcends power politics"[84], and when Ban Ki Moon calls upon the international community to act "in the name of humanity" against Syria's crackdown.[85] However, this sentence could be misleading. In the opposite sense, it is worth highlighting the aforementioned recent resolutions, since they could bring something very new to the whole issue of R2P.

Indeed, the latter, as explained in previous papers, had been proclaimed with a narrow scope – the four big crimes we sometimes name "the four horsemen of the Apocalypse" – since its goal was to help prevent deadly dynamics likely to lead to the hell. It was not about creating an implementing mechanism for any protective norm. Many criticisms had been raised against this narrow scope, which has led Secretary General Ban Ki Moon to justify this narrowness by the need to preserve the fragile

82 UN Doc. S/2011/612, *supra* note 80.

83 It was put on the Agenda with reference A/66/462/Add.3.

84 Frederic Hof, during a Hearing with Congressmen on US policy toward Damascus, *Agence France Presse*, 14 December 2011.

85 *Id*.

consensus reached in 2005. The Secretary General however explained that this narrow scope benefited from a deep protection in three pillars.[86]

But the present trend is to put the stress on the obligations under Human rights law of the State affected by political troubles and repression, when worried by putting in the forefront its responsibility to protect against the risk of sliding into a path leading to a major crime. And this is full of signification.

First, it is seen as a way of avoiding an armed operation on behalf of the subsidiary responsibility of the International community (and, in this regard, it might reveal a false interpretation of R2P, disregarding pillars Two and Three or a lack of confidence).

Secondly, it could be construed as a better acceptance – at least a reduced reluctance – toward civil and political rights,[87] up to now looked at with caution by strict defenders of sovereignty; the latter fearing any outside interference in the choice of political regime.

The observations afore deserve all the more attention that the cases under review show political efforts of crisis management. The "regime change" occurred in Yemen with the resignation of President Saleh, it is presently a pacific work in progress in Bahrain,[88] and it is at the centre of the diplomatic efforts around Syria. It seems as if a taboo had disappeared, even if another one is on the raise: nationally-led inclusive political process as crisis exit strategy.

It is too early to know whether in the near future, the Security Council is likely to adopt R2P "1973-like" resolutions. Or will it rather be inspired by this kind of softer "doctrine" which seems to be developing, based on political freedom and humanitarian access as a guarantee of survival for protesters? It very much depends on which will be the next country. Yet, in the second hypothesis, R2P would become "less narrow".

86 See Domestici-Met, *supra* note 5.

87 *Habeas corpus* and human rights related to the expression of political opposition. Economical and social rights seem better accepted, all the more that the related International Covenant allows their progressive realization.

88 The independent commission on Bahrain, led by Cherif Bassiouni, has issued on November 24 a severe report. The latter was welcome by Secretary-General Ban Ki Moon who called for liberation of all political prisoners. Then, the Government of Bahrain has asked to the UN High Commissioner for Human rights to help him establishing an open and democratic society, *UN News Trackers* (11 December 2011). A field delegation has been established.

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The Use of Combat Drones in Current Conflicts – A Legal Issue or a Political Problem?

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Abstract

The regulation of the employment of combat drones in current conflicts is a central issue of recent discussions in international law. Contrary to misinterpretations in the media, this article claims that the legal framework regarding today's drone systems is settled. The author first provides an assessment of unmanned combat drones as a new technology from the perspective of international humanitarian law. He then proceeds to the vital point of the legality of targeted killings with remotely operated drones. Further, he discusses the preconditions for applicability of humanitarian law and human rights law to such operations. In conclusion, the author holds the view that the legal evaluation of drone killings depends on the execution of each specific strike. Assuming that targeted killings with drones will generally only be legal under the law of armed conflict, States might be further tempted to label their struggle against terrorism as 'war'.

A. Introduction

In 1996, the U.S. Secretary of Defence assigned the U.S. Air Force for the operational control over the first Predator drone systems. Since then, the presence of unmanned drones in current conflicts has steadily increased. The U.S. fleet of Predator drones has reportedly grown from less than ten in 2001 to 180 in 2007.[1] But it is not only the U.S. which is equipped with this technology. 43 States already possess unmanned flight systems,[2] others also have or are developing armed ones.[3]

Originally, the drones were designed as reconnaissance aircraft.[4] In 2002, the U.S. added AGM-114 Hellfire missiles to its systems,[5] and

[1] P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (2010), 34.

[2] 'The Soldiers Call It War Porn', interview with P. W. Singer, *Spiegel Online International* (3 December 2010) available at www.spiegel.de/international/world/ 0,1518,682852,00.html (last visited 3 January 2012).

[3] P. Alston, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6, 28 May 2010 [Alston-report], para. 27.

[4] Singer, *supra* note 1, 33.

[5] U.S. Air Force, 'Fact Sheet to MQ-1B Predator' (20 July 2010) available at www.af.mil/information/factsheets/factsheet.asp?fsID=122 (last visited 3 January 2012).

expanded their purpose. From 2007 to 2011, the number of drones, Predators and now also Reapers, performing combat air patrols at the same time in Afghanistan and Iraq was estimated to increase from 21 to 54.[6] At the end of 2010, the drone assaults in Afghanistan and Pakistan reached their highest level for now, with 58 strikes in 102 days.[7]

The use of combat drones started a controversial discussion in the media and the academic world. This article will focus on the question whether the nature of the problem is legal or political. The perspective taken will be one of international humanitarian law (IHL). It will first provide an assessment of the technology 'drone' itself under this framework. Secondly, it will deal with legal issues arising from the engagement of drones in targeted killings, their most prominent field of employment. Thirdly, the circumstances for the application of IHL will be discussed. Following this, concluding remarks will be submitted.

B. Predator and Reaper – Illegal in Themselves?

> "From time to time in the history of international law, various weapons have been thought to be so cruel as to be beyond the pale of human tolerance. I think, cluster bombs and land mines are the most recent examples. It may be - it may be, I am not expressing a view, that unmanned drones that fall on a house full of civilians is a weapon the international community should decide should not be used."[8]

With these words, often cited by newspapers,[9] the British Lord Bingham brought forward his objections concerning the use of drones in

[6] 'Attack of the Drones', *Newsweek Magazine* (18 September 2009) available at http://www.thedailybeast.com/newsweek/2009/09/18/attack-of-the-drones.html (last visited 3 January 2012).

[7] S. Ackerman, 'Unprecedented Drone Assault: 58 Strikes in 102 Days' (17 December 2010) available at www.wired.com/dangerroom/2010/12/unprecedented-drone-strikes-hit-pakistan-in-late-2010 (last visited 3 January 2012).

[8] T. Bingham during an interview related to the British Institute of International and Comparative Law's launch of the Bingham Centre for the Rule of Law (2009) available at www.biicl.org/binghaminterview (last visited 3 January 2012).

[9] See M. Wardrop, 'Unmanned drones could be banned, says senior judge', *The Telegraph* (6 July 2009) available at http://www.telegraph.co.uk/news/uknews/defence/5755446/Unmanned-drones-could-be-banned-says-senior-judge.html (last visited 3 January 2012); R. Verkaik, 'Top judge: use of drones intolerable', *The*

modern warfare. Immanently in his remark, Lord Bingham pointed out on an important rule of international law, the so-called 'Lotus-Principle'. According to the Lotus case of the Permanent Court of International Justice, States may act in any way they wish as long as they do not contravene an explicit prohibition.[10] In the context of armed conflict, prohibitions of military conduct comprise the rules of IHL and especially of specific interdictions or restrictions on the use of certain weapons by multilateral treaties.[11] As long as no treaty exists that bars States from using combat drones, the framework for the recourse to drones is the specifically applicable *ius in bello*.

States are not free in their choice of methods or means of warfare.[12] The first main limitation to that choice is the principle of distinction between combatants, civilians directly participating in the hostilities, and military objectives on the one side, and civilians and civilian objects on the other side.[13] Secondly, IHL prohibits States from employing "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering"[14]. In its Nuclear Weapons Opinion, the International Court of Justice (ICJ) found that these limitations were the "cardinal principles"[15] of IHL and binding on all States as

Independent (6 July 2009) available at http://www.independent.co.uk/news/uk/home-news/top-judge-use-of-drones-intolerable-1732756.html (last visited 3 January 2012).

10 Judgment No. 9, *The Case of the S.S. Lotus (France v. Turkey)*, PCIJ Series A, No. 10 (1927), para. 46.

11 Starting with the *St Petersburg Declaration* in 1868, many international treaties on the restriction or prohibition of certain weapons were arranged. The latest is the *Convention on Cluster Munitions*, 30 May 2008, CCM/77, which entered in to force on 1 August 2010.

12 *Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Annexed to Hague Convention II of 1899 and Hague Convention IV of 1907*, Art. 22; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 23 January 1979, 1125 U.N.T.S. 3 [AP I], Art. 35(1); compare Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed. (2010), 8, para. 18.

13 This rule is incorporated e.g. in Art. 48 AP I.

14 Art. 35(2) AP I.

15 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, 226, 257, para. 78.

"intransgressible"[16] customary law. Consequently, they must be observed in conflicts of any character, international as well as non-international.[17]

Regarding the prohibition to cause superfluous injury or unnecessary suffering, the legal status of unmanned drones needs to be clarified. Lord Bingham's designation of drones as weapons probably is due to the use of everyday language. The legal classification is not as easy. According to the "Manual on International Law Applicable to Air and Missile Warfare"[18] prepared by the Harvard Program on Humanitarian Policy and Conflict Research, a weapon is a means of warfare that is capable of causing injury or death of persons or the damage or destruction of objects.[19]

Combat drones do not cause this definition's specific outcome of a weapon's action themselves. In contrast, the HPCR-Manual adopted the definition of an 'Unmanned Combat Aerial Vehicle'. This "means an unmanned military aircraft of any size which carries and launches a weapon, or which can use on-board technology to direct such a weapon to a target."[20] Exactly tailored to the capacities of combat drones, this definition outlines that drones are not weapons themselves, but weapons are a possible addition.[21] Consequently, it is not the drone that has to be reviewed in the light of the prohibition, but any weapons it carries.[22] Despite the legality of the weapon, the drone as the platform for the specific weapon does not raise legal issues with respect to superfluous injury and unnecessary suffering.

As drones per se cannot contravene the above discussed prohibition, the principle of distinction is more relevant.[23] The focus is on whether the drone can be directed at a specific military objective.[24] It must possess the ability to launch attacks which distinguish between civilian and military

16 *Id.*, para. 79.

17 See also ICRC, J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1 (2005) [Customary Law Study], Rules 11-13, 70-71.

18 Harvard Program on Humanitarian Policy and Conflict Research, *Manual on International Law Applicable to Air and Missile Warfare* (15 May 2009) [HPCR-Manual].

19 Rule 1, lit. ff) HPCR-Manual.

20 Rule 1, lit. dd) HPCR-Manual.

21 Compare R. Frau, 'Unbemannte Luftfahrzeuge im internationalen bewaffneten Konflikt', 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 60, 62.

22 For the extent of review regarding the specific missile see W. H. Boothby, *Weapons and the Law of Armed Conflict* (2009), 224-225.

23 Compare *id.*, 230.

24 *Id.*, 231.

objectives.[25] Reportedly, the precision of a Predator drone is higher than that of a traditional jet.[26] This is owed to the slower flight-velocity of the system. Drones are capable of circulating above their target for a few hours. Their operators have no need to destroy a target just as they face it, but have the possibility to gain more information about the surroundings.[27] Comparing the use of drones to the use of a fighter jet, the first probably even minimises the danger of indiscriminate attacks.

In any event, unmanned drones, as long as they have the necessary sensors, cameras and laser facilities, are capable of guiding missiles to their targets. Certainly, the drone operator has to assess the situation around the target to ensure that the attack is conducted discriminately.[28] This so-called 'man in the loop' is strictly necessary for such a complex decision.

From a factual perspective, future technologies might render the 'man in the loop' superfluous. From the legal perspective, the development of such new technologies is also governed by treaty law. According to Article 36 AP I, States must determine whether the employment of new means of warfare "would, in some or all circumstances, be prohibited". Considerations must deal with the question of how autonomous drones will obey the principle of distinction.[29] Furthermore, autonomous drone strikes will have to comply with other precautionary requirements as well.[30] These,

25 Article 51(4) AP I, the notion of which also applies in non-international armed conflicts as a rule of customary international law, compare Customary Law Study, *supra* note 17, Rule 7.

26 Singer, *supra* note 1, 33.

27 U.S. Major B. Callahan during an interview, 'It Is Not a Video Game', *Spiegel Online International* (3 December 2010) available at www.spiegel.de/international/world/0,1518,682842,00.html (last visited 3 January 2012).

28 Compare W. H. Boothby, 'The Law Relating to Unmanned Aerial Vehicles, Unmanned Combat Air Vehicles and Intelligence Gathering from the Air', 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 81, 83.

29 For a discussion of the principle of distinction with respect to the employment of autonomous combat drones see M. Wagner, 'Taking Humans Out of the Loop: Implications for International Humanitarian Law', *University of Miami Legal Studies Research Paper* No. 2011-21, 6-7.

30 For a detailed overview of necessary precautions in the planning of drone assaults see Boothby, *supra* note 28, 83-84.

for instance, include a proportionality assessment,[31] which, at a first glance, seems rather a task for a human being than for artificial intelligence.[32]

Regarding today's drones, the way in which the operator conducts the assaults could, of course, also be indiscriminate. However, remotely operated combat drones are not indiscriminate by nature. The principle of distinction is generally maintained. In consequence, only specific drone strikes could raise legal issues. These issues will then not relate to the employed drone system, but to the conditions of its employment.

C. The Employment of Combat Drones for Targeted Killings

The most relevant issue with respect to the employment of combat drones are targeted killings. A targeted killing in military operations is the use of lethal force against an individual selected human being who is not in the physical custody of the targeting entity, with the intent, premeditation, and deliberation to kill.[33]

For the purpose of this article, it is important to determine whether targeted killings by combat drones create 'drone-specific' legal problems. That would be the case if the legal issues arising could only arise in the context of drone assaults. Therefore, the legality of such a killing, which depends on the applicable legal framework, will now be assessed.

Under human rights law (HRL), targeted killings are likely never to be lawful, as "it is never permissible for killing to be the *sole objective* of an operation."[34] The main legal basis for this assessment is Art. 6 ICCPR[35]. This provision stipulates that no one shall be arbitrarily deprived of life, and

31 The implications of the principle of proportionality for autonomous drones are also further discussed by Wagner, *supra* note 29, 8-10.

32 Conversely, some commentators argue that artificial intelligence will be able to behave more ethically on the battlefield than human soldiers; compare e.g. R. C. Arkin, 'Ethical Robots in Warfare', 28 *IEEE Technology and Society Magazine* (2009) 1, 30, 30. For a discussion of these arguments see J. P. Sullins, 'RoboWarfare: Can Robots Be More Ethical Than Humans on the Battlefield?', 12 *Ethics and Information Technology* (2010) 3, 263.

33 Compare N. Melzer, 'Targeted Killings in Operational Law Perspective', in T. D. Gill & D. Fleck (eds), *The Handbook of the International Law of Military Operations* (2010), 277-278.

34 Alston-report, *supra* note 3, para. 33.

35 *International Covenant on Civil and Political Rights*, 23 March 1976, 999 U.N.T.S. 171.

forbids the use of lethal force without lawful reasons.[36] In contrast, a killing is only legal to prevent a concrete and imminent threat to life, and, additionally, if there is no other, non-lethal means of preventing that threat to life.[37]

For the situation of armed conflict, the ICJ held in the *Nuclear Weapons Opinion* that "whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 ICCPR, can only be decided by reference to the law applicable in armed conflict"[38]. Therefore, it is important to assess who may lawfully be targeted at war.

In case of an international armed conflict, the legitimate human targets of attacks generally are combatants. This group includes all members of the armed forces of a (State) party to that conflict.[39] Additionally, civilians taking a direct part in the hostilities may be lawfully targeted.[40] This rule also applies to non-international armed conflicts,[41] governed by Common Article 3 of the Geneva Conventions[42], Additional Protocol II[43], and customary law[44].

The major aim of U.S. drone strikes today is combating the terrorist network Al-Qaeda. Most of the targets are not members of armed forces, and are therefore not combatants. If IHL applies in those cases, the decisive

36 Human Rights Committee, *Chongwe v. Zambia*, UN Doc CCPR/C/70/D/821/1998, 9 November 2000, para. 5.2; M. E. O'Connell, 'The Choice of Law Against Terrorism', *Notre Dame Law School, Legal Studies Research Paper* No. 10-20, 2010, 4.

37 *McCann and Others v. United Kingdom*, ECHR (1995), No.18984/91, para. 145; Human Rights Committee, *General Comment No. 6*, UN Doc HRI/GEN/1/Rev.1 at 6 (1994), para. 3; *Concluding Observations of the Human Rights Committee*: Israel, UN Doc CCPR/CO/78/ISR (21 August 2003), para. 15; Alston-report, *supra* note 3, para. 32; N. Melzer, *Targeted Killings in International Law* (2008), 59.

38 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 15, para. 25.

39 Art. 43(2) AP I; compare K. Ipsen, 'Combatants and Non-Combatants', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed. (2008), 84.

40 Art. 51(3) AP I.

41 See Common Art. 3 and Art. 13(3) AP II.

42 *Geneva Conventions I to IV*, 12 August 1949, 75 U.N.T.S. 31, 85, 135, 287 [GCs].

43 *Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 7 December 1978, 1125 U.N.T.S. 609 [AP II]. The applicability of AP II depends on whether the requirements of the material field of application, laid down in Article. 1, are fulfilled, and whether the respective state is a state party to the protocol.

44 Customary Law Study, *supra* note 17, Rule 6.

question, regardless of whether the targeted person is a 'fighter' in a non-international armed conflict, or a civilian in any form of conflict, is whether each targeted person was directly participating in the hostilities.[45]

The requirements for 'direct participation in hostilities' are neither laid down in the Geneva Conventions nor in their Additional Protocols. In 2006, the Israeli Supreme Court had to assess the legality of the Israeli official policy of targeted killings.[46] The Court assumed an international armed conflict. As Israel is not a state party to AP I, Chief Justice Barak focussed on the interpretation of direct participation in the customary rule expressed in Article 51(3) AP I.[47] In conclusion, the Supreme Court adopted a "functional approach"[48] to determine which acts constitute direct participation, asking "whether civilians are performing the *function* of combatants"[49]. Additionally, the Court dealt with the time element of direct participation. Chief Justice Barak pointed out that, on the one hand, civilians who have detached themselves from single or sporadic hostile acts were entitled to protection under IHL.[50] On the other hand, he held the view that permanent members of terrorist groups would lose their protection.[51] According to the Court's ruling, "customary law has not yet crystallized"[52] with respect to cases in the grey area between these two extreme examples.

Three years later, in 2009, the International Committee of the Red Cross (ICRC) published a study as guidance for the interpretation of direct participation in hostilities.[53] It describes direct participation as a specific act,

45 The ICRC-study on the notion of direct participation in hostilities rightly suggests the interpretation of "active" or "direct participation" in Common Article 3 GCs, Art. 51(3) AP I, and Art. 13(3) AP II in the same manner with reference to the general use of "*participent directement*" in the authentic French texts; compare ICRC, N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,* (2009) [ICRC-study], 43.

46 Supreme Court of the State of Israel (sitting as the High Court of Justice), *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, HCJ 769/02 (11 December 2005).

47 See *id*., para. 29-40.

48 H. Keller & M. Forowicz, 'A Tightrope Walk between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing', 21 *Leiden Journal of International Law* (2008) 1, 185, 207.

49 *Id*.

50 *Public Committee against Torture in Israel et al. v. Government of Israel et al.*, *supra* note 46, para. 39.

51 *Id*.

52 *Id*., para. 40.

53 ICRC-study*, supra* note 45.

defines constitutive elements of its notion, and also elaborates on its time dimension. Accordingly, civilians lose protection against direct attacks as long as they participate in a specific hostile act.[54] In contrast, members of organised armed groups remain direct participants in hostilities for the duration of their membership by virtue of their continuous combat function.[55]

Still, the judgment of the Supreme Court of Israel[56] and the ICRC's study[57] leave room for further clarification, which this article does not seek to provide. Instead, the vital point is whether the remaining ambiguity is an issue that exclusively arises with respect to combat drones. Targeted killings were a phenomenon that occurred regularly throughout history,[58] long before the first U.S. drone strike on Qaed Senyan Al-Harithi was reported in 2002.[59] They can also be conducted by snipers, for instance. The question, as to which persons may be lawful targets at war, is even not only relevant in cases of targeted killings. All questions arising are generally relevant for operations under IHL.

54 *Id.*, 43-46.

55 *Id.,* 31-36.

56 For a discussion of the judgment see O. Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law', 5 *Journal of International Criminal Justice* (2007) 2, 322; K. E. Eichensehr, 'On Target? The Israeli Supreme Court and the Expansion of Targeted Killings', 116 *Yale Law Journal* (2007) 8, 1873; Keller & Forowicz, *supra* note 48; M. Lesh, 'The Public Committee against Torture in Israel v the Government of Israel: The Israeli High Court of Justice Targeted Killing Decision', 8 *Melbourne Journal of International Law* (2007) 2, 373; R. S. Schondorf, 'The Targeted Killings Judgment: A Preliminary Assessment', 5 *Journal of International Criminal Justice* (2007) 2, 301.

57 For a critical review of the ICRC-study see K. Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *New York University Journal of International Law and Politics* (2010) 3, 641; M. N. Schmitt, 'Deconstructing Direct Participation of Hostilities: The Constitutive Elements', *id*., 697; W. H. Boothby, ''And for such time as': The Time Dimension to Direct Participation in Hostilities', *id*., 741; W. H. Parks, 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect', *id*., 769. In return: N. Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', *id*., 831.

58 Melzer, *supra* note 37, 1.

59 J. Mayer, 'The Predator War', *The New Yorker* (26 October 2002) available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (last visited 3 January 2012).

Admittedly, the development of combat drones makes a profound interpretation of the notion of direct participation more important than ever before. However, interpreting decisive provisions within a legal framework is what lawyers are there for. Drawing the conclusion that IHL was not capable of providing a legal regulation for targeted killings by combat drones would be without rhyme or reason.

D. Applicability of International Humanitarian Law to Current Drone Operations

I. The Requirement of Armed Conflict

Due to the fact that actions of war are prohibited under Article 2(4) of the U.N. Charter, IHL is only the exceptional framework for the mere situation in which armed conflicts nevertheless occur. As noted above, targeted killings, with the sole purpose of eliminating a certain person, can never be lawful under the legal frame of peacetime, HRL. Bearing this in mind, the determination whether an armed conflict is at hand will be crucial for the legality of each specific drone strike.

Ratione temporis, the beginning of applicability generally "coincides with the moment at which an […] armed conflict exists"[60]. *Ratione materiae*, the determination of an international armed conflict does not prompt questions.[61] Common Article 2 GCs requires an armed conflict that arises between two or more States. This is the case if one State uses armed force against another,[62] directly or through attributed action.[63]

The more complicated question is the determination of a non-international armed conflict. Common Article 3 GCs lays down the lowest

[60] J. K. Kleffner, 'Human Rights and International Humanitarian Law: General Issues', in Gill & Fleck, *supra* note 33, 64, para. 27.

[61] Compare Alston-report, *supra* note 3, para. 51.

[62] C. Greenwood, 'Scope of Application of Humanitarian Law', in Fleck, *supra* note 39, 46, para. 202; for a more detailed definition see Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed. (2005), 15.

[63] According to the jurisprudence of the ICJ, attribution can be established by effective control of a state over non-state entities' actions; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, 14, 64, para. 115. The International Criminal Tribunal for the former Yugoslavia adopted the lower threshold of overall control in the Tadic case; *Prosecutor v. Tadic*, Judgment, ICTY (Appeals Chamber), IT-94-1-A, 15 July 1999, para. 120.

threshold for such a conflict. It requires an "armed conflict not of an international character"[64]. For States that are party to AP II, Article 1 of this Protocol adds the preconditions that the non-state party to the conflict must have a certain degree of organisational structure, exercise control over a certain territory, and be able to conduct sustained and concerted military operations, as well as to respect IHL. Also, a level of intensity of the conflict beyond internal disturbances is prerequisite.[65]

In its Tadic decision, the Appeals Chamber at the International Tribunal for the former Yugoslavia found a "comprehensive definition"[66] of armed conflict and held that "an armed conflict exists whenever there is a resort to force between two States or protracted armed violence between governmental authorities and organised armed groups or between such groups".[67] There are good arguments for this common definition of armed conflict to prevail in the academic debate.[68]

If it comes to a conflict between a State and a non-state actor, the vital question is what impact the definitional problem has on the application of the obligation to only target direct participants in the hostilities. This rule is also enclosed in the minimum humanitarian standard of Common Article 3 GCs. As shown above, this provision has the lowest threshold for its application. In the *Hamdan* case, the U.S. Supreme Court held that exactly this provision is the one governing the 'transnational conflict' against the non-state actor Al-Qaeda.[69] In any case, as the U.S. is not a state party to AP II, only the rules of custom enclosed in this protocol could apply. The mere application of Common Article 3 and customary law alongside one another provides a minimum of protection for those involved in the conflict. However, it is important to note that it also contains the possibility for the armed forces to conduct targeted killings. The alternative, applicability of HRL, would deny this 'right to kill'. The determination of the existence of an armed conflict should, therefore, more importantly than ever, be made by objective criteria.

64 Common Article 3 GCs.

65 Compare Article 1(2) AP II.

66 A. Paulus & M. Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict – a Tentative Conceptualization', 91 *International Review of the Red Cross* (2009) 873, 95, 99.

67 *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (Appeals Chamber), IT-91-1-AR72, 2 October 1995, para. 70.

68 See Paulus & Vashakmadze, *supra* note 66, 95.

69 U.S. Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557, 633, 126 Supr. Ct. 2749, 2797 (2006).

For States, the employment of combat drones could be an attractive alternative to traditional warfare or even to police enforcement measures.[70] This political consideration is likely to have an impact on state practice concerning the assumption of armed conflicts. The Bush Doctrine of the 'global war on terror' has been criticised often enough. Nevertheless, targeted killings with combat drones are only possible where there is an armed conflict. This could further lower the customary threshold of war.

II. International Humanitarian Law and the Justification for Drone Killings in Self-Defence

The Obama administration justifies the U.S. drone assaults with the right of self-defence. Accessorily, it holds the view to be in "an armed conflict" with Al-Qaeda, the Taliban and associated forces.[71] It is disputable whether, and in which areas of Afghanistan and Pakistan, international or non-international armed conflicts exist.[72] Contrary to the doctrine of a 'global war on terror', the still predominant perception of the *ratione loci* for an armed conflict provides that conflicts centre on a particular 'theatre of war'.[73]

For drone strikes outside this theatre of war, the applicability of IHL must be questioned again. For instance, such a strike occurred in Yemen on 5 May 2011, aimed at Anwar Al-Awlaki, a U.S. citizen who was suspected to have recruited Islamist militants for terrorist attacks.[74] Ultimately, Al-

70 F. Boor, 'Der Drohnenkrieg in Afghanistan und Pakistan', 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 97, 99.

71 H. Koh, Legal Adviser to the Department of State, 'The Obama Administration and International Law', Keynote Address at the Annual Meeting of the American Society of International Law (25 March 2010) available at http://www.state.gov/s/l/releases/remarks/139119.htm (last visited 3 January 2012).

72 For a detailed analysis of the situation in Pakistan see L. R. Blank & B. R.Farley, 'Characterizing US Operations in Pakistan: Is the United States Engaged in an Armed Conflict?', 34 *Fordham International Law Journal* (2011) 2, 151.

73 Greenwood, *supra* note 62, 59, para. 216; Kleffner, *supra* note 60, 65, para. 29; M. E. O'Connell, 'Combatants and the Combat Zone', 43 *University of Richmond Law Review* (2009) 3, 845, 863-864.

74 M. Mazetti, 'Drone Strike in Yemen Was Aimed at Awlaki', *The New York Times* (6 May 2011) available at http://www.nytimes.com/2011/05/07/world/middleeast/07yemen.html (last visited 3 January 2012). Al-Awlaki also aroused attention as he was the first U.S. citizen on the CIA's 'capture or kill list'; see S. Shane, 'U.S. Approves Targeted Killing of American Cleric', *The New York Times* (6 April 2010) available at http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html

Awlaki was killed.[75] In another drone strike, his son reportedly died.[76] Regardless of how the situation in Afghanistan and Pakistan is assessed, drone strikes occurring outside these States' territories cannot be seen as part of the existing conflicts.

Some commentators merely focus on the justification of such drone killings in self-defense.[77] This approach forgets about the distinction between *ius ad bellum* and *ius in bello*. The application of IHL in such a 'self-defence operation' depends on the same criteria as in general, even if the operating State is also obliged to comply with the law of inter-state force.[78] It is triggered by any action in self-defence that meets the threshold of armed conflict.[79]

These few drone strikes on the territory of Yemen do not amount to an armed conflict. Neither can the assessment be made that a conflict in Afghanistan or Pakistan spilled over into Yemen's territory.[80] Therefore, the strikes in Yemen, and other strikes alike, fall under the framework of HRL. Consequently, such targeted killings, as far as they do not prevent an imminent and otherwise inevitable danger, are illegal.

(last visited 3 January 2012), and L. Kramm, 'USA geben US-Amerikaner zum Abschuss frei', *Institute for International Law of Peace and Armed Conflict, Ruhr-University Bochum, Bofax* 346D, (7 June 2010) available at www.rub.de/ifhv/documents/bofaxe/bofaxe2010/346d.pdf (last visited 3 January 2012).

75 Y. Musharbash, 'The Death of Jihad's English-Language Mouthpiece', *Spiegel Online International* (30 September 2011) available at http://www.spiegel.de/international/world/0,1518,789427,00.html (last visited 3 January 2011).

76 L. Kasinof, 'Strikes Hit Yemen as Violence Escalates in Capital', *The New York Times* (15 October 2011) available at http://www.nytimes.com/2011/10/16/world/middleeast/yemeni-security-forces-fire-on-protesters-in-sana.html (last visited 3 January 2012).

77 Compare the criticism of Blank & Farley, *supra* note 72, 153.

78 This legality would be given if the state, on which territory the operation is conducted, consents to the use of force, or the targeting state can invoke its right of self-defence against an armed attack by or attributable to the first state.

79 C. H. B. Garraway, 'International Humanitarian Law in Self-Defence Operations', in Gill & Fleck, *supra* note 33, 213, para. 11.01.

80 Which could possibly trigger the application of IHL; compare D. Fleck, 'The Law of Non-International Armed Conflicts', in Fleck, *supra* note 39, 605.

E. Conclusion and Remarks

Unmanned combat drones, as long as they are remotely operated, do not raise legal issues by themselves. Their strikes can be conducted in compliance with the principle of distinction and the prohibition of superfluous injury and unnecessary suffering can generally be maintained. The legal assessment concerning these questions is clear.

Legal concerns may still be raised by each single strike. Targeted killings are of particular importance. Drone killings taking place under the framework of HRL will, in general, not be justifiable. Under the framework of IHL, the essential question is whether the target is a combatant or a person directly participating in the hostilities. The existing ambiguity concerning this term's definition is not a question especially raised by the drone but a general one. Consequently, it is not the drone that raises legal issues. It is the way the strikes are conducted. This leads to the conclusion that IHL is capable of regulating the employment of combat drones.

The question of the application of IHL generates anxiety. Given the fact that targeted killings are more likely to be legal under this framework and drone employment has an element of attraction for States, the assessment 'to be at war', to fight terrorism for example, might have further appeal. This argument is reinforced by the assessment that self-defence actions of a State that do not amount to an armed conflict themselves have to comply with human rights obligations. A further lowering of the customary threshold of armed conflict might be the consequence.

All the aforementioned points indicate that the legal issues regarding remotely operated combat drones are settled. Indeed, some legal terms need to be further defined, but the most significant question will be how States will comply with these legal regulations. Undoubtedly, this is a political issue. To avoid a situation of non-compliance, only Lord Bingham's proposal of a ban on combat drones might be a solution. Such a ban is again a question of politics, not of law, and in the near future probably not achievable due to the attraction of the drone.

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Completing the ICTY-Project without Sacrificing its Main Goals

Security Council Resolution 1966 – A Good Decision?

Donald Riznik*

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Abstract

Almost two decades after having established the ad-hoc criminal tribunal for the former Yugoslavia, this institution is about to fulfill its mandate and will close its doors in the near future. Looking back on 20 years of legal and political struggle, the overall result of this institutional project is positive. This article analyses the way the Security Council and the ICTY have chosen to bring the tribunal to an end by implementing the Completion. The problematic aspect, the Security Council was faced with before its final Resolution 1966, adopted on 22 December 2010, has been outlined together with the chosen path to avoid commitments, especially with regard to its major goal to end impunity for serious breaches of international law, and to bring justice and peace to the people living on the territory of the former Yugoslavia. This (so far) last resolution, which implemented the International Residual Mechanism for Criminal Tribunals (IRMCT), was adopted at a time, when the last two remaining fugitives, Ratko Mladic and Goran Hadzic were still at large. Only a few months ago, the two were caught and transferred to the tribunal. The author argues that not shutting the institutional doors entirely until all remaining fugitives are arrested, was a complex situation in a legal and practical sense. Facing and solving this problem through Resolution 1966 was the best choice at that time. This article will give a brief description about the practical impact of the IRMCT on the ICTY´s further work, and the relation between these two judicial institutions during their coexistence.

A. Establishing the ICTY & Shaping its Main Goals

During the armed conflict on the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) the Security Council of the United Nations decided, in May 1993, to establish an International Tribunal designated to prosecute persons who were responsible for grave breaches of international humanitarian law on this territory from 1 January 1991.[1]

[1] SC Res. 827, 23 May 1993 established the International Criminal Tribunal for the former Yugoslavia (ICTY) as a non-military measure under Article 41 UN-Charta. The precondition to execute the Chapter VII powers of the Security Council pursuant to Article 39 UN-Charta already have been ascertained by SC Res. 713, 25 September 1991. On the legality of the ICTY see *Prosecutor v. Dusko Tadic,* Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-

The main goal of this experimental Chapter VII measure was to put an end to impunity and to bring all persons to trial, who were responsible for serious breaches of international law. Furthermore, there was hope that, by establishing a tribunal designed to prosecute alleged war criminals, the deterrence-effect (as an extended goal) would minimize further serious breaches during the conflict. Unfortunately, the deterrence-effect could not prevent outrageous atrocities committed even after the establishment of the tribunal, which ended in the massacre of Srebrenica in June 1995. There, more than 8,000 civilians, mainly male Bosniaks (Bosnian Muslims) between 12 and 77 years of age lost their lives.[2] Other crucial aims have been to bring justice to the victims and to the people of a country that was strongly battered by the war and to build up a historical record of the atrocities by holding proper criminal trials, also to help prevent the glorification of war criminals as heroes. Both objectives serve the major goal, in the long run, of bringing lasting peace and reconciliation to the societies of the collapsed former SFRJ. However, it is impossible to accomplish all the described goals, if the starting point, that of ending impunity, has not yet been reached.

Let us first take a look at the early days of the ICTY and its working progress since its establishment in 1993, to capture the circumstances which, in the end, led to the implementation of the Completion Strategy. After an initial period of almost one and a half years, the tribunal issued its first indictment on 4 November 1994 against Dragan Nikolic.[3] Only four days later, the first public hearing was held before the Trial Chamber in a deferral application, which was filed by the Prosecutor on 12 October 1994.[4]

94-1, 05 October 1995, paras 26-48; Richard Goldstone, 'International Criminal Courts and Ad hoc Tribunals', in T. G. Weiss & S. Daws (eds), *The Oxford Handbook on the United Nations* (2007), 465; William A. Schabas, *The UN International Criminal Tribunals* (2006), 53; For the opposite view see B. Graefrath, 'Jugoslawientribunal – Präzedenzfall trotz fragwürdiger Rechtsgrundlage', 47 *Neue Justiz* (1993), 433.

2 See Preliminary List of Missing Persons from Srebrenica 1995 at the Website of the Potocari Memorial Center, available at www.potocarimc.ba/_ba/liste/nestali_a.php (last visited 3 January 2012). For a detailed analysis of the events see the Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica from 15 November 1999 (UN Doc. A/54/549).

3 *Prosecutor v. Dragan Nikolic*, Initial Indictment, IT-94-2-I, 4 November 1994.

4 Second annual report of the ICTY President A. Cassese, UN Doc. A/50/365, S/1995/728, 23 August 1995, para. 8; *Prosecutor v. Dusko Tadic,* 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

The granting of the deferral by the presiding judge, Adolphus Karibi-Whyte, led to the first war crimes trial since Nuremberg and Tokyo against Dusko Tadic and, eventually, delivered the ICTY´s first trial judgment on 7 May 1997, exactly one year after the commencement of that trial.[5] By that time, the sentencing judgment in the Erdemovic case[6] had already been rendered after a guilty plea by the accused. The Celibici Camp trial against the four accused named Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo commenced in March the same year. [7] At the end of June 1997 the Trial against Tihomir Blaskic started.[8] By August 1998 there had already been 13 cases in the trial or pre-trial stage with a total of 26 accused individuals (the Tadic case was on appeal, the final Erdemovic judgment was rendered in March 1998 and the Dokmanovic case was discontinued, due to the death of the defendant).[9] The institutional international criminal law machinery started to ignite quite fast from its establishment based on Resolution 827 from 23 May 1993, until the first judgment, less than four years later, especially, if one considers it being the first of its kind for almost fifty years.

After this rapid take off the ICTY soon had to realize that its capacity was limited. While most of the trials, which started in the early days of the

in the Matter of Dusko Tadic, IT-94-1-D, 12 October 1994, reprinted in: 6 *European Journal of International Law* (1995) 1, 144.

5 *Prosecutor v. Dusko Tadic*, IT-94-1-T, 07 May 1997; in his first opening paragraph the Trial Chamber stated: "It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations. The international military tribunals at Nuremberg and Tokyo, its predecessors, were multinational in nature, representing only part of the world community".

6 *Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, IT-96-22-T, 29 November 1996.

7 *Prosecutor v. Zejnil Delaic et al.*, Initial Indictment, IT-96-21, 19 March 1996; for the starting date see "Decision on the Applications for Adjournment of the Trial Date" from 03 February 1997, which adjourned the trial until 10 March 1997, available at http://www.icty.org/x/cases/mucic/tdec/en/70203PT2.htm (last visited 3 January 2012).

8 *Prosecutor v. Tihomir Blaskic*, Second Ammended Indictment, IT-95-14, 25 April 1997; for the starting date see "Order for the holding of a hearing and the setting of a date for the start of the trial" from 17 June 1997 which scheduled the beginning of the trial on 24 June 1997, available at http://www.icty.org/x/cases/blaskic/tord/en/70617RM113305.htm (last visited 31 December 2011).

9 Fifth annual report of the ICTY President G. K. McDonald, UN Doc. A/53/219, S/1998/737, 10 August 1998, paras 11-88.

Tribunal had not been entirely completed for a long time, the increased pendency of new cases brought to court,[10] let the tribunal struggle. From the above described so-called first cases, the Tadic case came to a final end in February 2001,[11] the Celibici Camp Trial in April 2003[12] and the Trial against Tihomir Blaskic [13] lasted until July 2004. The accumulation of old and new cases led to the conclusion that, despite the fact that time was constantly running, progress in terminating cases could not be mirrored numerically. Therefore, the ICTY itself introduced a number of reforms between 1997 and 2003 with the aim to shorten pre-trial and trial proceedings[14] and, eventually argued that a new approach would be needed and proposed the implementation of a completion strategy to conclude their mandate.[15]

10 Namely the huge number of first instance cases running in the period between August 2001 and August 2002 against more than 40 accused persons, 10 persons on appeal on the merits, several interlocutory appeals and requests for review. At that time 46 persons have been at the United Nations detention unit in Scheveningen (The Hague), see ninth annual report of the ICTY President C. Jorda, UN Doc. A/57/379, S/2002/985, 04 September 2002, paras 60-206 and Annex II.

11 *Prosecutor v. Dusko Tadic*, Appeals Chamber Judgment, IT-94-1-A-AR77, 27 February 2001.

12 *Prosecutor v. Zdravko Mucic et al.*, Appeals Chamber Sentencing Judgment, IT-96-21-A*bis*, 08 April 2003; One of the initially four accused was acquitted in the Trial Chamber Judgment in 1998 and the acquittal was upheld on appeal in 2001, *Prosecutor v. Zejnil Delaic et al.*, Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, paras 331-360.

13 *Prosecutor v. Tihomir Blaskic*, Appeals Chamber Judgment, IT-95-14-A, 29 July 2004.

14 For a detailed analysis about the ICTY reforms see M. Langert & J. W. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms', 36 *The Yale Journal of International Law* (2011) 2, 241, 247-253.

15 Ninth annual report of the ICTY President C. Jorda, UN Doc. A/57/379, S/2002/985, 04 September 2002, para. 37; Tenth annual report of the ICTY President T. Meron UN Doc. A/58/297, S/2003/829, 20 August 2003, paras 13-16; see also on that point F. Pocar, 'Completion or Continuation Strategy? – Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655, 657; D. Raab, 'Evaluating the ICTY and its Completion Strategy – Efforts to Achieve Accountability for War Crimes and their Tribunals', 3 *Journal of International Criminal Justice* (2005) 1, 82, 84.

B. Shutting down the ICTY by its Completion Strategy

Security Council Resolution 1503 from 28 August 2003 endorsed the ICTY´s Completion Strategy and envisaged the Tribunal's termination by the end of 2010.[16] The Completion Strategy provided two major approaches to bring the tribunal to an end. Firstly, one of the Tribunal's main goals, to prosecute persons, who were responsible for grave breaches of international humanitarian law was narrowed down to the prosecution of the major alleged war criminals, suspected of being most responsible for crimes within the tribunal´s jurisdiction. Secondly, cases involving intermediate- and lower-rank accused should be transferred to competent national authorities to reduce overall workload of the Tribunal.[17] This resulted in two major amendments to the ICTY Rules of Procedure and Evidence. Articles 11 *bis* and 28 of these rules provided the transfer of cases and the necessity of determination on the question, if an accused is "senior" enough to be tried by the ICTY itself.[18] Eventually, the termination of investigations by the Office of the Prosecutor by the end of 2004, as set out in the Completion Strategy,[19] began to pave the way for a conceivable ending.[20]

[16] With the same Security Council Resolution the Completion Strategy was simultaneously endorsed for the International Criminal Tribunal for Rwanda (ICTR) which was established by SC Res 955, 08 November 1994; For a summary of the Completion Strategy of the ICTR see Completion Strategy of the International Criminal Tribunal for Rwanda, enclosure, in Letter Dated 29 September 2003 from the President of the ICTR E. Møse addressed to the Secretary-General, UN Doc. S/2003/946, 3 October 2003. For a detailed analysis about the steps that in the end led to SC Res 1503, see T. Wayde Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals – From Completion to Continuation', 9 *Journal of International Criminal Justice* (2011) 4, 797, 799.

[17] In the first years the ICTY Prosecutor investigated a huge number of lower or intermediate level perpetrators as part of a so-called "pyramid indictment strategy", on that point see the analysis of N. Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004) 3, 446.

[18] For a further analysis on the impact of the Completion Strategy see D. A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals', 99 *American Journal of International Law* (2005) 1, 142; L. D. Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', 99 *American Journal of International Law* (2005) 1, 158.

[19] SC Res. 1503, 28 August 2003.

[20] For an analysis about the impunity gap as a result of the termination of investigations on the ICTR see L. Haskell & L. Waldorf, 'The Impunity Gap of the International

I. Implementing the Completion Strategy and its Progress

As time has proved, the work of the tribunal could not be finished by the end of 2010. Through several Security Council Resolutions[21] the initial deadline was postponed year after year. The last of its kind was Resolution 1993 from 29 June 2011, which extended the term of the office of the permanent and the ad litem judges until the end of 2012. An additional reason for this delay can be found in the fact that besides the Completion Strategy, all the additional measures the ICTY had implemented to speed up proceedings did not have the expected effect of reducing the length of the trials.[22]

Following the guidelines set out in the Completion Strategy, the ICTY referred 8 cases involving 13 persons to national courts in the former Yugoslavia between September 2005 and June 2007.[23] A precondition for transferring cases to the national courts was however the strengthening of the capacity of national jurisdictions. Especially in Bosnia and Herzegovina, where the war had its most severe impact, the judiciary structure was in a miserable condition and therefore not able to hold unbiased trials against alleged war criminals. During the same time frame the Completion Strategy was introduced, the Office of the High Representative in Bosnia and Herzegovina launched a restructuring process and conducted vetting within the judiciary. In 2003, new substantive and procedural Criminal Codes were adopted to gain a legal foundation to start proceedings, which would meet acceptable international standards. Furthermore, a new Court of Bosnia and Herzegovina was established and its first section became responsible for war crime cases.[24] This special War Crimes Chamber would act as a link between the ICTY and the national courts and would be able to handle and

Criminal Tribunal for Rwanda: Causes and Consequences', 34 *Hastings International and Comparative Law Review* (2011) 1, 49.

21 SC Res. 1837, 29 September 2008; SC Res. 1877, 07 July 2009; SC Res. 1931, 29 June 2010.

22 For an empirical assessment on the effects of the implemented measures by the ICTY on the length of the proceedings see Langert & Doherty, *supra* note 14, 252-278, who argue that the implanted measures prolonged the overall time of proceedings instead of reducing them.

23 One case was referred to Serbian courts. Another case involving two persons was referred to Croatian courts and the remaining six cases were referred to the courts of Bosnia and Herzegovina.

24 For further details of the establishment of the new court and the special war crimes section see Mundis, *supra* note 18, 152-155.

deliver the transferred cases to local courts.[25] After having made this substantive progress in the national judicial system of Bosnia and Herzegovina, the ICTY transferred 6 cases involving 10 persons, to the special War Crimes Chamber in Sarajevo to relieve their own caseload.[26]

II. Two Remaining Fugitives – An Obstacle for the Completion Strategy?

In 2010, after the completion of the Tribunal´s main work was within reach,[27] the Security Council had to determine the closing of the ICTY and to decide about the scope of the body, which would take over the ICTY´s tasks after its closure. At that point the Security Council was faced with the crucial question of how to deal with the case of the remaining fugitives.

On the one hand we had the need for justice and the goal of the ICTY to achieve its mandate: ending impunity for the most serious breaches of international law.

On the other hand the ICTY faces a huge financial burden. From an initial, rather manageable budget during the first years, it had increased rapidly to almost 100 Million US$ per year at the turn of the millennium and amounted to 170 Million US$ per year in 2008 and 2009.[28] The costs

[25] For further details about the relationship between the new established court of Bosnia and Herzegovina and the cantonal and district courts see A. Chehtman, 'Developing Bosnia and Herzegovina´s Capacity to Process War Crimes Cases – Critical Notes on a 'Success Story'', 9 *Journal of International Criminal Justice* (2011) 3, 547, 562-569.

[26] Beyond these transferred cases there are further cases that were picked up by the Special War Crimes Chamber. Firstly, the cases which were investigated but not prosecuted by the Office of the Prosecutor of the ICTY. Secondly, new investigations commenced by the Bosnian Special Department for War Crimes and thirdly those cases which were not processed by local authorities to the point of indictment, see E. Kirs, 'Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina', 3 *Goettingen Journal of International Law* (2011) 1, 397, 403-404.

[27] By the end of July 2010 the ICTY concluded proceedings against 126 of the 161 persons indicted, see seventeenth annual report of the ICTY President P. Robinson, UN Doc. A/65/205, S/2010/413, 30 July 2010, para. 2.

[28] The budget is listed at the ICTY's Homepage, available at www.icty.org/sid/325 (last visited 31 December 2011); see also the fifteenth annual report of the ICTY President F. Pocar, UN Doc. A/63/210, S/2008/515, 4 August 2008, para. 111.

totaled to approx. 7.5 % of the overall UN budget.[29] This money was spent to achieve the ICTY´s goals. But seen from a practical point of view, one is tempted to question the rationale behind allocating such a huge amount of money from the UN budget, towards one single conflict, that too, one which ended in June 1999 in the Kosovo region, and in December 1995 in the rest of the disintegrated SFRJ. This might be a pragmatic argument, but nevertheless one with substantial practice-relevant weight.

Even if the tribunal would not be able to get an accused to stand trial at The Hague, there is at least some positive effect which already can be seen as a contribution to peace and justice through the back-door. All of the indicted persons lost their social position and political power after a while.[30] This is especially true in the case of the remaining fugitives in 2010, Ratko Mladic[31] and Goran Hadzic[32]. But even taking this positive effect into account, which resulted solely from the indictments, it would have been too bitter a pill for this institution to close without the trial of these two missing persons, bearing in mind that Mladic is one of the most prominent alleged war criminals of the whole conflict.

C. SC Resolution 1966 – A Successful Approach?

With its Resolution 1966 of 22 December 2010, the Security Council established the International Residual Mechanism for Criminal Tribunals (IRMCT) to take over and continue the ICTY's and ICTR's tasks after the

29 Art 32 ICTY-Statute in accordance with Article 17 UN-Charta; Find the UN budget for the years 2009/2010 in GA Res. 62/237 A-C, 01 February 2008. In the following two years the budget decreased for the first time and amounted to approx. 5,5% of the overall UN budget, see Robinson, *supra* note 27, para. 94 and GA Res. 64/244 A-C, 04 March 2010.

30 See also O. Triffterer, 'Irrelevance of Official Capacity – Article 27 Rome Statute Undermined by Obligations under International Law or by Agreement (Article 98)?', in I. Buffard *et al.* (eds), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner*, 2008, 571-602, 602: "While in the short run such endeavours are not successful because the absent suspect cannot be tried, the development since the establishment of the ICTY and the ICTR has shown that a tremendous increase of successful investigation has attributed certain crimes to certain persons who consequently lost their political power and social position".

31 *Prosecutor v. Karadzic und Mladic „Bosnien und Herzegowina"*, Initial Indictment, IT-95–5-I, 24 July 1995 and *„Srebrenica"*, Initial Indictment, IT-95-18-I, 14 November 1995.

32 *Prosecutor v. Goran Hadzic "Krajina,* Initial Indictment, IT-04-75-I, 4 June 2004.

tribunals are closed.[33] The Security Council requested both Tribunals to expeditiously complete their work by 31 December 2014. The commencement dates for the ICTR and ICTY are 1 July 2012 and 1 July 2013. Its purpose is to bring the tribunals to a smooth end and install a mechanism, which is able to maintain their legacy[34] and carry on the remaining responsibilities in the aftermath of their work.

I. Basic Features of the Residual Mechanism

The basic functions of a residual mechanism can easily be identified.[35] Certainly a decision-making body will be needed to decide on matters like discharge of convicted persons. Adjudication on retrials, if new facts come to light after final judgments, rulings on penal matters connected to prior trials, like prosecuting witnesses who gave false testimony and so on. In addition, the mechanism was not only needed for judicial, but also for administrative tasks, like maintaining the archives of the Tribunal to keep a thorough record that acknowledges the pain and suffering of all victims to protect against later revisionism and denial of atrocities. Furthermore the residual mechanism can keep up prolonged support for the outreach program in the former Yugoslavia. Capacity building of national jurisdictions will constitute the tribunal's general legacy.[36]

[33] For an overview about the historical precedents see Guido Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?', 9 *Journal of International Criminal Justice* (2011) 4, 789, 791; For a detailed analysis about the steps that in the end led to Security Council Resolution 1966 see Thomas Wayde Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals – From Completion to Continuation', 9 *Journal of International Criminal Justice* (2011) 4, 797, 805.

[34] For a detailed analysis about the legacy of the ICTY and all his numerous and multifaceted aspects see B. Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) and R. H. Steinberg, *Assessing the Legacy of the ICTY* (2011).

[35] For a critical analysis about the eight residual functions of the IRMCT see C. Denis, 'Critical Overview of the 'Residual Functions' of the Mechanism and its Date of Commencement (including Transitional Arrangements)', 9 *Journal of International Criminal Justice* (2011) 4, 819.

[36] About the efforts the ICTY is undertaking to reach this goal see P. Robinson, *supra* note 27, para. 8: "The President continued to advance the capacity-building of national jurisdictions, as a priority of the Tribunal's legacy strategy. In February 2010, the Tribunal organized a donor-funded conference that gathered more than 350 participants from the international community and the countries of the former Yugoslavia to discuss aspects of the Tribunal's legacy, particularly in the region. On

II. Additional Features of the Residual Mechanism

The more difficult part was, whether or not and how the matter of the two remaining fugitives would be dealt with. Three major solutions were regarded as feasible. The first one was to shut down the ICTY and to install a residual mechanism, which serves the above mentioned goals, keeping up the necessary judicial functions, capacity building and legacy. That would have meant giving the two remaining fugitives the possibility of getting away without a proper criminal trial, if the Republic of Serbia is unwilling and unable to bring them to trial in accordance with the rule of law.[37] Not being able to try all major accused war criminals during the life of the ICTY, (which would be more than twenty years by the end of 2013) would remain as a lasting stain on the ICTY´s legacy. At the end of the day, one could say that the ICTY failed to achieve its most important goal of ending impunity for grave breaches of international humanitarian law at least in two cases.

The second major possibility would be exactly the opposite approach, namely to keep the ICTY open as long as the last remaining alleged war criminal is brought to trial and to install a residual mechanism after that. This would mean to keep the institutional framework of the Tribunal, including its staff, on hold, until such persons were captured and transferred to the ICTY. When this would happen remained uncertain during the year 2010, before SC Res. 1966 was adopted in December of that year. The possibility could not be ruled out that the ICTY would have to wait for an unpredictable amount of time for the capture of all criminals at large. Even the feasibility that the two accused would die without their death becoming public had to be taken into consideration. Keeping up the tribunal until the day of truth would become an extremely expensive solution. Nevertheless, it

1 May, the Tribunal and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe launched a joint 18-month project funded by the European Union aimed at assisting the national judiciaries of the region in securing their capacity to investigate, prosecute and adjudicate war crimes cases, including a project to translate trial transcripts and research tools into the languages of the region. The Tribunal is also preparing for the establishment of information centres under local ownership in the former Yugoslavia".

37 For a detailed analysis about the possibilities to try the remaining fugitives after the ICTY has closed its institutional doors see D. Riznik, 'Die voraussichtliche Schließung des ICTY im Jahre 2013: Ein Freibrief für flüchtige Kriegsverbrecher? – Die Bewältigungsstrategie und ihre Folgen', 47 *Archiv des Völkerrechts* (2009) 2, 220.

would be a solution which would give the ICTY the possibility to get its work done properly and to try all indicted major alleged war criminals before its closure.

The third option was a mixture between the mentioned two solutions and the one the Security Council has chosen in Resolution 1966.[38] It seemed that it was the declared intention of the Security Council members[39] that none of the two fugitives would get away without a proper trial, which Japan summarized at the meeting of the Security Council members on 22 December 2010 when Resolution 1966 was adopted as follows:

> "The establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal

[38] A similar conclusion was drawn by G. Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?', 9 *Journal of International Criminal Justice* (2011) 4, 789, 793-795; see also G. Acquaviva, 'Best Before Date Shown': Residual Mechanisms at the ICTY', in Swart *et al.*, *supra* note 34, 507, 523.

[39] See the completion strategy report of the ICTY President P. Robinson, UN Doc. S/2011/316, 18 May 2011, paras 91, where he states: "It again must be reported that Ratko Mladic and Goran Hadzic continue to remain at large. It is noted, however, that there is a general agreement among members of the Security Council that there will be no impunity regardless of when these remaining fugitives are apprehended. All States, especially those of the former Yugoslavia, are asked to intensify their efforts and to deliver these fugitives to the Tribunal as a matter of urgency"; see also SC Res. 1966, 22 December 2010 where it states: "*Reaffirming* its 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 ICTR are brought to justice"; see also the statements by two representatives of the Security Council members at the meeting on 22 December 2010 (UN Doc. S/PV.6463); United Kingdom: "The United Kingdom welcomes the adoption of this resolution, which makes arrangements for the continuation of essential legal functions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) following the completion of the Tribunals' trials and appeals, including by making provision for the trials of the remaining fugitives, who must be brought to justice"; Austria: "The establishment of the residual mechanism sends a strong Security Council message against impunity. The high-level fugitives indicted by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda cannot escape justice"; see also the Statement by the President of the Security Council, UN Doc. S/PRST/2008/47, from 19 December 2008 where he already declares: "The Security Council acknowledges the 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".

> for Rwanda was the manifestation of the full determination of the international community not to tolerate impunity”[40].

On the other hand, the intention to bring the tribunal to an end seemed to be as equally important as the former one. A solution had to be found, which would cut the costs by reducing the institutional framework including staff members and at the same time keep up the ICTY functionality as long as needed to try the remaining fugitives after their capture. The established IRMCT serves both goals. The ICTY as it is known will definitely come to an end within conceivable time through a Security Council Resolution. The installed Residual Mechanism will take over and keep up the main functions needed after the Tribunals’ termination. The ultimate residual functions, legacy building through administrative tasks and the continuation of necessary minor judicial tasks are the core features in the proper sense of a residual mechanism.

The additional function of being able to hold entire trial and appeal proceedings against remaining fugitives had to be integrated into this mechanism. Article 1 Nr. 1 of the IRMCT-Statute postulates the continuation of the material, territorial, temporal and personal jurisdiction as set out in the respective Articles of the ICTY and the ICTR by the Residual Mechanism. Article 1 No. 2 explicitly points out that the Mechanism shall have the power to prosecute the major alleged war criminals indicted by the ICTY or the ICTR.

Therefore, 25 judges will be appointed, to have a roster of experienced jurists in order to hold up the necessary functions of a judicial institution.[41] Their presence at the IRMCT seats is not required,[42] not even for minor judicial decisions and the pool of highly qualified professionals is large enough to fill up a few trial and appeals chambers,[43] if necessary. A similar approach regarding competent staff for the Office of the Prosecutor and the Registry was implemented.[44]

The legal foundation for the prosecution of the remaining fugitives as demonstrated is set up by the Residual Mechanism. Moreover, the practical

40 Statement by the representative of Japan at the Security Council meeting on 22 December 2010 (UN Doc. S/PV.6463).

41 Article 8 No. 1 of the Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT- Statute), SC Res. 1966, 22 December 2010, Annex 1.

42 Art 8 No. 3 IRMCT-Statute.

43 Art 12 IRMCT-Statute.

44 Arts 14 No. 5 and 15 No. 4 IRMCT-Statute.

aspects have been accounted by a system, which allows the tribunal in praxis to convert from a residual mechanism administrating its basic features to a well-equipped international criminal tribunal being able to deliver judgments on major war criminals. And last, but not least, the Residual Mechanism would be able to cut the costs immensely compared to the expenses spent on the ICTY. Therefore, judges appointed to the roster will not receive any remuneration until they do any service for the Mechanism.[45] The same holds true for the rest of the staff being part of the experts roster, even, if the Statute does not mention this explicitly.

III. Transitional Arrangements

The commenced date of the IRMCT of the ICTR branch is 01 July 2012, the one of the ICTY branch is 01 July 2013.[46] By that time both the ICTR and the ICTY will not be finished with their work.[47] Because the three judicial bodies ICTY, the ICTR and the Residual Mechanism coincide with each other in addition a few transitional provisions had to be set up.
In the special scenario regarding the remaining fugitives the areas of responsibility between the ICTY, ICTR and the IRMCT were decided in Article 1 of the Transitional Arrangements (TA).[48] Article 1 No. 2 of the TA prescribes that an arrest of an indicted fugitive 12 months prior to the commenced date of the IRMCT of the respective branch should remain within the competence of the respective tribunal. The commenced date of the ICTY branch of the IRMCT is 01 July 2013. Consequently the fugitives Ratko Mladic on the run since 16 years and Goran Hadzic on the run since 7 years arrested in May and June 2011 will be tried by the ICTY. Hence, there will be no need for the IRMCT to compose a trial chamber for the two former fugitives. Presumably the ICTY will not finish its work and close down until 2016, if both captured do not plead guilty and the length of the trial is comparable with the one against Radovan Karadzic.[49]

[45] Art 8 No. 3 IRMCT-Statute.

[46] SC Res. 1966, 22 December 2010, No. 1.

[47] See the estimated completion dates from both ad hoc in Tribunals in the Completion Strategy Report of the ICTY President P. Robinson, UN Doc. S/2011/316, 18 May 2011, enclosure VII, VIII & IX.

[48] SC Res. 1966, 22 December 2010, Annex 2.

[49] This assumption is based on an estimation considering that both trials will last as long as the trial dates of Radovan Karadzic estimated by the ICTY accounting the fact that they will start approx. two years later, see P. Robinson *supra* note 47, 11, para. 46 & enclosure VII. Ironically enough the ICTY, in its annual report from 2000, estimated

The situation is different in the case of appeals. Pursuant to Article 2 No. 2 of the TA all appellate proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the IRMCT, which is 1 July 2013, will fall within the competence of the Mechanism. Consequently, expected appeals from the last two captured fugitives as well as an appeal by Radovan Karadzic, which is expected around August 2014[50] will have to be tried before the IRMCT. The expected appeals seem likely to become the first on-road test for the IRMCT of the ICTY´s branch to transform from a genuine residual mechanism to a full-fledged criminal tribunal, able to undertake appellate proceedings.

D. Conclusion

Even if the necessary tools in the IRMCT for trying fugitive suspects proved to be superfluous for the ICTY, from today´s perspective, the opposite conclusion has to be drawn for the ICTR, which still has another nine accused at large.[51] And once again one should keep in mind that the Security Council had to decide on the IRMCT during a period, when the two accused, Ratko Mladic and Goran Hadzic, were still at large. It was, therefore, an appropriate decision at the time it was reached and gave a strong signal, not only to countries where the fugitives were hiding, but also to the entire world community.[52] The symbolic impact of the Security Council's conclusion on the ending of impunity must by no means be underestimated.

But one should not forget that one of the primary goals of the Completion Strategy is cost reduction by reducing the tribunal's life span. The downgrade of staff and premises is an auspicious approach. The constant reduction of ICTY staff has started to downsize the costs of the

its duration until 2016 excluding appeals but only if no changes will be implemented regarding penal policy, rules of procedure, format and organization of the court and other contributing factors, see seventh annual report of the ICTY President C. Jorda, UN Doc. A/55/273, S/2000/777, 07 August 2000, para. 336.

50 See Robinson, *supra* note 47, enclosure VIII.

51 Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council on 6 June 2011, UN Doc. S/PV.6545), 10, 12; Sixteenth annual report of the ICTR President K. R. Khan, UN Doc. A/66/209, S/2011/472, 29 July 2011, 12, para. 46.

52 The Security Council´s decision reflects the suggestion the author already made in June 2009, see Riznik, *supra* note 37, 220.

tribunal since its all-time high in the years 2008-2009[53] and will probably continue to drop.[54] In the end, time will show if cost reduction measures were duly implemented into the Mechanism and, compared to the budget of the reduced ICTY, the overall budget will decrease once the IRMCT takes over.

The will to finally accomplish trials for good on the international level after 20 years can be identified in Article 1 No. 5 of the IRMCT-Statute.[55] There, it states that the Mechanism lacks the power to issue new indictments except the ones against already indicted persons[56] and those who interfered with the administration of justice or gave false testimony.[57] It is a necessary provision to make sure that the chapter of the ad hoc criminal tribunals will be definitely closed one day.

The framework for a smooth transition from both ad hoc Tribunals to the Residual Mechanism was established by Security Council Resolution 1966. It will be interesting to see how the Mechanism will develop and perform; how parts of the staff will shift from the tribunals to the IRMCT;[58] and, in the long run, how the Mechanism will minimize its workload and functions[59] until its final transformation to an administrative body securing the archives of the ICTY and ICTR.

53 See already the difference of 40 Million US$ of the biennium budget 2010-2011 compared to the previous biennium at the ICTY´s budget listing at the Homepage of the Tribunal under the section "about the ICTY/the cost of justice", available at www.icty.org/sid/325 (last visited 17 October 2011).

54 By the end of September the ICTY had abolished approx. 170 posts, see Robinson, *supra* note 47, 22, para. 96.

55 See also Art 16 No. 1 IRMCT-Statute.

56 Art 1 No. 2 and 3 IRMCT-Statute.

57 Art 1 No. 4 IRMCT-Statute.

58 Art 7 of the Transitional Arrangements supports a smooth exchange of staff between the two ad hoc Tribunals and the IRMCT.

59 See the Statement by the President of the Security Council, UN Doc. S/PRST/2008/47, from 19 December 2008 about the future ad hoc mechanism: "In view of the substantially reduced nature of these residual functions, this mechanism should be a small, temporary, and efficient structure. Its functions and size will diminish over time".

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The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda

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Abstract

By Security Council Resolution 1966 (2010), the Security Council established the International Residual Mechanism for Criminal Tribunals as the legal successor to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In the creation of the Residual Mechanism, the Security Council appears to have intended to ensure the continuation of the work of the Tribunals and thereby safeguard their legacies. Accordingly, the Statute of the Residual Mechanism continues the jurisdiction of the Tribunals, mirrors in many respects the structures of the Tribunals, and ensures that the Residual Mechanism's Rules of Procedure and Evidence are based on those of the Tribunals. However, the Statute of the Residual Mechanism is silent with regard to the weight the Judges of the Residual Mechanism must accord to ICTY and ICTR judicial decisions. While there is no doctrine of precedent in international law or hierarchy between international courts, this omission by the Security Council does have the potential to negatively impact the legacies of the Tribunal by allowing for departures by the Residual Mechanism from the jurisprudence of the Tribunals, which lead to similarly situated persons being dissimilarly treated. Nevertheless, even if the Residual Mechanism does adopt the jurisprudence of the Tribunals as its own, as a separate legal body it will still have to answer constitutional questions regarding the legitimacy of its establishment by the Security Council. While it can be anticipated that the Residual Mechanism will find itself validly constituted, the wisdom of the Security Council's decision to artificially end the work of the Tribunals by the establishment of the Residual Mechanisms will ultimately turn upon the question of whether any inherent unfairness could be occasioned to persons whose proceedings are before the Residual Mechanism. It will be suggested that the Security Council has provided the Residual Mechanism with sufficient tools to ensure that its proceedings are conducted in *para passu* with those of the Tribunals and that the responsibility of ensuring the highest standards of international due process and fairness falls to the Judges of the Residual Mechanism.

A. Introduction and Background

The International Criminal Tribunal for the former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR] [collectively, Tribunals], have cultivated a rich legacy since their establishment in 1993 and 1994, respectively. One important means of ensuring the endurance of this legacy is the International Residual Mechanism for Criminal Tribunals [Residual Mechanism].

In 2010, the Security Council, acting pursuant to its Chapter VII powers issued Resolution 1966, which established the Residual Mechanism as the legal successor to both the ICTY and the ICTR. The Residual Mechanism was conceived as a means of closing down both Tribunals' prior to the conclusion of their mandates, while simultaneously ensuring the full completion of their respective mandates by the Mechanism itself.[1]

The Statute of the Residual Mechanism[2], annexed to Resolution 1966, contains various provisions demonstrative of the Security Council's intention to ensure continuity between the work of the Mechanism and the work of both Tribunals. Most explicitly, Article 2 provides that the Residual Mechanism "shall continue the functions of the ICTY and ICTR, as set out in the [Mechanism's] Statute". Additionally, Article 1 stipulates that the Residual Mechanism shall continue the jurisdiction of both Tribunals, and further provisions provide a structure and organization to the Mechanism which largely mirrors that of both Tribunals.[3] Furthermore, the provisions governing fair trial rights reflect those encapsulated in the ICTY and ICTR Statutes,[4] including those regulating the right to appeal and request for

1 An important function of the Residual Mechanism not discussed in this paper is the management of the Tribunals' archives. See the 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), UN Doc. S/2009/258, 21 May 2009, paras 15, 43-59, 87 [Report of the Secretary-General].

2 Statute of the International Residual Mechanism for Criminal Tribunals, SC Res. 1966, 22 December 2010, Annex One [Statute of the IRMCT].

3 Arts 2 and 3 Statute of the IRMCT; Art. 11 Statute of the International Criminal Tribunal for the former Yugoslavia [ICTY Statute]; Art. 10 Statute of the International Criminal Tribunal for Rwanda [ICTR Statute], see *infra* section B. I. 2 'Structure and Organisation'.

4 Art. 19 Statute of the IRMCT; Art. 21 ICTY Statute; Art. 20 ICTR Statute.

review.[5] Of further significance is a provision ensuring that the Residual Mechanism will base its Rules of Procedure and Evidence on those of both Tribunals.[6] Indeed, the Security Council has elevated a number of the Tribunals' Judge-made Rules to the status of statutory provisions of the Residual Mechanism.[7]

Yet, Resolution 1966 lacks explicit guidance regarding the weight the Judges of the Residual Mechanism must accord to ICTY and ICTR decisions. It is therefore not self-evident that the Residual Mechanism will follow the jurisprudence of the Tribunals' regarding the interpretation and application of its Rules of Procedure and Evidence or its substantive case law, and thereby, truly continue the work of the Tribunals' as the Security Council appears to have intended.

This may have been an intentional omission on the part of the Security Council. After all, the Residual Mechanism is a new and distinct judicial institution, and there is no doctrine of precedent in international law. Furthermore, had the Security Council wished to ensure that the Residual Mechanism follow the jurisprudence of the Tribunals, it could have explicitly provided the same in the Statute of the Residual Mechanism.

On the other hand, the Security Council may not have been particularly attentive to this issue. Instead, by endowing the Residual Mechanism with the jurisdiction originally exercised by the ICTY and ICTR, by incorporating elements from their respective Statutes and Rules of Procedure and Evidence into the Residual Mechanism's statutory framework, and by specifically ensuring that the Residual Mechanism's own Rules of Procedure and Evidence would be based on those of the ICTY and ICTR, the Security Council may have assumed that the Judges of the Residual Mechanism would consider themselves bound by the Tribunals' jurisprudence.

[5] Arts 23 and 24 Statute of the IRMCT; Arts 25 and 26 ICTY Statute; Arts 24 and 25 ICTR Statute. A party can submit a request for review of a decision of the Trial Chamber or Appeals Chamber when a new fact has been discovered that was not known to the parties at the time of the decision and that could have been a decisive factor in reaching the decision. See Rule 119 ICTY Rules of Procedure and Evidence (last amended 20 October 2011); Rule 120 ICTR Rules of Procedure and Evidence (last amended 1 October 2009).

[6] SC Res. 1966, 22 December 2010, para. 5, Art. 13 Statute of the IRMCT.

[7] See Arts 1(4), 6, 24 Statute of the IRMCT; Rules 77, 11*bis*, 119 and 120 ICTY Rules of Procedure and Evidence; Rules 77, 11*bis*, 120 and 121 ICTR Rules of Procedure and Evidence.

Although this assumption is not unreasonable, neither is it self-evident. Ultimately, it will fall to the Judges of the Residual Mechanism to decide what weight – be that binding authority, persuasive authority, or no weight at all – will be accorded to which of the Tribunals decisions. The decision of the Judges in this regard is an important one that has the potential to either bolster the legacy of the Tribunals', or significantly undermine it through departures that may result in unfairness to accused persons whose cases are transferred to the jurisdiction of the Residual Mechanism, or which may otherwise call into question the integrity of the Tribunals' proceedings. Furthermore, even if the Chambers of the Residual Mechanism concludes that it is generally bound by the jurisprudence of the Tribunals, it will undoubtedly be required to independently address the legality of the Security Council's decision to establish the Residual Mechanism in the first place, as well as other objections concerning the fairness of transferring Tribunal proceedings to the Residual Mechanism.

In this article, I undertake a three-part analysis in favor of the Residual Mechanism's adoption of ICTY and ICTR precedents.

First, I examine the Statute of the Residual Mechanism, comparing a sampling of its provisions with analogous provisions in the Statute and Rules of Procedure and Evidence of both Tribunals in order to demonstrate the implicit intention of the Security Council to ensure continuity between the work of the Tribunals and that of the Residual Mechanism.

Second, I address the Security Council's lack of guidance in Resolution 1966 regarding the weight of ICTY and ICTR decisions within the context of the jurisprudence of the Residual Mechanism. In doing so, I examine possible reasons for this deficit and possible measures the Judges of the Residual Mechanism will take to address this issue. I then explain why, in order to truly ensure continuity between the Tribunals' work and that of the Residual Mechanism, to guarantee the rights of accused persons whose cases are transferred to the Residual Mechanism, and to otherwise preserve the Tribunals rich substantive and procedural legacy, it is important that the Judges of the Residual Mechanism generally treat the decisions of the Tribunals' Appeals Chamber as binding precedent in the jurisprudence of the Residual Mechanism.[8]

[8] While I talk about Tribunals, meaning both ICTY and ICTR, they are separate institutions with their own Statutes. However, they share a common Appeals Chamber and this has resulted in a consistency of substantive and procedural jurisprudence between the two Tribunals. That said, neither Tribunal considers itself bound by the

Finally, I consider the inevitable challenge to the legality of the Security Council's establishment of the Residual Mechanism as a Chapter VII measure, as well as possible fairness challenges that might be made by those persons whose proceedings will come before the Residual Mechanism and the potential impact of these challenges on the Tribunals' legacies.

In order to put this issue into context, before embarking upon an examination of the Statute of the Residual Mechanism as contained in Annex I of Resolution 1966, I will briefly describe the purpose behind the establishment of the Residual Mechanism through Resolution 1966. I will also describe the operative paragraphs of the Resolution and the Transitional Arrangements found in Annex II of the Resolution, which address, among other things, the end dates of the Tribunals, the period of operation of the Residual Mechanism, the respective competencies of each institution and the handover of responsibilities between them.

The Residual Mechanism, like the Tribunals,[9] was established by the Security Council in Resolution 1966 pursuant to Chapter VII of the United Nations Charter.[10] Following the failure of the Tribunals to meet their indicated Completion Strategy dates of 2008 (for the end of all trials), and 2010 (for the end of all work), Resolution 1966 constituted a political decision by the Security Council to close the Tribunals, while at the same time continuing their necessary functions through an alternative mechanism.[11] While at least one of the five permanent members of the

jurisprudence of the Appeals Chamber of the other. That jurisprudence is of persuasive value only. See *infra* note 95.

9 SC Res. 827, 25 May 1993; SC Res. 955, 8 November 1994.

10 SC Res. 1966, 22 December 2010.

11 The Tribunals were established as *ad hoc* and temporary measures and their completion strategies were designed to meet concerns regarding the efficiency and length of the Tribunals proceedings. For the history of the matter see: GA Res. 53/212, 10 February 1999; GA Res. 53/213, 10 February 1999; SC Res. 1329, 30 November 2000; Advisory Committee on Administrative & Budgetary Questions [ACABQ], ICTY – Revised budget estimates for 1998 and proposed requirements for 1999 of the International Tribunal for the Former Yugoslavia, UN Doc. A/53/651, 9 November 1998, paras 65-67; ACABQ, International Criminal Tribunal for Rwanda (ICTR) – Revised estimates for 1998 and estimates for 1999, UN Doc. A/53/659, 11 November 1998, paras 84-86; GA Res. 53/212, 10 February 1999, para. 5; GA, Financing of the ICTY and the ICTR, UN Doc. A/54/634, 22 November 1999; GA-SC, Report of the ICTY, UN Doc. A/55/382-S/2000/865, 14 September 2000; SC Res. 1329, 5 December 2000; Report of the Secretary-General pursuant to paragraph 6 of Security Council resolution 1329 (2000), UN Doc S/2001/154, 21 February 2001; SC,

Security Council advocated for the complete closure of the Tribunals, i.e. the end of the work of the Tribunals, by the end of 2010, it was accepted by other members of the Security Council that this would not be possible.[12] A number of residual functions would necessarily continue for an undefined period following the Tribunals' closure, including the trial of fugitives, protection of victims and witnesses, review of judgments and pardon and commutation of sentence.[13]

I. Resolution 1966 – Operative Paragraphs

The operative paragraphs of Resolution 1966 provide that the purpose of the Residual Mechanism is to continue the jurisdiction, rights, obligations, and essential functions of the Tribunals,[14] and imposes upon all States an obligation to cooperate fully with the Residual Mechanism.[15]

Regarding the timeline of the Residual Mechanism, Resolution 1966 provides that the ICTR branch of the Residual Mechanism will commence functioning on 1 July 2012 and the ICTY branch on 1 July 2013.[16] Additionally, the Tribunals are requested to take "all possible measures to expeditiously complete all their remaining work" by 31 December 2014.[17] Consequently, for a period of time, the Tribunals and the Residual Mechanism will operate side by side, and the Tribunals will complete those proceedings of which they are already seized while the Residual Mechanism will take on all new matters which may arise.

Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council, S/2002/678, 19 June 2002; SC, Statement by the President of the Security Council, S/PRST/2002/21, 23 July 2002; SC Res. 1503, 28 August 2003; SC Res. 1534, 26 March 2004.

12 SC Res. 1966, 22 December 2010, was adopted 14-0-1 (Russian Federation); the Russian Federation explained their abstention by stating that the Tribunals had had sufficient time to complete their work: Statement of the Representative of the Russian Federation during the adoption of SC Res. 1966, UN Doc. S/PV.6463, 22 December 2010, 3.

13 These functions were described in the Report of the Secretary-General, *supra* note 1. This Report was devised by the Secretary-General in response to the Security Council's request for decision-making guidance on key areas regarding the creation of an ad hoc mechanism(s) to perform certain essential functions of the Tribunals after their closure, and contains a number of recommendations in that regard.

14 SC Res. 1966, 22 December 2010, para. 4.

15 *Id.*, paras 8-10.

16 *Id.*, para. 1.

17 *Id.*, para. 3.

The Resolution provides that the Mechanism will operate for an initial period of four years from its commencement date, with a review of its progress by the Security Council prior to the end of that initial period and every two years thereafter. The Resolution states that "the Mechanism shall continue to operate for subsequent periods of two years following each such review, unless the Security Council decides otherwise"[18].

Finally, the Resolution conveys the Security Council's "intention to decide upon the modalities for the exercise of any remaining residual functions of the Residual Mechanism upon the completion of its operation" and "to remain seized of the matter"[19].

II. Resolution 1966 – Annex II – Transitional Arrangements

Resolution 1966 provides that its provisions, including the Statute of the Residual Mechanism, as well as the Statutes of the ICTY and ICTR, are subject to the Transitional Arrangements.[20] The purpose of the Transitional Arrangements is to ensure a smooth transfer of functions from the Tribunals to the Residual Mechanism.[21]

The Transitional Arrangements provide that at the commencement of the Mechanism, the ICTY and ICTR shall have the competence to complete all trial or referral proceedings pending before them.[22] Further, "if any fugitive is arrested more than 12 months, or if a retrial is ordered by the Appeals Chamber more than 6 months prior to the start of the Mechanism", the ICTY and ICTR shall have the competence to conduct and complete that trial or to refer it to a national jurisdiction as appropriate.[23] If a fugitive is arrested 12 months or less, or a retrial ordered 6 months or less prior to the commencement of the Mechanism, the ICTY and ICTR shall only have the competence to "prepare the trial of such person, or to refer the case" to a national jurisdiction if appropriate. As of the commencement date of the Mechanism, competence over the case will transfer to the Mechanism, including the trial or referral of the case if appropriate.[24] If a fugitive is captured, or a retrial is ordered on or after the commencement of the

18 *Id.*, para. 17.
19 *Id.*, paras 18-19.
20 *Id.*, para. 2.
21 *Id.*, para. 3.
22 *Id.*, Annex Two, Art. 1(1) Transitional Arrangements [Transitional Arrangements].
23 Art.1(2) Transitional Arrangements.
24 Art. 1(3) Transitional Arrangements.

Mechanism, then only the Mechanism has the competence to conduct the proceeding.[25]

The ICTY branch of the Residual Mechanism will not conduct any trials in relation to persons indicted for substantive crimes because all ICTY fugitives have now been arrested. The only possible application of these provisions to the ICTY will be in the case of an order for re-trial by the Appeals Chamber. The likelihood of the Appeals Chamber rendering such an order is not beyond the realm of possibilities, as demonstrated by its judgment in the *Prosecutor v. Haradinaj et al.* case.[26] In contrast, there are nine remaining ICTR fugitives, and therefore a real possibility that the Residual Mechanism will conduct a trial for substantive crimes.[27] Prior to determining the appropriateness of doing so, pursuant to Article 6 of the Residual Mechanism's Statute, the Residual Mechanism will have to consider whether the case could be transferred to a national jurisdiction for trial.[28]

The Transitional Arrangements provide that the Tribunals shall have competence to conduct all appeals that have commenced before them with the filing of the notice of appeal, and that all other appeals will be dealt with by the Residual Mechanism.[29] Thus, the Residual Mechanism will have jurisdiction over all appeals of ICTY judgments or sentences that commence on or after 1 July 2013 and all appeals of ICTR judgments or sentences that commence on or after 1 July 2012. As can be ascertained from the current ICTY trial schedule contained in the most recent report by the ICTY President to the Security Council, the Residual Mechanism may take on some of the appellate work of the ICTY, at least in respect of appeals in the *Karadzic*, *Mladic* and *Hadzic* cases.[30] For the ICTR, there is the possibility

[25] Art. 1(4) Transitional Arrangements.

[26] *Prosecutor v. Haradinaj et al.*, Judgment, IT-04-84-A, 19 July 2010; See also ICTR case *Prosecutor v. Tharcisse Muvunyi,* Judgment, ICTR-2000-55A-A, 29 August 2008, where a partial retrial was ordered by the Appeals Chamber.

[27] SC, Letter dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, Annex III, UN Doc. S/2011/317, 18 May 2011; Bernard Munyagishari was arrested in 25 May 2011, see Statement by Justice H. B. Jallow, Prosecutor of the ICTR to the United Nations Security Council, 6 June 2011.

[28] Art. 1 Transitional Arrangements; Art. 6 Statute of the IRMCT.

[29] Arts 2(1), 2(2) Transitional Arrangements.

[30] GA-SC, Eighteenth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

of appeals in the cases of the nine outstanding fugitives if those cases are unsuccessfully referred to national jurisdictions.[31]

Similar provisions govern review proceedings and contempt or false testimony proceedings. The ICTY and ICTR will complete those for which the request for review is filed or indictment confirmed prior to the commencement date of the respective branch of the Residual Mechanism, and the Residual Mechanism will take on any requests for review filed or indictments confirmed on or after those dates.[32] However, again, the Residual Mechanism will proceed to prosecute persons for contempt or false testimony only following consideration of referral of the case to a national jurisdiction.[33]

There are several other provisions within the Transitional Arrangements. With respect to the protection of victims and witnesses, the ICTY and ICTR will provide protection and related judicial or prosecutorial functions in relation to all victims and witnesses connected to proceedings in respect of which the ICTY or ICTR has competence. The Residual Mechanism will do likewise in relation to all proceedings for which it has competence.[34] A provision in the Transitional Arrangements also allows the President, Judges, Prosecutor and Registrar of the Residual Mechanism to simultaneously hold the same office in the ICTY or ICTR, and for the staff

Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/66/210-S/2011/473, 31 July 2011.

31 SC, Letter dated 12 May 2011 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, UN Doc. S/2011/317, 18 May 2011, Annex I.C, I.D and II. There are seven trial proceedings at various stages, six of which are anticipated to be completed in the first quarter of 2012. Provided the notices of appeal are filed prior to 1 July 2012 the appeals will be heard by the ICTR Appeals Chamber. However, as mentioned above, if any or all of the notices of appeal are filed after 1 July 2012, the Appeals will go to the Residual Mechanism. One case, that of Nyamata Uwinkindi, is subject of a request for referral to Rwanda and is currently pending before the Appeals Chamber. Following submission of this paper for publication, on 16 December 2011, the Appeals Chamber rendered its decision upholding the referral of the ICTR Referral Bench.

32 Arts 3(1)-(2), 4(1)-(2) Transitional Arrangements.

33 Art. 1 Transitional Arrangements; Art. 1(4) Statute of the IRMCT. Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency. See Art. 6 Statute of the IRMCT.

34 Art. 5 Transitional Arrangements.

members of the Mechanism to also be staff members of the ICTY or ICTR.[35]

Ultimately, the Transitional Arrangements are meant to provide a seamless transfer of Tribunal functions to the Residual Mechanism. While the Transitional Arrangements provide a framework for transferring the responsibilities of the Tribunals to this new Mechanism, the success and ease of this transfer of functions will be aided in large part by the similarities between the Statute of the Tribunals and the Statute of the Residual Mechanism.

B. Continuity through the Imprinting of Key ICTY and ICTR Features on the Residual Mechanism

I. Statute of the Residual Mechanism

An examination of the Residual Mechanism's Statute reveals numerous and substantial similarities between its provisions and those of the respective Statutes of the ICTY and ICTR. In so structuring the Mechanism's statutory framework, the Security Council has not simply reinvented the wheel, but instead appears to have endeavored to ensure continuity between the work of the Tribunals and the Residual Mechanism.[36] Such provisions include those relating to the Mechanism's jurisdiction; its structure and organization; fair trial rights, including the right to appeal and review; and other provisions which largely mirror analogous provisions in the Statute and Rules of the Tribunals. Any minor differences between analogous provisions appear to reflect the reduced workload of the Residual Mechanism or efforts to ensure procedural efficiency.[37] Furthermore, the Security Council has elevated certain Rules adopted by the Judges of the Tribunals, pursuant to Article 15 of the ICTY Statute and Article 14 of the ICTR Statute, to the status of mandatory statutory provisions of the Residual Mechanism.[38] Additionally, there is a provision to ensure that the Mechanism's Rules of Procedure and Evidence

35 Art. 7 Transitional Arrangements.

36 The Report of the Secretary General, *supra* note 1, noted that there had been some indication from members of the working group on the tribunals that the statutes of the residual mechanism(s) should be based on amended ICTY and ICTR Statutes: see para. 7.

37 See i.e. Arts 1(4), 4, 8, 12, 14(5), 15(4) and 18 Statute of the IRMCT.

38 See Arts 1(4), 6, 24 Statute of the IRMCT.

will be based on the Rules of Procedure and Evidence of the Tribunals.[39] Thus, part of the means by which the respective legacies of the Tribunals' may be preserved after their closure is through their recreation in the Residual Mechanism.

1. Jurisdiction

The Security Council's intention to create a crucial nexus of continuity between the Tribunals' and the Residual Mechanism is evident in Article 1 of the Mechanism's Statute, which like paragraph 4 of Resolution 1966, governs the Mechanism's jurisdiction. Article 1 provides that:

> 1. The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and 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.[40]
>
> 2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered in paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused.
>
> 3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the

[39] Art. 13 Statute of the IRMCT; SC-Res. 1966, 22 December 2010, para. 5.

[40] Arts 1-8 ICTY Statute; Arts 1-7 ICTR Statute. Pursuant to Arts 1-8 of its Statute the ICTY has jurisdiction over individuals allegedly responsible for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1991; pursuant to Arts 1 to 7 of its Statute the ICTR has jurisdiction over individuals allegedly responsible for genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and Additional Protocol II committed on the territory of Rwanda, "including its land surface and airspace as well as to the territory of neighbouring States" in respect of Rwandan citizens from 1 January 1994 to 31 December 1994.

> Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

Article 1(1) clearly provides that the two branches of the Residual Mechanism do not possess a wholly redefined jurisdiction from that of the Tribunals – rather each branch is designed to simply continue the jurisdiction of its respective parent Tribunal.[41] This jurisdictional continuity between the Tribunals and the Residual Mechanism was considered to be of critical importance to the legacy of both Tribunals.[42]

Article 1(2)'s restriction of the Mechanism's jurisdiction to the prosecution of only "the most senior leaders" is derived from Rule 11*bis* of the ICTY Tribunal's Rules of Procedure and Evidence. Furthermore, the applicable standard stated therein for assessing whether cases fall into this category, through reference to the "gravity of the crimes charged and the level of responsibility of the accused", is likewise borrowed from Rule 11*bis* of the ICTY Tribunal's Rules of Procedure and Evidence.[43]

In a similar vein, the regime governing the referral of cases to national jurisdictions, as noted in Article 1(3) and detailed under Article 6 of the Mechanism's Statute, essentially mirrors Rule 11*bis* of the Tribunals Rules of Procedure and Evidence, albeit with minor variations. The main difference between both provisions specifically lies in the fact that whereas Article 6 imposes a mandatory obligation upon the Mechanism's Judges to pursue referral by providing that "[t]he Mechanism […] shall undertake

41 See B. Garner & H. Black, *Blacks Law Dictionary*, 9th ed. (2009), 868: "continuing jurisdiction" means "A court's power to retain jurisdiction over a matter after entering a judgment, allowing the court to modify its previous rulings or orders".

42 In this regard, the Secretary-General noted in his Report, *supra* note 1, the agreement among members of the Security Council Informal Working Group on International Tribunals that "in relation to the trial of fugitives [...] the closure of the Tribunals should not result in impunity" (para. 74). SC-Res. 1966, 22 December 2010, further reaffirms the Security 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 ICTR are brought to justice" (preamble).

43 See Rule 11*bis*(C) ICTY Rules of Evidence and Procedure. "In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused" (internal footnotes removed); Rule 11*bis* ICTR Rules of Evidence and Procedure does not have a comparable provision.

every effort" to refer all cases not involving the most senior leaders to national jurisdictions, Rule 11*bis* creates a discretionary referral mechanism by providing that the President "may appoint a bench" to determine whether such a case should be referred to the relevant national jurisdiction. Furthermore, whereas Article 6 mandates the monitoring of all cases referred to the Mechanism, Rule 11*bis* relegates the question of monitoring Tribunal-referred cases to the preserve of discretion by providing that the Prosecution "may send observers to monitor the proceedings"[44].

It is also noteworthy that the Tribunals' referral regime stems from a rule adopted by the Judges pursuant to Article 15 of the ICTY Statute and Article 14 of the ICTR Statute, which respectively instruct the Tribunals' Judges to adopt rules of procedure and evidence "for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters"[45]. In transposing this power of referral to the Residual Mechanism, the Security Council has elevated a rule adopted by the Tribunals' Judges in their discretion to the status of a mandatory statutory provision within the Residual Mechanism's construct, reflecting an attempt by the Security Council to preserve the methods and procedures of the Tribunals. Further, this decision to impose a mandatory obligation on the Residual Mechanism to refer cases when feasible reflects the Security Council's vision that

[44] See Art. 6(5) Statute of the IRMCT, Rule 11*bis*(iv) ICTY Rules of Procedure and Evidence; Rule 11*bis*(iv) ICTR Rules of Procedure and Evidence. There are two additional variations. First, pursuant to Rule 11*bis* of the Tribunals' Rules, the Prosecutor is responsible for monitoring cases referred to national jurisdiction, and does so in cooperation with a regional organization (OSCE), (Rules 11*bis*(iv) ICTY and ICTR Rules of Procedure and Evidence) whereas under Art. 6(5) Statute of the IRMCT, this responsibility falls to the Trial Chamber. Secondly, pursuant to Rule 11*bis* ICTY Rules of Procedure and Evidence, a request to revoke an order of referral is made by the Prosecutor, with the State authorities provided the opportunity to be heard before the Referral Bench renders its decision on the request, (Rules 11*bis* (F) ICTY and ICTR Rules of Procedure and Evidence) whereas under Art. 6(6) Statute of the IRMCT, the Trial Chamber of the Residual Mechanism may revoke an order of referral, either at the request of the Prosecutor or *proprio motu*, "where it is clear that the conditions for referral of the case are no longer met".

[45] The Statutory authority for this Rule in the Tribunals Rules of Procedure and Evidence is found in SC Res. 1503, 28 August 2003, and SC Res. 1534, 26 March 2004, which sanctioned the Completion Strategies of the Tribunals a vital element of which is the transfer of intermediate and lower rank accused to competent national jurisdictions.

referrals should play a central role in the functioning of the Residual Mechanism to ensure that the Mechanism's work is as limited as possible.

Article 1(4) of the Statute of the Residual Mechanism sets out the power of the Residual Mechanism to prosecute for contempt and the giving of false testimony, providing that:

> "4. The Mechanism shall have the power to prosecute, in accordance with the present Statute,
> (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
> (b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.
> Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency".

The transfer of jurisdiction to try persons for interfering with the administration of justice or giving false testimony before the Tribunals' and not only before the Residual Mechanism is critical for ensuring that the Residual Mechanism protects the integrity of the Tribunals' proceedings, and by consequence, their legacies.

The provisions of Article 1(4) replicate those governing the Tribunals' prosecution of these offences, as set out in their respective Rules of Procedure and Evidence.[46] Where they differ is in the instruction that the Residual Mechanism should consider referring such cases to a national jurisdiction prior to hearing the matter for itself. This is not a possibility that has been considered by the Tribunals. Nor would it be appropriate for them to do so. The basis of the Tribunals' exercise of jurisdiction over these offences, not laid out in their Statutes, is the inherent right of a court to protect the integrity of its own proceedings.[47] That right does not necessarily

[46] Rules 77 and 91 ICTY Rules of Procedure and Evidence, Rules 77 and 91 ICTR Rules of Procedure and Evidence; See e.g., *Prosecutor v. Tadic,* Judgment on Allegations of Contempt against Prior Counsel, Milan Vujjn, IT-94-1-A-R77, 31 January 2000, paras12-18, 26-28; *Prosecutor v. Seselj,* Judgment, IT-03-67-R77.2-A, 19 May 2010, para. 17.

[47] See, for example, *Prosecutor v. Tadic,* Judgment on Allegations of Contempt against Prior Counsel, Milan Vujjn, IT-94-1-A-R77, 31 January 2000, paras 12-18, 26-28.

extend to an obligation of other jurisdictions to protect the integrity of Tribunal proceedings.[48]

Finally, Article 1(5) stipulates that: "(t)he Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article"[49].

Thus under this Article, the Residual Mechanism only has competence to bring new indictments in relation to cases of contempt or false testimony as set out in Article 1(4). This, too, mirrors the jurisdictional situation of the Tribunals. In accordance with its Completion Strategy, which called for the closure of all investigations by 2004, the ICTY has not confirmed any new indictments since 2004 for crimes falling within Articles 1-8 of its Statute. Similarly, the last indictment of the ICTR for crimes falling within Articles 1-7 of its Statute was confirmed in 2005. Both Tribunals have, however, had cause to issue new indictments to prosecute cases of contempt and/or false testimony since that time.[50]

Additional provisions of the Statute of the Residual Mechanism concerning the exercise of jurisdiction also essentially mirror provisions of the Statutes of the Tribunals. For example, Article 5 states that the Residual Mechanism shall have concurrent jurisdiction with national courts but also primacy over those courts, mirroring Article 9 of the ICTY Statute and Article 8 of the ICTR Statute.[51] The difference is that the Residual Mechanism is only authorized to request national courts to defer to it cases of persons falling under Article 1(2) of its Statute, i.e., those "who are among the most senior leaders", a limitation that is not present in the ICTY and ICTR Statutes.[52] Article 7 of the Residual Mechanism, entitled *Non bis in Idem*, provides that no person shall be tried before a national court for acts for which they have already been tried before the Tribunals, and is

48 Art. 29 Statute of the ICTY and Art. 28 Statute of the ICTR impose an obligation on States to cooperate with the Tribunals "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law" only. Art. 28(1) Statute of the IRMCT imposes an obligation on States to cooperate with the Residual Mechanism "in the investigation and prosecution of persons covered by Article 1 of this Statute" thus including contempt and false testimony proceedings.

49 Art. 1(5) Statute of the IRMCT.

50 See e.g. *Prosecutor v. Seselj,* Judgment, IT-03-67-R77.2-A, 19 May 2010; *Prosecutor v. Kabashi,* Judgment, IT-04-84-R77.1, 16 September 2011; *Prosecutor v. Tabakovic*, Sentencing Judgment, IT-98-32/1-R77.1, 18 March 2010; *Prosecutor v. GAA,* Judgment and Sentence, ICTR-07-90-R77-I, 4 December 2007.

51 Art. 5(1) Statute of the IRMCT.

52 Art. 5(2) Statute of the IRMCT.

analogous to Article 10 of the ICTY Statute and Article 9 of the ICTR Statute, with the variation that its prohibition also applies with respect to persons tried by the Residual Mechanism.

2. Structure and Organization

The structure and organization of the Residual Mechanism is likewise indicative of the apparent aim of the Security Council to ensure continuity between the work of the Tribunals and the Mechanism. The Statute of the Residual Mechanism creates one institution with two branches, one for the ICTY and one for the ICTR.[53] The ICTY branch will be seated in The Hague and the ICTR branch in Arusha.[54] In relation to the structure of the Chambers, each branch of the Residual Mechanism has a Trial Chamber, and the two branches share a common Appeals Chamber.[55] This organization of separate trial capacity and a shared Appeals Chamber mirrors the existing relationship between the ICTY and the ICTR, with each having separate Trial Chambers but sharing a common Appeals Chamber.[56] The structure of the Residual Mechanism does reduce the number of Trial Chambers: whereas the Tribunals have three Trial Chambers each, the Residual Mechanism will have one for each branch.[57] However, the organizational arrangements of the Chambers are fundamentally the same as those that currently exist under the Statutes of the Tribunals.

Furthermore, the Statute of the Residual Mechanism provides for a Prosecution and a Registry in addition to the Chambers, thus mirroring the

[53] Art. 3 Statute of the IRMCT.

[54] Art. 3 Statute of the IRMCT: "The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha". This mandatory provision in the Statute is qualified by a provision in the SC Res. 1966, 22 December 2010, para. 7, that "the determination of the seats of the branches of the Mechanism is subject to the conclusion of appropriate arrangements between the United Nations and the host countries of the branches of the Mechanism acceptable to the Security Council".

[55] Art. 4 Statute of the IRMCT. At the Tribunals the shared Appeals Chamber sits as the ICTR Appeals Chamber to hear ICTR Appeals and sits as the ICTY Appeals Chamber to hear ICTY Appeals. The Residual Mechanism is conceived as one mechanism which is made up of two distinct branches and thus it is anticipated that the common Appeals Chamber will conceive itself as the ICTR or ICTY Appeals Chamber depending upon which Tribunals jurisdiction it is exercising.

[56] Art. 11 ICTR Statute; Art. 12 ICTY Statute. The ICTY and ICTR share a common Appeals Chamber: Art. 13(4) ICTR Statute; Art. 14(4) ICTY Statute.

[57] Art. 4 Statute of the IRMCT; Art. 12(2) ICTY Statute; Art. 11(2) ICTR Statute.

three organs of the Tribunals.[58] However, it departs from the organization of the Tribunals by providing for a common Prosecutor and Registrar for both branches of the Mechanism.[59] Yet, even this distinction is not entirely foreign to the Tribunals – although the ICTY and ICTR have always had separate Registrars, the Prosecutor was originally common to both institutions. It was not until Security Council Resolution 1503 (2003), in the interests of the Completion Strategies of both institutions, that a separate Prosecutor was created for the ICTR.[60] The Residual Mechanism's single Prosecutor and Registrar provide the bridge between the two branches of the Residual Mechanism. The Statute also provides for a common President of the Mechanism, who will exercise his or her functions at each seat of the Mechanism as necessary, unlike the Tribunals, which each have a President.[61] However, mirroring the Statute of the ICTY, the President of the Residual Mechanism also acts as the Presiding Judge of its Appeals Chamber.[62] Ultimately, this combination of functions in the Residual Mechanism is aimed at ensuring the efficiency of the Residual Mechanism and represents its anticipated reduced workload as compared to the Tribunals.

3. Fair Trial Rights, Including Rights to Appeal and Review

All the fair trial rights accorded to accused persons under the Statutes of the Tribunals are provided for in the Statute of the Residual Mechanism. Article 18 of the Mechanism's Statute regarding the commencement and conduct of trial proceedings, mirrors Article 20 of the ICTY Statute and Article 19 of the ICTR Statute. These provisions set out the rights of an accused to a fair and expeditious trial, conducted in accordance with the Rules of Procedure and Evidence and with "full respect for the rights of the accused and due regard for the protection of victims and witnesses". The only difference between the provisions is that trials before the Residual Mechanism, for cases falling under Article 1(4) of its Statute, which addresses contempt and false testimony, are dealt with by a single Judge

58 Art. 4 Statute of the IRMCT; Art. 11 ICTY Statute; Art. 10 ICTR Statute.
59 Art. 4(b) and (c) Statute of the IRMCT.
60 SC Res. 1503, 28 August 2003.
61 Art. 11(2) Statute of the IRMCT: The President "shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions". Cf. Art. 14 ICTY Statute; Art. 13 ICTR Statute.
62 Art. 12(3) Statute of the IRMCT, Art. 14(2) Statute of the ICTY.

whereas such trials before the Tribunal are dealt with by a Trial Chamber consisting of three Judges.[63]

The fair trial rights guaranteed to accused persons under Article 21 of the ICTY's Statute and Article 20 of the ICTR's Statute are repeated verbatim in Article 19 of the Statute of the Residual Mechanism.[64]

With respect to the right of appeal, Article 23 of the Residual Mechanism's Statute mirrors Article 25 of the ICTY Statute and Article 24 of the ICTR Statute, by identifying the two grounds on which appeals shall be heard by the Appeals Chamber, specifically:

- an error or question of law invalidating the decision;
- or an error of fact which has occasioned a miscarriage of justice.

Article 23 of the Statute of the Residual Mechanism, like Article 25 and Article 24 of the ICTY and ICTR Statutes, also sets forth the power of the Appeals Chamber "to affirm, reverse or revise the decisions" of the Trial Chamber. The only difference is that Article 23 of the Mechanism's Statute also applies this power to decisions taken by a Single Judge before the Residual Mechanism.[65]

Article 24 of the Residual Mechanism Statute, which governs review proceedings, essentially mirrors Article 26 of the ICTY Statute and Article 25 of the ICTR Statute in providing that:

> "Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber or the Appeals Chamber of the ICTY, the ICTR or the Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Mechanism an application for review of the judgement".

However, Article 24 adds two further provisions that are not found in the Statute of the Tribunals, but are rather derived from the Tribunals'

[63] Art. 12(1) Statute of the IRMCT.

[64] These rights, which are derived from Art. 14 of the International Covenant on Civil and Political Rights, are considered to have the status of customary law. See *Prosecutor v. Aleksovski*, Judgment, IT-95-14/1-A, 24 March 2000, para. 104.

[65] Art. 23(2) Statute of the IRMCT.

Rules.[66] The first places a one year limit from the day of the final judgment on the right of the Prosecution to bring an application for review, and the second provides that:

> "The Chamber shall only review the judgement 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."[67]

The power of review has been much maligned at the Tribunals because the threshold that must be satisfied for a Chamber to review a judgment is considered so high that it renders the right of review a nullity.[68] The Security Council's decision to elevate the Tribunals' approach to this subject, as reflected in its Rules, to a statutory provision in the Statute of the Residual Mechanism, reflects its intention to ensure that the Residual Mechanism's review proceedings mirror those of the Tribunals.[69]

4. Co-Operation and Judicial Assistance

Article 28(3) of the Residual Mechanism Statute provides yet another example of the codification of ICTY and ICTR practice. Article 28(3) places a reciprocal obligation on the Residual Mechanism to cooperate with national authorities "in relation to the investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in the countries of the former Yugoslavia and Rwanda". While the Tribunals' Statutes contain no such provision, it has long been the practice of the ICTY and the ICTR Offices of the Prosecutor to respond to requests from national jurisdictions for assistance.[70] Indeed, prior to amendments to the ICTY's

66 Rules 119(A), 120 ICTY Rules of Procedure and Evidence; Rules 120(A), 121 ICTR Rules of Procedure and Evidence.

67 Art. 24 Statute of the IRMCT; cf. Rule 120 ICTY Rules of Procedure and Evidence; Rule 121 ICTR Rules of Procedure and Evidence.

68 See J. Galbraith, ''New Facts' in ICTY and ICTR Review Proceedings', 21 *Leiden Journal of International Law* (2008) 1, 131, 146-147. Only one application for review has succeeded in passing the admissibility hurdle in the history of the Tribunals, see *Prosecutor v. Sljivancanin,* Review Judgment, IT-95-13/1.R.1, 8 December 2010.

69 Report of the Secretary-General, *supra* note 1, para. 80; Rule 119 ICTY Rules of Procedure and Evidence; Rule 120 ICTR Rules of Procedure and Evidence.

70 See e.g. Report on the Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia 2011, UN Doc. S/2011/316, paras 76-78; President of the

Rules of Procedure and Evidence [ICTY Rules], when material sought in such assistance requests was subject to protective measures ordered by Chambers, the Prosecutor would petition the Chambers for access on behalf of the relevant national authority.[71]

However, as part of its Completion Strategy, and in light of the remittance of its cases and related files to national jurisdictions pursuant to Rule 11*bis* of the ICTY's Rules, the ICTY Judges initiated amendments to the ICTY Rules, which provided national jurisdictions with an avenue to: (i) directly petition the Tribunal for access to confidential and protected material pursuant to Rule 75(H);[72] (ii) request assistance in obtaining testimony from persons in the custody of the Tribunal pursuant to Rule 75*bis*;[73] and (iii) request the transfer of persons for the purpose of giving evidence in other jurisdictions pursuant to Rule 75*ter*.[74] These Rules have no basis in the ICTY Statute. Nevertheless, they were enacted pursuant to the mandate conferred by the Security Council upon the ICTY, through resolutions 1503 (2003) and 1534 (2004), to assist national jurisdictions in capacity building.[75] By creating a reciprocal obligation on the Residual Mechanism to provide judicial assistance in criminal matters to States, the Residual Mechanism essentially mirrors typical bilateral or multilateral arrangements on judicial assistance between States.[76]

Article 28(3) further provides that the Mechanism should "where appropriate, provide […] assistance in tracking fugitives whose cases have been referred to national jurisdictions by the ICTY, the ICTR or the Mechanism". This provision does not find a counterpart in the Statute or the Rules of the Tribunals. However, it does recognize that the Tribunals have developed a body of expertise in tracking fugitives that should be made available to national authorities, who have accepted cases referred under Article 6 of the Statute of the Residual Mechanism. It also reflects the

ICTR, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda 2011, UN Doc. S/2011/317, 18 May 2011, paras 52-53, 67-69.

71 See e.g.: *Prosecutor v. Krstic,* Ex Parte Decision on Prosecution Application for Variation of Protective Measures, IT-98-33-A, 25 May 2006.

72 Rule 75(H) ICTY Rules of Procedure and Evidence.

73 Rule 75*bis* ICTY Rules of Procedure and Evidence.

74 Rule 75*ter* ICTY Rules of Procedure and Evidence.

75 SC Res. 1503, 28 August 2003, preamble, para. 1; SC Res. 1534, 26 March 2004, para. 9.

76 D. Stroh, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda', 5 *Max Planck Yearbook of United Nations Law* (2001), 249, 270.

Security Council's determination to ensure that there is no impunity for persons indicted by the Tribunals, which is of critical importance to the legacy of the Tribunals.[77]

5. Transference of Various Tribunal Functions to the Residual Mechanism

Other provisions of the Residual Mechanism Statute, containing only slight variations from analogous provisions in the ICTY and ICTR Statutes, clearly illustrate that the Residual Mechanism is envisioned, in large part, as inheriting the role of the Tribunals. Article 17 of the Mechanism's Statute, which addresses review of the indictment, is essentially a reproduction of Article 19 of the ICTY Statute and Article 18 of the ICTR Statute. Similarly, Article 20 of the Mechanism's Statute, entitled *Protection of Victims and Witnesses*, mirrors Article 22 of the ICTY Statute and Article 21 of the ICTR Statute, the sole difference being that the Mechanism is instructed to provide, in its Rules of Procedure and Evidence, for the protection of ICTY and ICTR victims and witnesses as well as those of the Residual Mechanism.[78]

Likewise, Article 25 of the Mechanism's Statute, concerning the enforcement of sentences, replicates Articles 27 and 26 of the ICTY and ICTR Statutes, respectively. Article 25 of the Mechanism's Statute is distinctive only in two respects: first, it grants the Mechanism the power to supervise the enforcement of sentences pronounced by the Residual Mechanism in addition to those of the ICTY and ICTR, and secondly, it grants the Residual Mechanism the authority to supervise "the implementation of sentence enforcement agreements […] and other agreements with international and regional organisations and other appropriate organisations and bodies"[79]. The regime of enforcement, however, remains the same as under the Statutes of the ICTY and the ICTR. Thus, prison sentences will be served in a State designated by the Residual

77 See, e.g. President of the ICTR, Report on the completion strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2011/317, 18 May 2011, paras 49, 54, 57; President of the ICTR, Report on the completion strategy of the International Criminal Tribunal for Rwanda, S/2010/574, 1 November 2010, paras 49-53.

78 Art. 20 Statute of the IRMCT.

79 These additions codify the practice at the Tribunal. The Registrar negotiates enforcement of sentences with Member States and also agreements with monitoring bodies such as the International Committee of the Red Cross.

Mechanism from a list of States that have entered into sentence enforcement agreements with the Mechanism, and will be served in accordance with the national laws of the enforcing State "subject to the supervision of the Mechanism"[80].

Also noteworthy is Article 26 of the Mechanism's Statute, governing pardon or commutation of sentence, which substantially reproduces the provisions of Articles 28 and 27 of the Statutes of the ICTY and ICTR, respectively. In this instance, a minor two-fold distinction arises from the fact that: first under Article 26, States notify the Residual Mechanism rather than the ICTY or ICTR when a convicted person becomes eligible for pardon or commutation of sentence; and second, whereas under the Tribunal system, the President determines the matter in consultation with the Judges, under the framework of the Residual Mechanism, the President determines the matter alone.

6. Staffing Issues

The Statute of the Residual Mechanism also contains some departures from the Tribunals' policy framework on staffing issues. These few points of divergence reflect a comparatively more minimalistic approach to staffing, aimed simply at increasing the Residual Mechanism's overall efficiency.

Thus, of the Judges, only the President will be present full-time at the Residual Mechanism, and there will be a roster of Judges, who will only be called to the seat of the Mechanism by the President when there is work to be done. By contrast, at the Tribunals, these Judges are present full-time.[81] Similarly, the Offices of the Prosecutor and the Registrar will be manned only by a small number of staff full-time, while both Offices will maintain rosters of qualified staff who are on call should the workload of the Residual Mechanism require.[82]

Furthermore, proceedings for contempt and false testimony traditionally conducted by a Trial Chamber of three Judges at the ICTY and ICTR may be conducted by a Single Judge before the Residual

[80] See Art. 27 Statute of the ICTY; Art. 26 Statute of the ICTR.

[81] Arts 8, 12 Statute of the IRMCT. Arts 12, 13*bis* ICTY Statute; Arts 11, 12*bis* ICTR Statute.

[82] Arts 14(5), 15(4) Statute of the IRMCT; Art. 16(3) ICTY Statute; Art. 15(3) ICTR Statute.

Mechanism,[83] and an appeal from a Single Judge will be heard by a bench of three Appeal Judges in lieu of five, as is the case at the Tribunals.[84] This does not represent a reduction of functions as such, but rather, a reduction in the number of Judges required to discharge them, and simply represents the determination of the Security Council to ensure the efficiency of the Residual Mechanism.

II. Rules of Procedure and Evidence

The Security Council's apparent underlying aim to secure the legacy of the Tribunals, by ensuring that the Residual Mechanism would employ the same *modus operandi* as the Tribunals, is further demonstrated by the Security Council's request in Resolution 1966 for the Secretary General to submit draft Rules of Procedure and Evidence for the Mechanism "based on the Tribunals' Rules of Procedure and Evidence subject to the provisions of this resolution and the Statute of the Mechanism"[85]. Further, Article 13(1) and (3) of the Statute of the Residual Mechanism also provides that the Mechanism's Judges shall adopt Rules of Procedure and Evidence, and that "[t]he Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise"[86]. Furthermore, Article 13(4) of the

83 Art. 12(1) Statute of the IRMCT; Art. 12(2) Statute of the ICTY; Art. 11(2) Statute of the ICTY.

84 Art. 12(3) Statute of the IRMCT. The ICTY and ICTR Appeals Chambers are composed of five members: Art. 12(3) ICTY Statute; Art. 11(3) ICTR Statute.

85 SC Res. 1966, 22 December 2010, para. 5.

86 Art. 13 Statute of the IRMCT. This provision is quite curious. On the one hand, it might be a way of the Security Council ensuring the Residual Mechanism adopts procedures akin to that of the Tribunals, and thus preventing a judicial revolution of the Rules of Procedure and Evidence; on the other hand, it may represent a mistrust by the Security Council of the Judges of the Residual Mechanism, and the Council wanting to maintain the right to veto amendments that Judges may make to the Rules that may impact the conduct of their proceedings, particularly any such amendments that may be perceived to lengthen proceedings. Neither of these potential motivating factors can be considered acceptable: it could not on any level be considered proper for the Security Council to interfere in any judicial proceeding before the Residual Mechanism, just as it would have been totally improper for the Council to attempt to interfere in any proceeding before the Tribunals. Hence this provision looms as something of a threat that one expects will never be utilized. That said, the fact that the Security Council considered it appropriate for reasons of political expediency to close the Tribunals suggests that in fact, direct interference in the Residual Mechanisms rules of procedure and evidence may be a possibility.

Statute of the Mechanism states that the Rules must be consistent with the Statute, a provision that is not found in the Statutes of the Tribunals. These provisions together strongly suggests the intent of the Security Council to ensure that the Mechanism's procedures will mirror those of the Tribunals, thereby promoting continuity between the work of the Tribunals and the Residual Mechanism. Thus, through the vehicle of the Residual Mechanism, the work of the Tribunals could be completed and the legacies of the Tribunals preserved.

III. Conclusion

The preceding examination of the Residual Mechanism's Statute demonstrates that there is little substantive difference between the Tribunals' functions and those of the Residual Mechanism. Indeed, the modeling of the Mechanism around a blueprint virtually identical to that of its predecessor Tribunals reflects a clear intention, on the Security Council's part, to secure a nexus of continuity between the two institutional paradigms by imprinting numerous key Tribunal characteristics onto the Mechanism's construct. The mirroring of the Tribunals' Statutes in the Statute of the Residual Mechanism, the elevation of certain Tribunal Rules and practices to the strata of statutory provisions[87] in the Mechanism's constituent framework, and the Security Council's expressed direction that the Mechanism's Rules of Procedure and Evidence be structured upon those of both Tribunals, are all indicative of the Security Council's intention to secure continuity by deliberate design.

C. The Residual Mechanism and ICTY Precedents

Through the Residual Mechanism's Statute, the Security Council has created the conditions whereby persons subject to the Mechanism's jurisdiction could anticipate their proceedings being treated as though they were before the Tribunals. This factor of treating like cases alike is important to the preservation of the Tribunals' legacies. However, despite the Security Council's apparent objective of continuity, no guidance has been furnished with respect to the weight, if any, assignable by the Residual Mechanism to the procedural and substantive jurisprudence of the Tribunals. Continuity between the procedural and substantive jurisprudence

[87] Which has elevated Judges of the Tribunals to legislators of provisions of the Statute of the Residual Mechanism.

of the Tribunals and that of the Residual Mechanism is of course critical to the preservation of the Tribunals' substantive and procedural legacy. Of vital importance in this regard is the potential for departures made by the Residual Mechanism from the Tribunals' jurisprudence to negatively impact the rights of accused persons who either have already been tried before the Tribunals, or whose proceedings will be conducted by the Residual Mechanism.

I. The Status of Precedent under International Law

In his report, the Secretary-General stated that provision would have to be made to ensure that the previous decisions of the Tribunals could not be called into question.[88] In considering how to address this issue, the Security Council may have considered that it faced a conundrum. How could it bind the Residual Mechanism to the previous decisions of the Tribunals when judicial decisions, even within the same court, are not considered binding under international law?

Judicial decisions are incapable of binding effect as precedents on any court, including the court of issuance, because they do not constitute a source of law in international law.[89] The sources of law in international law are those identified in Article 38(1) of the Statute of the International Court of Justice [ICJ Statute], which is considered to be customary law.[90]

88 See the Report of the Secretary-General, *supra* note 1, para. 99. Upon the closure of the Tribunals, it will be crucial to remove any risk of challenge to the continuing validity of the Tribunals official documents, including the indictments, judgments, decisions and orders. Likewise, if the Security Council decides to establish the residual mechanism(s) to carry out functions inherited from the Tribunals, there will be a need to remove any risk of challenges to the jurisdiction of the mechanism(s). For example, it will have to be absolutely clear that the mechanism(s) has (have) the jurisdiction to order the arrest of and try fugitives initially indicted by the Prosecutors of the Tribunals, to amend indictments in connection with cases initiated by the Tribunals and to implement or amend decisions that had been taken by the Tribunals (such as decisions varying protective measures).

89 While this is the clear position in international law, as will be seen, the ICTY and the ICTR Tribunals have created internal doctrines of precedent.

90 M. Shaw, *International Law,* 5th ed. (2003), 66-67.

Article 38(1) provides that:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

The sources of law identified by Article 38(1) include treaties, custom, and general principles of law. The conventional wisdom is that in rendering judicial decisions, judges state what the law is as made by States and identified in Article 38(1). They do not make the law.[91] While it is true that international criminal courts in particular have substantially clarified and defined international customary law and relevant treaty provisions, the theory is that they have not thereby made the law. Rather, the law has some basis in the conduct of States either through treaty provision or customary international law which is derived from *opinio juris* and state practice.[92] As Judges are not legislators, judicial decisions, even of the same court, do not constitute a source of law.[93] Instead, they are, as stated in Article 38(1)(d) of

[91] See A. Cassese, *International Criminal Law*, 2nd ed. (2008), 13-27; A. Cassese, *International Criminal Law: Cases and Commentary* (2011), 5-27.

[92] This is a conservative view and many now accept that Judges of international courts are in fact lawmakers, see T. Buergenthal, 'Lawmaking by the ICJ and Other International Courts', 103 *American Society of International Law* (2009) 103, 403-406.

[93] See K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdictions – Problems and Possible Solutions', 5 *Max Planck Yearbook of United Nations Law* (2001), 67, 72; G. Guillaume, 'The Use of Precedent by International Judges and Arbitrators', 2 *Journal of International Dispute Settlement*

the ICJ Statute, a “subsidiary means for the determination of international rules of law”. In other words, they are evidence of the law and not the law as such.[94]

In light of the above, the Security Council may have considered that conferring the status of binding authority upon the Tribunals’ judicial decisions, *vis-à-vis* the Residual Mechanism, would have been contrary to the provisions of Article 38(1) of the ICJ Statute, which has status as customary international law, and would have given the impression that it had elevated the Judges of the Tribunals to legislators.[95]

(2011) 1, 5, 8-9; R. Cryer, ‘Of Custom, Treaties, Scholars and the Gavel: The Influence of International Criminal Tribunals on the ICRC Customary Law Study’, 11 *Journal of Conflict and Security Law* (2006) 2, 239, 245-247.

94 See *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 540: “Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremburg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinion iuris sive necessitates* and international practice on a certain matter, or else they made be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts”.

95 Further, it would have faced the practical difficulty that the ICTR and ICTY Tribunals do not treat each others decisions as binding authority but as persuasive only, although the common Appeals Chamber does ensure a level of consistency between the two courts that for all practical purposes Appeals Chambers decisions are binding upon them. See *Prosecutor v Kanyabashi*, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997, para. 8: “The [ICTR] Trial Chamber respects the persuasive authority of the decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia.” However, see also *Prosecutor v Nahimana et al.,* Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal, Rule 98*bis* of the Rules of Procedure and Evidence, ICTR-99-52-T, 25 September 2002, para. 16, where the ICTR Trial Chamber held that it was bound

Another factor that militates against binding the Residual Mechanism to the Tribunals' previous decisions is the basic understanding that there is no hierarchy between international judicial bodies in international law.[96] International courts and tribunals are regarded as relational equals, and as such they are under no obligation to take account of either their own previous decisions or those of other judicial bodies, even if they relate to the same subject matter. Thus, it would have been contrary to the current understanding of the relationship between international courts and tribunals to bind the Residual Mechanism to the previous decisions of the Tribunals. It would also have created the situation of the Residual Mechanism being bound to the decisions of a body that would no longer be in existence. Furthermore, it may have appeared to be interference in judicial discretion for the Security Council to include a direction to the Judges of the Residual Mechanism concerning the consideration to be given to previous decisions of the Tribunals.[97]

II. The ICTY's Position on Precedent

While the lack of precedent in international law, and the horizontal relationship between international courts, are basic principles in international law that may have given the Security Council reasonable cause for reflective pause, they should by no means have been considered as inexorably obstructive. This is because these are principles that have primarily evolved from the jurisdiction of courts dealing with inter-State disputes, where the operability of the courts' jurisdiction is contingent upon States' consent. This in turn is a very different environment from that out of which the Tribunals and the Residual Mechanism have sprung. The Tribunals and the Residual Mechanism are Chapter VII enforcement

by an interpretation of the ICTY Appeals Chamber "in its interpretation and application of the corresponding ICTR rule".

96 *Prosecutor v. Kupreskic et al.*, Judgment, IT-95-16-T, 14 January 2000, para. 540: "the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community".

97 Art. 13 Statute of the IRMCT, which provides that "the Rules of Procedure and Evidence and any amendments thereto shall take effect upon the adoption by the Judges of the Mechanism unless the Security Council decides otherwise" suggests that the Security Council is not shy about interfering with the work of the Residual Mechanism.

measures prosecuting individuals for breaches of international humanitarian law. As Chapter VII measures, their proceedings bind all States and have normative force.[98] As criminal courts, other values come into play, including fairness, certainty, and predictability. Indeed, the profound importance of these values prompted the ICTY Appeals Chamber to decide, contrary to the tide of the basic international law principles noted above, to institute an internal doctrine of precedent at the Tribunal.[99]

Thus, in the *Aleksovski* Judgment, the ICTY Appeals Chamber held:

> "that a proper construction of the Statute, taking account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice.
> Instances of situations where cogent reasons in the interest of justice require a departure from a previous decision include cases where the previous decision has been decided on a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[100]

The Appeals Chamber further considered that a proper construction of the ICTY Statute required that the *ratio decidendi* of Appeals Chamber decisions would be binding on Trial Chambers. This, the Appeals Chamber reasoned, would comply "with the intention of the Security Council" that the Tribunal apply "a single, unified and rational corpus of law"[101]. It further reasoned that: (i) the Statute of the Tribunal created a hierarchy between the Appeals Chamber and the Trial Chambers; (ii) the mandate of

98 See E. Cannizzaro, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ', *European Journal of Legal Studies* (2007) 1, 1.

99 See G. Boas *et al*. (eds.), *International Criminal Law Practitioner: International Criminal Procedure*, Volume III (2011), para. 460 where the argument is made that the binding nature of previous appeals decisions on trial chambers may cause problems for international criminal justice.

100 *Prosecutor v. Aleksovski,*. Judgment, IT-95-14/1, 24 March 2000, paras 107-108 [Aleksovski Judgment].

101 *Id*., para. 113.

the Tribunal could not be achieved "if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the law" and (iii) the right of appeal, which is a rule of customary international law, "gives rise to the right of the accused to have like cases treated alike"[102].

The Appeals Chamber thus concluded that:

> "The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunals, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced"[103].

Finally, the Appeals Chamber determined that Trial Chambers, "which are bodies with coordinate jurisdiction" should not be bound by the decisions of each other, although they would be free to regard each other's decisions as persuasive.[104]

The *Aleksovski* decision of the ICTY Appeals Chamber has resulted in a situation at the Tribunals, especially after 15 years of judicial practice, where the applicable law and procedures are entrenched and well known.[105]

[102] *Id.,* para. 113; See also the decision of the ICTR Appeals Chamber in *Prosecutor v. Semanza*, Decision, ICTR-97-20-A, 31 May 2000 [*Semanza* Decision]. "The Appeals Chamber adopts the findings of the ICTY Appeals Chamber in the *Aleksovski* case and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice. Applying this principle, the Appeals Chamber has altered the interpretation it gave Rule 40*bis* in its *Barayagwiza* Decision for the reasons hereinafter given".

[103] Aleksovski Judgment, para. 113.

[104] *Id*., para. 114. Failure of the part of a Trial Chamber to follow the *ratio decidendi* of Appeals Chamber decisions constitutes an error law invalidating the Trial Chamber decision: See e.g., *Prosecutor v. Blagojevic et al.*, Decision on Provisional Release of Vidoje Blagojevic and Dragan Obrenovic, IT-02-60-AR65 & IT-02-60-AR65.2, 3 October 2002. The Trial Chamber is bound by the legal findings and not the factual findings of the Appeals Chamber, for example, see *Prosecutor v. Bradnin & Talic,* Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, para. 6.

[105] In the *Semanza* Decision, Judge Shahabuddeen appended a separate opinion in which he questioned the legal status of the *Aleksovski* Judgment, as the Statute of the

The ICTY's jurisprudence is so entrenched that it constitutes a substantial basis for ICTY decisions and Judgments. The actual sources of law on which those decisions depend is not necessarily identified, but reliance is placed on the fact that the earliest previous decisions sufficiently identified the relevant source of law in a treaty, custom, or general principles of law, the implication being that such previous decisions correctly identified the applicable law. Further, the instances of the Appeals Chambers departing from previous decisions for "cogent reasons in the interest of justice" are extremely rare.[106]

Thus, proceedings at the Tribunals are infused with predictability and certainty. Predictability and certainty of the law are key components of the rule of law and the right of an accused to a fair trial – the principle that the law should be knowable and foreseeable to its subjects, and that an accused can expect his or her case to be treated the same as similar cases that have come before. Indeed, a guiding rationale behind the Appeals Chamber decision in *Aleksovski* was its consideration that

> "[a]n aspect of the fair trial requirement is the right of an accused to have like cases treated alike so that in general, the same cases will be treated in the same way and decided […] 'possibly by the same reasoning'"[107].

If proceedings before the Residual Mechanism are meant to mirror those before the Tribunals, these proceedings should maintain the same level of predictability and certainty expected before the Tribunals.

In this respect, the Security Council could have followed the approach of the ICTY Appeals Chamber in *Aleksovski* and instituted a doctrine of precedent for the Residual Mechanism with respect to applicable previous decisions of the Tribunals, whereby departures should only occur for "cogent reasons in the interests of justice". Under Chapter VII of the UN Charter, the Security Council clearly had the power to have done so. Indeed,

Tribunals did not expressly mention a duty on the Appeals Chamber to follow its previous decisions.

106 There may only be two instances at the ICTY where this has occurred. *Prosecutor v. Zigic,* Decision on Zoran Zigic's "Motion for Reconsideration of Appeals Chamber Judgement, Case No. IT-98-30/1-A, Delivered on 28 February 2006", IT-98-30/1-A, 26 June 2006; *Prosecutor v. Kordic and Cerkez,* Judgment, IT-95-14/2-A, 17 December 2004, paras 1040-1043.

107 Aleksovski Judgment, para. 105.

to avoid challenges to the fairness of proceedings before the Residual Mechanism, it would have been advisable for the Security Council to have at least made it abundantly clear that the fair trial rights of persons appearing before the Residual Mechanism will mirror, not only in form but in substance, the equivalent rights before the Tribunals.

In some respects, it is even more surprising that the Security Council took no action to secure the procedural and substantive jurisprudence of the Tribunals given that the *Aleksovski* approach, while unusual in international law to the extent that the Tribunal proclaimed to follow a doctrine of precedent, is in practice consistent with the approach of other international courts and Tribunals. For example, the International Court of Justice [ICJ], while not recognizing that there is any binding value to its own precedent, does take its previous decisions into consideration.[108] Thus, in the *Bosnian Genocide* case, the ICJ stated that: "to the extent that the decisions contain findings of law, the Court will treat them as all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from settled jurisprudence unless it finds very particular reasons to do so"[109].

Other international and hybrid courts, such as the International Criminal Court,[110] the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia [ECCC], have adopted the same approach to such an extent that, for all practical purposes, a doctrine of precedent is being applied.[111] As is the practice at the Tribunals, previous

[108] G. Guillaume, 'The Use of Precedent by International Judges and Arbitrators', *Journal of International Dispute Settlement* (2001) 2, 1, 12. See also M. Shahabuddeen, *Precedent in the World Court* (1996).

[109] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, ICJ Reports 2008, 412, para. 53.

[110] Article 21(2) of the Rome Statute establishing the ICC provides that "the Court may apply principles and tiles of law as interpreted in previous decisions".

[111] Further, other international courts and tribunals do rely on the previous decisions of the Tribunals as correctly stating the law and the judgments of other Tribunals are replete with references to the ICTY's decision. Indeed, the Statute of the Special Court for Sierra Leone specifically provides in Article 20(3) that the judges shall be guided by the decisions of the ICTY and the ICTR Appeals Chamber. However, in this context the decisions of the Tribunals are treated as persuasive authority only, in the same way that the Tribunals treat the decisions of other jurisdictions. The same applies to the relationship between the ICTY and the ICTR Tribunals. The decisions of each are treated as persuasive authority to each other. The SCSL Trial Chamber has stated that the Special Court frequently cites decisions of the ICTY and ICTR for

decisions are also not easily departed from.[112] Thus, a Security Council provision binding the Residual Mechanism to applicable previous decisions of the Tribunals would hardly have been radical, particularly in the realm of international criminal law.[113]

Alternatively, it could be argued that the Security Council did not need to make a provision within the Mechanism's Statute binding the Residual Mechanism to the previous jurisprudence of the Tribunals because a proper interpretation of Resolution 1966 required the Mechanism to consider itself so bound. If the Residual Mechanism takes the same approach to the interpretation of its Statute as the ICTY Appeals Chamber in *Aleksovski*,[114] and interprets its Statute in accordance with the rules for interpreting treaties set out in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties, which is declaratory of customary international law, it should in any event come to the conclusion that it should be bound by the Tribunals' previous decisions.[115]

It may be found that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that the Mechanism is to facilitate the completion of the work of the Tribunals and to exercise

"guidance [on] the interpretation of general principles of law in the context of international criminal adjudication" (para. 21) and "[the] Court applies persuasively decisions taken at the ICTY and ICTR" (para. 24) see *Prosecutor v. Brimba et al.,* Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, SCSL-04-16-PT, 1 April 2004, paras 21-24. The ECCC OCIJ stated that it was "compelled to follow" the jurisprudence of the ICTY and ICC on the doctrine of abuse of process – 001/18-07-2007, Order of Provisional Detention, 31 July 2007, para. 21.

112 For example, the ICC Trial Chamber I stated that there is a "strong presumption [...] that a Chamber is bound by its own decisions" unless they are "manifestly unsound and their consequences manifestly unsatisfactory" – *Situation in the Democratic Republic of the Congo in case of the Prosecutor v. Thomas Lubanga Dyilo,* Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06, 30 March 2011, para. 18, see also *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo,* ICC-01/05-01/08, 30 June 2010, para. 54; *Situation in the Republic of Kenya,* Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09, 3 November 2010, para. 9.

113 See *supra* note 86 re interference through the Rules of Procedure and Evidence. Such a move, however, may have invited the criticism that it was an intrusion into the judicial function of the Judges of the Residual Mechanism.

114 *Aleksovski* Judgment, para. 98.

115 *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S, 1155, 331.

residual functions of the Tribunals into the future.[116] Thus, although it would be unusual for a separate international court to declare itself bound by the previous decisions of another, the Residual Mechanism is a special type of international court.

It is the legal successor to the Tribunals and meant to be residual in nature, finishing up the work of the Tribunals and carrying on some residual functions. It is designed to be a scaled-down version of the Tribunals. Its Statute and Rules of Procedure and Evidence are based on the Tribunals' and therefore it is clear that the intention of the Security Council has been to ensure that the rights of accused and convicted persons are fully respected by the Residual Mechanism in parity with the Tribunals. Thus, in essence, similarly situation persons should be treated similarly.

While the intent and purpose of the Statute can be relied upon to make this argument, the Residual Mechanism may well reject the notion that it is bound by the previous decisions of the Tribunals. In that regard, it would be more likely for the Judges of the Residual Mechanism to find the previous decisions of the Tribunals persuasive, not binding. This approach would be entirely consistent with international law and with Article 38 of the ICJ Statute, which identifies judicial decisions "as subsidiary means for the determination of rules of law". It would also avoid the legal problem identified by Judge Shahabuddeen as to whether a decision of the Appeals Chamber can of its own authority, absent a provision in the Statute, have the effect of binding the Appeals Chamber to its previous decisions. As he reasoned:

> "[a] decision of the Appeals Chamber interpreting the Statute to mean that it is obliged in law to follow its previous decisions subject to a limited power of departure does not, because it cannot, deprive that Chamber of competence to reverse the interpretation given in that decision itself. If the Appeals Chamber can do that in a latter decision, it is difficult to see what the earlier decision achieves. There is no basis for saying that, unless the departure falls within the exceptions visualised by the earlier decision, the interpretation given in that earlier decision cannot be reversed. The limitations imposed by the

[116] See *Aleksovski* Judgment, para. 107.

earlier decision cannot prevent the Appeals Chamber from later setting aside the very holding which fixed the limitation"[117].

Thus, in reality, considering the technical difficulty that the Mechanism faces in declaring itself bound by Tribunal decisions in the absence of a requirement in its Statute authorizing it to do so, the determination that such decisions at least possess persuasive authority, may constitute a compromise between the extremes of binding precedent and a wholesale disregard of the Tribunals' case law. This compromise may provide a somewhat adequate basis for the expectation that cases before the Residual Mechanism will be treated in the same manner as those before the Tribunals. However, precedent, by dint of the inherent and substantial degree of consistency which its authoritativeness engenders, would undoubtedly provide a far more secure hook upon which to hang such an expectation. Thus, despite the legal difficulty that confronts the Mechanism in holding that prior decisions of the Tribunals constitute binding authorities upon it, the more formidable specter of greater uncertainty looms from a failure to do so.[118]

Internal consistency and concomitant certainty are the results of the *Aleksovski* approach, as departure from previous decisions arises only where cogent reasons in the interest of justice outweigh the values of predictability and certainty, which is extremely rare.[119] If the Residual Mechanism treats Tribunal decisions as merely persuasive, persons whose proceedings are to be brought before the Mechanism will be unsure as to whether their case would be treated in the same manner as similar cases before the Tribunals. Furthermore, it may result in the Residual Mechanism extensively reviewing Tribunal decisions in order to determine whether or not those decisions are of persuasive authority for the Residual Mechanism. As the ICTY Trial Chamber stated in the *Kupreskic* case, "international criminal courts […] must always carefully appraise decisions of other courts before

[117] *Semanza* Decision, Separate Opinion of Judge Shahabuddeen, para. 12.

[118] *Id.,* para. 17: Judge Shahabuddeen concluded that the better view was that not to claim that "the Statute itself lays down a requirement from the Appeals Chamber to follow its previous decisions subject to a limited power of departure, but as asserting that the Statute empowers the Appeals Chamber to adopt a practice to that end and that such a practice has now been adopted".

[119] See *Prosecutor v. Milosevic*, Decision on Admissibility of Prosecution Investigator's Evidence, IT-02-54-AR73.2, Partial Dissenting Opinion of Judge Shahabuddeen, 30 September 2002, para. 38; See *supra* note 106.

relying on their persuasive authority as to existing law"[120]. As examined further in the section below, these scenarios could negatively impact the legacies of the Tribunals.

III. Practical Examples of the Potential Ramifications of the Mechanism's Failure to Adopt an Internal Doctrine of Precedent

Holding that judicial decisions of other international courts can have persuasive but not binding value does leave ample opportunity to find previous decisions of no persuasive value at all.[121] A well-known example is the disagreement over the standard of control test for the attribution of acts to armed groups. In the *Tadic* Appeal Judgment, the Appeals Chamber of the ICTY held that the "effective control" test set forth by the ICJ in *Nicaragua* was not persuasive.[122] In *Nicaragua*, the ICJ was faced with the

[120] See *Prosecutor v. Zoran Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000 [*Kupreskic* case], para. 542; See also *Prosecutor v. Brima et al.*, SCSL-04-16-Pt, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, para. 25: "Accordingly, as stated in some of its major decisions do far, the Special Court will apply the decisions of the ICTY and ICTR for their persuasive value, with necessary modifications and adaptions, taking into account the particular circumstances of the Special Court. The Trial Chamber will, however, where it finds it necessary or particularly instructive, conduct its own independent analysis of the state of customary international law or a general principle of law on matters related to inter alia evidence or procedure. Additionally, in cases where the Trial Chamber finds that its analysis of a certain point or principle of law may differ from that of either the ICTY or ICTR, it shall base its decisions on its own reasoned analysis".

[121] See *Prosecutor v. Zejnil Delalic et al,* Judgment, IT-96-21-A, 20 February 2001, para. 24: "The Appeals Chamber agrees that 'so far as international law is concerned, the operation of the desiderata of consistency, stability and predictability does not stop at the frontiers of the Tribunal. […] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interest it serves is none of its concern.' However, this Tribunal is an autonomous judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion". See also, *Prosecutor v. Kvocka et al.,* Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of the Trial Chamber I Dated 5 December 2000, IT-98-30/1-AR73.5, 25 May 2001, paras 16-22.

[122] *Prosecutor v. Tadic,* Judgment, IT-94-1-A, 15 July 1999, paras 99-14 [Tadic]

question of whether the United States, through its training and supplying of weapons to Nicaraguan rebels, could be liable for the crimes committed by those rebels. The ICJ held that in order for the United States to be liable, it had to be shown that the United States exercised "effective control" over the rebels. In *Tadic,* the ICTY Appeals Chamber found that the *Nicaragua* "effective control test" was not consistent with the logic of the law of state responsibility and conflicted with judicial and state practice. The *Tadic* Appeals Chamber departed from the "effective control" test in favor of an "overall control" test which it claimed to be representative of international law.[123] In the *Bosnian Genocide Case,*[124] that followed, the ICJ considered the *Tadic* Appeals Chamber decision and expressly departed from its "overall control" test for the "effective control" test stating that:

> "The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgement the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. The Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgements dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction, and, moreover,

[123] *Id.; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* (Merits), Judgment, ICJ Reports 1986, 14. For criticism of the ICTY's purported review of the ICJ, see, for example, K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 *Max Planck Yearbook of United Nations Law* (2001), 9-80.

[124] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, 43, para. 396.

> the resolution of which is not always necessary for deciding the criminal cases before it”[125].

While disagreement between courts exercising different jurisdictions can be explained on that basis, departures by other courts exercising international criminal jurisdiction from rulings made by the Tribunals' demonstrates that international criminal law is still in the early stages of its development and is far from a settled body of law. Further, the offences over which the ICTY, for example, exercises jurisdiction are limited to those established as customary law.[126] The unwritten nature of customary law allows broad judicial discretion in determining whether there is sufficient evidence of state practice and *opinio juris* to establish the customary nature of an offence.

An example is the divergence of opinion among international tribunals concerning the mode of liability of joint criminal enterprise [JCE], and most notably the third category of joint criminal enterprise. At the Tribunals, JCE is heralded as having the status of customary international law[127] and has been identified as having three categories: the first category is an intention to further a common criminal purpose; the second category is the intent to further a criminal system, such as a concentration camp; and the third category is the intent to carry out a common criminal purpose during which another crime is carried out by one of the participants which was a “natural and foreseeable consequence” of the agreed upon common purpose [JCE III]. Criminal responsibility for all three modes of JCE can attach for any of the crimes identified under the Tribunals' Statute, including special intent crimes.[128]

The ECCC reviewed the *Tadic* decision, which established the three categories of JCE, and considered the authorities relied upon by the ICTY

[125] *Id*., para. 403.

[126] Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993); UN Doc S/25704, 3 May 1993, para. 34: “In the view of the Secretary-General, the application of the principle of nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law”.

[127] *Tadic*, *supra* note 122, paras 194-213, 220.

[128] *Id.,* paras 190-194; See also A. Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’, 5 *Journal of International Criminal Justice*, (2007) 1, 109-133; G. Guliyeva, ‘The Concept of Joint Criminal Enterprise and ICC Jurisdiction’ 5 *Eyes on the ICC* (2008- 2009) 1, 49, 60. See also note 134.

Appeals Chamber to support its conclusion as to the customary status of the three modes of responsibility of JCE. The ECCC concluded that while the ICTY Appeals Chamber correctly identified the first two categories as existing in customary international law, it was not satisfied that it established that the third category had that status "at the time relevant to Case 002", i.e. 1975-1979.[129] Thus, this left open the question as to whether it indeed had that status as of 1991, at which time the Tribunal's temporal jurisdiction began.[130] However, the reasoning of the ECCC suggests that *Tadic* may not be a reliable precedent at all with respect to the customary status of JCE III.[131]

Further, the Special Tribunal for Lebanon found that contrary to the conclusion of the Tribunals, an accused cannot be convicted for JCE III for a special intent crime such as terrorism.[132] The Court held that:

> "Under international law, when a crime requires special intent (*dolus specialis),* its constitutive elements can only be met, and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question, that is, he entertained the required special intent. A problem arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*"[133].

[129] *Prosecutor v. Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, para. 77.

[130] Art. 1 ICTY Statute; *Tadic*, *supra* note 122, paras 195-220, The Appeals Chamber in *Tadic* in determining that third category joint criminal law was customary in nature relied upon cases that dated back to the end of the Second World War.

[131] See *Prosecutor v. Nuon Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Invesitgative Judges Order on Joint Criminal Enterprise, para. 75.

[132] *Prosecutor v. Ayyash et al.,* STL-11-01/I/AC/R176*bis*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, paras 248-249.

[133] *Id.,* para. 248.

On this basis, it expressly departed from the contrary view of the ICTY Appeals Chamber.[134]

Finally, on its face it appears as if the Rome Statute of the International Criminal Court [ICC Statute] may have distanced itself from JCE liability[135] in favor of a form of liability of co-perpetration.[136] This was the interpretation given to Article 25(3)(a) of the ICC Statute by the Pre-Trial Chamber in the *Lubanga* case. Article 25(3)(a) provides for criminal responsibility where a person:

> "(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible"[137].

In addition, the ICC Statute identifies a form of common purpose liability under Article 25(3) (d) which provides:

> "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity involve the commission of a crime within the jurisdiction of the Court; or
> (ii) Be made in the knowledge of the intention of the group to commit the crime."

134 *Id.,* para. 249; see ICTY: *Prosecutor v. Brdanin,* Decision on Interlocutory Appeal, IT-99-36-A, 19 March 2004, paras 5-10; *Prosecutor v. Stakic,* Judgment, IT-97-24-A, 22 March 2006, para. 38; *Prosecutor v. Milosevic,* Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004, para. 291; *Prosecutor v. Popovic*, *et al.,* Judgment, IT-05-88-T, 10 June 2010, Vol. I, paras 1195, 1332, 1427, 1733-1735.

135 *Prosecutor v. Lubanga Dyilo*, Decision on the Confirmation of the Charges, ICC-01-04-01/06, Pre-Trial Chamber I, 29 January 2007, paras 334-337, the Pre-Trial Chamber rejected joint criminal enterprise.

136 *Id.,* paras 322, 328-333. *See also Prosecutor v. Katanga & Ngudjolo Chui*, Decision on the Confirmation of Charges,, ICC-01/04-01/07, Pre-Trial Chamber I, 30 September 2008; See also T. Weigend, 'Perpetration through an Organisation', 9 *Journal of International Criminal Justice* (2011) 1, 91, 105.

137 Indirect perpetration and co-perpetration were rejected at the ICTY in favor of joint criminal enterprise, see *Prosecutor v. Stakic*, Judgment, IT-97-24-A22 March 2006, para. 62; *Prosecutor v. Simic*, Dissenting Opinion of Judge Schomburg, IT-95-9-A, 28 November 2006, paras 18-21.

Whether or not Article 25(3)(d) will be interpreted as a form of JCE remains to be seen, but even if it is so interpreted it does not seem capable of accommodating JCE III where the standard is not one of intention but foreseeability. As the ICC Statute is the product of negotiations between States, it could be argued that the failure to include JCE III in the ICC Statute is indicative of the *opinio juris* of States concerning its status as customary law.[138]

As the first obligation of any international criminal court is to apply the provisions of its statute, differences between statutes governing different international courts can explain, to some extent, their differences of opinion on the state of the law. Further, reasonable minds can differ,[139] and without a doctrine of precedent in international law, or a hierarchy between criminal courts, it can be expected that there will be differences of opinion as to the precise contours of international criminal law, and in particular customary international law, as currently exist among international criminal courts with respect to JCE III. But would this be an equally legitimate explanation if the departures are by the Residual Mechanism from the entrenched jurisprudence of the Tribunals? While the Residual Mechanism has its own Statute and is a separate legal entity from the Tribunals, its purpose is to continue the work of the Tribunals. Thus its Statute should be interpreted consistently with the Tribunals interpretation of its similar statutory provisions, and arguably, decisions of the Tribunals should have normative force on the decisions of the Residual Mechanism.

[138] The possibility that third category joint criminal enterprise may be revisited by the Residual Mechanism is made all the more likely considering a preliminary motion filed by Radovan Karadzic, an accused whose appeal, if any, will be before the Residual Mechanism, requesting that all special intent crimes based on third category joint criminal enterprise be dismissed. The Trial Chamber rejected the motion as not properly raised as a jurisdictional challenge. If the Residual Mechanism were to accept the argument during an appeal on the merits (assuming a conviction on that basis) it would impact substantially on the settled jurisprudence of the Tribunal and raises issues of unfairness in relation to those accused before the Tribunal convicted on that basis; See *Prosecutor v. Radovan Karadzic*, Preliminary Motion to Dismiss JCE III – Special Intent Crimes, 27 IT-95-05/18-PT, 27 March 2009; *Prosecutor v. Radovan Karadzic*, Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-05/18-PT, 28 April 2009.

[139] *Prosecutor v. Blagojevic, et al.,* Decision on Blagojevic's Application Pursuant to Rule 15(B) IT-02-60, 19 March 2003, para. 14: "[t]he Trial Chamber's behaviour resulted from its disagreement with the Appeals Chamber on a point of law about which reasonable jurists could certainly differ".

IV. Conclusion

Should the Residual Mechanism adopt the approach that it is not bound by the previous jurisprudence of the Tribunals, either by its Statute or otherwise under international law, then the Tribunals' legacy stands to be undermined through the absence of certainty and foreseeability with respect to the applicable law and procedures which would have been present had the proceedings remained with the Tribunals. The completion of the Tribunals' work by the Residual Mechanism could take on a fundamentally different character, as an accused or appellant whose proceedings fall before the Residual Mechanism may face unfamiliar adjudicatory standards attributable to the fact that the Mechanism's judicial operations would be unsupported by a history of entrenched jurisprudence, and the concomitant certainty of law which proceedings before the Tribunals would have guaranteed.

Whether the Residual Mechanism will choose to find the Tribunals' previous decisions binding, persuasive or of no weight at all remains to be seen. The Residual Mechanism may well choose to express a commitment to continuity with the decisions of the Tribunals early on in its operations. However, it should be borne in mind that in creating the Residual Mechanism, the Security Council did not automatically secure the legacy of the Tribunals, due to its failure to make some provision for an internal doctrine of precedent. Instead, it created a situation where various scenarios may be played out, possibly the worst of which includes departures from Tribunal decisions, resulting in unfairness to those whose proceedings have been transferred to the Residual Mechanism. Simply put, such unfairness would be attributable to similarly placed persons being dissimilarly treated. Additionally, such departures may impact on the integrity of the Tribunals' proceedings if they are of such a nature as to call into question the cogency of the Tribunals' entrenched jurisprudence.[140]

[140] See generally, R. Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance', 94 *American Society International Law Proceedings* (2000), 160; K. Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions', 5 *Max Planck Yearbook of United Nations Law* (2001) 67; S. Freeland, 'The Internationalization of Justice - A Case for the Universal Application of International Criminal Law Norms', *New Zealand Yearbook of International Law* (2007) 4, 45; C. Stahn, 'Between Harmonization and Fragmentation: New Groundwork on Ad Hoc International Criminal Courts and Tribunals', 19 *Leiden Journal of International Law* (2006) 2, 567; F. Pocar, 'The Proliferation of International Criminal Courts and

D. The Inevitable Challenge to Security Council's Decision to Establish the Residual Mechanism

I. Jurisdictional Issues

Even if the Residual Mechanism adopts the jurisprudence of the Tribunals as its own, the Mechanism will not thereby avoid the inevitable challenges that will be made against its exercise of jurisdiction due to its status as a separate legal body. In his Report, the Secretary-General raised the possibility of challenges to the Residual Mechanism's exercise of the jurisdiction of the Tribunals.[141] In order to address this concern, the Security Council attempted to minimize the possibility of such challenges by providing for a continuation of the Tribunals' jurisdiction, rather than allocating a separate and distinct jurisdiction to the Residual Mechanism.

The Security Council's decision to have the jurisdictional provision of the Mechanism's Statute expressly refer back to the jurisdictional provisions in the Tribunals' Statutes clearly indicates that the Mechanism was intended to inherit the Tribunals' jurisdictional scope. However, this on its own is unlikely to avert challenges to the Mechanism's jurisdiction. In particular, the Residual Mechanism can anticipate answering a challenge to its jurisdiction on the grounds that its establishment by the Security Council is *ultra vires* the powers of the Security Council.

In the *Tadic* case, the Appeals Chamber of the ICTY addressed a challenge to the exercise of the jurisdiction conferred upon it by the Security Council, premised on the alleged illegality of the Tribunal's establishment by the Security Council.[142] In that case, the Appeals Chamber determined that the Security Council has a wide measure of discretion in determining whether a situation constitutes one of the trigger events under Article 39 of the United Nations Charter [UN Charter], namely, "a threat to the peace", "breach of the peace" or "act of aggression", as well as a wide measure of

Tribunals: A Necessity in the Current International Community', 2 *Journal of International Criminal Justice* (2004) 2, 304-308; G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan Journal of International Law* (2003-2004), 849.

141 Report of the Secretary-General, *supra* note 1, para. 99.

142 *Prosecutor v. Tadic,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadic* Jurisdiction Case), IT-94-1,; The ICTR dealt with a similar challenge in the case of *Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

discretion in determining whether to adopt measures and what measures to adopt pursuant to Articles 41 and 42 of the UN Charter. Despite this broad power, the Appeals Chamber determined that the Security Council's powers are not unlimited and must be exercised consistently with the purposes and principles of the UN Charter.[143]

The Appeals Chamber in *Tadic* did not find it necessary to examine in detail the limits of the Security Council's discretion in determining a threat to the peace pursuant to Article 39, because it was satisfied that such a threat existed due to the armed conflict in the former Yugoslavia.[144] It was further satisfied that the measure adopted by the Security Council, specifically, the establishment of the ICTY, was within the wide discretionary powers of the Security Council under Article 41 of the UN Charter as a measure contributing to the restoration of peace in the former Yugoslavia.[145] The Appeals Chamber further held that contrary to the arguments of the Appellant, the Tribunal had been established by law as required by Article 14(1) of the International Covenant on Civil and Political Rights [ICCPR], explaining that in an international setting, the guarantee that a tribunal must be founded in accordance with the rule of law means that, "it must be established in accordance with proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with international human rights instruments"[146]. Upon an examination of the ICTY Statute and Rules of Procedure and Evidence, the Appeals Chamber concluded that the Tribunal had been established in accordance with the rule of law, as it provided for all the fair trial guarantees of Article 14 of the ICCPR, as well as other fair trial guarantees, including the high moral character and impartiality of Judges.[147]

The conclusion of the ICTY Appeals Chamber in *Tadic*, that the establishment of the Tribunal was *intra vires* the powers of the Security Council was predictable. However, the reasoning of the Appeals Chamber was not. There has been and remains considerable controversy surrounding the reviewability of the legality of Security Council decisions taken pursuant to Chapter VII of the UN Charter.[148] There is also considerable

143 *Tadic* Jurisdiction Case, paras 28-29.
144 *Id.,* paras 29-30.
145 *Id.,* paras 35-39.
146 *Id.,* para. 45.
147 *Id.,* para. 46.
148 K. Hossain, 'Legality of the Security Council Action: Does the International Court of Justice Move to Take up the Challenge of Judical Review?', 3 *USAK Yearbook of*

disagreement as to whether the powers of the Security Council pursuant to Article 39 of the UN Charter are subject to any limitations at all, or whether a determination thereto is of a non-justiciable nature.[149] There is also considerable disagreement concerning whether the discretion of the Security Council in choosing the type of enforcement measure for maintaining international peace and security pursuant to Articles 40, 41 and 42 of the UN Charter is subject to any limitation.[150]

The ICTY Appeals Chamber in *Tadic* swept aside these issues and determined that the Security Council was not *legibuus solutus* (unbound by law).[151] Pursuant to Article 39, a proper exercise of the Security Council's powers under that Article necessitated a finding that one of the trigger events had been established under that Article, i.e. a "threat to the peace", "breach of the peace" or "act of aggression" and its exercise of power thereto had to be consistent with the purposes and principles of the UN Charter.[152]

However, the decision of the Appeals Chamber in *Tadic* has not abated the disagreement with respect to the reviewability of the Security Council's exercise of its powers under Chapter VII of the United Nations. Notably, the ICJ, the principal judicial organ of the United Nations, has despite opportunity, not asserted any right to review of Security Council decisions.[153] In circumstances where the answering of a legal questions

International Politics and Law (2010), 91-122; F. Patel King, 'Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter', 10 *Emory International Law Review* (1996) 2, 509, 522-542; A. Orakhelashvili, 'The Power of the UN Security Council to Determine the Existence of a 'Threat to the Peace'', 1 *Irish Yearbook of International Law* (2006), 61, 95-98; J. W. Davis, 'Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally – but it was the Right thing to do… So Who Cares?', 28 *North Carolina Journal of International Law and Commercial Regulation* (2002) 2, 395-419.

149 Hossain, *supra* note 148, 91-122; Davis, *supra* note 148, 395-419.

150 Patel King, *supra* note 148, 552 and 561-574; Orakhelashvili, *supra* note 148, 61-99; S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 1, 175, 182-186; A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16 *European Journal of International Law* (2005) 1, 59-88; Jeffrey W. Davis, *supra* note 148, 395.

151 *Tadic* Jurisdiction Decision, para. 28.

152 *Id.,* para. 29.

153 Art. 92 Charter of the United Nations; See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v.*

posed by the General Assembly has necessitated that the ICJ consider General Assembly resolutions, the ICJ has in the process disavowed that it has any power to review decisions of other organs of the United Nations.[154] Further, in a case in which the ICJ was directly requested to consider the validity of a Security Council resolution during the provisional measure stage of a proceeding the ICJ made apparent its unwillingness to do so and the matter was dropped by the applicant during the merits stage.[155] The reluctance of the ICJ is understandable – at the time of the United Nations' establishment the ICJ was not intended to have this role.[156] – but arguably

Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325; Separate Opinion of Judge Ajibola, 390-391.

[154] See *Certain Expenses of the United Nations (Art. 17, para. 2 of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1961, 151, 168. In that case the opinion of the ICJ was sought by the General Assembly as to whether the expenses incurred by the UN operation in the Congo and the Middle East fell within the meaning of Art. 17(2) of the Charter of the UN – "that expenses of the Organisation shall be borne by the Members as apportioned by the General Assembly". In answering the question the Court had to review the resolutions authorizing the expenditure. It held that the "operations were undertaken to fulfill the prime purpose of the United Nations, that is, to promote and maintain peaceful settlement" and as such the expenditures were expenses of the United Nations within the meaning of Art. 17(2) of the Charter. In reaching this decision, the Court expressly rejected that it might have a power of judicial review. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, 16, 45, where the Court declared that it did not have the power of judicial review or appeal in respect of decisions taken by the United Nations organs concerned. However, despite its categorical rejection of a power of judicial review, the Court concluded that the resolutions of the Security Council relevant to the case had been adopted in conformity with the purposes and principles of the Charter and in accordance with Arts 24 and 25 of the Charter and thus demonstrated that it considered it was competent to decide whether a decision of the Security Council is in conformity with the Charter when that question arises during the exercise of its judicial function. See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom),* Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 2.

[155] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, 3, 6 and Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, 328. Bosnia-Herzegovina wanted the ICJ to consider the legal status and effects of the mandatory arms embargo that was imposed by the Security Council Resolution 713 of 25 September 1991 against the former Socialist Republic of Yugoslavia.

[156] See Hossain, *supra* note 148, 107-110.

the increased activity of the Security Council following the end of the Cold War may warrant the ICJ assuming this role, particularly as there seems to be general agreement that the Security Council should not be allowed to act in a legal vacuum.[157]

In these circumstances, it will be up to the Residual Mechanism to determine how it might respond to the inevitable challenge that will be made by Counsel to its establishment by the Security Council. If it does take the approach of the ICTY Appeals Chamber in *Tadic,* it may be a little more difficult to conclude that the Security Council validly exercised its powers pursuant to Chapter VII in establishing the Residual Mechanism.[158] Unlike the Tribunals, the Residual Mechanism is not being established during a period of armed conflict as a measure to restore international peace and security in the former Yugoslavia. Nor has it been established as a necessary follow on measure to the Tribunals. Left to their own devices, the Tribunals would have organically scaled down until the functions they were left to exercise were residual. However, the Tribunals are expensive institutions and the international community is suffering from Tribunal fatigue. As such, the decision of the Security Council to establish the Residual Mechanisms was fundamentally a political one.[159]

157 *Id.*, 91; Talmon, *supra* note 150, 178-179; see also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom),* Provisional Measures, Order of 14 April 1992, ICJ Reports 1992 3, Separate Opinion of Judge Shahabuddeen, 32; Dissenting Opinion of Judge Weeramanry, 61.

158 In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom),* Judge Bedjaoui expressed discomfort with the fact that the *Lockerbie* bombing should be seen as an urgent threat to the peace three years after its occurrence, but was not sure whether the ICJ could concern itself with this question. Judge Weeramantry concluded that a determination under Art. 39 of the Charter is one entirely within the discretion of the Security Council: See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America*), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 114 Dissenting Opinion of Judge Bedjaoui, 153, Dissenting Opinion of Judge Weeramantry, 176.

159 See, for example, Statement of the Representative of the Russian Federation to the United Nations Security Council, 6 December 2010, UN Doc. S/PV.6434, 22: "we are even more concerned about the continued prolongation of the Tribunals' existence."; Statement of the Representative of the United Kingdom to the United Nations Security Council, 3 December 2009, UN Doc. S/PV.6228, 17: "We acknowledge the measures taken by the two Tribunals to expedite proceedings, but we remain concerned that the latest reports indicate further slippage in the timelines for final completion.";

That said, it can reasonably be predicted that any eventual challenge made to the Security Council's establishment of the Residual Mechanism, should the Residual Mechanism determine it has the competence to consider it, will be dismissed and the finding made that the Residual Mechanism is lawfully established. The legitimacy of that decision may not turn upon the issue of the power of the Security Council to establish the Residual Mechanism, but the fairness of its decision to do so. The *sine qua non* is whether proceedings before the Residual Mechanism result in persons being deprived of rights that would have been recognized by the Tribunals. If that circumstance occurs, no amount of judicial reasoning will be able to legitimize the decision of the Security Council to close the Tribunals and establish the Residual Mechanism. The legacies of the Tribunals will be irreparably damaged.

II. The Importance of Judicial and Procedural Parity between the Tribunals and the Residual Mechanism: A Question of Fairness

There is little doubt that it would have been better for the Security Council to have allowed the Tribunals to naturally wind down as they completed their work, and then continue to operate as much smaller entities dealing with residual functions into the future. While the Security Council endeavored to find a compromise in establishing the Residual Mechanism as a mirror institution to the Tribunals, this decision in and of itself may be

Statement of the Representative of the Russian Federation to the United Nations Security Council, *id.,* 16: "We therefore believe that it is time for the Security Council to adopt specific decisions on implementing measures set out in the completion strategies conveyed to the Tribunals six years ago in resolution 1503 (2003) and reaffirmed in resolution 1534 (2004). […] Trials – no matter how complex – must not drag on interminably". See also the debates in the United Nations Security Council regarding the completion strategies of the ICTY and ICTR: 6 June 2011, UN Doc. S/PV.6545; 6 December 2010, UN Doc. S/PV.6434; 18 June 2010, UN Doc. S/PV.6342; 2 December 2009, UN Doc. S/PV.6228; 4 June 2009, UN Doc. S/PV.6134; 12 December 2008, UN Doc. S/PV6041; 4 June 2008, UN Doc. S/PV.5904; 10 December 2007, UN Doc. S/PV.5796; 18 June 2007, UN Doc. S/PV.5697; 15 December 2006, UN Doc. S/PV.5594; 7 June 2006, UN Doc. S/PV.5453; 15 December 2005, UN Doc. S/PV.5328; 13 June 2005, UN Doc. S/PV.5199; 23 November 2004, UN Doc. S/PV.5086; 29 June 2004, UN Doc. S/PV.4999. See further R. Zacklin, 'The Failings of the Ad Hoc Tribunals', 2 *Journal of International Criminal Justice* (2004) 2, 541.

harmful to the Tribunals' legacies if the rights of persons whose proceedings will fall to be determined before the Residual Mechanism are deficient in any way from those rights they would have had before the Tribunals. The fundamental issue is whether any inherent unfairness could be occasioned to persons whose proceedings will be transferred to the Residual Mechanism. An argument on this basis would be a much more serious objection to the establishment of the Residual Mechanism than one based on alleged *ultra vires* action on the part of the Security Council in creating the Mechanism.

At the outset it can be anticipated that there will be no shortage of objections made by Counsel to the transfer of Tribunal functions to the Residual Mechanism. That said, on its face, it would appear that there should be little ground upon which an accused could object to being tried by the Mechanism as opposed to the Tribunals. Under the Mechanism's Statute, the accused has all the fair trial guarantees that he would have had had he been tried before the Tribunal. Provided those fair trial rights are interpreted consistently with their interpretations before the Tribunals, a trial before the Residual Mechanism should mirror a trial before the Tribunals. For example, the Residual Mechanism would have to ensure that the right of the defense to adequate time and facilities for the preparation of their case was interpreted consistently with the practice at the Tribunals and also ensure the provision of legal aid to indigent accused applying the same policies as the Tribunals. It is only through such measures that an accused can be satisfied that his rights are being respected with the equivalency that they would have been had he been tried by the Tribunals.

The same applies to appellate proceedings. The framework is there for the conduct of those proceedings before the Residual Mechanism to mirror how such proceedings would have been conducted by the Tribunals. Undoubtedly, Counsel will formulate any number of objections to the appeals from decisions of the Tribunals taking place before the Residual Mechanism but provided the Residual Mechanism adheres to the procedural and substantive jurisprudence of the Tribunals the expectation is that there will be little basis for objection to be made. The appellant will have the same rights they would have had if appealing before the Tribunals and the appellate procedure will mirror that of the Tribunals.

With respect to the right to review a judgment, the objection could be made that the transfer of the power of review to the Residual Mechanism effectively nullifies that right. At the Tribunals a review is a re-examination of a final judgment by, as much as possible, the same judges who gave it, in

the light of a new fact brought forward by the convicted person or the prosecution.[160] This is provided for in Rule 119 of the ICTY Rules of Procedure and Evidence and Rule 120 of the ICTR Rules of Procedure and Evidence. Significantly, it is only when any of the Judges that constituted the Chamber are no longer Judges of the Tribunal that another Judge can be appointed to sit in their place.[161]

In his report, the Secretary-General warned against the transfer of this provision to national jurisdictions positing that:

> "If the review of judgments were transferred to national jurisdictions they would […] be likely to apply different approaches and standards in relation both to the Tribunals and to each other. It might be difficult or impractical for a national jurisdiction to review a judgement in which it played no role and to do so on the basis of the Tribunal's Statute and Rules of Procedure and Evidence. There would inevitably be inconsistencies of approach among the various national jurisdictions on the basis that they had a right to review of judgment under the Tribunals Statutes, and that that protection has been diminished, or is being applied inconsistently among similarly placed convicted persons in different jurisdictions. The review would be conducted not only by a court constituted differently from the one that issued the judgement, but by an entirely separate jurisdiction."[162]

On its face it appears that at least some of these objections also apply to the transfer of the right of review to the Residual Mechanism. While the Residual Mechanism's structure as a singular court anticipates that there will be a level of consistency that may not be achieved among different national jurisdictions, the Residual Mechanism is, while continuing the jurisdiction of the Tribunals, simultaneously an entirely separate

160 Rule 119 ICTY Rules of Procedure and Evidence; Rule 120 ICTR Rules of Procedure and Evidence. See A. Carcano, 'Requests for Review in the Practice of the International Criminal Tribunals for the former Yugoslavia and for Rwanda', 17 *Leiden Journal of International Law* (2004) 1, 103-119.

161 Rule 119(A) ICTY Rules of Procedure and Evidence; Rule 120(A) ICTR Rules of Procedure and Evidence.

162 Report of the Secretary-General, *supra* note 1, para.80.

jurisdiction. Moreover, by giving the power of review to a new judicial mechanism, the Residual Mechanism, the Security Council may well have deprived accused persons of the right of review guaranteed to them under the Statute as there is no guarantee that the Tribunals' Judges will be Judges of the Residual Mechanism. As such, it could well be that Judges who have neither had prior involvement in the relevant case, or any cases whatsoever before the Tribunal, will be appointed to consider the application for review.

Yet, there is equally no guarantee that an applicant for review would benefit from a bench made up of the same Judges who rendered the original judgment if that review is conducted by the Tribunals. While this is the preferred procedure for a review, the turnover of Judges at the Tribunals means that it is unlikely, after any considerable passage of time, that the same Judges will be available to conduct a review. This is particularly so due to the reliance of the Tribunals on *ad litem* judges who are typically assigned to the Tribunal for a single case only and leave upon the rendering of the judgment in the particular case. Thus, it would appear that one of the most serious objections to the transfer of this power to the Residual Mechanism, namely that the review might be conducted by Judges unfamiliar with the proceedings, could equally apply to proceedings before the Tribunal.

However, as the Mechanism's Rules of Procedure and Evidence are based on those of the Tribunals, it can perhaps be anticipated that a rule similar to the Tribunals will direct the President to assign as much as possible Judges on the roster who were Judges of the Tribunals with involvement in the previous case, or if none are available, Judges who were previously Tribunal Judges, and therefore familiar with its proceedings. Such an approach will go a long way towards defending against claims of a reduction of the right to review before the Residual Mechanism.

The mandatory obligation of Article 6 of the Residual Mechanism's Statute to consider referral of cases of accused indicted before the Tribunals for substantive crimes to national jurisdictions will no doubt give rise to challenges from accused persons that their cases are only being referred to national jurisdictions because of pressure by the Security Council. However, the merit of this argument is questionable. The ICTY has long made clear that it has no remaining cases suitable for referral, having already referred 13 cases.[163] Thus Article 6 of the Mechanism's Statute should have no

[163] P. Robinson, Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security

impact on the ICTY. Also, long before the establishment of the Residual Mechanism, the ICTR Prosecutor made public his intention to seek transfers to national jurisdictions of all but three of the ICTR's remaining cases.[164] Thus, it is not to be anticipated that persons indicted by the ICTR will be treated any differently under the Residual Mechanism than they would have been if the ICTR had retained jurisdiction of their cases. Those earmarked as suitable for transfer have already been identified and only if that situation changes may there exist a valid reason to object.

Objection could, however, still be made with respect to any decision by the Mechanism's Trial Chamber to order a transfer to a national jurisdiction. Again, it could be argued that pressure from the Security Council may result in the Trial Chamber of the Residual Mechanism sanctioning an application to transfer to a national jurisdiction that would not have been sanctioned by a Trial Chamber of the Tribunals. This objection may particularly be made with respect to transfer of cases to jurisdictions which the ICTR has previously determined could not guarantee a fair trial to the accused, notably transfers to Rwanda, which has expressed an ongoing desire to try cases of persons indicted by the ICTR.[165] Arguably, in making any decision contrary to that of the Tribunals, the Residual Mechanism would have to demonstrate the circumstances which now warrant a different conclusion.[166] To avoid objections of this kind, it would

Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009, UN Doc. S/2009/589, 13 November 2009, para. 47.

164 Statement by Justice H. B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council, 6 December 2010, UN Doc. S/PV.6434, 10.

165 Failed transfers to Rwanda include, *Prosecutor v. Gatete,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ICTR-2000-61-R11bis, 17 November 2008; *Prosecutor v. Kanyarukiga,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda, ICTR-2002-78-R11bis, 6 June 2008; *Prosecutor v. Hategekimana,* Decision on Prosecutor's Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda: Rule 11 bis of the Rules of Procedure and Evidence, ICTR-00-55B-R11bis, 19 June 2008; *Prosecutor v. Munyakazi,* Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda: Rule 11bis of the Rules of Procedure and Evidence, ICTR-97-36-R11bis, 28 May 2008.

166 There is currently pending before the ICTR Appeals Chamber an appeal against a referral of a case from the ICTR to Rwanda: *Jean Uwinkindi v. Prosecutor*, ICTR-01-75-AR11*bis*. The Trial Chamber determined that the conditions in Rwanda now warranted transfer: *Prosecutor v. Jean Uwinkindi***,** Decision on the Prosecutor's Request for Referral to the Republic of Rwanda: Rule 11*bis* of the Rules of Procedure and Evidence, ICTR-2001-75-R11*bis*, 28 June 2011, paras 222-225.

be preferable for the ICTR to consider the referral of cases prior to its closure, as the Secretary General recommended in his report.[167] Currently, a case of referral to Rwanda is pending appeal before the Appeals Chamber and the rendering of the appeal in that matter might clarify the appropriateness of referrals to Rwanda.[168] In any event, it would be preferable if the issue of Rwanda's capacity to try cases fairly is resolved by the ICTR Tribunal and not by the Residual Mechanism.

Another issue is whether it should be of any concern if a person indicted by the Tribunal is transferred from the Tribunal to the Residual Mechanism and then referred from the Mechanism to a national jurisdiction. Provided this double transfer does not result in undue delay, it appears that little objection could be made as the end result is the same – the person would end up being tried in a national jurisdiction and this result would have occurred whether the person was referred directly by the Tribunal or by the Residual Mechanism.

The mandatory provision in the Residual Mechanism's Statute indicating that the Residual Mechanism shall consider the referral of cases involving contempt and false testimony "in the interests of justice and expediency" does result in a situation where a person subject to the jurisdiction of the Residual Mechanism can anticipate being treated differently than under the jurisdiction of the Tribunals.[169] For example, different national jurisdictions may well have different laws and different penalties for contempt or false testimony offences which could result in like cases being treated differently. Should accused be subject to less fair trial rights than before the Tribunals or if the penalties imposed by any national jurisdiction be greater than the maximum available penalties under the Tribunals' Rules of Procedure and Evidence, this may well constitute ground for objection.[170]

[167] Report of the Secretary General, *supra* note 1, para. 85.

[168] *Jean Uwinkindi v. Prosecutor*, ICTR-01-75-AR11*bis.* Following the submission of this paper for publication, on 16 December 2011, the Appeals Chamber rendered its decision case upholding the decision of the ICTR Referral Chamber to refer the case for trial in Rwanda pursuant to Rule 11*bis* of the ICTR Rules of Procedure and Evidence.

[169] Art. 1(4) Statute of the IRMCT.

[170] ICTY Rules of Procedure and Evidence Rule 77 (G): The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years or a fine not exceeding 100,000 euros or both.; ICTR Rules of Procedure and Evidence Rule 77(G): The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of

While the Security Council has included the possibility of referral to a national jurisdiction of cases of contempt and false testimony in the Statute of the Residual Mechanism there may be difficulty in finding States willing to take such cases due to their unfamiliarity with proceedings at the Tribunal. In his Report the Secretary-General noted that despite the cost benefit[171]:

> "[…] it may be difficult or impractical for a national jurisdiction, which had no involvement in the trial proceedings, to determine an issue which relates directly to those proceedings, and to the Tribunal's statute and Rules of Procedure and Evidence. The residual mechanism(s), on the other hand – particularly if managing the Tribunal's archives and with judges who were formerly judges of the Tribunal concerned – would be in a much stronger position to decide upon the contempt"[172].

Thus, while there is room for departure from the Tribunals concerning referrals of these types of proceedings to national jurisdictions, this may be unlikely due to a reluctance on the part of Member States to accept such cases, for the reasons identified in the Secretary-General's Report. However, it should be noted that the ease with which the Secretary-General contrasts the ability of the Residual Mechanism as opposed to national jurisdictions to deal with these types of proceedings does assume a level of continuity of the Residual Mechanism with the Tribunal, which, as explained above, is not guaranteed. As described previously, there is no requirement which states that the Judges of the Residual Mechanism must be the same Judges as those at the Tribunals and there is no requirement that the Residual Mechanism accept as binding previous decisions of the Tribunals.

With respect to the enforcement of sentences and consideration of applications for pardon and commutation of sentence, it is uncertain whether

imprisonment not exceeding five years, or a fine not exceeding USD10,000, or both; Statute of the IRMCT Article 22(1): The penalty imposed on persons covered by paragraph 4 of Article 1 of this Statute shall be a term of imprisonment not exceeding seven years, or a fine of an amount to be determined in the Rules of Procedure and Evidence, or both.

171 Report of the Secretary-General, *supra* note 1, para. 75

172 Report of the Secretary General, *supra* note 1, para.79.

convicted accused can anticipate being treated in the same manner as they would have been by the Tribunals. The Secretary-General's Report noted that the

> "Presidents of the Tribunals apply standard criteria when deciding on pardon or commutation. If such functions were transferred to national jurisdictions, there would inevitably be differing approaches and inconsistency of treatment among those convicted […] this could lead to challenges on the basis that the rights of those convicted are not being effectively and equally protected"[173].

Throughout different administrations, Presidents of the ICTY applied standard criteria in assessing requests for pardon or commutation of sentence under Article 28 of the Statute, and Rules 124 and 125 of the Rules of Procedure and Evidence. But the fact that the ICTY and ICTR enforce sentences in any number of countries that have entered into agreements for that purpose invariably does result in inconsistencies between defendants as to the conditions of imprisonment and the right to petition for pardon or commutation of sentence. In this circumstance, the approach of the ICTY Tribunal has been to try and ensure that all convicted persons are treated alike in applications for early release[1] through a practice where convicted accused will only be considered eligible for pardon or commutation of sentence once they have served two-thirds of their sentence.[174] Thus, if a

[173] Report of the Secretary-General, *supra* note 1, para. 81.

[174] *Prosecutor v. Ivica Rajic*, Decision of President on Early Release of Ivica Rajic, IT-95-12-ES, 22 August 2011, para. 12; *Prosecutor v. Milomir Stakic*, Decision of President on Early Release of Milomir Stakic, IT-97-24-ES, 15 July 2011, para. 22; *Prosecutor v. Momcilo Krajisnik*, Decision of President on Early Release of Momcilo Krajisnik, IT-00-39-ES, 11 July 2011, para. 21; *Prosecutor v. Veselin Sljivancanin,* Decision of President on Early Release of Veselin Sljivancanin, IT-95-13/1-ES.1, 5 July 2011, para. 20; *Prosecutor v. Johan Tarculovski,* Decision of President on Early Release of Johan Tarculovski, IT-04-82-ES, 23 June 2011, para. 13; *Prosecutor v. Blagoje Simic*, Decision of President on Early Release of Blagoje Simic, IT-95-9-ES, 15 February 2011, para. 20; *Prosecutor v. Darko Mrda*, Decision of President on Early Release of Darko Mrda, IT-02-59-ES, 1 February 2011, para. 15; *Prosecutor v. Ivica Rajic*, Decision of President on Early Release of Ivica Rajic, IT-95-12-ES, 31 January 2011, para. 14; *Prosecutor v. Zoran Zigic*, Decision of President on Early Release of Zoran Zigic, IT-98-30/1-ES, 8 November 2010, para. 12; *Prosecutor v. Haradin Bala*, Decision on Application of Haradin Bala for Sentence Remission, IT-03-66-ES, 15 October 2010, para. 14; Prosecutor *v. Momcilo Krajisnik*, Decision of

convicted person is eligible at the halfway mark for early release as in some national jurisdictions, it is likely that pardon or commutation will be refused.[175] If ineligible until the three-quarters mark as in other national jurisdictions, a means will be found by the President to consider pardon after the convicted person has served two-thirds of the sentence.[176] In one case, this has meant breaking an enforcement of sentence agreement.[177]

In light of the efforts made by the ICTY to ensure consistency of length of service of sentences imposed, the Residual Mechanism should also adopt a consistent approach in this regard towards all persons convicted by the Tribunals or the Residual Mechanism. However, it is not bound to take the same approach as the Tribunals. As already discussed, there is no requirement in the Residual Mechanism's Statute, or in international law, that it abide by the approach taken by the Tribunals. Consequently, there is no guarantee that the Mechanism will continue the ICTY's practice of regarding all persons convicted by the Tribunal as eligible in principle for

President on Early Release of Momcilo Krajisnik, IT-00-39-ES, 26 July 2010, para. 14; *Prosecutor v. Milan Gvero*, Decision of President on Early Release of Milan Gvero, IT-05-88-ES, 28 June 2010, para. 8; *Prosecutor v. Dusko Sikirica*, Decision of President on Early Release of Dusko Sikirica, IT-95-8-ES, 21 June 2010, para. 13; *Prosecutor v. Dragan Zelenovic*, Decision of the President on Application for Pardon or Commutation of Sentence of Dragan Zelenovic, IT-96-23/2-ES, 10 June 2010, para. 13; *Prosecutor v. Dario Kordic*, Decision of President on Application for Pardon or Commutation of Sentence of Dario Kordic, IT-95-14/2-ES, 13 May 2010, para. 13; *Prosecutor v. Mlado Radic*, Decision of President on Application for Pardon or Commutation of Sentence of Mlado Radic, IT-98-30/1-ES, 23 April 2010, paras 12-13; *Prosecutor v. Mitar Vasiljevic*, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Mitar Vasiljevic, IT- 98-32-ES, 12 March 2010, para. 14; *Prosecutor v. Dragan Jokic*, Public Redacted Version of Decision of President on Application for Pardon or Commutation of Sentence of Dragan Jokic of 8 December 2009, IT-02-60-ES & IT-05-88-R.77.1-ES, 13 January 2010, para. 14; *Prosecutor v. Biljana Plavsic*, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavsic, IT-00-39 & 40/1-ES, 14 September 2009, para. 10.

175 *Prosecutor v. Zelenovic,* Decision of President on Application for Pardon or Commutation of Sentence of Dragan Zelenovic, IT-96-23/2-ES, 10 June 2010, para. 13.

176 *Prosecutor v. Kupreskic, et al.,* Public Redacted Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Santic, IT-95-16-ES, 16 February 2009, para. 7.

177 *Prosecutor v. Krnojelac,* Public Redacted Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac,IT-97-25-ES, 9 July 2009, paras 23-24.

early release after serving two-thirds of their sentence. As a result of the Residual Mechanism's discretion to adopt its own approach, there is the possibility that unfairness will occur if the Residual Mechanism does not apply a consistent approach to similarly situated persons.

With respect to the monitoring of sentences, the Secretary-General's report noted that the Tribunals "have already concluded agreements with other international bodies for them to carry out some aspects of their functions" and that it "would seem advisable for the residual mechanism(s) to continue those arrangements"[178].

The Tribunals have entered into agreements with bodies such as the International Committee of the Red Cross, and the European Committee for the Prevention of Torture and Inhumane and Degrading Treatment or Punishment to monitor the enforcement of its sentences and it benefits from the assistance of those bodies in the monitoring of its sentences. While the Secretary-General did not indicate why specifically it "would seem advisable for the residual mechanism(s) to continue those arrangements", these arrangements have provided a means whereby the Tribunals can be satisfied that the rights of their convicted accused are being respected by the enforcement State, and have provided an avenue via which the Tribunals convicted accused can bring matters of concern to the attention of the Tribunals. Thus, it is advisable for the Residual Mechanism to continue these arrangements.

III. Conclusion

On balance, it appears that the most difficult challenge to be faced by the Residual Mechanism will not be to the legality of its establishment by the Security Council, but to the impact of its establishment on the rights of persons whose proceedings would have come before the Tribunals. While it can be anticipated that Counsel will bring any number of challenges to the Residual Mechanism's exercise of jurisdiction on that basis, provided the Judges of the Residual Mechanism ensure continuity between the work of the Tribunals and that of the Residual Mechanism by adopting the Tribunals' procedural and substantive jurisprudence, as well as their practices, potential unfairness to persons whose proceedings are before the Mechanism should be avoided. Further, the legacies of the Tribunals will thereby be preserved and the integrity of their decision making secured.

[178] Report of the Secretary General, *supra* note 1, para. 82.

E. Final Analysis

From a realist perspective, the Residual Mechanism is no more than the Tribunals' under a different name. The Residual Mechanism's Statute mirrors the Statute of the Tribunals, the only real variance being that it also elevates Judge made rules or practices of the Tribunals to its Statute and includes minor variations aimed at securing the efficiency of the Mechanism. These latter measures are reflective of the fact that once all substantive proceedings have concluded, the role of the Residual Mechanism will be to deal with reduced functions that are really residual in nature, for example, the continued protection of victims and witnesses and applications for pardon and commutation of sentences. This residual functioning of the Mechanism will continue well into the future and has the potential to therefore assist in the preservation of the Tribunals' legacies. Further, provision has been made to ensure that the Mechanism's Rules of Procedure and Evidence will be based on those of the Tribunals so that the Mechanism can adopt the same *modus operandi* of the Tribunals. Thus, while it may have been better for the Security Council to have allowed the Tribunals to scale down naturally, the Residual Mechanism can achieve the same objectives as would have been achieved by the Tribunals.

However, the Security Council neglected to make provision to ensure the continuity of the Tribunals procedural and substantive jurisdiction by the Residual Mechanism. It has merely provided the framework for Mechanism to function as the Tribunals and left it open to the Judges of the Residual Mechanism to determine the value to be attributed to the previous decisions of the Tribunals. This lacunae opens up the possibility of the Residual Mechanism undermining rather than preserving the legacies of the Tribunals by jurisprudential departures by the Residual Mechanism which could cause unfairness to accused whose proceedings were started at the Tribunals and transferred to the Residual Mechanism, or accused whose proceedings were finally determined by the Tribunals.

The integrity of any judicial institution is inextricably bound up with the fairness of its proceedings. Inherent to the notion of fairness in legal proceedings is the equal application of judicial standards to persons subject to the same jurisdiction. Such parity of treatment is attainable within the context of the Residual Mechanism's operations, through its assimilation of the Tribunals' jurisprudence as binding precedent, subject to departure only in instances where "cogent reasons in the interests of justice" so demand. This sustained jurisprudential continuum between the Residual Mechanism and the Tribunals thus constitutes an imperative bulwark against the possible infiltration of the taint of unfairness into the Mechanism's

proceedings, through the disparate treatment of those whose cases were fully adjudicated before the Tribunals, relative to those whose cases are projected for completion before the Residual Mechanism. At the end of the day, the Residual Mechanism's Judges bear the responsibility of ensuring that proceedings before it meet the highest standards of international due process and fairness. In this regard, the Security Council has more than amply provided the Mechanism with sufficient tools to ensure that its proceedings are conducted *in pari passu* with those before the Tribunals. Thus, the Security Council has furnished the Residual Mechanism with the means of safeguarding the integrity of its proceedings as a judicial institution, and, by extension, the legacy of both Tribunals.

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Tadic Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY

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Abstract

This article will return to questions raised during the establishment of the ICTY and particularly the Tadic case. It will be argued here that the aspect of Tadic that remains unresolved is the fundamental question of whether the ICTY has been established legitimately. The legitimacy argument forms an important part of the legacy debate of the ICTY. Although the Tadic Appeals Chamber has formally answered the question of the legitimacy of the ICTY it will be argued that the reasoning of the Appeals Chamber was not sufficiently strong or persuasive. The legitimacy debate reflects the wider influence of the ICTY's jurisprudence since some of the arguments made by the Tadic Appeals Chamber have been replicated or repeated in the trials of Saddam Hussein and Charles Taylor. The legitimacy question is crucial since it affects the very foundations of the ICTY. If the legitimacy of the ICTY is not established satisfactorily, it affects how one considers the achievements mentioned above. In a sense the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY. This article will consider the difference between the ICTY's self-perception and the way the work of the Tribunal over the last sixteen years has been perceived from the outside. The focus of the article will be on the lingering question of the legitimacy of the Tribunal. It has argued that legitimacy can also be acquired after the initial establishment. The article will consider whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.

A. Introduction

Much has been made of the impending closing of the International Criminal Tribunal for the former Yugoslavia [ICTY]. In formulating its completion strategy the Yugoslavia Tribunal started a process of reflection and self-examination of its own work and on what it perceives to be its legacy. Academic commentators have also started to comment on the ICTY's legacy.

It has been widely agreed that the Yugoslavia Tribunal has made various valuable contributions to the emerging discipline of international criminal law. The ICTY has been credited for going far beyond the legacy of Nuremberg in establishing a system based on high standards of fairness and due process. It is not an exaggeration to say that in the absence of the

ICTY International Criminal Law as a discipline would still have been in its infancy. As the first post-Nuremberg international criminal tribunal, the ICTY has set into motion a series of developments that would probably not have been possible in its absence. The creation of the ICTY by Security Council fiat was unprecedented and controversial. The ICTY's particular mandate was also new, particularly its *ad hoc* nature and the limits on its temporal jurisdiction. The ICTY has indeed been responsible for a number of "firsts".[1] In 2004 Ralph Zacklin wrote that "a new culture of human rights and human responsibility [...] has gradually taken root"[2]. It can indeed be said that the Tribunal went beyond developing the substance and procedure and helped to create a new legal culture. In fact, the ICTY's impact and influence has been so strong and diverse that one article cannot do justice to all aspects of the ICTY's legacy. This article will acknowledge the many and varied achievements of the ICTY but will take a critical perspective. It will examine some of the "unanswered questions" raised by the creation and the *sui generis* nature of the ICTY.

The article will return to the dispute regarding the establishment of the ICTY: the Tadic case.[3] The Tadic case has been described as one of the cases which contributed the most to the jurisprudence of the ICTY. The case took an innovative approach to the law in many respects by changing the definition of "protected persons"[4], by addressing the distinction between

1 The ICTY deserves credit for a number of "firsts" in the sense of groundbreaking achievements. In *Tadic* the Court clarified the legal criteria for distinguishing between international and internal armed conflict. Also, taking one step further the ICJ's Nicaragua finding that Common Article 3 represents a minimum yardstick applicable also to international armed conflicts, the ICTY Appeals Chamber established that most of the protective rules of IHL are applicable to non-international armed conflicts. The ICTY has also been praised for recognizing rape as war crime, and for clarifying (and sometimes collapsing) the distinction between international and non-international armed conflicts and for the development of JCE. For more on the achievements of the ICTY see K. D. Askin 'Reflections on Some of the Most Significant Achievements of the ICTY', 37 *New England Law Review* (2003) 4, 903.
Furthermore, the *Milosevic* indictment was the first war crimes indictment against a sitting head of state.

2 R. Zacklin, 'The Failings of *ad hoc* Criminal Tribunals', 2 *Journal of International Criminal Justice* (2004) 2, 541.

3 *Prosecutor v. Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999.

4 *Prosecutor v. Tadic*, Appeals Judgment, IT-94-1-A, 15 July 1999, paras 163-169.

international and non-international armed conflicts[5] and by taking the first steps towards the formation of the notion of Joint Criminal Enterprise (JCE). It will be argued here that the aspect of Tadic that remains unresolved is the fundamental question of whether the ICTY has been established legitimately. Alvarez formulated the essential question: “whether the [Security] Council can create a denationalized body capable of depriving individuals of their liberty without national court appeal or involvement”[6]. The legitimacy argument forms an important part of the legacy debate of the ICTY. In the same way as one has to build a house on a firm foundation, the Tribunal had to be built on a firm and legitimate legal foundation.

Although the Tadic Appeals Chamber has formally answered the question of the legitimacy of the ICTY it will be argued that the reasoning of the Appeals Chamber was not sufficiently strong or persuasive. The legitimacy debate reflects the wider influence of the ICTY’s jurisprudence since some of the arguments made by the Tadic Appeals Chamber have been replicated or repeated in the trials of Saddam Hussein and Charles Taylor.[7] The fact that other ‘younger’ international tribunals rely on the reasoning of the ICTY judges illustrates the impact of the ICTY and places a responsibility on the shoulders of the ICTY.

The legitimacy question is crucial since it affects the very foundations of the ICTY. If the legitimacy of the ICTY is not established satisfactorily, it affects how one considers the achievements mentioned above. In a sense the substantive and procedural achievements of the ICTY are dependent on the legitimacy of the ICTY.

The word “legacy” is increasingly being used by commentators as well as by the ICTY itself. But what does the term “legacy” mean? This article will consider the difference between the ICTY’s self-perception and

5 *Prosecutor v. Tadic*, *Decision* on the Defence Motion for Interlocutory Appeal on *Jurisdiction*, IT-94-1-AR72A, 2 October 1997, paras 77-78.

6 J. E. Alvarez ‘Nuremberg Revisited: The Tadic Case’, 7 *European Journal of International Law* (1996) 2, 242, 252.

7 Newton describes the Iraqi Tribunal as the “intellectual twin” of the ICTY. See M. A. Newton, ‘The Iraqi Special Tribunal: A Human Rights Perspective’, *Vanderbilt University Law School, Public Law and Legal Theory, Working Paper Number 05-35*, 7.

the way the work of the Tribunal over the last sixteen years has been perceived from the outside. The focus of the article will be on the lingering question of the legitimacy of the Tribunal. It has argued that legitimacy can also be acquired after the initial establishment. The article will consider whether the ICTY's initial defect in legitimacy could subsequently be remedied by the fairness of the proceedings and the moral power of the ICTY.

B. The Concept of "Legacy"

The term "legacy" is an ambitious and enigmatic concept. The noun "legacy" means an "amount of money or property left to someone in a will" or "something left or handed down by a predecessor"[8]. It can be argued that a "legacy" can most appropriately be determined *ex post facto.* One can most meaningfully speak of a legacy after the fact. Ultimately, one will have to distinguish between legacy 'during' its lifetime (in the sense that a public figure such as Nelson Mandela has a legacy even during his lifetime) but it is clear that the "real legacy" can only be assessed many years after the closing of the Tribunal.

Another characteristic of the term "legacy" is that a person or an institution cannot determine, predict or control its own legacy. It can be argued that a "legacy" is a quality others (usually the successor or recipient of the "gift") attribute to you or an evaluation others make of you. Yet the ICTY has been preoccupied by its own legacy quite intensely. An Associate Legal Officer at the ICTY, Dianne Brown, carries the title "Legacy Officer".

The question of the legacy of the ICTY has often been discussed in the context of the establishment and work of the International Criminal Court (ICC). Leila Sadat commented on the legacy of the ICTY as early as 2002. She described the ICC as the "heir apparent to the ICTY"[9]. The "success" of the ICTY probably made a significant contribution to the establishment of the ICC. In the absence of the precedent set by the ICTY, it is doubtful whether the international community would have had the confidence to establish the International Criminal Court.

8 Oxford Dictionaries Online, available at http://oxforddictionaries.com/definition/legacy?q=legacy (last visited 2 January 2012).

9 L. Sadat, 'The Legacy of the ICTY: The International Criminal Court', 37 *New England Law Review* (2002) 4, 1074.

C. Self-Perception of the ICTY

One positive consequence of the sensitivity of the ICTY to its own legacy is the fact that the Tribunal is more sensitive to public perception and public criticism and concerned about procedural correctness in being aware of the wider "ripple effects" of its work. Former ICTY President has stated that the "Completion Strategy" of the ICTY could more aptly be described as a "Strategy of Continued Legacy Building"[10]. This was illustrated vividly by the fact that the ICTY hosted a conference on its legacy in February 2010 (with a specific focus on its legacy in the Balkans) and is in the process of planning a conference on the "Global Legacy" of its work for November 2011.

The February 2010 conference focused on the legacy of the ICTY specifically in the former Yugoslavia.[11] The idea behind the conference was that the ICTY would use this as an opportunity do stocktaking of its work. The results of the conference will not be analyzed or discussed here. However, the outlook on the willingness of political leaders in the region to pursue national reconciliation was very pessimistic.

Just as one cannot control one's reputation one cannot fundamentally control one's own legacy. The current ICTY President Robinson acknowledged this at the February 2010 conference on the Legacy of the ICTY hosted by the ICTY when he explicitly stated that the ICTY does not attempt to control its own legacy.[12] President Patrick Robinson spoke of the importance of being honest about experiences and results and of displaying full transparency. He mentioned the importance of creating a climate of

10 F. Pocar, 'Completion or Continuation Strategy, Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655.

11 The ICTY has been said to have adopted a strategy of 'continued legacy building' in the region of the former Yugoslavia. The aim of this strategy is to facilitate local institutional capacity to deal with the numerous cases that still has to proceed to trial. *Id.,* 665.

12 P. Robinson, 'Opening Remarks', Presentation at the Conference 'Assessing the Legacy of the ICTY', 23- 24 February 2010, The Hague.

impunity. He also emphasized the importance of creating an institutional memory as well as the importance of the creation of the ICTY archives.[13]

He added that it was important that the ICTY should assist in peace-building and peace maintenance in the Balkan region and help strengthen the rule of law. In this regard the ICTY has worked on a solution to the question of "what happens to middle and low ranking perpetrators". The ICTY worked on a solution to maintain its legitimacy while dealing pragmatically with the problem of thousands of potential defendants.[14]

On the same occasion Robinson stated that one of the main shortcomings of the ICTY was that it neglected victims. It is problematic that victims did not receive any reparation or compensation. The ICTY did not position itself close enough to the victim communities. He also mentioned other mistakes of the ICTY which impaired its legacy: the length and the expense of trials[15] as well as the lack of uniform criminal law policy were primary concerns.

The ICTY has also been working to ensure its legacy through a compilation of its best practices. The purpose of this compilation of expertise is to provide a blueprint to future international courts.[16]

D. Unanswered Questions

A number of fundamental questions have never been addressed by the ICTY or never addressed in satisfactory manner. These include questions pertaining to whether the ICTY has respected the limits of the ICTY's lawmaking power as well as the legitimacy, legality and accountability of the ICTY. It is vital for the credibility of the ICTY that the Tribunal is an institution as well as its judgments be perceived as legitimate by the international community. The Tribunal must be perceived to be competent, fair and universal.[17] Integral to the question of legacy is the idea that judgments may help to establish norms that predispose rulers and citizens

13 The "immense" archive of the ICTY contains documents and evidence relating to the crimes and conflicts in the territory of the former Yugoslavia from 1991 up to 2001. See Pocar, *supra* note 10, 655.

14 W. Sandholtz, 'Creating Authority: The International Criminal Tribunals', *International Studies Association, San Diego* (2006), 25.

15 See in this regard Askin, *supra* note 1, 912.

16 Pocar, *supra* note 10, 663.

17 T. M. Franck, *The Power of Legitimacy Among Nations* (1990), 16.

alike to conform their behavior to legal expectations even without the application of coercive sanctions.[18]

E. Legitimacy

Many have remarked that the existence of the Tribunals as a functional reality is in itself a great accomplishment.[19] It can be argued that only the legitimate establishment of the Tribunals would lend legitimacy both to the "ordinary" work of the judges and to the more innovative lawmaking activities of ICTY judges.

What does legitimacy mean in this context and why is it important? Since international law makes a claim to authority, the question of legitimacy is relevant to international law.[20] Similarly, the fact that the Tribunal makes a claim to authority necessitates an investigation into its legitimacy. Furthermore, the moral force of international law or duty to obey international law necessitates an enquiry as to legitimacy. In examining legitimacy as a construct[21] the starting point can be Thomas Franck's definition of legitimacy. Franck discusses legitimacy in the context of the broader question of why nations obey international law in the absence of coercion or threats of coercion such as sanctions.[22] Franck proposes the following partial definition of legitimacy adapted to the international system: a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.[23] Legitimacy exerts a pull to compliance which is powered by the quality of the rule or the rule-making institution and not by coercive authority. It exerts a pull to compliance in the voluntarist mode. According to Franck legitimacy can be a matter of degree.

18 *Id.*, 16.

19 M. C. Bassiouni & P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 236.

20 M. Kumm, 'The Legitimacy of international Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 908.

21 See Franck, *supra* note 17; J. E. Alvarez 'The Quest for Legitimacy: An Examination of the Power of Legitimacy Among Nations by Thomas M. Franck', 24 *New York University Journal of International Law and Politics* (1991), 199.

22 Franck, *supra* note 17, 3.

23 *Id.,* 16.

Franck writes that legitimacy theorists fall into three categories. The first group defines legitimacy in terms of *process*.[24] Max Weber has played a leading role in evaluating legitimacy in such terms. Weber writes of the setting out of a superior framework of reference including rules about how laws are made, how governments are chosen and how public participation is achieved.[25] In the political sphere this means that the legislature who enacted the laws should be honestly elected. Legitimacy is also defined in procedural-substantive terms. One should look not just at how a ruler was chosen but also in whether the rules made and commands govern were objective.

A second group legitimacy can be defined in procedural-substantive terms.[26] Franck cites Habermas who wrote that "the procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based"[27].

A third group of legitimacy theorists focus on outcomes.[28] They hold that a system seeking to validate itself has to be defensible in terms of equality, fairness, justice and freedom which are realized by the system. It is intriguing to explore the question of whether an illegitimately established Tribunal could subsequently become legitimate because of the equality and fairness of its outcomes.[29]

Some believe that the meta-legal question of legitimacy is not only determined by the positive law. Legitimacy can be also be interpreted as "social legitimacy". Social legitimacy depends on the extent to which the Tribunal is viewed as unbiased and impartial by society. "Unbiased and impartial" here means free from outside influence, particularly from the Security Council and the Permanent Members.[30] The Trial Chamber in Tadic stated that criminal law is only efficacious if the body that determines

[24] *Id.,* 17.

[25] M. Weber, *Economy and Society: An Outline of Interpretive Sociology,* edited by G. Roth & C. Wittich (1968), 31.

[26] Franck, *supra* note 17, 17.

[27] J. Habermas, *Communication and the Evolution of Society* (1979), 185.

[28] Franck, *supra* note 17, 18. Franck attributes this view to "neo Marxist philosophers and related students of radical social restructuring".

[29] David Luban supports this view of legitimacy. See D. Luban 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 579.

[30] G. P. Lombardi 'Legitimacy and the Expanding Power of the ICTY', 37 *New England Law Review* (2003) 4, 889.

criminality is "viewed as legitimate"[31]. This implies that the perception of legitimacy itself matters for the efficacy of the Tribunal. In international context the definition of legitimacy also includes: the perception of those addressed by a rule or rule-making institution that the rule has come into being and operates in accordance with generally accepted principle of right process.[32]

F. The Tadic Case

In the early phase of the ICTY's existence, the question of the establishment of the ICTY attracted much attention and was seen as important since it affected the authority and credibility of the establishment of the ICTY.

Some States preferred the establishment of the Tribunal by way of a consensual act of nations or by treaty. Others believed that the General Assembly, being the most representative organ of the United Nations would have been the most appropriate organ to establish the ICTY since it would have guaranteed full representation of the international community.[33]

At the time Morris and Scharf wrote that the disadvantages of the treaty approach were that it provided States with an opportunity to "carefully examine and elaborate provisions on all aspects of the tribunal"[34] and to exercise their sovereign will in the negotiation and conclusion of such treaty. The main argument against the treaty approach was that too much time would be needed for the negotiation and conclusion of a treaty and for obtaining the necessary ratifications for its entry into force. In light of the sensitive political situation there was no guarantee that the States whose participation would be essential for the effectiveness of the tribunal would have to become party to the treaty.[35] Commentators such as Bassiouni argued that the involvement of the General Assembly in the preparation of the statute would have added a potentially time-consuming phase.[36]

[31] *Prosecutor v. Tadic*, Decision on the Defense Motion on Jurisdiction, IT-94-1, 10 August 1995.
[32] Franck, *supra* note 17, 19.
[33] V. Morris & M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia:Documentary History and Analysis* (1995), 326.
[34] *Id.,* 40.
[35] *Id.*
[36] Bassiouni & Manikas, *supra* note 19, 220.

Doubts about the establishment were already raised during the debate on Security Council Resolution 827. Some delegates referred to 'the exceptional nature or character of establishing the Tribunal' and indicated that for political reasons they were willing to accept the method of establishment.[37]

The most important case in this regard was the *Tadic Jurisdictional Decision*.[38] The diverse responses of the Trial Chamber and Appeals Chamber in Tadic show the contested propositions regarding the reviewability of Security Council decisions posed by the creation of the Tribunal.

The Trial Chamber in Tadic concluded that it did not have jurisdiction to review the action taken by the Security Council. The Trial Chamber concluded that it was a Tribunal with "a limited criminal jurisdiction" derived solely from the Statute and that the Tribunal did not have the jurisdiction to determine the legality of its own creation.[39] The Trial Chamber stated:

> "The International Tribunal is not a constitutional court set up to scrutinize the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. It is to confine its jurisdiction to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council."[40]

The Trial Chamber held that the competence of the Tribunal is narrowly defined and does not extend beyond the prosecution of persons responsible for serious violations of international humanitarian law. The Trial Chamber resorted to the political question doctrine derived from US

[37] Security Council, Provisional Verbatim Record of the 3217th meeting, 23 May 1993, Representative of China, UN Doc S/PV 3217. The Chinese representative said that "the international tribunal can only be an *ad hoc* arrangement suited only to the special circumstances of the former Yugoslavia and shall not constitute any precedent".

[38] *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 [Tadic Jurisdictional Decision].

[39] *Prosecutor v. Tadic*, Trial Chamber Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995.

[40] *Prosecutor v. Tadic*, Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995.

constitutional law and considered the Article 39 determination of 'threat to the peace' and its choice of means to meet the threat as a non-justiciable policy determination.[41]

The Appeals Chamber disagreed, holding that in terms of the principle *competence de la competence* it had the inherent jurisdiction to determine its own jurisdiction:

> "To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council […] a 'creation' totally fashioned to the smallest detail by its creator and remaining totally in its power and at its mercy."[42]

According to the Appeals Chamber the Tribunal is a self-contained system whose "inherent" or "incidental" jurisdiction derives automatically from the exercise of the judicial function. The Appeals Chamber went even further and stated that *competence de la competence* was not only a power but an obligation in international law.[43] In support of this the Appeals Chamber quoted Judge Cordova who stated that it was the "first obligation of the Court" as it would be of any other judicial body to establish its own competence.[44]

In response to Tadic's argument that the tribunal was not "established by law", as required by *inter alia* the International Covenant on Civil and Political Rights (ICCPR) the Appeals Chamber held that this merely means that the ICTY is "established in accordance with the proper international standards" and that it provides all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.[45] According to the Appeals Chamber these standards were met.

[41] The Trial Chamber cited the criteria for "political questions" delineated by the *US Supreme Court in Baker v. Carr* 369 US 186, 217 (1962). *Prosecutor v. Tadic* IT-94-1-T, 10 August 1995, para. 24.

[42] *Tadic Jurisdictional Decision*, para. 15.

[43] *Tadic Jurisdictional Decision*, para. 18.

[44] Judge Cordova, Dissenting Opinion, *Advisory Opinion on Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, 1956 I.C.J. Reports (Advisory Opinion of 23 October) 77, 163.

[45] M. P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (1997), 104, 106.

G. Criticising Tadic

The reasoning of both the Trial Chamber and Appeals Chamber in Tadic has been widely criticized. In a dissenting opinion to the Appeals Chamber decision Judge Li disagreed with the view that the Tribunal had the competence to determine its own jurisdiction. He argued that the Tribunal cannot review the legality of the resolutions by the Security Council. According to him such review is *ultra vires* and unlawful. In his comment in a collection of essays in memory of Judge Li, Judge Shahabuddeen asks: If jurisdiction entitles the ICTY to say that it has not been validly established, in what capacity is it acting when it makes that determination?[46] According to Shahabuddeen the view that persons who accept appointments as judges of a court and who swear to serve such a court can, in their capacity as judges, question the validity of the law establishing the court. In what capacity are such persons acting when they make that decision? Are they acting as judges or as individuals?[47] Shahabuddeen points out that if judges say that their court was never lawfully established they are speaking s individuals. He writes:

> "If they are speaking as court, they are exercising judicial power and therefore recognizing the authority from which that judicial power flows; for the only way they can decide as a court is by affirming the validity of the law by which the court is established. The contradiction will be that they are accepting that they are a court at the same time when they are denying that they are a court."[48]

Shahabuddeen continues that the Security Council, acting under Article 96 of the Charter, could have referred the matter to the ICJ for an advisory opinion. In the Effects of Awards case, the ICJ decided that the General Assembly was competent to establish the United Nations Administrative Tribunal as a judicial body.[49] By a similar procedure the

46 M. Shahabuddeen, 'The competence of a tribunal to deny its existence', in S. Yee & W. Tieya (eds) *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), 474.

47 *Id.*, 475.

48 *Id.*, 476.

49 *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal,* 1954, *Advisory Opinion of 13 July 1954,* I.C.J. Reports 1954, 47, 56-58.

court could have been asked for advice as to whether the Security Council was competent to establish the ICTY.

Alvarez attacks the Trial Chamber position. He finds it inconsistent that the Trial Chamber judges aver that an issue is non – justiciable and then the purport to dismiss this issue as "perfunctorily on the merits".[50] If the judges believe there is "no law" to apply with regard to certain questions, they should also not pronounce on these questions. Judge Li takes the same absolutist yet logical position. In his Separate Opinion he argues that judicial statements about either the Security Council's Article 39 determination or its chosen means of dealing with a threat to the peace are "imprudent and worthless in both fact and law"[51]. Alvarez states that the reason why the majority of the judges in the Trial and Appeals Chambers reject this position may be because they regard it as unacceptable for an international criminal court to admit that a defendant will be subject to the "capricious whim" of the Security Council instead of the rule of law.[52]

Bassiouni wrote that similar challenges to Security Council actions have been unsuccessful in the past. He points out that organs of the UN enjoy a presumption of legality. Security Council actions only become *ultra vires* once the presumption is rebutted.[53] To rebut such a presumption there would have to be a showing that the establishment of the tribunal is not rationally related to the establishment, maintenance and restoration of peace. Considering the international character and the *ius cogens* nature of the crimes committed in the Balkans it is hard to conceive the possibility that the presumption of validity would be rebutted. The ICJ, despite being described by some as the "ultimate guardian of UN legality" has not yet resolved the question of whether it can legitimately review the legality of Security Council action.

Alvarez states that the legal arguments used by the Trial Chamber and the Appeals Chamber to affirm the legality of Tadic's prosecution by the ICTY are in themselves not sufficient to legitimize a Tribunal with "political, foundational and epic goals". He writes it "would be naive to believe that this Tribunal, whose questionable pedigree is at stake" has

[50] Alvarez, *supra* note 6, 250, 251.
[51] *Id.*, 251.
[52] Alvarez, *supra* note 6.
[53] Bassiouni & Manikas, *supra* note 19, 24.

conclusively settled a question which even the ICJ has avoided.[54] According to Alvarez the Appeals Chamber should have adopted some model of judicial review and of UN constitutional interpretation.[55]

In the *Tadic Jurisdictional Decision* the Prosecutor stated that the ICTY is not a constitutional court set up to scrutinize the actions of the Security Council.[56] The Prosecutor emphasized that the ICTY is a criminal tribunal with very limited defined powers and that if it were to confine its adjudication to those limits "it will not have authority to investigate the legality of its creation by the Security Council"[57].

H. Legitimacy Questions before Other Tribunals

The ICTR's establishment by Security Council Resolution instead of by treaty was equally controversial. The legitimacy of the ICTR was initially challenged in a district court in the United States in the *Ntakirutimana*[58] case. In this case the United States requested the extradition of Elizaphan Ntakirutimana. The first request for extradition was refused by the magistrate of the US district court. Ntakirutimana's counsel argued that, in establishing the Rwanda Tribunal the UN Security Council exceeded its powers under Chapter VII of the UN Charter. The magistrate explained why the Tadic judgment did not settle the legitimacy question:

> "The Tadic opinion adds nothing to the issue. The Yugoslavia Tribunal is a creature of the very statute that was under challenge. The several views of the judges show they cannot agree on anything except their own legitimacy. But they fail to find a source for their creation in the Charter."[59]

Ntakirutimana appealed the case to the fifth Circuit of Appeals. The majority of the Fifth Circuit decided that Ntakirutimana could be extradited.

[54] Alvarez, *supra* note 6, 250. *In The Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding the Security Council Resolution 276 (1970).

[55] Alvarez, *supra* note 6, 245. 261.

[56] *Tadic Jurisdictional Decision*, para. 20

[57] *Tadic Jurisdictional* Decision, para. 20.

[58] *In Re The Surrender of Eliziphan Ntakirutimana*, Misc No L-96-005 (SD Texas. 1997).

[59] *Ntakirutimana v. Reno*, 184 F 3d 419, 430 (5th Cir 1999), cert denied, 68 USLW 3479 (US 25 January 2000) (No 99-4790).

The first challenge to the legitimacy of the ICTR brought before the ICTR was by Joseph Kanyabashi. Similar to the Tadic Trial Chamber, the *Kanyabashi* Trial Chamber rejected the defense challenges to the jurisdiction of the ICTR.[60] *Kanyabashi* did however not merely copy Tadic. The Trial Chamber stated that even though some of the issues raised by the defense have already been dealt with in the Tadic case, "in view of the issues raised regarding the establishment of this Tribunal, its jurisdiction and its independence in the interest of justice […] the Defence Counsel's motion deserves a hearing and full consideration"[61].

In considering the merits of the motion, the Trial Chamber rejected the principal objections raised by the defense. The defense argued that the establishment of the Rwanda Tribunal violated the sovereignty of States, particularly Rwanda, because it was not established by means of a treaty. The Trial Chamber concluded that the ICTR did not violate the sovereignty of Rwanda or other members of the United Nations which had accepted certain limitations on their sovereignty by virtue of the United Nations Charter and had agreed to follow and carry out Security Council resolutions under Article 25 UN Charter.[62] The Trial Chamber further stated that there was no merit in the argument by the defense that the Rwandan conflict did not pose a threat to international peace and security.[63]

Ten years into the life of the ICTY, the legitimacy question was revived during the trial of Slobodan Milosevic. Milosevic's defense lawyers summoned the Netherlands to release him. When the request was refused, the defense lawyers instituted injunction proceedings against the Netherlands in the District Court in The Hague. The Hague District Court considered itself incompetent to consider the question of the legality of the ICTY. The President of the District Court addressed the matter and said that the issue of Security Council competence has already been dealt with at length by the Trial Chamber II and the Appeals Chamber of the Tribunal in the Tadic decision.[64] The Trial Chamber stated that it respected the 'persuasive authority' of the decision of the Appeals Chamber in the Tadic

60 *Prosecutor v. Kanyabashi,* Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997.

61 *Id.*, para. 6.

62 *Id.*, para. 13.

63 *Id.*, para. 24.

64 See the summary of the case 'Judgement in the Interlocutory Injunction Proceedings: Slobodan Milosevic v The Netherlands', 2 *Netherlands International Law Review* (2001), 357, 360.

case.[65] Kress writes that the ICTR's acceptance of Tadic as quasi-precedent for *Kanyabashi* is desirable as a matter of judicial policy.[66]

Milosevic questioned and attacked the legitimacy of the Tribunal during his very first appearance before the Tribunal. In responding to Judge May's inquiry as to whether he would like to be represented by Counsel he stated: "I consider this Tribunal a false Tribunal and the indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [an] illegal organ"[67]. At his next appearance he stated that the Tribunal was not a "juridical institution" but a "political tool"[68].

The *Milosevic* Trial Chamber held that the ICTY was created to "restore international peace and security" and dismissed Milosevic's motion. In the view of the Trial Chamber, the Security Council Resolution 827 (establishing the ICTY) centered on the ICTY's role of promoting peace and reconciliation in the former Yugoslavia.[69] The Trial Chamber therefore came to the conclusion that the creation of the ICTY was within the powers of the Security Council under Articles 39[70] and Article 41[71] of the United Nations Charter and the motion was dismissed.[72] The *Milosevic* Trial Chamber deferred to the Appeals Chamber decision in Tadic on the question of whether the Tribunal had the competence to determine its own legality.[73]

65 *Prosecutor v. Kanyabashi,* Decision on the Defence Motion on Jurisdiction, ICTR-96-15-T, 18 June 1997, para. 8.

66 See the Commentary by C. Kress, in A. Klip & G. Sluiter (eds), *Annotated Leading Cases on International Criminal Tribunals, The International Criminal Tribunal for Rwanda*, Vol. 2 (2001), 23.

67 *Prosecutor v. Milosevic,* Transcript of Initial Appearance, IT-02-54, 3 July 2001, 2.

68 *Prosecutor v. Milosevic*, Transcript of Status Conference, 30 August 2001, IT-02-54, 24-25.

69 *Id*. B, para. 7.

70 Art. 39 Charter of the United Nations (giving the Security Council the power to "determine the existence of a threat to the peace, breach of peace, or act of aggression" and "shall make recommendations, or decide what measures shall be taken in accordance with Art. 41 […] to maintain or restore international peace and security").

71 Art. 41 Charter of the United Nations (authorizing the Security Council to decide which "measures not involving the use of armed force" will be taken to fulfill Art. 39).

72 *Prosecutor v. Milosevic*, Decision on Preliminary Motions, IT-02-54, 8 November 2001, 3.

73 *Id.*

At the start of this trial in 2009 Radovan Karadic similarly filed a motion challenging the legitimacy of the ICTY. Karadic claimed that the SC overstepped its powers when creating the ICTY.[74] Karadic wrote that it was his "moral duty" to challenge the legal validity and legitimacy of the Tribunal.[75]

Following Tadic, challenges to the legitimacy of war crimes courts became a "routine defence" especially in the case of high profile accused. Saddam Hussein followed in the footsteps of Tadic and used the "legitimacy" defense.[76] During his pretrial hearing in July 2004, Hussein attacked the legitimacy of the Iraqi Special Tribunal (IST). Hussein questioned the judge on the law under which the IST was created.[77] The assessment of legitimacy depends partly on the method of establishment of a court. The legitimacy of the IST was called into question because the IST was established by the transitional governing council (Coalition Provisional Authority) that received funding and other kinds of support from the U.S. The fundamental legitimacy of a Tribunal being created under an occupation has been questioned. The illegitimacy of the occupation tainted the legitimacy of the IST. Many would have preferred a tribunal created under the authority of the United Nations. However some have commented that the question of whether the IST has been fundamentally tainted by its method of establishment depends on how fair its standards and procedures will be.[78] This view complies with the "outcome" based notion of legitimacy: a system can validate itself if it meets certain standards of equality, fairness, justice and freedom.

Unlike the ICTY and ICTR, the Special Tribunal for Sierra Leone [SCSL] was established by a treaty between the Government of Sierra Leone and the United Nations to prosecute those with the greatest

[74] The Centre for Peace in the Balkans, 'Karadic challenges war crimes court's legitimacy' (30 November 2009) available at http://www.balkanpeace.org/index.php?index=article&articleid=15667 (last visited 2 January 2012).

[75] *Id*.

[76] See A. Kang, 'Memorandum for the Iraqi Special Tribunal', *Case Western Reserve University School of Law, International War Crimes Research Lab* (2004), 3.

[77] See R. Cornwell 'Saddam in the Dock: Listen to His Victims, Not Saddam, Says White House', *The Independent,* 2 July 2004.

[78] C. Eckhart 'Saddam Hussein's Trial in Iraq: Fairness, Legitimacy and Alternatives, a Legal Analysis', *Cornell Law School Graduate Student Papers* (2006), 5

responsibility for violations of international humanitarian law.[79] The SCSL Appeals Chamber has stated that it was not vested with the power to determine its own legality. The Appeals Chamber in the Taylor case explicitly stated that the ICTY's Tadic decision was not binding on it.[80] The Appeals Chamber of the SCSL has dealt with the question of the legality and legitimacy of the SCSL on numerous occasions.[81] The legal basis for the SCSL was articulated in *Prosecutor v. Charles Taylor*.[82] The judges in the Taylor case stated that although the SCSL was established in a different manner from the ICTY and ICTR, it was set up in a lawful manner by the Security Council which derives its power from the UN Charter.[83]

The IST was said to be legitimized by the fact that its statue was subsequently amended and approved by the Iraqi Transitional Assembly. The Court was also expressly mentioned in the Iraqi Constitution.[84] The fact that the court has been approved by the Iraqi people through a direct vote in adopting the Constitution and through the Transitional Assembly (a body that was popularly elected by the Iraqi people) adds to its legitimacy.[85]

It is clear that any new Tribunal or international court should henceforth expect a challenge to its legitimacy and should be ready to defend the legality and legitimacy of its establishment. Although judges form other international tribunals may not always defer (or even refer) to Tadic, the Tadic approach to legitimacy will undoubtedly be influential.

According to Lombardi the "longevity of the legitimacy debate" can be attributed to the "continuing tension inherent in the dual form of the

79 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, UN Doc S/2000/915.

80 *Prosecutor v. Charles Taylor*, Decision on Immunity from Jurisdiction, SCSL 2003-01-I, 31 May 2004, paras 6-8, 11, 15.

81 See for example *Prosecutor v. Moinina Fafana,* Decision on the Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Power by the UN, SCSL-2004-14-PT, 25 March 2004

82 *Prosecutor v. Taylor*, Decision of the Immunity from Jurisdiction, SCSL-2003-01-1, 31 May 2004.

83 *Id*., para. 37.

84 Art. 134 of the Iraqi Constitution (adopted on 15 October 2005) reads: "The Iraqi High Tribunal shall continue its duties as an independent judicial body, in examining the crimes of the defunct dictatorial regime and its symbols. The Council of Representatives shall have the right to dissolve by law the Iraqi High Criminal Court after the completion of it work".

85 See C. Eckart 'Saddam Hussein's Trial in Iraq: Fairness, Legitimacy and Alternatives, a Legal Analysis', *Cornell Law School Graduate Student Papers* (2006), 16.

Tribunal"[86]. On the one hand the Tribunal is a body with circumscribed powers that would serve the political goals of the Security Council and on the other hand the Tribunal, to achieve that goal, should be seen as independent. The judges have acknowledged that their jurisprudential and rulemaking powers emanates from the Security Council but have also expanded their power beyond what the Statute provides.[87] This dilemma or tension between the pedigree of the ICTY and its attempts to carve out its own identity can be seen in many aspects of the ICTY's work.

It has been suggested that the legal arguments presented by the Trial Chamber and Appeals Chamber in the *Tadic Jurisdictional Decision* were not sufficient to legitimize a Tribunal with political, epic and foundational goals.[88] The position of the Trial Chamber was especially problematic. In light of the controversial nature of the Tribunals and the adventurous lawmaking by the judges the Trial Chamber should not have glibly dismissed the matter as non-justiciable.

Stronger reasoning in Tadic could have legitimized not only the work of the ICTY but also of successor Tribunals established by the Security Council Resolution such as the ICTR and could have had an impact even on second generation Tribunals[89] such as the Special Court for Sierra Leone [SCSL], Special Court for Lebanon [SCL], Extraordinary Chambers for Cambodia [ECCC] and East Timor. For similar reasons it is important that the Tribunals be independent. But it seems all is not lost. Could one argue that the ICTY could have legitimized itself through its work?

I. Subsequent Legitimization

David Luban has argued that Tribunals might compensate for the fact that they lack the authority of world governments, by building their legitimacy from the bottom up. This means that tribunals can build legitimacy by the fairness of their proceedings and the moral power they

[86] G. P. Lombardi, 'Legitimacy and the Expanding Power of the ICTY', 37 *New England Law Review* (2003) 4, 887.

[87] *Id*., 888.

[88] Alvarez, *supra* note 6, 245, 246.

[89] D. Shraga 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions', in C. P. Romano *et al*. (eds), *Internationalized Criminal Courts and Tribunals* (2004), 15.

project.[90] In the view of Luban, legitimacy of international trial emanates not from the "shaky political authority that creates them" but from the manifested fairness of their procedures and punishments. He writes that it is important that the ICTY deliver "champagne quality justice" by adhering to due process and fair, humane punishments and that in most respects they do.[91] Because of the insecure pedigree and legitimacy of the ICTY, the authority of the Tribunal must be largely self-generated by strict adherence to natural justice.[92] According to this view, international tribunals must earn their legitimacy rather than inheriting it.[93]

The legitimacy of the tribunals refers to the belief on the part of states and other actors that requests and commands of the tribunal merit compliance.[94] Sandholtz proposes that legitimacy of international institutions can fluctuate over time. Institutions initially need procedural legitimacy (by means of procedures that are accepted as consistent with prevailing norms and standards). After the establishment of an institution the nature of legitimacy shifts to performance legitimacy. Performance legitimacy requires that the functioning of institutions be seen as effective.[95] Sandholtz proposes that tribunals can lose legitimacy if in spite of the initial legitimate establishment they do not act in a way that shows that they deserve continued respect and compliance. The intriguing question is whether tribunals can also acquire legitimacy if they did not initially possess such legitimacy. Sandholtz, however, suggests that the test of legitimacy lies in whether there was substantial opposition to the creation of the tribunals which was not the case with the ICTY. There was a strong degree of consensus in the international community about the establishment of the

[90] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Public Law Research Paper No. 1154117*, (July 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154177 (last visited 28 December 2011), 24.

[91] *Id*., 14

[92] Natural justice includes all the basic procedural rights including the right to a speedy, public trial before an impartial tribunal, the right to offer a defense, the right to be informed of the charges against one in a language one understands, the right to counsel and the right against self-incrimination; the ban on double jeopardy and the right to an appeal.

[93] Luban, *supra* note 89, 15.

[94] Sandholtz, *supra* note 14, 27.

[95] *Id*., 16; J. d'Asprémont distinguishes between legitimacy of origin and legitimacy of exercise. See J. d'Asprémont & E. De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise', 34 *Fordham International Law Journal* (2011) 2, 190, 232.

ICTY. He suggests that initial legitimacy can fade if an institution is ineffective, incompetent or unfair.

But the procedural fairness of the ICTY has not gone unquestioned. One of the major procedural "deficiencies" at the ICTY has been the judges' ability to make and amend the Rules of Procedure and Evidence. It is problematic that the judges themselves are implicated in the procedural system and the decisions made about it.[96] Whiting has described this as one of the drawbacks of the flexible procedural system at the ICTY.[97] The process of easy amendments of the Rules may lead to expedient, short-term solutions "that sacrifice long-term or more diffuse interests or the rights of the accused"[98]. The practice of frequently amending rules can threaten the principle of legality and legal certainty.[99] And a system that allows for easy amendments can lead to stop-gap or cherry-picked procedural solutions resulting in an incoherent system. Whiting describes the legacy of procedure at the ICTY as a process of essential, though imperfect, experimentation.[100] Albin Eser has highlighted the procedural deficiencies relating to the principle of equality of arms. In his view this goes to the heart of fair trial guarantee.[101] In his view it may be doubted whether the defense is in factual status equal to that of the prosecution. He also highlights concerns regarding the impartiality of the judges despite the fact that repeatedly described by the Appeals Chamber as an important "component of the right to a fair trial".

What explains the widespread tolerance on the part of academic and other commentators for the way the judges have dealt with the Rules and for much of the lawmaking at the ICTY? One explanation for this tolerance could be the lack of a reference point in another system may explain the

[96] A. Whiting, 'The ICTY as a Laboratory of International Criminal Procedure', in B. Swart, A. Zahar & G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), 83, 85. See also M. Swart, 'Ad Hoc Rules for ad hoc Tribunals?', 18 *South Africa Journal on Human Rights* (2002), 570-589.

[97] Whiting, *supra* note 96, 107.

[98] *Id*. According to Whiting it is problematic that the ICTY Trial Chambers will often apply the Rules differently, leading to greater variation among chambers than may be found in domestic criminal justice systems.

[99] Swart, *supra* note 96, 577.

[100] Whiting, *supra* note 96, 105.

[101] A. Eser, 'Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY', in B. Swart, A. Zahar & G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the former Yugoslavia* (2011), 108, 133.

easier acceptance of commentators.[102] Because the procedures at the ICTY were created within a previously unoccupied space they were accepted by commentators at the outset.[103] The gravity of the crimes committed in the Yugoslavia also contributed to the large measure of international support for the ICTY. David Luban has argued that the ICC's legitimacy hinges on respect for individual rights.[104] Perhaps the same can be said for the ICTY.

Allen Buchanan challenges the contemporary view that adherence to human rights and acting in accordance with the major human rights conventions or articulating international human rights norms legitimizes an institution.[105] He argues that in order to be legitimate an international legal order would have to overcome the "parochialism objection" – the view that human rights are not really universal but a reflection of "Western" or "liberal individualist" thinking. He writes that institutions should not merely be viewed as venues in "which antecedently justified moral norms are given legal form" but as institutions for global public deliberation that can contribute to the moral justification of human rights norms and to their own legitimacy and to the legitimacy of the international legal order as a whole"[106].

J. Accountability

The question of the legitimacy of the ICTY is closely related to the question of accountability. The accountability of the Tribunals has been affected by questions regarding the funding and independence of the Tribunals. Independence includes both, the independence of mind of a judge (what Franck calls internal independence) as well as the independence of the judges from the countries that nominated them as well as the institutional independence of the Tribunal from the Security Council ("external independence"). Independence can refer to formal or "structural" independence or substantive independence. Over the years of the ICTY's

[102] Whiting, *supra* note 96, 83.

[103] For more criticism in this regard see P. Murphy, 'Excluding Justice or Facilitating Justice? International Criminal Law would benefit from Rules of Evidence', 12 *International Journal of Evidence and Proof* (2008), 1. See also R. Skilbeck,'Frankenstein's Monster: Creating a New International Procedure', 8 *Journal of International Criminal Justice* (2010) 2, 451, 452.

[104] Luban, *supra* note 90, 775.

[105] A. Buchanan, 'The Legitimacy of International Law', in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 79, 95.

[106] *Id*., 96.

existence, doubts have been raised about the independence of certain Tribunal judges. There are other structural features affecting the independence of the Tribunals. Two of the more important are the absence of a separate, structurally independent Appeals Chamber and the fact that the Office of the Prosecutor and Chambers are housed in the same building. And it is argued that the political nature of the appointment process of the judges and the political nature of work of Tribunal judges could militate against an activist approach to lawmaking at the Tribunals.

It is clear that the question of funding has some impact on the independence of the Tribunals. The fact that the Tribunals are funded by the United Nations means that they are not completely independent from the Security Council.[107] It has been argued that the expense of international Tribunals place greater responsibility and accountability on the shoulders of judges.[108]

Trifunovska has written that the manner of financing of the Tribunal through "private donors and "intermeshing of NATO governments" indicates the influence which some countries might exercise on ICTY activities and the lack of independent review of the whole system"[109].

K. Conclusion

The question of the legality and the legitimacy of the ICTY is important since an unsatisfactory answer to a challenge to its legitimacy taints all other achievements of the ICTY as well as the legacy of the ICTY. To an extent, one can argue that the ICTY's adherence to fair trial standards had a legitimizing effect on the Tribunal and that the end justifies the means. This does not however remove the concerns over the effect the method of establishment had on the legitimacy of the ICTY.

Even if the Tadic Appeals Chamber judges were more persuasive in finding that the ICTY's creation by the SC was legitimate, the legitimacy inquiry does not stop there. It can further be asked whether the Security Council has democratic legitimacy which in itself is a controversial

[107] S. Trifunovska, 'Fair Trial and International Justice: The ICTY as an example with special reference to the Milosevic case', *Rechtsgeleerd Magazijn Themis* (2003) 1, 3, 11. See also F. Mégret, 'The politics of International Criminal Justice', 13 *European Journal of International Law* (2002) 5, 1261.

[108] See M. Swart, *Judges and Lawmaking at the International Criminal Tribunals for the former Yugoslavia and Rwanda* (unpublished PhD thesis, 2006), 290.

[109] Trifunovska, *supra* note 106, 11.

question. Alvarez wrote that the Tadic trial was “foundational, political and epic”. The Tadic trial was foundational in that it sought to reinvigorate the Nuremberg principles and indirectly the rule of law, political in as far as it sought to deter future war crimes and make reconciliation in Yugoslavia possible and epic since what was at stake is the SC’s power to direct the first international criminal proceedings since World War II through *ad hoc* tribunals established by SC fiat.[110] Because of the importance of the *Tadic* judgment and because of the impact this judgment had on subsequent trials (by the ICTY and other Tribunals) the Trial and Appeals Chamber could have formulated more powerful arguments to place the legitimacy of the establishment beyond doubt.

One will of course have a deeper sense of the legacy of the ICTY with the passing of time. It is however not premature to say that the impact of the ICTY has been substantial and groundbreaking. There are already clear signs that the international community has taken the concerns flowing from Tadic seriously. One such concern is that the ICC was established by way of treaty and not by Security Council fiat. As the work of the ICC progresses, the impact and legacy of the ICTY will become clearer.

[110] Alvarez, *supra* note 6, 245.

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The Legacy of the ICTY as Seen Through Some of its Actors and Observers

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Abstract

This article proposes an exploration of the 'legacy' of the ICTY through the experience of some of its actors and observers. It is based on material provided by a dozen interviews and written in the spirit of understanding the tribunal's legacy as a collection of complex individual narratives of what the tribunal stands for, what it did well, and what it might have done better. The legacy of the ICTY as an international criminal tribunal on the one hand, and as a device for transitional justice on the other hand are considered. Although a tension is found to exist between a more 'forensic' and a more 'transitional' view of its role which is particularly manifest in determining the tribunal's constituencies and policies, the two are also linked. There is broad consensus about the tribunal's importance, but on the eve of its closing, also a sense of the limits of what international criminal justice can aspire to achieve.

A. Introduction

This article is an attempt to think about the legacy of the ICTY by letting some of its actors and close observers speak. It is based on 10 interviews conducted in the fall of 2011. An effort was made to strike a balance between persons who have worked for or at the tribunal in various capacities, and persons in the former-Yugoslavia who either had some direct involvement with the tribunal or worked on transitional justice issues. The selection is meant to be loosely representative, not in a controllably scientific way. About half the interviewees were 'internationals' working in the Hague, whilst the other half were more closely related to the former-Yugoslavia. Choice of interviewees also inevitably reflected availability and willingness to speak. The interviews were conducted in the spirit of a conversation, gently prodding interviewees when the interviewer thought that more could be said, but also largely driven by the interviewees' own interests and agendas.

The interview format was chosen as part of an effort to engage in more dialogical scholarship, and push the formal boundaries of what can be published in an international law journal (although this is obviously not the first interview based article to be published in this way, nor is the format one close to the canon of international legal scholarship). In that respect, I am grateful to the dynamic editorial staff of the Goettingen Journal of International Law for being so open and enthusiastic about my early

suggestion to proceed in this direction. But the interview format also seemed particularly suited to an article on a tribunal's *legacy*. Legacy is not a legal term of art or a specifically legal term, although it is one that seems very important for the particular circumstances of an institution such as the ICTY that will have been relatively short-lived in time (two decades), and which is now contemplating its quasi-imminent shutting down. A legacy is not something cast in stone for all times; rather it is an evolving intellectual relationship that we construct with an object receding in the past (to the point of it being strange to speak of legacy whilst the tribunal is still in activity), and that we are condemned to reinterpret on the basis of changing circumstances and assumptions. It thus seemed important to foreground the extent to which the tribunal's legacy is already an intense locus of discussions, even struggles, about its definitive meaning for the history of international law, our understanding of criminal justice in post-conflict situations, or the fate of the former-Yugoslavia.

In many ways, it quickly appeared from my interviews that the tribunal means very different things for different people. In the course of discussions, I realized there was a very significant convergence on some of the fundamentals of what the ICTY will be remembered for; yet one's perception of the its legacy will inevitably be shaped by the nature of the work one did for it, how one was personally affected by it, or what one hoped it would achieve in the first place. There were definitely differences in sensitivity, which often came down to what the interviewee chose to emphasize at the expense of other things. The idea of legacy is also captured quite well by a series of interviews because so much of the legacy of a tribunal is also about memories that one has of it, and in that respect there is no replacing actors speaking in their own voice. Opening to several voices also makes for an approach to the legacy that is more open and less suspect of wanting to foist a particular message on the reader or of reducing what is inevitably a complex narrative to something.

To the extent that I am interested in the subjectivity of perceptions of the ICTY's legacy, I should probably also disclose my own relationship to the topic. I worked for UNPROFOR from July to December 1995 in the French Battalion in Sarajevo. Soon after that, as a student of international law, the ICTY seemed a natural counterpoint to the frustrations of peacekeeping, and I have remained a curious but distant observer ever since, frequently talking to tribunal participants including, with the passage of the years, some of my former students, and once catching a glimpse of Slobodan Milosevic in the courtroom. My relative distance from the tribunal, the fact that I am not privy to the many anecdotes that insiders

invariably seem to share, made me particularly keen on getting the story straight from some of its actors. My attitude in researching this article was overwhelmingly one of curiosity, of finding out more seriously what to make of these decades of activity, dozens of cases, and considerable efforts by so many involved.

An institution's legacy may on the long term turn out to be as if not more important than its actual activity, because that legacy stands for what can be accomplished. This is also what makes it interesting, the fact that the meaning of that legacy will inevitably become something controversial in at least some respects. I begin with a short 'atmospheric prologue' (I), before considering the ICTY both as an international criminal tribunal (II) and as a device for transitional justice in the former-Yugoslavia (III).

B. Atmospheric Prologue

Soon enough, the legacy of the ICTY will be what it is remembered for. In that respect the tribunal will be remembered as an intellectual, legal or political object of sorts. But its legacy will also lie in a range of more subtle and intimate recollections of a certain atmosphere, of a certain moment in history. One question that I asked all interviewees, therefore, and that can serve as a sort of prologue to this article is what they think their most vivid memory of the tribunal will be. When all is said and done, a certain 'image' of international criminal tribunals may be worth many long discourses (I am reminded for example of the famous black and white, cross-section picture of the defendants at Nuremberg that became emblematic of the trial – Hess with his sunglasses, the Military Police soldier with a white helmet standing guard), and has since been used time and time again to represent it. In many ways, each person's most vivid recollection reflected the particular gaze of their function, but also pointed more concealed ways in which they have been "touched" by the tribunal's activity.

Payam Akhavan, formerly of the ICTY Office of the Prosecutor and who was involved in the prehistory of the tribunal (notably a mission in a September-October 1992 CSCE mission to Yugoslavia under Hans Correl which, for the first time, recommended the creation of an international criminal tribunal) reminisced about the ICTY's very improbable beginnings with a sense of awe at how far it had moved on since:

> "My most vivid moment was April 3rd of 1994 when I entered the Aegon building (note: Aegon is a Dutch insurance company

> which previously occupied the building which the tribunal has occupied since its beginnings), and walked into a physical structure that was only the hypothetical home for a tribunal that existed on paper only, at a time when the leading war criminals were still in positions of power, were seemingly invincible, untouchable, the international community was negotiating with them, ethnic cleansing was ongoing, and the prospect that this tribunal would be anything more than a paper tiger was far from a foregone conclusion. […] I had never imagined that our proposal would be taken seriously and that the tribunal would be created. Having been in Bosnia, having witnessed the complete impotence of UNPROFR in the face of ongoing atrocities, and after imagining this institution in purely conceptual term, here was a physical structure. And there were 5 of us in a huge wing of that building; I came for only three months. Even Cassese kept saying 'we are going to find out. Maybe this is going to be a fiasco.' But there were others such as Graham Blewitt whose *naiveté* was refreshing, and who said that 'of course this tribunal is going to work because the UN established it, they must intend to make it work.'"

Michael Wladimiroff, the first counsel to appear before the ICTY, pointed to a remarkable atmosphere of cooperation, borne from circumstances:

> "When I started in April 1995, I had no clue whatsoever about international humanitarian law. I had always focused on white-collar crime. But I remember very well that, learning as I went, it was a relief to see that the other judges (with the exception of Cassese) and prosecutors were facing the same difficulties. We were all learning on the job, sailing uncharted water and that created a sort of bond between participants. This was something which I had not faced in any other jurisdiction before. When we were faced with an issue we first discussed it within the defense team, but often then just called the prosecution and discussed with them how they would approach it, until we came to an agreement. And if not we would direct ourselves either together or ex parte to the judges and ask how they felt. It was very odd, people coming from different areas, not knowing the law of the

> place where they worked but eager to resolve all the issues that arose."

Judge Pocar was the President of the tribunal from 2005 to 2008. He spoke of an experience of empathy with victims:

> "I will never forget the first case in which I was sitting as a trial Judge, which is a quite different experience as compared with appeals because one hears the direct testimony of the witnesses. And I will never forget the persons that were brought as witnesses who at the same time were victims. It happened 12 years ago but I don't need photos to remember some of the witnesses and their demeanor, the way they came with their thoughts before the tribunal, is something one will have difficulty in forgetting. It's an extremely interesting experience from the legal point of view as well as from the human point of view [….] It is also quite a difficult exercise to be involved, and at the same time to keep one's distance in order to make a good judgment, without being influenced emotionally by the facts that are brought to one's attention by the victims. Live testimony is really quite different from reading about atrocities in a book."

For others, it was perhaps the surprising power of international criminal justice and the way the trial could create conditions of real leverage against the powers that be. Peter Robinson, a defense attorney who has assisted the defenses of both Radovan Karadzic, the former President of the Bosnian Serb Republic and Dragoljub Ojdanic, the fomer Chief of Staff of the Yugoslav Army, remembers being startled by one hearing:

> "I would have to say that my most vivid memory was probably a hearing that we had with the 11 States of NATO in which I was representing general Ojdanic and we were seeking wiretap intercepts. We asked for them from NATO and all their member States that were involved in the course of the war. We had a very crowded hearing in front of the trial chamber where all the States and their representatives came and we all argued about whether we were entitled to these wiretaps. […] What was striking was the fact that the ICTY has a power to summon all of these States and NATO to explain why they wouldn't give this material to an accused person at the tribunal. It was a test of the

> fair trial rights of an accused (regardless of the fact that the trial decision in our favor was subsequently overturned by the appeal chamber)."

For yet others, the ICTY was the occasion for strange cultural-juridical experiences as worlds collided. Zoran Pajic, for example, recalls how he was a little startled by his counter-interrogation in court as an expert witness:

> "[…] the most striking experience to me was that the defense lawyer of Mr. Blaskic who was an eminent, distinguished, Croat advocate in fact had a counsel from California, an American whose primary task was to discredit the expert witness. And I was taken aback by that, it took me five to ten minutes to realize what was going on. And then I was telling myself 'okay, calm down, calm down there is nothing substantial here, he is just producing a show.' That was something that I really didn't expect."

These various snapshots can begin to capture the diversity of perspectives that make up the ICTY as a place where legal and political logics collide, where viewpoint informs perception, and where power, violence and emotions intersect. But what of the ICTY as a legal object?

C. The ICTY as International Criminal Tribunal

The ICTY is perhaps first and foremost an international criminal tribunal. That is its name and its *raison d'être*, part of the broader legacy of international criminal justice, the first such tribunal after Nuremberg and Tokyo. In that, it is also a hybrid, part *international* tribunal in that it is created and operates internationally, but also part *criminal* tribunal in that its day to day courtroom operation is much closer to a domestic criminal court than, for example, the functioning of the ICJ.

I. An International Tribunal

1. The Tribunal's Creation and the Issue of Judicial Review

As is well known, the circumstances of the creation of the ICTY were unusual and somewhat controversial at the time. It had never been

particularly anticipated that the Security Council could create a subsidiary judicial body, although nor had it been excluded or had many things that the Council has engaged in the last 60 years been specifically mandated. What was even more controversial perhaps was the fact that the ICTY decided that it had the competence to review the legality of its own creation. This was of course a foundational event for the ICTY, one that was supposed to establish its credentials as a legitimate international judicial institution. But it also anticipated by perhaps a decade a whole range of issues linked to the possible judicial review of Security Council actions, seen as something of a Grail for the idea of an international rule of law. As Marko Milanovic put it:

> "This was the first real attempt at reviewing the actions of the Security Council. This is an issue we are faced with today, for example in the domain of targeted sanctions. But it may have been less influential than one might have thought so far. The whole posture of the case resembles Marbury v. Madison, where the Supreme Court said 'by the way, we have the power to review the constitutionality of laws passed by Congress, but in this particular case we think Congress acted constitutionally.' This is a tried and tested maneuver for a court to take a power for itself, and then to say we do not need to use it now. And that is what happened in Tadic: 'by the way, we have the power to review the actions of the Security Council constitutionally, but the Council acted lawfully.' The European Court of Justice and the European Court of Human Rights today try to interpret Security Council resolutions so as to make them compatible with their legal orders. So there has not been a showdown yet, but I have no doubt that when it comes – and it will come – that court will cite Tadic."

2. International Criminal Law and the Fragmentation of International Law

According to Marko Milanovic, perhaps one of the most unexpected legacies of the ICTY was that it became fully part of what would soon become known as the problem of the "fragmentation of international law", i.e.: the separation of general international law into several more or less self-contained regimes. This occurred famously when the ICTY sought to define the conditions of imputability of the acts of non-State actors to States, nominally for the purposes of characterizing a conflict as international or

non-international but in ways that seemed to clash head on with the ICJ's own criteria for State responsibility. The Tadic case was "one of the most cited examples of the phenomenon of fragmentation [and] caused an enormous ruckus". It was a "major contribution because that particular issue resonates throughout some of the main contemporary issues of international law, such as the *jus ad bellum*. What is the right standard of attribution for saying whether the acts of terrorists are attributable to the State, or whether an armed attack occurred?" The ICTY, led by Cassese, sought to change the law but was rebuked by the ICJ. At least, however, the decision "generated an enormous debate" on the standard of responsibility for non-State actors, even though the "overall control test" has not become part of general international law beyond the specific context of international humanitarian law. It introduced new ways of thinking about some old issues of international law.

Another area where a form of international criminal law separatism has manifested itself is in the doctrine of sources. What was particularly interesting to Judge Pocar was that a new substantive law also entailed a new approach to the sources of international law:

> "The treaties, the Geneva conventions were not prima facie complete in terms of the criminal norms because the conduct was provided but not the sentences, nor the modes of responsibility for instance, and all this had to be completed on the basis of customary law by the tribunal. And when I say customary law, I take it in a wide perspective, as including to a large extent recourse to principles of law affirmed in domestic legislation and domestic legal orders, which are formally a different source of international law. So having worked to a large extent on customary law which is by itself a difficult assessment and principles of law is something that is probably new in terms of international law not because this has never been done by other calls including the ICJ, but because the extent to which the tribunal has done this is a new and significant contribution to international law and international adjudication."

In other words, the exercise of uncovering a largely new law at the ICTY in its turn took quite novel routes. Although perhaps less

controversial than the issue of attribution to the State, this is a change that potentially has deep implications for the development of international law.

3. The Development of International Humanitarian Law and the Question of Impunity

One would expect the legacy of the ICTY to be a certain culture of international prosecutions, a highly specific form of know-how about how to prosecute persons suspected of having committed atrocities. In that respect, the ICTY acted as a sort of laboratory. Its judges were granted considerable leeway to develop rules of procedure and adapt them as they went. They were given the extraordinary opportunity to contribute jurisprudentially to a branch of international law where much still needed to be decided. The ICTY thus became the site of many *premières* in international humanitarian law. For Judge Pocar:

> "The most important contribution of the ICTY is that it was the first court to have considered international humanitarian law, both customary and treaty law, from the angle of the individual criminal responsibility of the actors. Of course, up to the ICTY international humanitarian law had been scrutinized and examined from the point of view of those who conduct military operations, those who are victims of violations of the rules governing military operations, but never from the point of view of the responsibility that we attached to individuals in connection with such violations. Although the Geneva conventions provide for criminalization of grave breaches of the conventions, this was almost never done. In fact, cases before the domestic courts were very limited, because most States did not actually implement the Convention from that point of view, and the tribunal had to do this as of the beginning by making recourse to international customary law."

Beyond specific contributions by the tribunal to international law, there is of course the issue of the tribunal being in and by itself a contribution to international law. The ICTY was credited by several interviewees as having made the point that international criminal justice was viable, at least to a greater extent than typically thought possible before that. Several also emphasized the role that the ICTY had had in paving the way for the ICC. Payam Akhavan spoke of a "*cultural* transformation" rather

than an “immediate impact on the propensity of genocidal leaders across the world to cease and desist from all further atrocities because of fear of punishment”, and of a “culture of impunity gradually being transformed into a culture where there is ever greater degrees of accountability”. In effect, the ICTY:

> “[…] stole the thunder from everything that came afterwards, simply because it was unprecedented. The most significant accomplishment is political rather than legal. The question of setting up a tribunal that can administer fair justice, jurisprudence that is reasonably sophisticated and coherent, all of those are secondary to the fact of having arrested and prosecuted people.”

Akhavan particularly emphasized the powerful symbolic connotations of the “image of once untouchable tyrants as defendants in the dock answering to the world”. What is really striking is that “policy and decision makers not normally engaged with human rights issues, that would not really see those soft issues as being anywhere except on the margins of realpolitik actually shifted their perception and saw the tribunal as an important instrument of post–conflict governance.”

At the same time, the existence of the tribunal also underscored some of the difficulties that would inevitably beset any international criminal jurisdiction relying on State cooperation. Mark Harmon, a prosecutor at the ICTY for more than a decade and one associated with some of its leading cases, suggested a strong word of caution:

> “When I worked as a (US) Federal Prosecutor, I had access to coercive instruments such as subpoenas and subpoenas duces tecum to collect the evidence. But in the ICTY statute, the regime was cooperation, States had an international legal obligation to cooperate with the tribunal. That was all good and well but when trying to request documents from States which were complicit in the crimes, you simply did not get their cooperation. In the Blaskic case, after repeatedly failing to obtain the requested documents from Croatia, the OTP issued a subpoena duces tecum to Croatia to compel it to produce documents, which provoked huge litigation […] In the end, Croatia actively hid documents that would have proved their

> involvement and helped us to establish the existence of an international armed conflict and the guilt of the accused. Some defendants were clearly getting cooperation from states intent on protecting their interests. In the Blaskic case, Croatia's obstruction had an impact on later appellate proceedings."

II. A Criminal Tribunal

Aside from being an international tribunal, the ICTY, in its day-to-day operation, decorum and professional roles is perhaps first and foremost a *criminal* tribunal, something which became clearer with the years once many of the foundational international law questions had been addressed. It was, no doubt, a tribunal endowed with specific characteristics. Mark Harmon particularly emphasized "how hard trials at the ICTY are. They are endurance contests; they are grueling marathons. Domestic trials are considerably shorter, considerably fewer witnesses, and by and large don't merit large amounts of public attention." Part of this has to do with the weight of jurisdictional elements. Harmon pointed out the considerable challenge of jurisdictional and threshold requirements for certain crimes (e.g.: widespread or systematic attack for crimes against humanity, existence of an international armed conflict for grave breaches of the Geneva Conventions). Harmon insisted that one of the ways of making sure that indictments were legally and factually sound was to have a rigorous system of indictment "peer review process" within the OTP based from the start on a standard of "beyond reasonable doubt" (that of culpability) rather than aim simply for the lower "*prima facie*" standard of confirmation of indictments and then somehow hope that further investigations would provide incontrovertible evidence. The complexity of proceedings nonetheless inevitably raised numerous challenges for the integrity of trials.

1. Due Process

The ability of the ICTY to grant a fair trial to the accused has perhaps been one of the most constant *motif of critique*. Probably no one is better placed to ascertain fairness to defendants than defense attorneys. In that respect, Peter Robinson made the case that things were complicated and nuanced.

> Peter Robinson: "I think the most challenging aspect of standing up for the rights of the accused in the face of sometimes of

> presumption of guilt. So, it seems like the tribunal as opposed to some domestic practices, they really want to get on with things and to take judicial notice of adjudicated facts from other cases to admit testimony from other trials without the right of cross examination. And so, probably the most challenging part has been to stand in front of the train with my hand forward protecting my client from this train that just wants to roll over him."
>
> FM: "And did you ever have the impression that the train was just too strong, it was sort of effectively rolling over you?"
>
> Peter Robinson: "Definitely."
>
> FM: "Is that because there is a mismatch of power between the tribunal and the defense or maybe between the defense and the prosecution? Is that what the train metaphor refers to?"
>
> Peter Robinson: "Yes, I feel that every day at the ICTY, when you go into the building there are bunch of signs on door that say people with red passes are not allowed to enter. The people with red passes are the defense, so there are large parts of the tribunal that we can't go to, the defense is not an organ of the tribunal (note: nor should it be Robinson emphasized when later asked). So for example we are not allowed to go to any of the press briefings that the prosecution and the registry hold. We can't have press interviews within the building, we have to meet the journalists outside on the lawn and those are just examples of sort of some of the cosmetic things which show that there is not so much equality in – but in the real important part the resources between the prosecution and the defense especially are really overwhelmingly lopsided."

However, Ekkehard Withopf, a former Senior Trial Attorney with the ICTY, disagreed that the inequality in means was decisive. He noted that "There is a difference between having to prove a case beyond a reasonable doubt and simply showing a doubt, poking holes in the prosecution case. It flows naturally from the fact that the OTP has a higher burden of proof that it has more employees, more resources, and more money." At any rate, the defense attorneys I spoke to, insisted they felt their clients had gotten a fair

trial. Peter Robinson mentioned that "the most striking thing about the ICTY is the professionalism of the people that are working there and the judges and the prosecution, defense on the registry. And I think that is what results in them trying to be fair on the daily basis, even though some of the rules and procedures can just really lend themselves to a conviction". Problems highlighted by defense counsel had to do with a number of more or less discrete issues (disclosure, accessibility of evidence, lack of provisional release), rather than any fundamental concern with the tribunal's independence or impartiality.

2. The Fairness of Substantive Law

Unfairness need not only be procedural. It can also be substantive. In that respect perhaps the oldest fear is that, precisely because of the fast-paced character of international criminal law's development under the ICTY's watch, the principle of legality (*nullum crimen sine lege*) may be stretched. I specifically asked Judge Pocar how individuals in the heat of battle in 1993 were expected to understand the law if it took so long and so many expert lawyers to ascertain it? He was unmoved by the suggestion:

> "In my view this goes more to the accessibility of the law than its substance. Even in domestic criminal law, the question is not that the alleged perpetrator have actually known the law, but that it be accessible in theory (the fact that it is published in the official journal, does not mean that people know it). Customary law may be less accessible than statutory law, but it is nonetheless accessible. The problem is whether that customary law existed or not, not whether the accused knew its content. Of course, it is true that there is a margin of appreciation in determining the content of customary law, but I don't think the tribunal went beyond the law, it tried to stick to solely interpreting the law. But interpretation, assessment, development of the law are sometimes borderline notions, and different people will disagree on what is going on especially when the law is in flux. In addition, there were precedents that have not been followed as not being in conformity with customary law. For example, in terms of command responsibility there was the Yamashita decision which went

> beyond what the ICTY, which has been quite prudent, decided was the law."

Nonetheless, the tension between a fast developing international criminal law and traditional principles of criminal punishment proved a source of concern for lawyers at the Tribunal. Michael Wladimiroff emphasized that a lawyer trained in the continental tradition of "*lex certa*, where there is a code with all the crimes and elements of crimes so that one always knows that the elements are and the only challenge is to prove them. Here not even the core crimes were properly defined." The judges typically did not tell the parties what they thought of the issue until the verdict, making it difficult to understand what to prove. Marko Milanovic did point to the risk, in this context, of "compromising the legality principle". In the short term, this may help secure convictions to develop international criminal law dynamically but it is true that for "many criminal lawyers, particularly from the continent, were left with a bad aftertaste." This may explain the subsequent tendency to create a "much more formalized system with the ICC, with an influx of old doctrinal theories from Germany about liability issues".

Another area of substantive law that caused concern according to some interviewees was the recurrent suspicion that the nets of criminal liability in the ICTY Statute and case law are cast so wide as to make it very difficult to prove one's innocence, even in a context of procedural due process. Peter Robinson mentioned the case of Serbian General Ojdanić, a Kosovo Serb, who was found guilty of aiding an abetting because he sent troops in Kosovo and had reason to believe that they would be involved in expelling Kosovars. For Peter Robinson this case shows that "[…] the jurisprudence of the tribunal is so broad that it ensnares people who themselves aren't in my opinion criminally culpable, and makes them into criminals […] it is almost automatic that if crimes happened on your watch you can be found guilty if a Chamber wants to". Ekkehard Withopf, as a Prosecutor, also said that he had some sympathy for how difficult things could be for the defense. Payam Akhavan explained in detail what his sense of the dangers was when already expansive modes of liability are combined with a certain form of judicial activism:

> "[…] in terms of the judiciary, there was a political sensibility that this tribunal, because it has a unique opportunity to implement international humanitarian law after all these decades

> of impunity, must expand the law. No one becomes a hero in our profession by being a conservative judge. Our sympathies are with the victims and we believe that justice is so rare that when the opportunity presents itself we have to interpret the law in an expansive way to maximize the prospects of conviction, to make it easier for the prosecution to prove its case. We have now reached a point where must be asking whether the tribunal has not gone too far in this direction, and whether by using devices such as JCE (joint criminal enterprise) very broadly defined, often in combination with the notion of 'persecution' as part of crimes against humanity which is a sort of a basket in which you can throw multiple acts without really specifying what is the basis of persecution, then you have created a kind of 'magic bullet' for the prosecution which makes it easier to convict."

Miodrag Majic, a judge at the Appellate Courtin Belgrade, suggested that command responsibility was not as familiar to the criminal law in Serbia as it was to international criminal law, and also noted he had some reservations with what he saw as a more general prosecutorial drive to establishing guilt:

> "[…] under the flag of transitional justice it sometimes seems as if we need more and more accused and convicts, as if the machine feeds on this. In fact, only conviction of the guilty is explicitly stated as a goal of transitional justice efforts: but what about protection, even affirmation of the innocence of the innocent? Maybe this is too obvious to mention, but there is an imbalance in the goals."

3. The Role of Victims

One aspect of international criminal justice that is currently undergoing significant transformation is the role of victims. The ICC, for example, has made this into a central plank of its legitimacy. Yet victims before the ICTY only appeared as witnesses if at all. Could things have been done differently? Was this a weak point in the ICTY's legacy? Views on the matter differed starkly. Mark Harmon emphasized that testifying was hardly a minor role and provided some of the tribunal's most powerful moments: "Our relationship at one level was purely functional, but those in the

courtroom could not help but be moved by testimonies. There were days when all of us had tears in our eyes."

Judge Pocar was doubtful, however, that an ICC type victim participation regime would have been of benefit to the tribunal he presided over:

> "Frankly, I believe that the absence of victims as parties from proceedings – which has been criticized actually – is a non-problem, and the current work of the ICC in this respect gives room for pause. The ICC is to a large extent prevented from functioning because when you have mass crimes it is almost impossible to have the victims participate in the proceedings. Furthermore, only some will participate, but who? The representatives of victims, NGOs? But NGOs may have their own agenda, may manipulate things. Victims mostly participate as witnesses and the ICTY had thousands of those. So participation was there. What is lacking, it is true, is a system of reparation, but this does not necessarily need to go through participation. When it comes to mass crimes it is more a matter of finding ways and means of granting reparations to large numbers of victims that sometimes are very hard to identify correctly because the entire population was victimized. It is a good thing that the ICC has a Victim Trust Fund, but we should not be wasting funds for participation, which does not add anything to the proceedings and could lead to additional delays."

Yet Ekkehard Withopf, having worked for both the ICTY and the ICC saw things differently, even suggesting that, with the benefit of hindsight, the ICTY could have benefited from a more victim friendly regime:

> "What happened on a few occasions is that witnesses who were prosecution witnesses only; they had the feeling, which the expressed occasionally, that they were instruments in the hands of the Prosecution rather than independent individuals in the court proceedings. If I compare this with the ICC situation where I have seen victim participation in practice, I very much take the view that victim participation is a positive aspect in international criminal proceedings. I know of the concern that very many of my colleagues had and continue to have that

> victim participation delays proceedings, but what I have seen so far at the ICC does not vindicate that fear. If it is dealt with properly by the trial chamber and certain limits are put to victim participation, it is absolutely necessary and would have helped address some of the shortcomings of the ICTY."

Among these shortcomings may be, precisely, the limitations of the tribunal's impact on the region due to a lack of direct involvement of some of its core constituents in its activity.

D. The ICTY as Transitional Justice Device

One criticism that might emerge from listening to interviewees talking about the contribution of the ICTY as an international criminal tribunal, perhaps an easy one but one that bears careful scrutiny, is that the tribunal has been more important for international law or the idea of criminal justice than the region it was supposed to have an impact on. It of course remains a possibility that this was actually intended, that the ICTY was merely a stepping stone for the broader project of creating a permanent international criminal court. Yet there would seem to be something ultimately awkward and circular about justifying the creation of international tribunals on the basis of how they may have helped create more tribunals. The question of the impact on the former-Yugoslavia, it seems, is not one that any of the interviewees wanted to elude, although they differed quite markedly on what it had been.

For example, whilst there was a sense that the tribunal had hardly single-handedly brought about international peace and security in the region, it had certainly helped create the conditions and consolidate such a situation. For Payam Akhavan:

> "One of the immediate effects of the tribunal, which has little do with subtle and long term shifts of people's perception of history, is the removal of certain individuals from the political space. And that is a very immediate and tangible effect: you take someone, who is a demagogical leader, who is responsible for violence, who cannot be trusted to conduct politics in any way except to incite hatred, and you remove that person. In criminological terms, it is a form of incapacitation, which in itself is extremely valuable. Combined with economic aid, conditionality and other incentives, the ICTY significantly

> contributed to moderate the political space, despite recurrent tensions."

From many of my interviewees, nonetheless, I heard a note of strong caution about investing too high a hope in what the tribunal could achieve. For Judge Pocar, who at one point in the interview emphasized that "from a court you can't expect more than doing the work of a court":

> "It is certain that the resolutions which established the tribunal contained a number of references in the preamble to reconciliation process and stressed the importance of rebuilding the society and establishing the rule of law in the countries concerned. Now, it's certain that this contribution cannot be complete, I do not think that a judicial body can do all these things alone, it is clear that other measures are necessary in this respect. A judicial body like the ICTY can only deal with a limited number of cases - although at the end we will have dealt with 161 cases. But I do not think that further transformation can be brought about without a more generalized adjudication of all these cases, or a different treatment through procedures like truth commissions."

Yet simply because we agree that the tribunal could not do everything, does not mean that we cannot speculate about what it did do. The question of whether the ICTY has had an impact on the former-Yugoslavia is central to understanding its legacy, not only for the region but even for the promise of international justice itself.

I. The Tribunal and its Constituencies

One interesting way of thinking about the ICTY and its larger role is in terms of having a series of "constituencies". Its impact can then be evaluated by how each constituency has been affected by its work. Refik Hodzic put it most starkly by suggesting that defining the tribunal's constituency depends on what one's idea of the goal of the tribunal is:

> "Of course there are many constituencies in international justice. We cannot forget that there are funders, there is the 'international community' as abstract as that notion is, and also a number of other circles (academic and legal,) but ultimately if

> one wants to determine what the real constituency is we need to deconstruct why the ICTY was created. Why was it setup? What was its purpose? What was its mandate? Its mandate was, as defined by the UN Security Council resolution that established it, to contribute to a lasting - to establishment and maintenance of a lasting peace where in the former Yugoslavia. So if *this* is the mandate then of course the constituents are the people that you are supposed to establish and maintain this peace for. These are the same people who appear in the legal process or trial as defendants, victims, witnesses. These are the people who will be affected by the outcome of the trials."

That, at least, is the theory. A constant theme in Refik Hodzic's thinking about the issue is the extent to which the obviousness of that constituency was not necessarily the most shared thing at the tribunal:

> "Unfortunately I have to say that this interpretation was far, far, far from accepted at the tribunal and around the tribunal because most presidents, most people who worked for the tribunal, decision makers saw New York, Washington, Berlin, London, Paris, Moscow as their constituents. That is where they looked for approval or support and - of course, I understand that they had to in order to make the tribunal work and make sure that it receives funds and all that. At the same time, I have to say that in the end this resulted in the sort of alienating gap where basically developing international law was far more important to many of the people, many of the presidents of the ICTY, many of the judges, many of the prosecutors than the communities that they were supposed to serve."

Refik Hodzic, who served for several years as Tribunals spokesman and outreach coordinator for Bosnia and Herzegovina, nonetheless insisted that we should take seriously the idea of the tribunal as a Chapter VII measure "to restore international peace and security" beyond the "immediate task of prosecuting and judging".

1. Defendants

One perhaps not so obvious but interesting place to start in terms of ICTY constituencies might be the defendants themselves. After all, they are

the tribunal's primary "clients", what of *their* views on its process? Some of these views (most notably Milosevic's) have been amply publicized in court and clearly saw nothing in the process but political justice; but it is not always evident to know what goes on behind the closed expressions of defendants in court, tie and suited, sometimes looking like the shadow of their former belligerent selves. It also struck me that if international criminal justice were to encourage genuine sentiments of repentance from those convicted this might go a long way to stimulate reconciliation efforts. Was there ever at least a grudging recognition that the tribunal stood for a fundamental aspiration to justice in the wake of atrocity?

Zoran Pajic, now an academic at King's College but who worked as an expert with the Office of the High Representative in Bosnia, did at least know of people who "upon being released from the prison in the Hague or somewhere else, just wanted to be left alone, go home in peace and rejoin their families". Yet beyond that sort of wariness (which could be explained in a variety of ways and is not necessarily a manifestation of atonement), the interviewees, particularly defense counsel, insisted that the ICTY had swayed few defendants in their views. For Peter Robinson it was axiomatic that:

> "[…] almost all of the people who appeared before the ICTY think the court is political, whether they are Serbs, Bosnian or Croat. I think that's the very, very common view that's held and the only difference is how they deal with that. So, some of them accepted that that's the way it was and they just tried to mount a conventional defense and hope that things will fall in their favor. Others wanted to fight politics with politics and have their trial be conducted on a more political level. So, I think that's the difference in the way people handle their defenses, but it's pretty common that the accused think that the ICTY is a very political institution. […] As a counsel, I tell my clients that, even if it is political, which I also believe, it is they who are in a UN jail and so the best thing to do for them is to try to use the tribunals rules and their procedures to their advantage as much as possible. It's really futile to just say this is a political court and refuse to participate or boycott; otherwise, the case will just be conducted without them and they will gain nothing from that. So my advice to my client is basically to try to make the best they can under the circumstances, and that is what most of them have done."

That evident lack of remorse extended to individuals such as Biljana Plavšić who had pleaded guilty before the tribunal, and went on to give interviews from her jail in Sweden in which she watered down her plea and presented it as tactical. One exception was Erdemovic whose guilty plea during his trial for his participation in Srebrenica, Marko Milanovic pointed out, “was very emotional. But he was a low level guy, and it did not produce any cathartic effect.”

2. Public Opinion(s)

If not defendants, then at least public opinion in the former-Yugoslavia might have been significantly influenced by the proceedings before the ICTY. Initially, the ill-feeling towards the tribunal was such that not even defense counsel seemed to be welcome even when they were there to defend members of a certain community. Michael Wladimiroff remarked that “one would expect that a lawyer acting on behalf of a Bosnian Serb would be at an advantage to travel in the area because people would like what he was doing, but the reality was the opposite. I was treated in a very unfriendly way at times because I was seen as a representative of the tribunal.”

One measure of how the tribunal may have influenced public opinions would be the degree to which ICTY convictions contributed to the ostracization of those convicted when they eventually returned to the region. If anything, the effect seemed to be quite the opposite, “People are going home, they served their sentences be it 8 years, 10 years, 12 years, and they're welcomed as heroes in their own communities and they feel like heroes” (Zoran Pajic). Zoran Pajic stated his view very simply: “I think that the Hague tribunal has alienated itself from people in the region. It has done a remarkable job, but that job was ‘somewhere else’, from the point to view of local people and local communities in the former Yugoslavia.” Hasan Nuhanovic pointed out that “the Hague tribunal is far from Bosnia, it is 2000 kilometers away. And the only thing that people know about it is from some media reports, unless it is prime news or on the front page of daily newspapers. Otherwise, it will pass unnoticed. There is no continuous flow of information from the Hague to Bosnia Herzegovina.” Worse than that, almost two decades after the conflict surveys carried out by the Belgrade Centre for Human Rights show that in some parts of the region a vast majority of the population still denies that crimes happened, or is prone to

strongly relativize them. As Hasan Nuhanovic noted "Remember that there is a constituency to bury the issue of war crimes, to sweep it under the carpet, especially in Republika Srpska. The prevailing view is that it is history, we should start looking at history from the day the Dayton agreement was signed, since the agreement legitimizes *Republika Srpska*."

Might the smaller 'public opinion' of legal professionals in the region have been more influenced than general public opinion? After all, even if the general public did not "get" the ICTY with its removed and foreign usages, at least advocates, judges and legal academics might serve as more effective relays. Marko Milanovic made it clear that:

> "The legal communities, notably in Belgrade and Zagreb, divided very early on, at the very beginning (1989-1990) into those legal scholars and academics who supported the nationalist regimes; and those who were more of civil society, human rights orientation. And certainly the nationalist cohort dominated, everywhere and to a large extent up to this day. They immediately instrumentalized the whole issue of the ICTY and its legality as something that is an enemy of the people. They deployed all arguments, plausible and implausible, to denigrate the ICTY, producing a lot of confusion in the process. There was until a couple of years ago an official textbooks in international law at the University of Belgrade Faculty of Law which said that the ICTY was illegal, that it was established in violation of international law. The heading concerning the ICTY described it as 'tribunal' in inverted commas."

3. Victims

Finally, I wondered about victims, perhaps the most obvious constituency for the Tribunal. Zoran Pajic pointed out the difficulty of understanding sentences handed out in the Hague for some victims, alluding to General Blaskic's sentence that was reduced from 42 years to 9 years on appeal. These sentences were not only less than those that would be handed in the domestic courts of the region, they were often seen as "confusing" and even a "mockery of justice." The absence of capital punishment was also hard to understand for some among victims.

Yet unsurprisingly victims were a very strong constituency of the tribunal something that was clear if nothing else in the dangers they were willing to defy to come and testify. For Mark Harmon:

> "especially in the early days, victims who came to testify were exceptionally courageous people. They came from communities in which the perpetrators were still at large, they had to go back to villages where perpetrators, who did not like the tribunal, and with no witness victim protection beyond the courtroom."

Hasan Nuhanovic pointed out that as far as many victims he knew were concerned, such was the demand for justice that the tribunal could have gone on working for years. At the same time, victims could not be conceived of as an entirely separate constituency, removed from the rest of society. Nuhanovic made it very clear that lack of recognition in *Republika Sprska* of the crimes committed during the war made it difficult to fully turn the page, even when verdicts had been handed down by the tribunal which vindicated all or part of the victims' narrative. Refik Hodzic also made it clear that we should not:

> "[…] fall into the trap of thinking that international criminal justice is only about the victims, even though they are a very important group and the one that is most invested in the process and in its success. It is also about the rest of the community. Ultimately if we look at what this mechanism is supposed to deliver to victims, it is not only some sort of personal satisfaction at seeing the perpetrator sent off and locked away, but also contribution to victims' rehabilitation, to the acknowledgment of their suffering and ultimate integration as equal citizens. That can only be achieved if the rest of the community and especially the community that as it were supports the perpetrator is also invested in the process and accepts the process and accepts its outcome."

II. Competing Philosophies of the Tribunal's Role

The fact that the impact on several constituencies in the former-Yugoslavia has been uneven and generally limited may ultimately be traceable to a crucial divide between what one might call an 'internal' or 'forensic' vision of international criminal justice in the Hague – one focused on the specifics of each crime and courtroom drama – and a more "external" or "strategic" vision of how that justice might be perceived in the region and

provoke certain reactions (or fail to do so). Refik Hodzic had obviously spent much time mulling over this division. Here is what he had to say:

> "When it comes to fulfilling its mandate, there were always two schools of thought. One school of thought that was led by some judges at the tribunal as well as others who have worked for or been involved in it in different ways basically preached that the tribunal's only task was to provide fair trial in accordance with the highest international standards […] but anything that happens outside the tribunal is not its concern, and the impact that it has on core affected communities which are what I would call its constituents, the only real constituents of the tribunal is secondary – not even secondary but simply something that they were not concerned with or should not be concerned with."

Zoran Pajic was even more specific when it comes to describing that 'school':

> "Let me give you an example. I have spoken with many judges in the past 15 years in the Hague some of them are my good colleagues and friends, and I asked them about their expectations and more specifically whether they had any idea how their verdict were going to resonate on the ground back home so to speak, how they may contribute to the process of co-existence of different ethnic groups in the former Yugoslavia and the process of reconciliation in the future. And many of them said to me, 'look we are not interested, we are Judges, we are here to hear a case, to hear the evidence, to establish the level of responsibility and guilt and that's it. Otherwise, our independent judgment would be jeopardized.' I can understand that. But this gives you an idea of the huge gap between what people were expecting of the tribunal and what the tribunal was able to achieve."

All along, Refik Hodzic argues, the second school of thought, saw things very differently:

> "[...] in order for the tribunal to fulfill its broader mandate it should go further and not forget that many founding documents including the Secretary General's report, which was the basis for

> the tribunal's establishment went beyond this, and spoke about the reconciliation that this tribunal was supposed to help and support and rule of law that it was supposed to contribute to and so on and so forth."

Payam Akhavan was also of the opinion that "[…] prosecuting war criminals wasn't just morally desirable but that it was a political necessity in order to stabilize the Balkans". However, this approach to international criminal justice remained very much in the minority, and depended on key individuals without ever being strongly endorsed institutionally. Successive Presidents of the tribunal, according to Refik Hodzic:

> "[…] very often paid nothing more than lip service to the role that it had in terms of its responsibility to constituents in the former Yugoslavia and the impact that it had on the ground. They were very eager and ready to present this to general assembly and the Security Council that there was – the tribunal was reaching out to victims and so on and so forth, but the fact on the ground were not exactly supporting this because we know that the outreach program of the tribunal, which was in a way the sole mechanism for maintaining this relationship with the constituents in the former Yugoslavia along with some other developments, was never on the budget of the tribunal and it was never treated as part of the core mandate of the tribunal not only by the founders, the Security Council but not even by the decision makers in the tribunal."

These deeply structuring views of the core mission of the tribunal have contributed to shape its attitudes on a range of policies.

1. The Paucity and Poverty of Outreach

It seemed that if interviewees from the region shared on regret, it was the paucity and poverty of outreach. Refik Hodzic credited Tribunal president Gabrielle Kirk McDonald for being one of the few to realize the importance of outreach "on the basis of the reaction to the Tadic judgment in the communities where the crimes were committed northwest of Bosnia around Prijedor, which had led to a direct and comprehensive denial of the facts established in the Tadic judgment so that 'something had to be done' if the tribunal's broader mandate was to be ever achieved". But for the rest,

the tribunal's approach to outreach had been "very superficial", with "little understanding of the dynamics in the former Yugoslavia". Zoran Pajic described outreach efforts as "very, very poor" and deplored the fact that "there were no persistent effort of the tribunal to hold sessions, even occasional sessions, in the region; no persistent efforts to get local NGOs involved in the conversation, in discussions". Vesna Terselic, a peace activist involved in efforts to memorialize some of the atrocities committed, insisted that inhabitants in the region did not even know basic facts about the tribunal.

Specifically, Zoran Pajic gave the example of the trial of General Gotovina, whose fate was closely watched in Croatia as long as he was on the run, but dramatically less so by the time he was brought to the Hague and prosecuted so that by the time public opinion had caught up and Gotovina was sentenced to 20 years in prison "that was a shock for people in Croatia because they simply did not know what crimes he was answering for." For Refik Hozic, this begs the question: "How is it possible that after all this time, after all the effort that the tribunal invested such pervasive denial exists?" asks Refik Hodzic. One of the problems, he suggested, is the excessively narrow understanding of what outreach entails:

> "I have to say that unfortunately the concept of outreach has been severely limited in its interpretation and implementation. First of all, by the term itself. The term outreach functions only in English language. All other languages have great problems in translating it and then defining what it means, which betrays a larger problem and that is the understanding of what the concept is about. In my understanding outreach is about the relationship between the court and the community that it is serving and I strongly believe that goes far beyond public relations, far beyond what communication experts can deliver, i.e., making these courts look good in the communities, make people accept their judgments. It is about far more than that, and we can see outreach potentially unfolding on many different levels. In a sense everything that an institution of this kind does can be seen as a form of outreach. The way it investigates and engages with potential witnesses is outreach, the announcements that courts make is outreach, the conduct in the courtroom is outreach, the judgments. This is where I have a problem with the term itself because it is so limiting and it can even serve as a good excuse to those who never saw it as part of the core mandate of the

> ICTY, and see it as something unnatural, something that lawyers have sort of a natural aversion to and that is the job of journalism and communication and media."

It is definitely highly interesting that, for some key observers in the region, what turns out to have been the most important dimension is something that most courts and judges would not consider to fall within their judicial remit. Why was outreach not more prominent? Why did the ICTY fail to be as crucial a building block n the overall effort at transitional justice as it could have been? Observers from the region had no shortage of leads.

The problem was and continues to be that on the domestic side there were, in a sense, many efforts at "outreach" of a very different sort, which ended up drowning what might have been the ICTY's message. So rather than "create a sense of ownership of the tribunal in the communities of the former Yugoslavia", local constituencies "were very often neglected and left to be influenced by a hostile propaganda coming from different regimes whether Milosevic or Tudjman, and including academic and religious elites or communities loyal to their nationalist causes" (Refik Hodzic):

> "What that meant was that tribunal's judgments were just one voice among many voices targeting these communities in offering a version of events, and you can judge for yourself who had bigger chances of success: the tribunal with its feeble voice from the Hague saying 'oh, this is what we established in these trials', or the powerful propaganda machines of the state, relayed by intellectual and academic elites, the media, religious institutions, everybody repeatedly bombarding these communities with messages such as 'These crimes have not happened. Anybody who says that they did happen is trying to actually perpetrate a great injustice upon you, they are trying to prosecute our heroes who have defended you, they are trying to revise our history; we were the victims not perpetrators and this is simply a tool in the hands of imperialist powers trying to subjugate you so reject it, don't accept it, don't ever believe them."

Some went as far as to suggest that the poverty of outreach may have been intentional. For Hasan Nuhanovic, maybe the tribunal thought that "if they bombard the people in Bosnia with information from the Hague, it will

not help the process of normalization, people will live in the past rather than look to the future.” On a different note, Refik Hodzic was particularly irked by the argument from those inclined to a narrow judicial understanding of the ICTY’s mandate (“we are only responsible for what happens in the courtroom, not outside”) that after all national courts never have to “communicate and explain themselves”. The comparison is at the very least problematic:

> “I think that we have to understand the situation in which ordinary crimes are prosecuted is very different. From primary school constituents will have been subjected to a form of outreach about these courts. They learn about the legal system, how it functions or why and what is the social role courts, what role in the government they play. When it comes to the general public, the media as a matter of course report on what is going on in these courts. There is an entire branch in journalism that is called court reporting dedicated to making sure that what happens in courtrooms comes out. The courts are organically parts of society which appoints the judges. So these national courts have an entire system behind them that does what outreach programs for international courts are supposed to do. So to draw the comparison with national courts and point that they do not engage in outreach is misleading.”

Might things be different in the future? Perhaps if outreach was not seen so much as an appendix or even as something that is done simply for constituents, but as very useful to international tribunals themselves. “Institutions act in their interests”, Refik Hodzic pointed out, and this is why it is important to understand that a quality outreach policy “will make investigations much more successful, it will facilitate access to witnesses and subsequently and consequently to evidence, not to mention the fact that the ultimate outcome, the judgment will be accepted by the communities in a much greater degree, than when they don't feel these institutions as their own but some sort of foreign body that has been imposed upon them”. Yet, in the ultimate analysis, Pesnic cautioned that “one very important lesson is whenever an international court is to work do not expect that countries where crimes have been committed will make any serious effort to distribute the information.”

2. Prosecutorial Discretion and "Distributive Justice"

The dialectics of individual and collective guilt are among the most interesting features of the ICTY. At one end of the spectrum, the temptation by communities, even when they eventually acknowledged that crimes had been committed, was that they were the product of a few "bad apples". Vesna Terselic noted that this was one of the greatest breaks on the tribunal communicating its message in Croatia for example "People in the region actually think that crimes have been committed, but they see those as individual crimes committed by individual members of the Croatian forces, for example, during operation Storm. However, there is a tendency to see these crimes as disconnected from those forces, and not see them as part of a pattern or a joint criminal enterprise." One of the problems is a disconnect between individuals who committed crimes directly and those who did so indirectly:

> "When it comes to Mirko Norac (a Croat officer involved in the Gospic massacre of Serbs), there was actually some understanding because he was the first to shoot and kill a woman. So, the perception with the public was this is okay, he was a General of the Croatian Army, he has committed the crime, he personally killed a woman and that's why he is serving a sentence. But with the case of Gotovina, and Markac, you do not have someone who personally killed somebody. These are the sort of differences about which people are sensitive. I do not condone this of course, I just note that it is public perception."

At the same time, individual guilt inevitably tends to taint the communities from which it originated, and is very much perceived as such. From the outset, the ICTY has often been perceived as engaging in a form of "distributive justice" between the different communities that compose the former-Yugoslavia. Certainly, Serb public opinion was very sensitive, as has been seen, to the fact that most defendants were Serbs. One of the problems is the difficulty of separating individual guilt from issues of collective responsibility. Even though the international criminal tribunals focused heavily on the former, it was often hard for people in the region not to see prosecutorial decisions as reflective of a judgment about the latter. I asked Professor Ljubo Bavcon, Professor of International Criminal Law at the University of Ljubljana, Slovenia, whether he thought the trials had been of individuals, States or communities:

> "In my opinion, it is very difficult to divide the responsibility of Milosevic or Tudjman from the responsibility of their subalterns, and even from the responsibility of *States*. By State, I mean the whole population. Almost all Croats were particularly touched by the indictment of Croat Generals, and almost all Serbs were touched by the arrest and conviction of Serb leaders. With time, these emotions have waned a little. But it is very difficult to disentangle legal questions from political ones. Milosevic's arrest was also seen as a symbolic condemnation of people who supported him, those who supported his policies *vis-à-vis* Bosnia and Croatia."

If that is the case, then was and should there be a more deliberate effort to play on that dimension and apportion blame in a way that somehow fairly reflects a share of the blame? In the initial stages the disproportion, to the extent that there was one, could be attributed to issues of cooperation. As Michael Wladimiroff pointed out, when the Office of the Prosecutor began its work it relied on the already accumulated evidence of the Bassiouni Commission and the fact that the government of Bosnia Herzegovina was willing to cooperate with the tribunal where Serbia was not. Nonetheless, on the long run, there seemed to be a balancing of indictments. What was interesting is that some of my interviewees considered it implausible that this was the result of a deliberate effort, whilst others were quite willing to see it as such. For example Ekkehard Withopf, in investigating and prosecuting the few cases involving Bosnian Muslims, was not oblivious of the impact this might have on observers:

> "It was quite interesting to see that there was a perception that the Bosnian Muslims are *the* victims, or the *only* victims. It was interesting to see how people reacted occasionally when they realized that the ICTY was also investigating and prosecuting Bosnian Muslims. Because this was contrary to the general and widely accepted perception that the perpetrators were Serbs or Croats only."

However, that is a very different thing from thinking that prosecutions were decided on the basis of a conscious effort to prove the tribunal's impartiality by giving each group their "fair share" of guilt as it were. For Ekkehard Withopf:

> "That may have been the result and hopefully it was, but I do not think there was ever a 'politically driven' decision along these lines. The ICTY has investigated the crimes whereto the evidence took it, and there was evidence that Bosnian Muslims committed crimes. This may have been perceived if there had been a political will that all sides be prosecuted, but to my knowledge there was certainly no conscious decision of that sort."

Conversely, Payam Akhavan, who defended Gotovina, thought that there was an attempt to engage in "distributive justice," and that it had occasionally had "mixed results" for the tribunal. Distributive justice is understood as implying that, "in order to avoid a suspicion of victor's justice, for example, if all the defendants in the dock are Serbs, that the tribunal would indict individuals from other 'ethnic factions'." He warned that there is a:

> "[…] very delicate balance between demonstrating impartiality and letting prosecutorial decisions be driven by the facts on the ground. Whether it was deliberate or not, there were many political considerations, especially when it came to prosecutorial discretion, because at some point you have to exercise discretion in ways that ordinarily are unimaginable. For example in a murder case domestically, there is very little prosecutorial discretion: you have to investigate at least and prosecute (discretion is only for lesser offences). However, internationally things are very different: any discretion that you exercise means that some very serious international crimes will go unprosecuted, this is the dilemma of international criminal justice, you can only prosecute a very small handful of perpetrators. In the case of Yugoslavia, 20 years and billions of dollars later, that means about 200 people, which is a very small number. I think that in certain instances the ICTY, as a result of prosecutorial decisions, spent a disproportionate amount of time on certain cases in an effort to achieve 'distributive justice'. For example the prosecution of Naser Oric was not worth the resources spent by the tribunal. The crimes were relatively trivial and he was only condemned to three years on the basis of command responsibility, and that that did not justify the massive

> expense of resources, at a time when major crimes went unpunished."

Regardless of whether there was a deliberate attempt to engineer blame apportioning or whether that was the net result of following evidence, it was often perceived as such in the region, but for the wrong reasons. As Hasan Nuhanovic points out, the complaint from the Serbs is that "the statistics show that 80% of those convicted are Serbs. This means that something wrong is going on, the 'West', the 'lobbies', the Vatican are simply biased against the Serbs. There is nothing between the lines about this, it is very open." Yet as Payam Akhavan pointed out, this may simply be because some sides committed much more crimes than others. For example, the fact that most prosecutions concerned Serbs is arguably based "on the facts on the ground which shows that one side was overwhelmingly responsible for the atrocities".

However, beyond the issue of prosecutorial discretion, distributive notions could also find an interesting echo in how prosecutions might have been organized. Ekkehard Withopf pointed out the difficulties that arose from having investigating teams assigned to examining a particular ethnic group. This was then later inevitably reflected in the trials themselves, which were mostly mono-ethnic, concentrating on the crimes committed by a particular group in a given area. This in turn occasionally lead to what Ekkehard Withopf described as "flip side" cases – concerning crimes committed in the same geographical reason at the same time, but prosecuting the crimes committed by another group. Withopf always thought that:

> "Ethnic specific investigations and trials were very artificial. With hindsight, one could have divided investigations along geographic lines. For example what happened in the Lavsa valley in 1993. One would have avoided all kinds of procedural problems of repetition, which meant that witnesses had to be called repeatedly, and the problem that the perpetrators in the one case were the victims in the other case. It crossed my mind several times, that if one were to have done one thing differently, it could have been to have complex trials of particular events involving members of different groups. Technically it would have caused problems, but it would also have solved others, in terms of overlap. And it would also have better reflected realities."

3. Between Primacy and Complementarity

From the start, one of the limitations on the impact of the tribunal in the region was its very international character. Whilst their professionalism was hardly ever in question, lawyerly professionalism is not all, and Zoran Pajic pointed out that:

> "There is indeed a real problem of translation, but the problem is much broader than the issue of translating the documents or translating statements or analysis. The problem of course is that the Judges are coming from all over the world except from the region of the former Yugoslavia. In 80% of cases they are people who have no idea about the social cultural background of society in the former Yugoslavia. They are ignorant about the history, they are ignorant about relationships that had been established for generations in the region. And these things cannot simply be picked up from the literature. They can never become judges' 'intellectual property'. For people who hear the cases, it is hard to understand how those mostly affected by the war will react to the sentences or to the evidence exposed in the courtroom."

Michael Wladimiroff also spoke of judges and prosecutors who for the most part "had no insight in the area, who spoke of Bosnia as of a far flung country, and had no opportunity of travelling in the country".

This may explain the increasing importance that the tribunal's strategy of reverting cases to the former-Yugoslavia eventually attained. Judge Pocar was particularly keen on focusing on this aspect of his work as a key part of the tribunal's legacy, via what he described as the "rediscovery of complementarity" hidden in the tribunal's primacy over domestic courts:

> "What the tribunal has done, and this is a relatively recent approach of the last 5 years that was not a concern beforehand, is to better take in to account the tribunal's own limitations, and of the need for the ICTY to operate in a way that its activity will not be lost when we close our doors. When I was president, this is what I called transforming the so-called completion strategy demanded by the Security Council into a *continuation* strategy. We need to have a continuation of the activity of the tribunal in the region and in order to do so we put in place a number of

> partnership and cooperation programs with local judiciaries in order to 'transfer our technology.' The idea is that they should continue the activity of the tribunal following the same kind of approach that the tribunal has shown throughout these years. So these are actions we are conducting together with international organizations, particularly OSCE, the UN, etc. We have established a manual of our practice which is the basis for using our methodology in dealing with crimes against humanity in the region. With all the support we have for this program we are now starting to see some impact, and if local judiciaries take action and become those who are continuing our work this will be in my view a major legacy of the Tribunal because without the action of the local judiciaries the rule of law definitely cannot be re-established in these countries. If this tribunal succeeds in perpetuating its action locally, then in my view it would really have met the expectations of the resolutions of the Security Council because."[1]

This significance of this international/domestic nexus was confirmed by Miodrag Majic, a judge in the Belgrade Chamber of Appeal. Of course, there were differences in legal culture and the process of translation of international criminal law into domestic law was not without its points of friction. For example, the notion of command responsibility had no equivalent in Serbia and its introduction in the criminal law was sometimes problematic. Nonetheless:

> "One of the most significant contributions of the ICTY in the region is an accelerator. It broke new grounds by introducing the idea that one should be liable for international crimes both internationally and domestically. It really started things, prosecuting step by step, which changed many peoples' minds at the national level, that something should be done. So above all it was a trigger, bringing an end to a long history of not being accountable, and not just in the former-Yugoslavia."

[1] Readers interested in this dimension are encouraged to access Judge Pocar's article on the issue. F. Pocar, 'Completion or Continuation Strategy?', 6 *Journal of International Criminal Justice* (2008) 4, 655-665.

But was this perhaps a case of the right remedy coming too late? Might not the ICTY have started putting pressure on domestic courts earlier, without simply being prompted to do so by the Security Council as part of a desire to implement a 'completion strategy'? The interviewees all expressed skepticism that cases could have been deferred much earlier. Judge Pocar suggested that the war made this impossible, and that even a mixed court would not have worked, so that it was safer "to do things ourselves". Complementarity, as he put it, "cannot –– and this is also true for the ICC – work completely by itself. It can work only if the local judiciary is assisted by international community." The important thing, Vesna Terselic noted, was that "the exchange between the ICTY and domestic courts functions well and I would say that there is respect for each, other and that there are open channels of communication and co-operation – even though, unfortunately, the public often does not know that this is happening."

4. Conclusion

There is a clear imbalance between the respect in which the tribunal is held at the international level as an essential step towards the realization of a form of universal justice, and some of the skepticism that has surrounded its activity in the former-Yugoslavia. Professor Ljubo Bavcon was the most forthcoming about this:

> "Although in many respects the ICTY undoubtedly represented an important step forward in the development of international law, the idea that it could create peace and security in the region was utopian and unrealistic. Emotions ran too strongly between Serbs, Croats and Muslims. It took other things: time, an international intervention, even an armed one, to finish this atrocious war. So there is no doubt that the creation of the tribunal did more for international justice and international criminal law generally than for the former-Yugoslavia."

The tribunal's local impact may in the end be mostly legal and judicial, via for example the return of cases to national jurisdictions, rather than more deeply engaged with the region's political fabric. This is perhaps an appropriate legacy for a judicial institution, one that is in the end mostly formal and legal.

It also became evident in the course of my exchanges with interviewees that there is a more intimate connection between what happens

in the courtroom and what happens in the region than often thought, so that minute variations in the procedural or substantive makeup of the tribunal may have quite an effect on the ground. For example, the fairness of trials will influence the way they are received; outreach is not simply a communications operation, but a way of being *vis-à-vis* constituents; broad modes of imputation of liability, according to Akhavan, "create a disincentive for the prosecution to do its job properly, […] and if the function of the tribunal is also to uncover the truth" then that is less than ideal; having focused trials based on geographic happenings involving all parties rather than ethnically segmented trials both makes sense in terms of resource allocation and the need to show the reality of conflicts as complicated and not one-sided.

In the course of the interviews, several 'dissonant' notes emerged that may go some way to understanding some of the ICTY's limitations. One of the more interesting was suggested by Hasan Nuhanovic in the form of reluctance to ever see the UN's *own* role in allowing mass crimes to be committed at the time. Speculating as to why he had never been called as a witness despite being a survivor at Srebrenica, he mentioned his case against the Dutch State and hinted that his testimony "would be incriminating for the UN Peacekeepers rather than the Serbs". "At the same time", he went on:

> "I understand the position of the ICTY. They are located in the Hague, the capital of the country that I am suing. Moreover, the ICTY is a UN body, it was probably politically difficult for the tribunal to talk about that issue, although that does not mean that they should not have looked at the case on purely legal grounds. Why only citizens of the former-Yugoslavia? There was never an investigation of the wrongdoings of UN peacekeepers in Potočari […]. The problem is not with 'what the UN did not do.' This is the official line 'we stood by and watched, we should have done more, but we could not, because of the mandate, etc.' But this is totally wrong, they actually actively participated, conducted by themselves the expulsion of 5,000 people from the UN compound. The Serbs would not even enter the compound, it was the Dutch who did it."

Another nuanced line of critical questioning was suggested by Vesna Terselic, who pointed ways in which the ICTY's work could only remain limited, and the need for international criminal justice efforts to ultimately

connect with other local initiatives to memorialize the crimes that were committed:

> “I hope that in 30 years you will not be able to distinguish what is the legacy of the international tribunal and what is the domestic legacy. Because at the end of the day, why would you really want to distinguish what is there thanks to the international tribunal and what is there because of domestic prosecution. I really hope that eventually we will not be discussing such things because the domestic and the international will have converged. The problem which we have with narratives of war is that the mainstream narratives, including the international one, are simplified, they interpret a complex war reality into something relatively simple. There are clear cases. For example, when you say the Yugoslav Army artillery bomb Dubrovnik, that's very clear. But then you have many places in Croatia where beside aggressions of the Yugoslav Army and defense there were also elements of civil war, even though this is very difficult for the Croatian public to follow. The important thing that we need to remember and discuss is that there are victims on both sides of war, and that we have to find a way to at least remember them because not all war crimes will be prosecuted (unfortunately because you don't have all that material evidence, all the organizational capacity, witnesses, etc.). It's a process in which tribunal played a major role. But now that the tribunal is about to complete its work we are advocating for a regional commission to establish facts. No government has even hinted that they might be interested (apart from Montenegro).”

Finally, Payam Akhavan wished to question our idealization of all things international and worried about what he saw as the occasionally dubious quality of investigations undertaken by the tribunal. Maybe this is “because the tribunal is a sort of sacred cow that we do not want to criticize because we stand for international justice, so much so that we are sometimes not sufficiently critical about whether the institutions resources were spent properly and by qualified people”. Mark Harmon also found that there were problems but he attributed them directly to the uneven support provided by the international community. The rigidities associated with the United Nations administrative regulations, for example, made it difficult at times to

retain the most competent staff ("no private law firm could run a litigation under such conditions"). The completion strategy, at critical times, "decimated" OTP trial teams leaving them "understaffed and under-resourced." Harmon contrasted the Oklahoma city bombings, in which 168 people died, and following which the prosecution had 2500 FBI agents working on the case during the first year alone. By contrast, he pointed out, "when I did the Srebrenica case at the high watermark the highest number of investigators was 5. Having 5 investigators for a crime like Srebrenica is obviously insufficient". The net result is that:

> "The international community expects us to prosecute these crimes efficiently and competently on the one hand, and on the other hand we do not have the tools to do so. States expect a perfect justice with limited resources. But with justice on the cheap, you get what you pay for. But for the superhuman efforts of the prosecution staff and investigators, and their exceptional dedication, working 7 days a week, 15 hours or more a day, the truth about what happened at Srebrenica would not have been revealed at the Tribunal."

Yet for all these limitations, there was by and large a recognition that the contribution to peace in the former-Yugoslavia was significant. First, my attempts to tempt interviewees with a counterfactual scenario showed that even the most skeptical had no doubt that the region was better off with the tribunal than without it. I specifically asked what would have happened if in 1993 the international community had pushed for a blanket amnesty for all international crimes in the former-Yugoslavia. Zoran Pajic was prompt to turn the question on its head:

> "Let me give you another example as an illustration. After the Second World War, which saw much fighting between groups in Yugoslavia, there were only two trials for war crimes, one against General Milanovac on the Serbian side and the other one on Bishop Stepinac on the Croatian side. And then Tito came with the idea of brotherhood and unity and basically said 'okay there was a war, we all suffered, let's build the brotherhood and unity, let's sweep the past under the carpet.' It didn't work […] I mean it did work for 50 years. But, you know, generational memory simply produced this cycle of violence again."

In effect, the ICTY may well have broken the cycle of impunity in the former-Yugoslavia for good. Akhavan had no doubt that removing certain key individuals from power (to which they could have easily clung were it not for the tribunal) was a much better scenario than legitimizing them there. The rest, as he said, “will take time, maybe generations, just as the de-nazification process did after a period where an overwhelming number of people saw Nuremberg as victor’s justice. But at least the mothers of Srebrenica “feel that they had some recourse, however inadequate, that someone is listening to them, that some have been called to answer”. We cannot, he emphasized, “take all these things for granted, if Karadzic and Mladic and others had simply been allowed to stay in power, we would be in a far worse situation.” Hasan Nuhanovic remarked that “the Hague” (the expression commonly used rather than ‘ICTY’) “became a symbol for justice. People are not disappointed, they believe in what the tribunal did, and their only regret is that the tribunal will be closed soon even though it is far from done. Justice is still far from being done.”

Second, even if the full extent of responsibilities was far from being recognized in the region, a record had been built which could eventually provide a basis for a more lasting legacy. In particular, Vesna Terselic credits the tribunal for making everyone accept that at least offences were committed, although by who often remains a matter of debate.

> “One of the great legacies of the tribunal are, quite simply, the verdicts which have already passed appeal level. The facts that are presented in such verdicts are something which hardly anyone disputes. I cannot recall the last time I have seen in any kind of important daily or weekly or in electronic media that somebody would put in question what was established in the verdict, on the level of fact. For example there is some debate in Croatia on whether the military authorities actually knew that killings were happening in Vukovar (Terselic has no doubt that they knew). But what is not disputed is that people have been killed there. This is an important source for historical interpretation, even though it is not a full source. The facts are practically not disputed. Even with Srebrenica, many Serbs will acknowledge that many people were killed, although for various reasons they may resist calling what happened genocide. That factual legacy is very important.”

Another reason for hope was the extent to which, slowly, the ICTY had help 'de-ethnicize' some of the political issues in the former-Yugoslavia, either to repoliticize or individualize them. Payam Akhavan emphasized that it was ultimately a revolt in Serbia that provoked the ouster of Milosevic, showing that extreme nationalism in Serbia was hardly inevitable. Mark Harmon found "inspiration" in the fact that he never heard victims "who had suffered terribly during the war, and had to recount painful events that would have destroyed many people say bad things about other ethnic groups, despite their immeasurable pain."

Third, there was remarkable support for the idea that the tribunal had gotten its core mission right and that, beyond simply "developing international law" it actually rendered justice. Peter Robinson, perhaps interestingly for a defense counsel, was perhaps the most emphatic:

> "I have to say that in most of the cases, when it comes to finding guilty people guilty and not guilty people not guilty, the Tribunal seems to have gotten it right in the end which is, after all, its main function. So, it seems like they did hear both sides, speaking very generally, and in the end came to a result that seemed to be pretty accurate, in contrast my experience with the ICTR."

Moreover, the ICTY did not just get individual cases right, it also did a good job of getting some kind of intra-communal balance right since it "prosecuted all sides to the conflict, which the ICTR failed to do", and its legitimacy "in the minds of people in the region and others is very high" whereas the ICTR's is not.

The legacy of the ICTY is a question that will continue to remain current for a very long time. But this glimpse of the views of a number of persons who have been either quite invested in it or watched it closely, suggests a tribunal whose legacy lies as much in some of the questions it asked than the answers it brought.

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The ICTY Legacy: A Defense Counsel's Perspective

Michael G. Karnavas*

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Abstract

The ICTY's achievements are as impressive as they are irrefutable. Less impressive is the uneven quality of procedural and substantive justice that the Tribunal has rendered. The author highlights several shortcomings at the Tribunal, including the appointment of unqualified judges, excessive judicial activism, its disparate application of law, procedure, and prosecutorial resources to different ethnic groups, and its tinkering with the rules of procedure to promote efficiency at the cost of eroding the fundamental rights of the Accused. Drawing on specific examples, from the approach adopted concerning the admissibility of testimonial evidence to specific areas of substantive law where judicial activism has been pronounced – the development of joint criminal enterprise and the requirements for provisional release at a late stage of the proceedings – this article is one defense counsel's perspective of some of the most unfortunate shortcomings of the ICTY, which regrettably form part and parcel of the Tribunal's legacy.

A. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first international court established by the international community through the United Nations Security Council to try international crimes – grave breaches of the Geneva Conventions, war crimes, genocide, and crimes against humanity. The objectives of the Tribunal are threefold: (1) to do justice; (2) to deter further crimes; and (3) to contribute to the restoration and maintenance of peace.[1] One of its goals is "promoting reconciliation and restoring true peace"[2]. By the time the ICTY closes its doors (save for

1 SC Res. 827, 25 May 1993, Preamble.

2 First Annual 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 A/49/342, S/1994/1007, 29 August 1994, para. 16: "The role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace." See also Report of the Secretary-General pursuant to Paragraph 2 of SC Res. 808, UN Doc S/25704, 3 May 1993, para. 26: "Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of

the residual matters attendant to convicted persons serving sentences) in the next 3-4 years, the ICTY will be able to boast that, among other achievements, it has processed at least 161 cases over a period of approximately 20 years.[3]

The achievements of the ICTY are as impressive as they are irrefutable. Less impressive but equally irrefutable is the uneven quality of procedural and substantive justice rendered. The ICTY has underperformed as a judicial institution, particularly when one considers that denominating a tribunal as "international" carries a certain *caché*, invariably heightening expectations of standards and quality. Regrettably, the same can be said of the other *ad hoc* international tribunal, the International Criminal Tribunal for Rwanda (ICTR), and the so-called "internationalized" (hybrid) State tribunals, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), that have been established to try international crimes at the domestic/national level. The jury is still out on the Special Tribunal for Lebanon (STL) and the International Criminal Court (ICC) as there is little record to go by. Early indicators suggest, however, that these two institutions are equally incapable of avoiding certain fundamental mistakes made by the ICTY and other tribunals. The STL's Chambers already face criticism for engaging in judicial activism,[4]

taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace"; President Theodor Meron, Address to the UN Security Council, UN Doc S/PV.4999, 29 June 2004, 8: "We must be careful to ensure that our dedication to completing the Tribunal's mandate on time does not detract from the Tribunal's basic purposes, which are to administer justice even-handedly and to contribute to the restoration and maintenance of peace in the region".

3 See ICTY website, which indicates that the Tribunal has indicted 161 persons, has concluded proceedings for 126 Accused, and has ongoing proceedings for 35 Accused, available at http://www.icty.org/x/file/Cases/keyfigures/key_figures_111115_en.pdf (last visited 2 December 2011).

4 See K. Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', 24 *Leiden Journal of International Law* (2011) 3, 655, 656: "the [STL Appeals] Chamber's considerations [in its Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011], albeit innovative and creative, are essentially *obiter*, since the applicable terrorism definition can be found, without further ado, in the Lebanese law. There is no need to internationalize or reinterpret this law; it should be applied before the STL as understood in Lebanese practice".

and at the ICC some commentators have been critical that a basic level of experience is not required of the Court's judges.[5]

All these tribunals tend to suffer, to one degree or another, from the same shortcomings, such as: the appointment of unqualified judges, excessive judicial activism in legislating from the bench, the disparate application of law and procedure, and the constant tinkering with the rules of procedure for the sake of promoting efficiency and expeditiousness while eroding the fundamental rights of the Accused. Oddly, many of these errors are easily avoidable and unnecessary; lessons from the Nuremberg trials seem to have been ignored. As significant as the Nuremburg trials were in commencing the modern development of international criminal justice, the legacy of the Nuremberg Tribunal (the International Military Tribunal, or 'IMT') is stained by its numerous deficiencies. Even back in 1945, when the IMT, soon followed by the Tokyo Tribunal (the International Military Tribunal for the Far East, or 'IMTFE'), was created, hindsight was not necessary to recognize that the tribunal was subjective. The tribunal promoted victor's justice by targeting only the vanquished (as at the ICTR, a problem which has been tolerated, if not sanctioned, by the UN Security Council), enacted a flawed system of procedural due process, applied a retroactive application of substantive law, denied equality of arms, and so on.[6] The ICTY not only repeated many of these well-recognized errors, but also went on to make more.

[5] It has been argued that it was this inexperience that has caused the Appeals Chamber to stumble over the basic protections that should have been afforded by the Court in the *Lubanga* case. See M. Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts', 12 *New Criminal Law Review* (2009) 4, 529, 539-540 at fn. 16. Bohlander writes that: "The other judges in this case had mostly little experience as practitioners, let alone as judges, and although they have professional legal qualifications, much of their actual careers appear to have been spent in government-related work, academia, or diplomacy. Judge Kourula's CV lists him as having served as a district judge in 1979 [...]; Judge Kirsch has no judicial experience although he is a member of the Quebec bar and was made a QC in 1988 [...]; Judge Song was a Judge Advocate in the Korean Army from 1964 to 1967, ie, a military prosecutor for the first six months and a military judge for two and a half years [...]; Judge Nsereko has been an advocate in criminal cases since 1972, but has no judicial experience, either".

[6] Telford Taylor, one of the prosecutors at Nuremberg, after some 40 years of distance and reflection recounts in his memoirs some of the difficulties the defense counsel faced in those trials, which, if one were to poll defense counsel before the *ad hoc*

This article is a defense counsel's perspective on some of the most pronounced shortcomings of the ICTY which are part and parcel of its legacy. Unsurprisingly, this author's perspective differs from the picture that the ICTY paints of itself as the judicial institution that is "bringing war criminals to justice, bringing justice to victims"[7].

B. The Noble Cause of the ICTY: Fiat Justitia Ne Pereat Mundus[8]

The establishment of the ICTY was a milestone in the advancement of international criminal justice. While the UN was celebrating its 50th anniversary, war raged in parts of the former Yugoslavia. Not since World War II had Europe experienced fighting with such raw intensity and utter disregard for accepted principles of behavior set out by various international instruments and customary international law. The international community for decades struggled with modest success to find common ground in establishing an international criminal court. It would not be until 1998, with the adoption of the Rome Statute, that the ICC would be created.[9] An imminent solution was required. Wisely, the UN Security Council, exercising its authority under Chapter VII of the UN Charter, established the ICTY on 22 February 1993 with the passage of Resolution 808.[10] This novel approach was later repeated in the creation of the ICTR.[11] Thus, the ICTY

international tribunals, are echoed today: lack of equality of arms, lack of certainty in the application of the procedure, and lack of certainty in the law. See T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). See also C. Tomuschat, 'The Legacy of Nuremberg, Symposium', 4 *Journal of International Criminal Justice* (2006), 830, 832-834.

7 This phrase is a motto of the ICTY and is displayed as a banner in the lobby of the Tribunal and on the ICTY website. See ICTY website, available at http://icty.org (last visited 2 December 2011).

8 "*Let justice be done lest the world should perish.*" Then-ICTY President, Antonio Cassese, invoked these words from G. Hegel, *Elements of the Philosophy of Rights* (1821), para. 130, in the First Annual 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 A/49/342, S/1994/1007, 29 August 1994, para. 18.

9 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90.

10 SC Res. 808, 22 February 1993.

11 SC Res. 955, 8 November 1994, para. 1, which calls for the ICTR to prosecute "persons responsible for genocide and other serious violations of international law

was born – the first international criminal tribunal since the IMT and IMTFE.

Irrespective of the ICTY's shortcomings, the Tribunal's enormous contributions to advancing international criminal law and procedure merit recognition. Until its establishment, save for the judgments from Nuremberg, Tokyo and the national courts that dealt with World War II-era cases, there was no application of international criminal law. Put differently, there was no opportunity to implement the composite body of law constituting international criminal law (which is derived from customary international law, international humanitarian law, international human rights law, and national law). Nor had the opportunity ever presented itself for the establishment of a tribunal with all the complexities envisaged. What may be taken for granted today were virtually uncharted waters in 1993. Thanks to the ICTY, the ICTR, the hybrid tribunals and the ICC have benefited, be it by referring to ICTY jurisprudence as a point of reference in resolving legal issues, or by adopting similar rules of procedure and modalities in dealing with issues prevalent in war crimes cases, or simply by tapping into the vast reservoir of institutional knowledge accumulated by the ICTY organs such as the Registry, the Victims and Witnesses Section and the Office of Legal Aid and Detention Matters. It is difficult to fully appreciate the ICTY's (and the ICTR's) contributions to international criminal justice. It is virtually impossible (save when dealing with issues related to Civil Parties) to think of any aspect touching on the investigation, prosecution, administration, defense, witnesses, outreach, procedure, or jurisprudence that has not been dealt with by the ICTY. Not only has the ICTY been the vanguard in international criminal justice, it has also become the frame of reference for all subsequent tribunals trying international crimes. These are significant contributions. Thus, while some of its jurisprudence may not stand the test of time, the ICTY will leave behind an enduring legacy as the post-Nuremberg trailblazer of international criminal justice, spanning, and in many ways nurturing, the advent of similar tribunals.

committed in […] 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".

C. Shortcomings in Pursuit of a Lofty Ideal

The necessity of establishing the ICTY at the time it was established is beyond cavil. While some of its objectives – such as bringing reconciliation to the war-torn region of the former Yugoslavia – were unrealistic or unattainable, bringing to trial individuals suspected of committing war crimes, crimes against humanity, and genocide has indelibly influenced the international community's thinking in dealing with impunity. Lofty as the ICTY's ideals may have been, if lessons are to be learned and problems hopefully avoided in the future its successors, a critical examination is merited. The ICTY's legacy is not just the sum total of its convictions[12] or the extent of the jurisprudence it claims,[13] but also the manner in which this institution has functioned, with all its faults and misadventures. To put it viscerally, one cannot think of a 'legacy' without inquiring whether any of the institution's key actors – that is, the judges or prosecutors – if charged with the same sort of crimes, would unflinchingly submit to be tried at the ICTY, particularly given the manner in which some cases were tried or the way in which the law and procedure has sometimes been applied. Put to the test, this author surmises that very few judges and prosecutors, if any, would find the standards of most trials conducted at the ICTY to be adequate if hypothetically applied to their own case. Why is that so?

D. The Uneven Quality of Judges

One of the most frequent phrases one hears during ICTY proceedings when issues of procedural or substantive fairness arise (most particularly

[12] *Prosecutor v. Milosevic*, Appeals Chamber Decision, IT-02-54-AR73.4, 21 October 2003, para. 22: "This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials".

[13] See 'Assessing the Legacy of the ICTY, Background Paper, Introduction' (23-24 February 2010): "The Tribunal's legacy may be conceptualised broadly as 'that which the Tribunal will hand down to successors and others', including: […] [t]he legal legacy of the Tribunal […] perhaps most significantly – its judgements and decisions […]", available at http://www.icty.org/sid/10292 (last visited 3 January 2012); 'Report of the President on the Conference Assessing the Legacy of the ICTY' (27 April 2010), para. 10: "The significance of the Tribunal's legal legacy and its contribution to the development of international criminal justice […] was recognised by the participants", available at http://www.icty.org/x/file/Press/Events/100427_legacy conference_pdt_report.pdf (last visited 3 January 2012).

when it comes to issues of evidence) is that the bench is composed of "professional judges". On its face, this label should inspire confidence and give comfort; matters of fact and law are being determined by "professional" judges, as opposed to laypersons (jurors). The use of the adjective "professional", however, has nothing to do with the judges actually being professional in the sense that these triers of fact and law were judges by profession prior to appointment at the ICTY. The truth is that many of the judges who have sat in the Trial and Appeals Chambers at the ICTY have never had any prior experience as judges. Indeed, many of them have never had any experience as lawyers or prosecutors. Several of the ICTY's judges, prior to their appointment, had no knowledge of how criminal trials are actually conducted, no experience with criminal law, and no knowledge of the procedural issues associated with any of the phases of a simple criminal trial, let alone an international criminal case of enormous complexity.[14] In other words, many of the judges appointed by the UN (after lobbying, incentive offerings or horse-trading)[15] had no actual experience

[14] "There have been complaints from a former ICTY judge, a high-ranking former member of the ICTY Office of the Prosecutor and by at least one American politician, Ron Paul, the congressman for Texas, that the selection of judges for service at the ICTY produced undesirable results to the effect that there were too many judges with little or no trial or judicial experience hearing complex criminal cases, which was said to be a reason for the long and cumbersome proceedings before the war crimes tribunal." M. Bohlander, 'The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics', in M. Bohlander (ed.), *International Criminal Justice, A Critical Analysis of Institutions and Procedures* (2007), 325, 326, *citing* M. Simons, 'An American with Opinion Steps Down Vocally at War Crimes Court' (24 January 2002) available at http://www.nytimes.com/2002/01/24/world/an-american-with-opinions-steps-down-vocally-at-war-crimes-court.html?pagewanted= all&src=pm (last visited 2 December 2011). Bohlander also surveyed the data on the ICTY website as of 22 March 2006, which provided the professional experience of the permanent and *ad litem* judges in office at that time as trial and ICTY/ICTR appellate judges. He found that eight out of twenty-five judges (almost one-third) of the judges at the ICTY and the common appeals chamber with the ICTR had no prior criminal judicial experience, Bohlander at 332-354. See also ICTY website, available at http://www.icty.org/sid/151 (last visited 2 December 2011). Performing a similar survey of the professional experience of the permanent and *ad litem* judges on the ICTY website (as of on 7 October 2011) shows that 6 of the 24 judges did not have prior criminal judicial experience, so the statistics are only slightly better today than they were in 2006. (Note that one judge's past judicial experience could not be ascertained from the data on the website).

[15] P. Wald, 'Running the Trial of the Century: The Nuremberg Legacy', 27 *Cardozo Law Review* (2006) 4, 1559, 1564: "The U.N. has never attempted to second guess the

that would justify the characterization of "professional" judge. The term "professional," as used at the ICTY, merely means that these individuals, who have been elevated to the status of judges, have studied law and have the minimum qualifications to sit as judges.[16] In other words, they are neither laypersons nor jurors. Thus, it has not been uncommon to have diplomats and professors, with no real trial or appellate experience, appear in court for the very first time and embark on a new career, that of a "professional" international judge.

Obviously, it would be unfair to generalize that all diplomats and professors have failed to bridge the divide between the theoretical knowledge of law and its application in a trial or appeals setting. That said, any *real* judge will readily concede that while the theory (knowledge) of law is relevant and useful during the course of trial proceedings, the art and science of judging, e.g., managing the court proceedings, dealing with procedural issues, and ruling on evidentiary matters, requires skills that can only be acquired by courtroom experience. As one former judge noted, having a professor of law act as a trial judge, without any prior experience, is like taking a professor of anatomy, placing him in the operating theater and asking him to perform brain surgery.[17] The unintended consequence of appointing clever diplomats and bright professors is that some of them are utterly unfit to sit on the bench – at least for their first trial. Until such appointees learn the judge's role and how trials are conducted, the result will be a palpable inconsistency in the quality of trials. This, as will be seen

merits of individual nominations; its members more often vote on the basis of regional concerns and tradeoffs".

16 Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 1877, 7 July 2009, Art. 13, Judicial Qualifications: "The permanent and *ad litem* 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. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law".
See also Wald, *supra* note 15, 1564: Article 13 of the ICTY Statute embodies aspirational criteria, which has been "translated by the nominating countries as they see fit; while many of the judges at the ICTY are experienced jurists, many have not had prior judicial or criminal experience".

17 Simons, *supra* note 14: "Of course we need a mix [of judges with extensive trial experience and judges who are legal scholars or diplomats], but you wouldn't put a judge who has never been in court in charge of a big conspiracy case. You wouldn't take a professor of anatomy and put him into an operating theater and say, 'Now perform this brain surgery'".

below, is just one of the factors contributing to the disparities in trials conducted at the ICTY.

E. No Orientation or Bench Book is Offered to Judges Prior to Taking the Bench

Once judicial candidates are sworn in as judges, they are – as they must be – independent. Naturally, this is positive. However, when considering that some of these independent judges are untrained and ill-prepared to act as judges, being anointed as "independent" without any prior training, orientation or testing, poses a problem. Should an international criminal tribunal such as the ICTY be used as a vocational school or an apprenticeship for inexperienced diplomats and professors? Is it fair to the Accused and the victims in trials of such magnitude to have judges learning the art and science of judging from the bench? It cannot be assumed that successful academics and diplomats inexorably are, or will become, competent judges. There is a vast difference between lecturing students on the law, grading papers and writing academic articles, or engaging in diplomatic matters where nuance, subtlety and ambiguity are valued skills, and being a trial judge in a courtroom, where clarity and consistency are important attributes.

Another matter worth commenting on is the resultant unevenness in the proceedings when the quality of procedural justice depends on the makeup of the bench. Even experienced judges have been prone to using their independence in a manner which frustrates uniformity, consistency and predictability in the proceedings; hallmarks of a credible and reliable judicial institution.

Because the judges come from different legal traditions, it is to be expected that each will approach the various judicial functions, such as the admission or assessment of evidence, the application of the Rules of Evidence and Procedure (RPE), and the interpretation of the Statute, from his or her own frame of reference, *i.e.*, his or her own legal tradition and experiences. When considering that the procedure at the ICTY is a hybrid, a marriage of the adversarial and inquisitorial systems, this causes confusion and has resulted in conflicts amongst judges on a bench.[18] Some judges, it

[18] Here too, it should be noted that the procedure has been in a constant state of flux, with the balance tipping from adversarial to inquisitorial and *vice versa* depending on the issues involved and the respective stage of the ICTY's life-cycle.

would appear, are either reluctant to or incapable of applying the Statute and RPE based on the procedure adopted by the ICTY. Effectively, some judges apply their own judicial traditions to the Rules; that is, they try to make the Rules fit their legal tradition, as opposed to adjusting their judicial thinking and behavior to the Rules. Recognizing that the judges are inexorably prisoners of their own legal training and experiences, and that they cannot be expected to think and act as automatons, they should be expected to honor the Statute and interpret and apply the Rules as intended. Depending on the make-up of the bench and the judges' interpretation and application of the Statute and Rules, the Accused are likely to receive anything from a relatively fair trial to what could barely be considered a semblance of a trial. Of course, it is not just the Accused who feel a sense of injustice when trials are not being conducted in accordance with the Rules; the prosecution has also been left feeling frustrated at having spent an enormous amount of time and effort in preparing a meticulous case only to find itself in trials conducted by what appears to be improvisation, or worse yet, experimentation.[19] From the perspective of the Accused on trial, the end results of these trials are viewed with skepticism and cynicism, detracting from the ICTY's coveted legacy.

The ICTY, like the other tribunals, has no orientation, training or testing program for its judges. It is assumed that if someone is nominated to be a judge (even if the nominee is from a national jurisdiction in want of rule of law and judicial independence), then the nominee is fit to be sworn in, handed a fresh set of documents, given the scarlet silk robe to wear, and escorted to the courtroom, with no need to determine whether the newly minted judge has any actual knowledge of or relevant experience in being a

[19] See, *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 19 March 2007, 15852: "[Prosecutor Kenneth Scott]: A number of people asked me following last Thursday's trial day if I was feeling okay, if I was all right, as I was sitting, you may remember, at the Prosecution with my head down. […] I was so embarrassed for this institution, I was embarrassed for myself, I was embarrassed for anyone watching these proceedings. Frankly, I was even embarrassed for the Judges. […] The Prosecution is very concerned whether the victims, the Prosecution, the international community will receive a fair trial in this case. We are very, very concerned about that on a number – for a number of reasons, including the time limits placed on the case, because also repeated statements and comments by the Chamber and the President, and the way certain things have been handled". See also *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 19 March 2007, 15855-15858, where the Prosecutor discussed the examination of witnesses and the Judges' interference with the parties' questioning of witnesses.

judge, or appreciation for the manner in which the proceedings are to be conducted and the legal traditions of the ICTY. Of course, the irony is that once a candidate does get sworn in, he or she becomes an independent judge, above being instructed or tested. A simple orientation procedure or a two to four week judicial training program followed by some basic testing would, at a minimum, provide the judges with a common understanding of or exposure to what is expected of them. Along these lines, the judges could also be provided with a Bench Book that sets out in detail a step-by-step process on how judges should conduct the proceedings, perhaps even with a commentary on the Rules. Thus, a uniform procedure with clear guidelines could be made available to all judges, guiding them throughout the proceedings. This would, to the extent possible (since the judges are independent), compel judges to conduct themselves and the proceedings in a more-or-less uniform fashion. Had the ICTY adopted such a Bench Book – which many of the judges from the Anglo-Saxon tradition would be familiar with since Bench Books are common to their practice – then, even without orientation, training or testing, it is reasonable to conclude that some of the apparent disparity in the application of the Rules and conduct of the proceedings would have been minimized. It remains a mystery why the ICTY never adopted any quality control modalities to reconcile these rather obvious shortcomings.

F. The Rules Change as the Game is Played

As noted, the judge-made Rules at the ICTY are constantly being tinkered with. Indeed, the changes in the Rules have been so extensive and the procedure has effectively been transformed to such a degree that some changes seem to transgress upon the letter and spirit of the Statute, which only the UN Security Council is entitled to amend.[20] The Rules that were

[20] D. Mundis, 'The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals', 99 *American Journal of International Law* (2005) 142, 147-148: "Despite the merits of the completion strategies as instruments for attaining the successful conclusion of the International Tribunals' mandates, they have brought forth some unintended and even unfortunate consequences. […] The amendment of ICTY Rule 28(A), giving the bureau discretion to determine whether indictees meet the standard of 'most senior leader', was adopted by the permanent ICTY judges pursuant to Rule 6 without any consultation with the ICTY prosecutor. […] It must be noted, however, that the Security Council opted not to amend the Statutes of the International Tribunals and although the ICTY judges have broad discretion in adopting and amending the Rules of Procedure and Evidence in

initially adopted and the Rules as they exist today are remarkably different. This can be attributed to the fact that when the ICTY was established, the IMT and IMTFE were its frame of reference. Many of the challenges confronted by the ICTY judges would not become known until the Rules were put to the test. Creative measures would be required. Conveniently, the judges were entrusted with writing and adjusting the Rules as they deemed necessary to meet the objectives of the ICTY and the human (fair trial) rights and obligations set out by the Statute. The only limitation imposed on the judges was that the Rules, and any amendments to them or changes to the proceedings, must be consistent with the Statute. Since there is no actual judicial oversight, the judges have been unimpeded in interpreting the contours of the Statute and defining the extent to which the Rules can be amended. In other words, no entity is judging or monitoring the judges to ensure that they are not improperly amending the Rules or instituting proceedings that violate the Statute. Such unchecked authority is vulnerable to abuse especially considering the ease with which it can be suggested that something is implied by, and thus need not be explicitly stated in, the Statute[21] or the ease in making an artful argument that justifies a desired result.

G. Excessive Judicial Activism

When the ICTY was established, it was supposed to apply what was "beyond any doubt" customary international law.[22] As previously observed, as far as actual jurisprudence, there was little to speak of other than what had been created by the post-World War II cases. Determining the extent to which customary international law had progressed and existed beyond doubt at the time of the temporal jurisdiction of the ICTY would, expectedly, become an issue to be resolved. Judges are routinely called upon to

accordance with Article 15 of the ICTY Statute and Rule 6 of the Rules, the scope of this amended rule touches on core issues involving the independence of the prosecutor and may be *ultra vires*": See also *Prosecutor v. Prlic et al.,* Trial Transcript, IT-04-74-T, 22 March 2007, 16154: "[Defense Counsel Karnavas]: Only the Security Council can amend the Statute. I know that Judge Pocar has indicated that this is a – President Pocar has indicated that this is now a Judge-controlled system, but the Statute was adopted by the Security Council and no judge-made law or judge-made rule that comes out of the Plenary Session can trump the Statute that was adopted by the Security Council […]".

21 See *infra*, section on Joint Criminal Enterprise.

22 1993 Report of the Secretary-General, UN Doc S/25704, 3 May 1993, para. 34.

determine the contours of applicable jurisprudence; there is nothing surprising or necessarily disconcerting about this. Yet when considering that a large segment of the judges come from the ranks of professors and diplomats, this is a cause for concern. Being learned in the law or versed in the art of diplomacy and nuanced linguistics can actually be an impediment, particularly if, for instance, academics who are not familiar with or do not care for the limitations of the role of a judge, are more interested in promoting their ideas as to where the law ought to be, as opposed to simply applying the law as it is. Another phenomenon that has occasionally arisen is the creation of law by judges without citation to any credible authority. Once created, of course, it is then used as precedent to justify future decisions. Just two examples will suffice in illustrating the sort of judicial activism that has been seen at the ICTY. The first example deals with the mode of liability coined at the ICTY referred to as joint criminal enterprise (JCE). The second example deals with the recent imposition of new and inventive criteria for restricting the provisional release of the Accused in certain instances when, in reality, there is no credible justification for such a restriction.

I. The Creation of JCE as a Mode of Criminal Liability

JCE was first created in 1999 by the ICTY Tadic Appeals Chamber as a distinct form of criminal liability.[23] JCE is applied to a group of people who have carried out crimes collectively. The Tadic Appeals Chamber held that participation in a common plan is implicitly recognized as a form of "committing" under Article 7(1) of the ICTY Statute.[24] It reasoned that the object and purpose of the ICTY Statute allowed the extension of the Tribunal's jurisdiction to all persons who have in any way participated in the crimes within the Tribunal's jurisdiction.[25] Furthermore, the Tadic Appeals Chamber held that the notion of common plan liability has been

23 *Prosecutor v. Tadic,* Judgment, IT-94-1-A (Appeals Chamber), 15 July 1999, paras 185-234.

24 *Id*., para. 186. Article 7(1) of the ICTY Statute provides that "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".

25 *Id*., paras 189-190.

firmly established in customary international law.[26] The ICTY Appeals Chamber identified three forms of JCE:

a. The basic form (JCE I) ascribes individual criminal liability when "all co-defendants, acting pursuant to a common design, possess the same criminal intention […] even if each co-perpetrator carries out a different role within it"[27].

b. The systemic form (JCE II) ascribes individual criminal liability when "the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan"[28].

c. The extended form (JCE III) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose"[29].

JCE has been the most controversial form of liability to be applied at the *ad hoc* international tribunals, particularly because it has been viewed as judge-made and not grounded in customary international law.[30] Customary

26 *Id.*, para. 220.

27 *Id*., para. 196.

28 *Id*., para. 202.

29 *Prosecutor v. Vasiljevic*, Judgment, IT-98-32-A (Appeals Chamber), 25 February 2004, para. 99. See also *Prosecutor v. Tadic,* Judgment, IT-94-1-A (Appeals Chamber), 15 July 1999, para. 204.

30 See e.g., C. Damgaard, 'The Joint Criminal Enterprise Doctrine: A 'Monster Theory of Liability' or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?', in C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 129: "[T]his doctrine raises a number of grave concerns. It, arguably, *inter alia* is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the nullum crimen sine lege principle and infringes the right of the accused to a fair trial". M. Badar, ''Just Convict Everyone!' – Joint Perpetration: From Tadic to Stakic and Back Again', 6 *International Criminal Law Review* (2006) 2, 293, 301: "A major source of concern with regard to the applicability of JCE III in the sphere of international criminal law is that under both the objective and subjective standards, the participant is unfairly held liable for criminal conducts

international law is created through (i) general and consistent State practice[31] and (ii) *opinio juris*, which is the belief by a State that it is under a legal obligation to follow a certain practice.[32] In finding that JCE existed under customary international law, the Tadic Appeals Chamber only relied on a limited number of cases from a handful of jurisdictions.[33] Such a limited State survey is not representative of general and consistent legal practice and cannot justify the finding of JCE as customary international law. Moreover, most States use co-perpetration rather than JCE liability in their legal systems.[34]

that he neither intended nor participated in". W. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2002-2003) 4, 1015, 1034: "Granted these two techniques [JCE and command responsibility] facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy".

31 In relation to State practice, the International Court of Justice has held that "[t]he party which relies on custom […] must prove that this custom is established in such a manner that it has become binding on the other Party […] [and] that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question […]", *Columbian-Peruvian asylum case (Columbia v. Peru),* Judgment of November 20th, 1950, ICJ Reports 1950, 266, 276. State practice should be "extensive and virtually uniform in the sense of the provision invoked". *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* Judgment, ICJ Reports 1969, 3, 43, para. 74.

32 M. Shaw, *International Law*, 6th ed. (2008), 74-75.

33 In relation to JCE I, the *Tadic Appeals Chamber* merely relied on six cases in total, four from British military tribunals, one from a Canadian tribunal and one from an American tribunal: *Otto Sandrock and three others; Hoelzer et al.; Gustav Alfred Jepsen and other; Franz Schonfeld and others; Feurstein and others; Otto Ohlenforf et al.* (*Prosecutor v. Dusko Tadic*, Appeal Judgment, IT-94-1-A, 15 July 1999, paras 197-200. With respect to JCE II, the *Tadic Appeals Chamber* relied upon two cases in the body of the judgment: the *Dachau Concentration Camp* case (*Trial of Martin Gottfried Weiss and thirty-nine others)* and the *Belsen* case (*Trial of Josef Kramer and forty-four others).* For JCE III, the *Tadic Appeals Chamber* relied upon the *Essen Lynching Case, Borkum Island Case,* and numerous unpublished decisions from post-World War II Italian jurisprudence: *Repubblica Sociale Italiana; D'Ottavio et al.; Aratano et al.; Tossani; Ferrida; Bonati et al., Mannelli.*

34 In an expert opinion commissioned by the ICTY Office of the Prosecutor, it was determined most states use co-perpetration rather than JCE. See Max Planck Institute for Foreign and International Criminal Law, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Part 1: Comparative Analysis of Legal Systems, p. 16. See also *Prosecutor v. Gacumbitsi,* Appeals Chamber Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility for the

In addition, the Tadic Appeals Chamber relied upon two international conventions to show the customary nature of JCE: the International Convention for the Suppression of Terrorist Bombing (ICSTB)[35] and the Rome Statute of the ICC.[36] Both conventions entered into force after the date of commission of the offenses in Tadic, which affects their usefulness when evaluating customary international law at the time the crimes in Tadic were committed. Judge Liu, in his partially dissenting opinion and declaration to the Appeals Judgment in *Oric*, stated that "because customary international law has to be assessed as of the date of the commission of the offences, the fact that […] texts were adopted subsequent to these dates […] further limit their weight and usefulness as sources of customary international law at the time the crimes were committed"[37]. The ICSTB and the Rome Statute had limited value in assessing the customary status of JCE. Even if these two conventions had entered into force before the commission of the offenses in Tadic, they would not support the creation of

Appellant for Committing Genocide, ICTR-2001-64-A, 7 July 2006, 114, para. 24. "[W]hen interpreting the meaning of 'committing' based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades".

35 *International Convention for the Suppression of Terrorist Bombing*, 12 January 1998, 2149 U.N.T.S. 256.

36 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3.

37 See *Prosecutor v. Oric*, Appeals Chamber Judgment, IT-03-68-A, 3 July 2008, 82, para. 26, referring to the texts of the Draft Code of Crimes Against the Peace and Security of Mankind and Article 28 of the ICC Statute being adopted subsequent to the adoption of the ICTY and ICTR Statute. See also *Prosecutor v. Hadzihasanovic & Kubura*, Appeals Chamber Decision, Partially Dissenting Opinion of Judge Shahabuddeen, IT-01-47-AR72, 16 July 2003, para. 21, where Judge Shahabuddeen noted that "weight has of course to be given to the texts as indicative of the state of customary international law as it existed when they were adopted. But, as the texts [Draft Code of Crimes Against the Peace and Security of Mankind] were adopted subsequent both to the making of the Statute of the Tribunal and to the dates on which the alleged acts […] were committed, on the question what was the state of customary international law on these occasions they do not seem to speak with the same authority as do the earlier provisions […] of the 1977 Additional Protocol I to the Geneva Conventions 1949".

JCE liability. The ICSTB deals with different crimes from those in the ICTY Statute, and the ICC has soundly rejected the application of JCE.[38]

The cases the Tadic Appeals Chamber used in holding that JCE is custom are inconsistent or do not support this form of liability. A review of these cases demonstrates, *inter alia*, that the *mens rea* was inconsistently applied, or that there was a failure by the Judge Advocate to state the law. In its analysis of certain cases, the Tadic Appeals Chamber assumed that the prosecution's arguments relating to criminal liability were followed because the Accused was convicted.[39] The Chamber relied on cases that provide "almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine"[40].

[38] See *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 29 January 2007; See *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Katanga & Ngdujolo*, Decision on Confirmation of Charges, ICC-01/04-01/07 (Pre-Trial Chamber I), 30 September 2008.

[39] For example, in reviewing the *Essen Lynching* case, the Appeals Chamber inappropriately assumed that because the Defendant was convicted, the court must have accepted the prosecution's arguments in respect of criminal liability. The ECCC Pre-Trial Chamber found that "there is no indication in the case that the Prosecutor even explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law." *Case of Nuon Chea et al.,* Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OCIJ (PTC35) (Pre-Trial Chamber), 20 May 2010, D97/14/15, para. 81. As Professor Ohlin poignantly explains: "The first problem with these cases [relied upon by the *Tadic* Appeals Chamber] is that neither case produced a written decision from the judges, and so the written material consists only of submissions from the prosecutor and defense counsel. One is left to infer agreement with the prosecutor's doctrine on the basis of the judges' decision to issue convictions. This is problematic purely as a matter of legal reasoning. Second, and more importantly, neither case involved a situation where a defendant explicitly agreed to a criminal plan but was convicted for the actions of confederates that extended beyond the scope of the criminal plan. Rather, these were lynchings where the deaths were attributed to the defendants by the judicial system, even though the prosecutors could not prove who had killed whom (by delivering the fatal blows). Indeed, there is not a single *international* case cited in the Tadic opinion that includes the language of liability for actions that were reasonably foreseeable". J. Ohlin, 'Joint Intentions to Commit International Crimes', 11 *Chicago Journal of International Law* (2011) 2, 693, 708.

[40] "The cases cited in Tadic […] do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY. Instead, the cases discussed in Tadic fall into one of two types. The first involves unlawful

JCE has been roundly criticized as judge-made law that has no basis in customary international law. Affirming this criticism, the Pre-Trial Chamber and the Trial Chamber of the ECCC recently have shown conclusively that JCE III did not exist as a mode of criminal liability in 1979 under customary international law. Save for its rejection as a mode of liability at the ICC, there have been no changes in the status of JCE III under customary international law since 1979; thus, it still does not exist as a mode of liability in customary international law.

In these Decisions, the ECCC Pre-Trial Chamber and Trial Chamber thoroughly examined the international instruments and case law relied on by the Tadic Appeals Chamber and found that the materials cited did not support the existence of JCE III under customary international law (the Trial Chamber additionally considered whether JCE III existed as a general principle of law and concluded that it did not).[41]

As Tanya Pettay and Helen Sullivan explain:

> "[t]he Trial Chamber […] considered the post-World War II cases cited in the Tadic Appeals Judgement as well as two additional World War II era cases, U.S. v. Ulrich and Merkle and U.S. v. Wuelfert, cited in the STL Decision [which was relied upon by the prosecution to support the existence of JCE III]. Both U.S. v. Ulrich and Merkle and U.S. v. Wuelfert involved businessmen who were held responsible for the mistreatment of prisoners at their factories and the Dachau concentration camp. In reviewing the judgements, the Trial

killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople. The second group of cases concerns concentration camps. […] [T]here is no indication in [*Essen Lynching*] that the prosecutor explicitly relied on the concept of common design, common purpose, or common plan. The Tadic court nevertheless cited this case as support for Category Three of JCE". A. Danner & J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 1, 75, 110-11.

41 See *Case of Nuon Chea et al.,* Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OCIJ (PTC35) (Pre-Trial Chamber), 20 May 2010, D97/14/15; *Case of Nuon Chea et al.*, Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007-ECCC/TC (Trial Chamber), 12 September 2011, E100/6.

> Chamber found that the cases appeared to support JCE I and JCE II, because the Accused were part of the concentration camp structure and participated personally in the mistreatment of prisoners, but did not necessarily support findings of guilt based on JCE III. The Trial Chamber observed that '[a]gain, the Interlocutory Decision of the Special Tribunal for Lebanon cites review judgements which do not provide the legal reasoning behind the affirmed convictions.' Since the legal basis for conviction was not clear in either of the cases, the Trial Chamber found that the cases could not support a conclusion that JCE III had emerged as a principle of customary international law by 1975-1979."[42]

The findings of the ECCC Pre-Trial and Trial Chambers, while definitively excluding JCE III as a mode of liability, also raise questions about the validity of JCE I and JCE II as a mode of liability under customary international law. The Tadic Appeals Chamber did not rely upon any more cases to support its finding that JCE III has a basis in customary international law than were relied on to support a finding that JCE II has such a basis.[43] Consequently, "it is dubious whether the jurisprudence [relied on in Tadic to support the customary status of JCE III, i.e. the *Borkum Island* and *Essen Lynching* cases] involves significantly more inference than the other post-World War II jurisprudence that led the [ECCC Pre-Trial Chamber] to find 'without a doubt' that JCE 1 and JCE 2 were customary law"[44].

42 T. Pettay & H. Sullivan, 'The Belated demise of JCE III: The ECCC debunks the myth created by the ICTY in Tadic that JCE III exists in customary international law' ADC-ICTY Newsletter, Issue 21, 31 October 2011 (internal citations omitted).

43 D. Scheffer & A. Dinh, 'The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility', *Cambodia Tribunal Monitor* (3 June 2010), available at http://www.cambodiatribunal.org/images/CTM/ctm%20scheffer%20dinh%20jce%20commentary%203%20june%202010.pdf (last visited 16 November 2011), 5.

44 Scheffer & Dinh, *supra* note 42, 5. This statement equally applies to the two additional World War II-era cases, *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert,* recently relied on by the STL Appeals Chamber in its decision reaffirming the existence of JCE in customary international law. See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1 (Special Tribunal for Lebanon), 16 February 2011, para. 237. As with the other cases, the Judgments in *Ulrich and Merkle* and *Wuelfert* do not provide the legal reasoning behind the convictions. *Prosecutor v. Nuon Chea et al.*,

After creating JCE as a mode of criminal liability, the Appeals Chamber of the ICTY has so far refused to entertain challenges to its findings in Tadic on the customary nature of JCE.[45] Although cogent reasons abound,[46] overturning the JCE holding from Tadic would have a catastrophic effect on ICTY prosecutions – and the legacy of the Tribunal – due to the sheer number of prosecutions and convictions that have been based on JCE.[47] The major question that now arises, particularly in light of the ECCC Decisions, is whether the judges at the *ad hoc* tribunals will have the intellectual integrity to reevaluate whether JCE liability as a whole has a place in international criminal law and, at the very least, re-examine whether JCE III may legitimately be applied in future cases and revisit past convictions based on this form of liability. As Pettay and Sullivan have noted, a question that begs an answer is whether the Judges at the ICTY "will have the intellectual integrity to hold that JCE III is not a legitimate form of liability to be applied in future cases and, more importantly, to revisit and reverse past convictions based in whole or in part on JCE III. Given the impact that the erroneous use of JCE III liability has on the legacies of the *ad hoc* Tribunals, […] Judges should take immediate steps to redress the egregious mistake made more than ten years ago by the Tadic

Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007-ECCC/TC (Trial Chamber), 12 September 2011, E100/6, para. 34.

45 When the customary law basis of JCE liability was challenged by the Defense in *Prosecutor v. Milutinovic et al.*, the Appeals Chamber simply asserted that it "does not propose to revisit its finding in *Tadic* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadic committed the crimes for which he was eventually convicted". *Prosecutor v. Milutinovic et al.*, Appeals Chamber Decision, IT-99-37-AR72, 21 May 2003, para. 29.

46 The *Aleksovski* Appeals Chamber has stated that "the Appeals Chamber should follow its previous decisions, but should be *free to depart from them for cogent reasons* in the interest of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a *wrong legal principle* or cases where a previous decision has been given *per incuriam*." *Prosecutor v. Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, paras 107-108 (emphases added).

47 Danner & Martinez, *supra* note 40, 107: "The first indictment to rely explicitly on JCE was confirmed on June 25, 2001 – eight years into the ICTY's work. Of the forty-two indictments filed between that date and January 1, 2004, twenty-seven (64%) rely explicitly on JCE".

Appeals Chamber and blindly, if not obsequiously, repeated by subsequent Chambers."[48] The failure to honestly assess the creation of JCE liability by the Tadic Appeals Chamber and its impact over the last twelve years on prosecutions at the ICTY will be a tremendous stain on the legacy of the Tribunal.

II. The Judicially-Created Requirement of a Showing of Sufficiently Compelling Humanitarian Reasons before Granting Provisional Release

In October 2011, it was proposed that the Plenary Meeting of judges at the ICTY consider whether Rule 65(B) should be amended to either require or permit a showing of "sufficiently compelling humanitarian reasons" for provisional release at a late stage of the proceedings, and in particular after the close of the prosecution's case.[49] The codification of this additional criterion to make its application mandatory would have created a high standard for the provisional release of an Accused, making it exceptionally difficult for an Accused to be provisionally released after the close of the prosecution's case, despite having satisfied the criteria enumerated in Rule 65(B). The proposed amendment to require a showing of sufficiently compelling humanitarian reasons meant that an Accused could remain incarcerated throughout the often long period of time needed for the ICTY Trial and Appeals Chambers to render their judgments. For example, in *Prlic et al.*, applying the additional criterion could lead to the unjust result that the six Accused be held in provisional detention for nearly two years while awaiting the Trial Chamber's judgment.[50] This standard is

[48] T. Pettay & H. Sullivan, 'The Belated demise of JCE III: The ECCC debunks the myth created by the ICTY in Tadic that JCE III exists in customary international law', 21 *ADC-ICTY Newsletter* (2011).

[49] Prior to its amendment by the Plenary on 28 October 2011, Rule 65(B) of the Rules of the Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc IT/32/Rev. 46, stated that provisional release "may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person".

[50] See, e.g., *Prosecutor v. Prlic et al.*, IT-04-74, Decision on Jadranko Prlic's Motion for Provisional Release, 21 April 2011 [*Prlic et al.* 21 April 2011 Decision], para. 35. See also Letter dated 12 May 2011 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International

in direct conflict with the presumption of innocence because Accused, who have not been convicted, are being punished as if they were already guilty. Moreover, this standard resulted from recent Appeals Chamber jurisprudence and has no basis in either the Rules, the Statute, or in customary international law.

On 11 March 2008, the Appeals Chamber[51] overturned the Trial Chamber's Decisions[52] to provisionally release five of the accused during a recess in the trial following the close of the prosecution's case.[53] The Appeals Chamber considered that a Rule 98*bis* (Judgment of Acquittal) ruling warranted the "explicit consideration" of the risk of flight posed by the Accused pursuant to Rule 65(B),[54] and concluded that the humanitarian grounds put forward as justification for the short period of provisional release (such as to visit ailing relatives) were not "sufficiently compelling, particularly in light of the 98*bis* Ruling, to warrant the exercise of the Trial Chamber's discretion in favor of granting the Accused provisional release"[55]. The *Prlic et al.* 11 March 2008 Decision repeatedly emphasized the specific circumstances "in this case" and "the present context of the proceedings"[56]. Judicial inquiry has followed regarding whether the *Prlic et*

Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc S/2011/316 (18 May 2011) available at http://www.icty.org/x/file/About/Reports%20 and%20Publications/CompletionStrategy/completion_strategy_18may2011_en.pdf. (last visited 2 December 2011), paras 33-35. President Robinson projects that the Judgment will be issued in June 2012; however, current predictions show it is more likely to be issued at the end of 2012 or the beginning of 2013.

51 Constituted by Judges Pocar, Liu, Vaz, Meron and Schomburg.

52 *Prosecutor v. Prlic et al.*, Decision on the motion for provisional release of the accused Prlic, IT-04-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused Stojic, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused *Praljak*, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused *Petkovic*, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused Coric, IT-05-74-T, 19 February 2008.

53 *Prosecutor v. Prlic et al.*, Appeals Chamber Decision, IT-04-74-AR.65.5, 11 March 2008 [*Prlic et al.* 11 March 2008 Decision], paras 19-20.

54 *Id.*, para. 20.

55 *Id.*, para. 21.

56 *Id.*, paras 19-21. See also *Prosecutor v. Stanisic & Zupljanin*, Decision Denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 17.

al. 11 March 2008 Decision intended to add an additional criterion to Rule 65(B) at all.[57]

However, on 21 April 2008, a majority of the *Prlic et al.* Appeals Chamber,[58] constituted to decide the prosecution's appeal against granting provisional release to Milivoj Petkovic, relied on *Prlic et al.* 11 March 2008 Decision when concluding that "provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist"[59]. The Appeals Chamber further premised its conclusion on the potential prejudice victims and witnesses could suffer if accused persons were provisionally released to the same regions in which victims and witnesses live.[60] On 23 April 2008, in another decision in *Prlic et al.* regarding provisional release for Berislav Pusic, the Appeals Chamber held that Rule 65(B) of the Rules does *not* mandate humanitarian justification for provisional release.[61] Yet on 15 May 2008, the Appeals Chamber returned to the "sufficiently compelling humanitarian reasons" standard when deciding requests for a custodial visit by Ljubomir Borovcanin and provisional release by Milan Gvero and Radivoje Miletic in *Popovic et al.*[62]

The Appeals Chamber thus set a faulty pattern by upholding the *Prlic et al.* 21 April 2008 Decision. More recently, the Trial Chamber and

57 See *Prosecutor v. Stanisic & Zupljanin*, Decision Denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 17. See also Partially Dissenting Opinion of Judge Liu in *Prosecutor v. Popovic et al.*, Appeals Chamber Decision, IT-05-88-AR65.4, AR65.5 and AR65.6, 15 May 2008, para. 6. The *Prlic et al.* 11 March 2008 Decision "was specific to the circumstances of that particular case and was made in light of the arguments presented. It was not creating a general principle by assessing whether the Trial Chamber had erred in finding humanitarian reasons". See also *Prosecutor v. Prlic et al.*, Appeals Chamber Decision, IT-04-74-AR65.6, 23 April 2008 ("*Prlic et al.* 23 April 2008 Decision"), paras 14-15.

58 Judges Pocar, Shahabuddeen, Vaz and Meron, *Prosecutor v. Prlic et al.*, Decision on "Prosecution Appeal from Décision relative à la demandede mise en liberté provisoire de l'accusé Petkovic dated 31 March 2008", IT-04-74-AR65.7, 21 April 2008 [*Prlic et al.* 21 April 2008 Decision]; Judge Güney partially dissenting.

59 *Prlic et al.* 21 April 2008 Decision, para. 17.

60 *Id.*

61 *Prlic et al.* 23 April 2008 Decision, para. 14.

62 *Prosecutor v. Popovic et al.*, Appeals Chamber Decision, IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, 15 May 2008 [*Popovic et al.* 15 May 2008 Decision], para. 24.

Appeals Chamber in *Prlic et al.* upheld this new standard in their decisions to refuse Dr. Jadranko Prlic's post-trial application for provisional release during the Trial Chamber's deliberations.[63] Even though the Trial Chamber found that all of the requirements of Rule 65(B) were met,[64] it considered "itself constrained in its analysis" by the Appeals Chamber's requirement to determine whether sufficiently compelling humanitarian reasons existed.[65] In June 2011, the *Stanisic & Zupljanin* Trial Chamber questioned the new standard,[66] and on appeal the "sufficiently compelling humanitarian reasons" criterion would have been reversed but for Judge Liu's decision to "defer to the outcome" of the majority decision, notwithstanding "his well-documented antipathy towards the case law in this regard"[67].

The "sufficiently compelling humanitarian reasons" criterion was built on nothing more than a dubious amalgamation of Tribunal case law. As ICTY President Judge Robinson has opined, that release "may" be ordered by a Trial Chamber pursuant to Rule 65(B) "does not mean that a Chamber is free to refuse an application for reasons other than those set out in the text; if it does so, it would have acted arbitrarily and unlawfully. All that the word 'may' means [in Rule 65(B)] is that the Chamber has the power, that is, it is competent to grant bail […]. In sum, the word 'may' imports not so much discretionary power as jurisdictional competence"[68].

Turning to the Appeals Chamber jurisprudence which created this additional criterion, the reliance placed by the majority in the *Prlic et al.* 21 April 2008 Decision on the *Prlic et al.* 11 March 2008 Decision "was

63 *Prlic et al.* 21 April 2011 Decision, paras 35-39.

64 *Prlic et al.* 21 April 2011 Decision, paras 16-22, 26, 38-39. See also *Id.*, Dissenting Opinion of Presiding Judge Antonetti, paras 9, 15, 17; *Prosecutor v. Prlic et al.*, Decision on Slobodan Praljak's motion for provisional release, IT-04-74, 21 April 2011.

65 *Prlic et al.* 21 April 2011 Decision, para. 39.

66 *Prosecutor v. Stanisic & Zupljanin*, Decision denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 30.

67 *Prosecutor v. Stanisic & Zupljanin*, Appeals Chamber Decision, IT-08-91-AR65.2, 29 August 2011, Declaration of Judge Liu, para. 2.

68 *Prosecutor v. Krajisnik & Plavsic*, Decision on Momčilo Krajisnik's Notice of Motion for Provisional Release – Dissenting Opinion of Judge Patrick Robinson, IT-00-39 & 40-PT, 8 October 2001 [*Krajisnik & Plavsic* 8 October 2011 Decision – Dissenting Opinion of Judge Robinson], paras 27-28. See also *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-AR65.2, 29 August 2011, paras 7-9.

misplaced”[69]. As Judge Liu has observed, the *Prlic et al.* 11 March 2008 Decision “was specific to the circumstances of that particular case […] [i]t was not creating a general principle”[70]. The *Prlic et al.* 21 April 2008 Decision cited *Ademi* to support the notion that provisional release in later stages of a case requires sufficiently compelling humanitarian reasons.[71] Yet nowhere did the *Ademi* Trial Chamber suggest that sufficiently compelling humanitarian reasons should become *the* pre-requisite for provisional release.[72]

Due to its grave impact on the presumption of innocence and a person’s human right to liberty, Rule 65(B) is no mere procedural rule. Its terms must be consistent with both the Statute *and* customary international law. The Tribunal must fully respect internationally recognized standards

[69] *Popovic et al.* 15 May 2008 Decision, Partially Dissenting Opinion of Judge Liu, para. 6. See also *Prlic et al.* 21 April 2008 Decision, Partially Dissenting Opinion of Judge Güney, para. 7: “Superfluously, I wish to underline that most of the references quoted in support of the majority finding ‘that the development of the Tribunal’s jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist’ are to decisions based on the Decision of 11 March 2008. The other decisions cited are no more than consideration by a Trial Chamber of the two requirements of Rule 65(B) of the Rules and the usual exercise of its broad margin of discretion”.

[70] *Popovic et al.* 15 May 2008 Decision, Partially Dissenting Opinion of Judge Liu, para. 6.

[71] *Prlic et al.* 21 April 2008 Decision, n. 52,

[72] *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional ReleaseTrial Order, 20 February 2002, para. 22, cited in para. 17 of the *Prlic et al.* 21 April 2008 Decision, states that the Trial Chamber “agrees with the interpretation that a Trial Chamber will still retain a discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person. This applies even if the Prosecution does not object to the application for release. Consequently, the express requirements within Rule 65 (B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case. There may be evidence of obstructive behaviour other than absconding or interfering with witnesses, which a Trial Chamber finds necessary to take into account. For example: the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large. In addition, factors such as the proximity of a prospective judgement date or start of the trial may weigh against a decision to release. The public interest may also require the detention of the accused under certain circumstances, if there are serious reasons to believe that he or she would commit further serious offences” (internal citations omitted).

that protect the rights of the Accused at all stages of the proceedings, particularly those in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[73] Principles taken from the European Convention on Human Rights and the ICCPR are a part of international law and Rule 65(B) should be construed in light of them.[74] Pursuant to these instruments, provisional detention is considered to be the exception rather than the rule,[75] and all Accused are presumed innocent until proven guilty.[76] Derogation from customary international law must be authorized by the Tribunal's Statute.[77] As the Statute does not derogate from these principles, the additional criterion's effect (by making provisional release exceptional) contravenes international human rights law.[78] It bears repeating that

[73] 1993 Report of the Secretary-General, para. 106.

[74] *See Prlic et al.* 21 April 2011 Decision, para. 30, citing *Prosecutor v. Limaj*, Appeals Chamber Decision, IT-03-66-AR65, 31 October 2003, para. 12.

[75] Article 9(3) of the ICCPR reflects a customary norm that detention shall not be the general rule. *See also Prlic et al.* 21 April 2011 Decision, para. 32: "The Chamber also wishes to recall that the jurisprudence of the European Court of Human Rights ('EHR Court') has spoken to the circumstances where measures of lengthy provisional detention may be enforced: 'According to the settled jurisprudence of the Court, it falls first to national judicial authorities to ensure that in any given case, the length of provisional detention of an accused does not exceed the bounds of what is reasonable. For this purpose, they must examine all of the circumstances likely to reveal or to rule out whether the requirements of the public interest regarding the presumption of innocence, would warrant making an exception to the rule of respect for individual liberties and to take this into consideration in their decisions with respect to any release. It is principally on the basis of the grounds appearing in these decisions, as well as of uncontested facts signaled by the appellant in his appeals that the Court must determine whether or not there has been a violation of Article 5 § 3 of the Convention.' /Registry translation", citing *Prencipe v. Monaco*, ECHR. (2009) No. 43376/06, paras 74 and 75.

[76] Article 21(3) of the Statute of the ICTY states: "The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." Article 14(2) of the ICCPR states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

[77] For example, Article 21(2) authorizes a derogation from the Accused's right to a public hearing in the interest of the protection of victims and witnesses. *See Krajisnik & Plavsic* 8 October 2001 Decision – Dissenting Opinion of Judge Robinson, para. 10.

[78] See *Krajisnik & Plavsic* 8 October 2001 Decision – Dissenting Opinion of Judge Robinson, para. 12. See also *Prlic et al.* 21 April 2011 Decision, paras 31-34; *Prosecutor v. Stanisic & Zupljanin*, Trial Decision, IT-08-91-T, 25 February 2011, para. 18: "The Trial Chamber notes in this context that post-2008 Appeals Chamber decisions [on provisional release] do not contain references to the [ICCPR] and the

applying this judge-made additional criterion could lead to unjust results such as where an Accused, when presumed innocent, is held in provisional detention for nearly two years between the end of closing arguments and a Trial Chamber judgment.[79] The Trial Chamber noted in its decision on Dr. Jadranko Prlic's application for provisional release that "the length of detention already served by the Accused removed all justification for the further criterion of compelling humanitarian circumstances", although it felt compelled to continue his detention anyway.[80]

The Appeals Chamber had cited public policy considerations to justify this state of affairs, i.e. that "an accused's provisional release after a decision pursuant to Rule 98*bis* of the Rules could have a prejudicial effect on victims and witnesses"[81]. Yet even if an Accused's provisional release after a Rule 98*bis* decision could be considered to have a prejudicial effect on victims and witnesses, public policy considerations do not justify the creation of additional criteria lacking legal foundation and cannot compensate for deleterious effects on the human rights and dignity of the Accused.[82] Simply, public policy considerations, however compelling,

European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), or to the principle of presumption of innocence but, instead, emphasize policy considerations, such as the perception of the Tribunal and its work in the former Yugoslavia, particularly by the victims of the crimes charged". See also *Prosecutor v. Popovic et al.*, Trial Decision, IT-05-88-T, 17 December 2009, Judge Prost's Separate Declaration, para. 4: "[…] I feel compelled to maintain my dissent on this essential legal issue, despite the subsequent Appeals Chamber ruling, as I consider the 'reading in' of such a requirement to be in direct contravention of Article 21 (3) of the Statute which accords to Gvero a right to be presumed innocent until proven guilty." In addition, at the national level, many national jurisdictions will look at a range of factors when considering whether to grant bail during criminal proceedings. Generally limiting temporary release or bail to all but the most exceptional of circumstances does not feature in most national jurisdictions. See, e.g., The Bail Act 1976, England and Wales; Moore's Federal Practice–Criminal Procedure para. 646.11 Terms of Release After Trial Begins, Matthew Bender & Company (2009); United States Fed. R. Crim. P. 46(b); Canadian Charter of Rights and Freedoms, para. 11(e), Canada Constitution Act 1982; Criminal Procedure Code of Bosnia and Herzegovina, para. 5, Art. 137; German Criminal Procedure Code, para. 117.

79 See, *supra* note 50.

80 *Prosecutor v. Prlic et al.*, Decision on Jadranko Prlic's Motion for Provisional Release, IT-04-74-T, 21 April 2011, paras 17, 38.

81 See, e.g., *Prosecutor v. Prlic*, Appeals Chamber Decision, IT-04-74-AR65.24, 8 June 2011, para. 9. See also *Prlic et al.* 21 April 2008 Decision, para. 17.

82 The protection of human rights rests "directly on a moral foundation, the belief that every human being, simply by virtue of his or her existence, is entitled to certain very

cannot cure the additional criterion's lack of legal basis, i.e. its incompatibility with the Statute and customary international law.[83] Nor can they justify a standard which violates an Accused's fundamental fair trial rights.

Furthermore, the "sufficiently compelling humanitarian reasons" criterion is premised on a fundamental misunderstanding of the significance of dismissal of a Rule 98*bis* motion. The apparent justification for the criterion's creation was that following a Rule 98*bis* Decision, the Accused's flight risk increases. This is wrong. The "position in law is that the dismissal of a motion for acquittal under Rule 98*bis* of the Rules does not place the accused any nearer to a conviction than an acquittal"[84]. Prior to its amendment on 8 December 2004, Rule 98*bis* compelled Trial Chambers to review, *in toto*, all of the evidence adduced during the prosecution's case-in-chief to determine the sufficiency of its case and whether, based on the evidence, the trial should proceed in whole or in part.[85] However, in Rule

basic, and in some instances unqualified, rights and freedoms". T. Bingham, *The Rule of Law* (2010), 116. Human dignity is "a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain instrinsically valuable aspects of being human. […] [This] inherent dignity cannot be replaced by anything else, and it is not relative to anyone's desires or opinions". A. Gewirth, 'Human Dignity as the Basis of Rights', in W. Parent (ed.), *The Constitution of Right: Human Dignity And American Values* (1992), 10, 12-13. The rights guaranteed by the ICCPR "derive from the inherent dignity of the human person." ICCPR, Preamble.

83 Further, as observed by Judge Robinson, "a Trial Chamber which has evidence that the release of an accused could have a 'prejudicial effect on victims and witnesses,' […] would be properly exercising its discretion under Rule 65(B) of the Rules if it refused an application for provisional release made at any stage of the trial on that ground, because such a refusal would be covered by the second limb of the Rule. Indeed, it would be an improper exercise of the discretionary power to grant provisional release in those circumstances". *Prosecutor v. Stanisic & Zupljanin*, Appeals Chamber Decision, IT-08-91-AR65.2, 29 August 2011, Dissenting Opinion of Judge Robinson, para. 15.

84 *Id.*, para. 13.

85 Prior to amendment on 8 December 2004, Rule 98*bis* stated: "(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that *the evidence is insufficient to sustain a conviction* on that or those charges". The current version of Rule 98*bis* states: "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is *no evidence capable of supporting a conviction*" (emphasis added).

98*bis*'s amended version, only the prosecution's evidence is considered. Also, only a preponderance of evidence standard (as opposed to proof beyond a reasonable doubt) is applied. Thus, the current Rule 98*bis* procedure is nothing more than a reconfirmation of the indictment; it is intellectually disingenuous to interpret the impact of dismissal of a Rule 98*bis* motion as increasing the likelihood of a conviction in any given case, and thereby enhancing an Accused's flight risk.

Codification of the additional criterion to make its application mandatory would have risked further staining the Tribunal's legacy. The standard was judge-made, had no basis in law or the Rules, and was an assault on the presumption of innocence. In effect, even if an Accused satisfied the criteria in Rule 65(B), the "sufficiently compelling humanitarian reasons" standard could, nonetheless, prevent the Accused from being provisionally released, save for exceptional circumstances. To use the procedure for amending the Rules retroactively to legitimize a judge-made criterion that manifestly transgresses the fair trial rights of the Accused and denies individuals their right to bail, sends the message that all Accused are presumed guilty and that provisional detention is a form of punishment.

The Plenary's decision on 21 October 2011 to amend Rule 65(B) so that "release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement", and that "[t]he existence of sufficiently compelling humanitarian grounds *may* be considered in granting [provisional release to an Accused]"[86], is to be cautiously welcomed as a

A. Cayley & A. Orenstein, 'Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals, What Purpose If Any Does it Serve?', 8 *Journal of International Criminal* Justice (2010) 575, 581, citing A. Klip & G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal For The Former Yugoslavia*, Volume 15 (2003), 138, concludes that the amendment "seems to place a different (lower) threshold requirement on the prosecution". But see *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, SCSL-04-16-T, 31 March 2006, para. 8: "In our view, there is no contextual difference between 'no evidence capable of supporting a conviction' and 'evidence in sufficient to sustain a conviction'".

86 Amendments to the Rules of Procedure and Evidence, IT/275, 21 October 2011, 4 (emphasis added). Pursuant to Rule 6(D) of the Tribunal's Rules of Procedure and Evidence, the amended rule entered into force on 28 October 2011. *Id.*, 2. Rule 65(B), as amended, states: "Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released,

constructive attempt to resolve the difficulties caused by the creation of the additional criterion. Unfortunately, however, the amended rule's language is in certain respects superfluous and risks giving rise to questions of interpretation causing confusion and time-consuming litigation.

The addition of the words "at any stage of the trial proceedings prior to the rendering of the final judgement" is unobjectionable but redundant. From the language of Rule 65(B) as it was previously drafted, it was axiomatic that provisional release may be ordered at any stage prior to final judgment and, in the event of a conviction, that Rule 65(I) becomes operative.

The express addition of language to permit consideration of the existence of the additional criterion serves to legitimate the questionable jurisprudence upon which it was based. The revised rule's language may also be (erroneously) interpreted as granting a *power* to consider sufficiently compelling humanitarian reasons when considering applications for provisional release, and suggesting that there are occasions where a showing of "sufficiently compelling humanitarian grounds" is *necessary*, when in fact Trial Chambers retain a *discretion* to consider whether humanitarian grounds are sufficiently compelling to warrant provisional release notwithstanding as accused's flight risk or danger to victims or witnesses. Following the Appeals Chamber's decision on 15 December 2011 to affirm the Prlic Trial Chamber's Decision of 24 November 2011 to release Dr. Jadranko Prlić for three months with the possibility of extension,[87] paving

will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release".

[87] Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic, IT-04-74-A65.26, 15 December 2011. See also Joshua Kern, 'Provisional Release Precedent set for ICTY Accused Awaiting Final Judgement,' (16 December 2011) available at http://www.internationallawbureau.com/blog/?p=3707: "The decision is a watershed as it provides the first indication of how the Appeals Chamber will interpret the amended version of Rule 65(B) of the ICTY's Rules of Procedure and Evidence, which governs provisional release. […] The 15 December 2011 Prlic decision is of particular interest as it provides the first appellate clarification that under the newly amended Rule 65(B) there is 'no absolute requirement for a Trial Chamber to take into account the existence of [sufficiently compelling humanitarian] grounds before ordering a release' (para. 12). Further, it establishes that a procedure where an accused may apply to the Trial Chamber for his release to be prolonged prior to the expiry of his release period does not constitute a grant of 'indefinite provisional release' and is not an abuse of the Trial Chamber's discretion (para. 17)."

the way for Accused at the ICTY to be granted provisional release for extended periods pending final judgement in their cases, it can be hoped that this distinction will continue to be recognized and ruled upon correctly by the Appeals Chamber in decisions interpreting Rule 65(B) going forward.

H. The Impact of the Completion Strategy on the Rights of the Accused

Over the years one of the criticisms of the ICTY has been the enormous amount of time it takes to complete a case, particularly during the trial proceedings. This is in part due to the practice of judges confirming overly broad indictments, with insufficient attention being paid to the actual evidence available to justify such expansive indictments or to the time and resources required for litigation. It is only recently that the judges have come to the realization that this practice is excessive and counterproductive, particularly if the idea is to ensure that the Accused receive an expeditious trial, as many judges claim.

Since 2004, the trials at the ICTY have been conducted under the shadow of the Completion Strategy, which, at least at the time, called for all trials to be completed by 2008 and all appeals to be completed by 2011-2012. Having confirmed these mega-indictments, some Chambers instituted modalities to speed up the trial proceedings, such as using what is best characterized as a litigation by stop-watch approach: imposing time limitations on the parties for presenting evidence.[88] In some cases, for instance, the total amount of cross-examination time allotted to the Accused would be more or less equivalent to the time allotted to the prosecution for

[88] J. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', 48 *Virginia Journal of International Law* (2008) 3, 529, 590: "Perhaps the greatest recent challenge to the perception of judicial independence has been the so-called 'Completion Strategy' – the mandate that the tribunals complete their work in the next several years. To fulfill this mandate, judges have been limiting both parties' time to examine witnesses and present evidence, and have been making greater use of affidavits while relying less on oral testimony. They have also been more willing to demand that prosecutors trim the indictments and to take judicial notice of certain historical facts of common knowledge. A number of commentators, including defense attorneys and former tribunal judges, have argued that in the aim to fulfill the completion mandate, judges have unduly prioritized efficiency over fairness".

direct examination.[89] In other words, if the prosecution were to spend 60 minutes on direct examination, the amount of time the Accused would have would also be approximately 60 minutes. Thus, if there were 4 or 6 Accused, they would each be granted 10-15 minutes (or sometimes less) for questioning, unless they could agree amongst themselves how to best allocate the time.[90] Since only some of the Chambers have adopted this approach to trial management, the perspective of some of the Accused and defense counsel is that there is a lack of equality of arms in the proceedings.[91] In some cases, the defense has adequate time and facilities for challenging the evidence and putting on evidence, while in other cases the defense is unfairly restricted. When considering that individual trials at the ICTY are associated with single ethnic/national groups of the former Yugoslavia, it is not unreasonable for an Accused to perceive that he is not receiving equal treatment as another Accused of a different ethnic/national group. The disparity in which cases are tried, and the treatment of the Accused resulting from this disparity, give rise to conclusions that a particular ethnic/national group is being afforded fewer fair trial rights. While these are only perceptions, they do contribute to the legacy of the ICTY in that they undermine the supposed objective of promoting and fostering reconciliation.

I. Questionable Evidence Permitted by the Judges

By adopting a hybrid system, the ICTY avoided having to design and follow cumbersome rules of evidence as mostly seen in the adversarial system, where the screening of the admission of evidence is done either before or during the presentation of the evidence, as opposed to at the end of the trial. The ICTY's flexible approach, which is based on the Civil Law tradition, has distinct advantages, particularly in large and complex cases where it is challenging to appreciate the actual significance (or lack thereof)

89 See, e.g., *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 7 June 2007, 19707-19709.

90 See, e.g., *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 10 December 2007, 25431-25435.

91 See, e.g, *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 14 March 2007, 15632: "[Defense Counsel Karnavas]: [The Accused] deserve to have a fair trial. We're not saying it's unfair, but the process is – is to the point where it appears unfair, and in my opinion we're dangerously coming to the point where it is becoming unfair because we are unable, the parties are unable to put their cases forward in the manner which they prepared".

of pieces of evidence until all of the evidence is admitted and considered as a whole. Here again there is no universal approach as to what sort of evidence should be freely admitted during the trial, though a consensus seems to have emerged that lends sufficient certainty. A mere *prima facia* showing that the evidence is authentic, reliable and relevant will suffice.[92] Certainty as to what may be admitted may not necessarily lead to a measure of comfort that what is being admitted is trustworthy or of any evidentiary value or weight. For instance, having newspaper articles that describe events published by news wires (where the actual observer of the event is not known) admitted as proof of an event,[93] or admitting unverifiable documents simply because they were found in an archive, or having a witness comment about documents when the witness is not competent to testify, does not indicate that the evidence is trustworthy or of value to the trial.

The most troublesome sort of evidence created by the prosecution, and warmly received by many judges, are witness statements that are compiled over a series of interviews.[94] These types of statements tend to be in a

92 See RPE, Rule 89: "(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence [...] (C) A Chamber may admit any relevant evidence which it deems to have probative value. (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (E) A Chamber may request verification of the authenticity of evidence obtained out of court".

93 See C. Gosnell, 'Admissibility of Evidence', in K. Khan, C. Buisman & C. Gosnell (eds), *Principles of Evidence in International Criminal Justice* (2010), 375, 408-409: "[M]edia reports are understood to be fraught with ambiguous reliability. Some local media outlets are no more than platforms for propaganda whose reports, as one chamber has commented, are 'notoriously a servant of morale rather than truth.' Even the most objective journalism often relies on a confection of unidentified sources that is 'double or triple hearsay'. The ICTY Appeals Chamber in another context has warned against reliance upon such information. Allowing media reports into evidence without requiring the journalist's testimony means that the substance is inserted onto the record without any further clarification of sources. No prejudice will likely arise where the reports are general in nature; […] the ambiguity assumes much greater significance when the conduct is specific and highly incriminating, and may not be subject to corroboration or contradiction by other sources. Some chambers have responded to these concerns by treating contemporaneous media reports as documentary evidence, but then excluding them as not meeting the requisite threshold of probative value".

94 C. Rohan, 'Rules Governing the Presentation of Testimonial Evidence', in Khan, Buisman & Gosnell, *supra* note 93, 499, 522: The ICTY Rules "allow for the admission of written witness statements or prior testimony as part of a party's case-in-

narrative (story telling) format with headings and subheadings. No tape recordings exist so there is no way to verify what questions were asked, the format of the questions (open-ended or leading), what the answers were, what may have been suggested or commented upon by the prosecution's investigators, or what documents may have been used to coax or refresh the witnesses' memories. The narrative is drafted by the investigator, and though it is a composite of a series of interviews, the text reads as if it was the actual words spoken by the witness. This poses significant challenges to the defense since there is no concrete way of knowing what was actually done and said while the narrative was being drafted.[95] By admitting and relying on this sort of statement, the Chambers are circumscribing the Accused's right of confrontation. While recognizing the independence of the prosecution to conduct its investigation as deemed fit, nothing prevents

chief, in lieu of or in conjunction with the presentation of *viva voce* testimony at trial". Rule 92*ter* of the ICTY Rules and Evidence allows for "the introduction of written witness statements in lieu of direct examination, in whole or part, when the witness will appear in court and be available for cross-examination by the opposing party or questioning by the trial chamber". See also RPE, Rule *92bis*, allowing the admission of written statements and transcripts in lieu of oral testimony under certain circumstances, and Rule 92*quater*, allowing in "[t]he evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally" under certain circumstances. See also Wald, *supra* note 15, 1588-1589: Although the ICTY Rules initially stated a clear preference for live testimony, they have always contained more liberal allowances than the American system for depositions, video testimony, transcripts of prior testimony, and judicial notice of 'adjudicated facts'. In the early years, ICTY appeals chambers […] insisted that written testimony contain indicia of credibility and reliability [...] In recent years, however, the Rules have been liberalized specifically to allow admission of written witness statements so long as they do not go to the core of the challenged conduct or role of the accused. The latest decisions have permitted written statements to be introduced across-the-board so long as the witness is held available on request for cross-examination.

95 *Prosecutor v. Prlic et al*, Trial Transcript, IT-04-74-T, 14 February 2011, 52195-52196: [Defense Counsel Karnavas]: Over a period of four days, the Prosecution sits with the witness […] provides the witness documents the witness has never seen, and then over a period of four days a narrative with titles, subtitles […] is prepared. There is a draft, there is another draft, until we just get it right. Now, we then present that statement here, and we move it into evidence because we're going to save some time. Major witness; save some time. Four days getting that statement just right. Comma in the right place, right adjective. Here's a document, and if you haven't seen it, who knows, it might help you refresh your memory. And I submit that if this were to occur in any of our jurisdictions, that statement would be thrown out of court".

the Chambers from denying the admission of this sort of evidence and demanding that statements be taken in the most reliable fashion: on tape where the questions and answers are accurately recorded and there is full transparency. By admitting and relying on such statements, the Chambers have effectively given the green light to the prosecution to simply carry on with business as usual.

J. A Reconciliation Failure: Selective Prosecution and Disparity among Prosecuting Teams

A component of the ICTY legacy that bears highlighting, especially when considering the objective of advancing or contributing to reconciliation in the war-torn region of the former Yugoslavia, is the prosecution's selective process when determining who to indict as well as the prosecution teams and resources that are allocated to those tried. A careful analysis reveals that the prosecutions have not been even-handed. The differences in practice – that is, in the inconsistent application of the Rules by the various Trial Chambers – have created differences in the fairness of trials from one courtroom to the next,[96] resulting in unintended and very unfortunate consequences that Accused of different ethnicities are perceived as receiving varying degrees of fairness.[97]

Setting aside where blame should lie for the events in the former Yugoslavia, the prosecution appears to have selectively targeted one or two ethnic/national groups while nominally prosecuting others. For example,

96 *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 14 March 2007, 15628: "[Defense Counsel Karnavas]: I think that this trial has to be conducted the way other trials are being conducted in this Tribunal in the sense that the parties should be allowed to ask questions. That is the procedure that is adopted at this Tribunal. […] That is the procedure that is followed in every court except this one. […] I think that everybody that is sitting in the dock is entitled to the same trial process as everyone else in this Tribunal". *Id.*, 15630: "Are we going to have a new system that is independent and different from other Trial Chambers or are we going to fall in line with the other Trial Chambers with some slight modifications but not so dramatic in this particular case"; *Prosecutor v. Prlic et al.*, Trial Transcript, 22 March 2007, 16148: "[Defense Counsel Karnavas]: I think a mature legal system, and this one has to be mature because it's been in existence for at least 10 years, should have a uniform procedure whether you go to courtroom I, courtroom II, courtroom III. Whether you have a continental bench or an adversarial bench or a mixed bench, the procedure should be by and large the same".

97 Wald, *supra* note 15, 1589.

when it comes to the events in Bosnia and Herzegovina (BiH), the most underrepresented group has been the Muslims/Bosniaks.[98] None of the Muslim/Bosniak political leaders who were front and center in the policy and decision making process and/or who were in positions to command and control military commanders have been indicted. Moreover, when examining who was indicted and considering the overall authority and responsibility they held, it would appear that the indictments are not truly representative. Recognizing that resources are finite and that it is generally impracticable to charge all of those most responsible for all the crimes for which they may have been responsible, it nonetheless does appear that the decisions not to prosecute or to minimally prosecute were based on politics, or worse yet, prosecutorial bias.[99] The sad reality is that the ICTY, as with other such tribunals, is not beyond politics; denying this fact is absurd.

By selectively prosecuting individuals, the narrative that has emerged from the ICTY as to what may have happened, and who may have been responsible and held accountable, is unreliable and misleading. This is significant because, rather than fostering a better understanding of the events, the ICTY is establishing or making findings of fact that contribute to a false narrative. This could potentially be unsettling for national politics in places such as BiH, where many of the issues which were at the forefront of the conflict, such as the political and administrative division of authority

98 Turner, *supra* note 87, 579: "At the ICTY, too, some alleged selective prosecution and claimed that prosecutors were not as strict with their charges against Bosnian and Kosovar Muslims as they were with Serbs".

99 See R. Hayden, 'Biased 'Justice': Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia', 47 *Cleveland State Law Review* (1999) 4, 549, 551-52: "This article […] finds that the ICTY delivers a 'justice' that is biased, with prosecutorial decisions based on the national characteristics of the accused rather than on what available evidence indicates that he has done. Evidence of this bias is found in the failure to prosecute NATO personnel for acts that are comparable to those of Yugoslavs already indicted, and of failure to prosecute NATO personnel for *prima facie* war crimes. This pattern of politically driven prosecution is accompanied by the use of the Tribunal as a political tool for those western countries that support it, and especially the United States: put bluntly, the Tribunal prosecutes only those whom the Americans want prosecuted […] Further, judicial decisions by the ICTY render it extremely difficult if not impossible for an accused to obtain a fair trial, while the Tribunal has also shown a lack of interest in the investigation of potential prosecutorial misconduct." (citations omitted).

amongst the three constituent nations (Muslim/Bosniak, Serb and Croat), have yet to be fully resolved.[100]

The prosecution's selective prosecution has also undermined the credibility of the ICTY as an objective and impartial tribunal. This, of course, undermines the ICTY's objective of reconciliation. Certain ethnic/national groups in BiH, for instance, are less likely to accept the results (and the attendant narrative) of the ICTY. Lasting reconciliation is only likely to be achieved if all stakeholders perceive that the prosecution has executed its mandate with equal zeal and commitment against all who fall within the ICTY's jurisdiction.

K. Quality of Prosecution Teams

It would appear that there is a disparity in prosecutorial competence and overall resources allocated to cases depending on the ethnicity/national background of the Accused. While this impression cannot be quantified, it nevertheless appears that a pattern has emerged over the years suggesting that the best trial lawyers from the prosecution are dedicated to cases involving the Serb and Croat Accused. The second and third tier prosecuting lawyers are placed on cases involving Accused from other ethnic/national backgrounds. Naturally, with better lawyers, more resources tend to be allocated, resulting in better or more robust prosecuting. While it may just be serendipitous that this pattern appears to have emerged, it certainly gives rise to the suspicion that there is less of a commitment to prosecute some ethnic/national groups than others. Again, from an equal protection point of view, as well as fairness which, no doubt, is an indispensable ingredient in promoting reconciliation, this disparity negatively impacts on the legacy of the ICTY. Unlike at the ICTR, where the prosecution was forbidden, rather

[100] For example, Milorad Dodik, the prime minister of the Serb part of BiH, the Republika Srpska, was quoted in April 2011 as stating: "There are many who still seem to believe [that BiH may yet break up] – some, perhaps even in the lower reaches of our own Foreign Office. Others can be heard whispering that it is all too much – what would it matter if Bosnia did break up? Surely now, it would do so peacefully? The answer to that is a resounding no. The place is awash with arms and with veterans still fit enough to fight. I just cannot see the Muslim Bosniaks allowing themselves to be trapped into a tiny pocket in central Bosnia, isolated, let down by Europe yet again and surrounded on all sides by their enemies. They did not allow it 20 years ago against far greater odds and they will not allow it now". T. J., 'Two visions for Bosnia' (13 April 2011) available at http://www.economist.com/blogs/easternapproaches/2011/04/bosnias_gridlock (last visited 2 December 2011).

hypocritically by the Rwandan and UN donor nations, from prosecuting Tutsis with equal zeal as it has prosecuted Hutus,[101] the ICTY prosecution has not had any apparent limitations placed upon it which would have prevented the allocation of personnel and resources for the prosecution of all Accused on an equal basis. Thus, while there may not have been a policy to target a select ethnic/national group while pretending to prosecute others, that is exactly what is perceived by close observers of the prosecutions at the ICTY. There can be no acceptable reason for this disparity, other than that there has been a lack of commitment by the prosecution to prosecute some of the ethnic/national groups. This lack of commitment has also negatively influenced the narrative of what may have occurred during the conflicts in the former Yugoslavia. By not prosecuting with equal zeal all ethnic/national groups and by allowing weak prosecutions of some, which has resulted in partial or total acquittals of those individuals, the narrative is manipulated. Blame and responsibility are affixed inaccurately to the conflict.

L. The Likely Legacy Left by the ICTY

Despite all of its shortcomings, the ICTY will be remembered for making invaluable contributions to international criminal law – substantively, procedurally and administratively. It is regrettable that the ICTY has been unable or unwilling to engage in introspection; a modicum of self-criticism may have induced meaningful measures to diminish, if not eliminate, many of the shortcomings identified above. It is not that these shortcomings were not apparent or appreciated, but rather, much like many UN organs, there seems to have been a lack of political and institutional will to tackle inconvenient truths. There can be no justifiable reason for an international tribunal to have acquiesced to mediocrity, to have creatively transgressed the principle of legality through excessive judicial activism, and to have tolerated inequity in the prosecution of Accused of different ethnic/national groups, however unintended these consequences may be. Hopefully, when discussing the legacy of the ICTY as it winds down its

[101] T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', 100 *American Journal of International Law* (2006) 551, 561: "The ICTR has enjoyed the solid support of the government of Rwanda, except when the ICTR prosecutor has tried to investigate crimes allegedly committed by the Tutsi. This stance further reveals how national-political considerations continue to affect the work of the tribunals".

affairs, the dialogue will include an examination of what went wrong, what errors were committed, what lessons can be drawn, what solutions were available but not sought, and what other future tribunals, including the ICC, can learn from the shortcomings of the ICTY.

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The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims

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Abstract

Even though not clearly spelled out in its constitutive instrument, one characteristic of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is its temporary character. This characteristic presents the ICTY with a significant challenge, the complexity of which is increased by the fact that the tribunal has a multi-faceted mandate. This article examines the effects of the completion strategy of the ICTY on the victims of the crimes under its jurisdiction. Initially, it considers the impact of the completion strategy on the victims who participated, as witnesses, in the proceedings before the ICTY. It argues that the pressure to comply with the timeframe established by the Security Council has resulted in the reduction of the victims to their forensic usefulness. The victims were considered primarily in light of their instrumental relevance to the proceedings. Then, the article suggests, through the analysis of the referral of cases to domestic courts and the value of the archives of the ICTY, that the completion strategy can or might have a positive effect on the implementation of the rights of the victims who have not had direct contact with the ICTY. In this context, this article argues that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished.

A. Introduction

One of the characteristics of the ad hoc international criminal tribunals, even though not clearly spelt out in their constitutive instruments, is their temporary character.[1] With regard to the International Criminal Tribunal for the Former Yugoslavia (ICTY), Judge Theodor Meron, former President of the ICTY has noted that "[t]he Tribunal has always been mindful that its role is not that of a permanent court, but of an *ad hoc* entity intended to complete a task that is finite, albeit large and complex"[2]. This

[1] G. Acquaviva, ''Best Before the Date Indicated': Residual Mechanisms at the ICTY' (1 November 2009) available at http://ssrn.com/abstract=1503923 (last visited 23 December 2011), 2.

[2] Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc

temporary character presents a significant challenge to the ad hoc international criminal tribunals.

The complexity of the challenge faced by the ad hoc international criminal tribunals is increased by their multi-faceted mandate.[3] It is reasonable to expect that not all objectives will be achieved at the same time. More importantly, different stakeholders might have different views about the completion of a certain task.[4] In this context, one needs to ask who determines that the objectives of the ad hoc international criminal tribunals have been completed or when they need to be completed. Is it the Security Council, the ad hoc international criminal tribunals, the States, the prosecutor, the judges, the international community or the victimized communities? All these stakeholders are interested in the work of the ad hoc international criminal tribunals.[5] All of them are interested in the design of a strategy for closing down the tribunals that does not undermine their legitimacy.

Nonetheless, not all of them have participated in the process that designed the completion strategy of the ad hoc international criminal tribunals.[6] With regard to victims, unfortunately, an unbroken continuity can be perceived: their views had a peripheral role in the establishment and work of the ad hoc international criminal tribunals as well as in the design of their completion strategy and establishment of the residual mechanism. The victims had however to deal with the consequences of the completion

S/2004/420 (24 May 2004), Enclosure I, [ICTY Completion Strategy Report May 2004], 3.

3 The ICTY was conceived as a means of doing justice, deterring further crimes, and contributing to the restoration and maintenance of peace. See: First Annual 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 to the Security Council and the General Assembly, UN Doc A/49/342-S/1994/1007 (29 August 1994), [First Annual Report of the ICTY], 11. The various objectives of the ICTY are also discussed in the literature; see, for instance, L. A. Barria & S. D. Roper, 'How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR', 9 *The International Journal of Human Rights* (2005) 3, 349, 357.

4 On the confusion surrounding the completion strategy of the ad hoc international criminal tribunals, see the views of Damaska in M. B. Harmon, 'Discussion', 6 *Journal of International Criminal Justice* (2008) 4, 681, 702.

5 K. J. Heller, 'Completion Strategies and the Office of the Prosecutor' (26 June 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1425923 (last visited 23 December 2011).

6 *Id*.

strategy. This article examines the impact of the completion strategy of the ICTY on the victims. The focus on victims follows the understanding that the crimes under the jurisdiction of the ICTY affected not only the interests of the international community and the accused, but also the interests of individual victims. It can be expected, therefore, that the closing down of the institution created for "the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia"[7] will also affect the victims of these crimes.

To explore the effects of the completion strategy on the victims, this article is divided into four sections. Section B provides a brief overview of the development of the completion strategy of the ICTY. It clarifies which stakeholders have had a central role in the design of the completion strategy. In addition, it examines whether the interests of the victims of the crimes committed in the former Yugoslavia have been taken into account in the design of the tribunal's completion strategy and its further development. In this context, it is suggested that the completion strategy of the ICTY has changed gradually in order to include post-closure issues,[8] creating a promissory space for the consideration of the interests of the victims and implementation of their rights.

Section C illustrates the impact that the completion strategy had on the victims that have taken part in the proceedings before the ICTY, i.e. the victims called to testify before the tribunal. Section C.I. analyses the (unintended) consequences that the amendments carried out to the Rules of Procedure and Evidence (RPE) of the ICTY to increase the efficiency of the proceedings have had on the participation of witnesses. This section draws attention to the inherent conflict between initiatives aimed at speeding up proceedings and the desire to allow the victim's voice to be heard in the proceedings. Section C.II analyses the impact of the completion strategy on the ICTY's perception of protective measures. It highlights the instrumental

7 SC Res. 827, 25 May 1993, para. 2.

8 The term, post-closure issues, is used to refer to residual issues and legacy projects. "Residual mechanisms refer to tribunal functions that need to continue even after the tribunal is formally terminated, such as supervising the sentences of convicted defendants and ensuring the continued protection of tribunal witnesses. Legacy projects refer to longer-term post-completion projects, such as creating tribunal archives and continuing outreach to affected communities", Heller, *supra* note 5, 2.

approach that has informed the discussion of protective measures in the first completion strategy reports. It suggests that this approach has changed with the acknowledgement that the privacy and safety of the witnesses need to be protected even after the tribunal has been formally terminated.

Section D discusses the consequences of the completion strategy more broadly. It considers the impact of the strategy on victims of war crimes who might have not had direct contact with the ICTY. Section D.I highlights the potential created by the referral of cases to domestic courts for the continued implementation of victims' access to justice. Section D.II draws attention to the symbolic value of the archives of the tribunal and their relevance to the victims.

It is acknowledged that various other completion issues and residual functions might have affected the victims, their rights, interests and expectations. The measures discussed in this article aim to point out that the termination of the ICTY does not necessarily mean that the struggle for the implementation of the rights of the victims has finished. In this context, it is argued, in accordance with the suggestion of Judge Fausto Pocar, that the completion strategy of the ICTY should be understood as a continuation strategy.[9]

B. Situating the Victims in the Development of the Completion Strategy

Although the ICTY was intended to have a finite life-span, no formal consideration was given to completion issues when the tribunal was established.[10] The development of a completion strategy was triggered by a report of the former President of the ICTY, Judge Claude Jorda, to the Security Council in 2000.[11] At that time, it was estimated that if the pace of the tribunal's work and the Prosecutor's penal policy were maintained, all

9 F. Pocar, 'Completion or continuation strategy? Appraising problems and possible developments in building the legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655.

10 Acquaviva, *supra* note 1, 2; Heller, *supra* note 5, 9.

11 Seventh Annual 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 to the Security Council and the General Assembly, UN Doc A/55/273-S/2000/777, 7 August 2000 [Seventh Annual Report].

trials would be disposed of not before the year 2016.[12] The tribunal would, then, need to deal with the appeals.

In August 2003, the Security Council made the completion strategy official with Resolution 1503. Resolution 1503 called on the tribunal to "take all possible measures" to complete investigations by 2004, first-instance trials by 2008, and all work by 2010.[13] Less than two months later, Judge Theodor Meron, then President of the ICTY, reported to the United Nations General Assembly that it would not be possible "to accommodate any new indictments within the timeframe indicated by the Council".[14] Reporting to the Security Council, the Prosecutor concurred with that assessment and stated that the Office of the Prosecutor (OTP) would review new indictments to determine which ones should be tried at The Hague and which could be transferred to domestic jurisdictions.[15]

The Security Council responded in 2004 by enacting Resolution 1534.[16] In this Resolution, the Security Council reiterated the completion schedule previously provided in Resolution 1503. It called on the Prosecutor "to review the case load of the ICTY [...] with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions"[17]. In addition, it instructed the ICTY "to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes"[18] within its jurisdiction. Resolution 1534 also required the ICTY to provide 6-monthly reports to the Security Council setting out in detail the progress made towards the completion of its work. Since then, the ICTY has submitted 15 reports, the latest in May 2011.

In accordance with Resolution 1534, the ICTY amended its RPE. Rule 11*bis* was amended in 2004 to permit the referral of cases to national

12 *Id.*, 5.

13 SC Res. 1503, 28 August 2003.

14 ICTY, Address of Judge Theodor Meron, President of The International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly (10 October 2003) available at http://www.icty.org/sid/8181 (last visited 23 December 2011).

15 ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council (10 October 2003) available at http://www.icty.org/sid/8180 (last visited 23 December 2011).

16 SC Res. 1534, 26 March 2004.

17 *Id.*, para. 4.

18 *Id.*, para. 5.

jurisdictions in the former Yugoslavia. Rule 28(A) was also amended to review new OTP indictments. According to the current version of Rule 28(A), "[o]n receipt of an indictment for review from the Prosecutor […] [t]he President shall refer the matter to the Bureau, which shall determine 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". These amendments are part of the efforts undertaken by the ICTY to expedite the trial process.[19]

The analysis of the first reports on the completion strategy indicates that both the Chambers and the Prosecutor focused on issues related to the work of the tribunal prior to its termination. They referred to aspects related to the allocation of space, maintenance of personnel, cooperation by member States with respect to the arrest of fugitives, access to evidence and the granting of waivers of immunity to enable witnesses to provide statements or testify before the ICTY and contempt cases.[20] In addition, they considered the referral of cases involving lower and intermediate rank

[19] See Seventh Annual Report, *supra* note 11, para. 288. The report refers to the creation, in September 1999, of a Judicial Practices Working Group to gather all those involved in the trial to discuss, evaluate and, if necessary, amend the Tribunal's judicial practice to ensure the effective operation and functioning of the ICTY.

[20] See ICTY Completion Strategy Report May 2004, *supra* note 2, para. 78; Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2004/897, 23 November 2004, Annex I, [ICTY Completion Strategy Report November 2004], paras 21-24; Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2005/343, 25 May 2005, Annex I, [ICTY Completion Strategy Report May 2005], Sections A, B and D; Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2005/781, 14 December 2005, Annex I, [ICTY Completion Strategy Report December 2005], paras 47, 49; Assessment and report of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2006/353, 31 May 2006, paras 52-54, [ICTY Completion Strategy Report May 2006]; Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2006/898, 16 November 2006, Annex I, [ICTY Completion Strategy Report November 2006], Section A.

accused to national courts.[21] It was only in the completion strategy report of May 2007 that express reference was made to residual functions, i.e. the judicial functions that need to remain in place following the closing of the tribunal.[22] It is suggested in sections A.II and B that the inclusion of post-closure concerns in the completion strategy reports was paramount to the interests of the victims.

Nonetheless, victims are mentioned in all completion reports. In general, the references to victims can be divided into two categories: those related to the victims that have taken part in the proceedings and those related to victims in general. Drawing from this division, Section A explores in more detail the impact of the completion strategy on the victims called to testify before the ICTY. Section B focuses on victims more broadly.

C. The Completion Strategy and its Impact on Victims who Testified before the ICTY

Judge Patrick Robinson, President of the ICTY, estimated in his completion strategy report of May 2011 that "more than 6,900 witnesses and accompanying persons from all over the world have been called to appear before the Tribunal"[23]. The report does not clarify the number of victims that actually testified before the ICTY. It seems, nonetheless, reasonable to expect that they represent a significant part of this estimate.[24] Two aspects of the completion strategy seem to have had a direct impact on

[21] See ICTY Completion Strategy Report May 2004, *supra* note 2, para. 20. ICTY Completion Strategy Report November 2004, *supra* note 20, para.6; ICTY Completion Strategy Report May 2005, *supra* note 20, Section C; ICTY Completion Strategy Report December 2005, *supra* note 20, para. 27, ICTY Completion Strategy Report November 2006, *supra* note 20, Section C.

[22] Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), UN Doc S/2007/283, 16 May 2007, Annex I, [ICTY Completion Strategy Report May 2007], para. 34.

[23] Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2011/316, 18 June 2011, Annex I, [ICTY Completion Strategy Report June 2011], para. 88.

[24] According to Klarin, writing in 2004, "more than 1.000 victims have passed through the Tribunal's courtrooms, to give evidence of the horrors that were visited upon then". M. Klarin, 'The Tribunal's four battles', 2 *Journal of International Criminal Justice* (2004) 2, 546, 557.

the victims as witnesses. The first, which is discussed in Section I, encompasses the measures adopted to speed up the proceedings before the ICTY. The second, considered in Section II, regards the maintenance of a safe and non-hostile environment, i.e. the maintenance of the conditions that ensure the respect of the privacy and safety of the victims who testified before the ICTY.

I. Meeting Deadlines or Target Dates? The Limited Participation of the Victims as Witnesses

The procedural framework established for the ICTY limits the communicative engagement of the victims in the process to their participation as witnesses. The relevance of the victims to the ad hoc international criminal tribunal is related to their ability to clarify the specific actions of the accused and, as a consequence, to assist in the determination of the responsibility of the accused. In this context, the ICTY has adopted a very narrow definition of victim. A victim is only "[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed"[25]. By focusing on direct victims, the ICTY increases the chances of first-hand accounts of the crimes.

Nonetheless, the participation of the victims in the proceedings as witnesses has not been considered only as an important source of information for assessment by the judges of the impact of the crimes on the victims and, more broadly, on the community. It has been argued that the testimony of the victims "exposes the events from the human side and, as a result, it fosters public support for international justice, it permits people, NGOs and the public to understand what happened on the ground and to people like them and to appreciate why international justice is important"[26]. In addition, the participation of the victims has also been said to have some therapeutic function. In this regard, it has been said that:

> "War crimes trials must address the needs of three key parties: the perpetrators, the victims and the community affected by the war. To accomplish this, the court must find a way to help the victims accept, understand, and verbalize what has happened to them. The victims must be given an opportunity to articulate and

[25] ICTY Rules of Procedure and Evidence, Rev. 45, 8 December 2010 [RPE], Rule 2.

[26] Harmon, *supra* note 4, 690.

> visualize their experiences. Anger and sadness have to be expressed in a public arena"[27].

Despite these possible benefits, the scope for victims' participation as witnesses in the ICTY has been reduced considerably in an attempt to cut down on the excessive length of the proceedings. Whilst it would be mistaken to affirm that the amendments to the RPE that limited the participation of the victims were a direct result of the completion strategy,[28] the strategy had a considerable impact on the number of victims that could participate as witnesses in the proceedings as well as on the length of their participation. This is illustrated, for instance, by Rule 73*bis*.

In 1998, the ICTY introduced Rule 73*bis*, which obliged the prosecution to estimate the length of its case-in-chief and the number of witnesses it would call, and allowed the pre-trial judge to invite the prosecutor to shorten the estimated length of examination-in-chief for some witnesses and to reduce the number of witnesses. Even though this rule pre-dates the completion strategy, it has not been immune to the pressure imposed by the completion strategy. Rule 73*bis* was amended in 2001, allowing the pre-trial judge to determine the number of witnesses the prosecution could call, and the time available to the prosecution for presenting evidence. In 2006, one of the strategic uses of Rule 73*bis* was mentioned in the ICTY completion strategy report. Judge Fausto Pocar, then the President of the ICTY, asserted:

> "The International Tribunal has long been aware that the length of its trials also depends on the complexity and breadth of the indictments. The philosophy behind the Prosecution's pleading practices is its obligation to victims. In practice, the length of the Prosecution case has meant that in order to accord the accused due process, Judges have had to allocate a comparable amount of time to the Defence case. *The solution for the Judges, therefore, is to limit the length of the Prosecution's case to require the Prosecution to focus at trial on the strongest part of its case. This in turn will lead to a shorter Defence case.*

[27] N. Paterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation', 4 *Georgetown Journal of International Affairs* (2003) 1, 95, 97.

[28] Such amendments have taken place since 1998.

> One recommendation of the Working Group for implementing this proposal is wider use of Rule 73bis, which allows the Trial Chamber […] to call upon the Prosecution to shorten the estimated length of the examination-in-chief of some witnesses and to determine the number of witnesses the Prosecution may call as well as the time available to the Prosecution for presenting evidence. Further, the Trial Chamber may fix the number of crime sites or incidents comprised in one or more of the charges with respect to which evidence the Prosecution may present. Greater use of the provisions of this Rule by the Judges has had the practical effect of limiting the Prosecution's case."[29]

Another example of amendment to the RPE that has had an impact on the victims is Rule 90(A), on the presentation of evidence. In December 2000, Rule 90(A), which favored oral testimony, was deleted from the RPE. In the same revision of the RPE, two rules were introduced: Rule 89(F) and Rule 92*bis*. The former permits the trial chamber to receive evidence either orally or, in the interests of justice, in written form. The latter allows written statements to be admitted so long as they do not go to establishing the actions with which the defendant has been charged. Rule 92*bis* has not been used as a complete substitute for oral evidence, but to cut down on time spent in examination-in-chief. For this purpose, the ICTY designed a procedure in which "whenever a witness discussed a point that seemed to be contested by the accused […] the witness was required to appear for cross-examination"[30]. The prosecution would read into the record a summary of the statement of the witness and then turn the witness over to the accused for cross-examination. This procedure creates an opportunity to contest the claims made by the witnesses and provides them with an opportunity to clarify, justify or expand on their claims.

Nonetheless, as the witnesses are called to participate only if their testimonies are contested, this procedure has limited the relevance of the testimony of the witnesses to their epistemic function. The public space where the witnesses could articulate their experiences more freely has been

[29] ICTY Completion Strategy Report May 2006, *supra* note 20, paras 28 and 29 (emphases added).

[30] G. Nice & P. Vallières-Roland, 'Procedural Innovations in War Crimes Trials', 3 *Journal of International Criminal Justice* (2005) 2, 354, 367.

significantly reduced. In addition, the procedure established by Rule 92*bis* reinforces the power discrepancies between the questioners and the witnesses, whose participation in the trial is limited to answering questions. It creates a context in which witnesses fell constantly challenged.

The changes that these rules have brought about have been explained by the Prosecutor in her completion report of May 2007:

> "An objective comparison between trials at the Tribunal in the early years and at present would show dramatic changes. Much more written evidence is being presented. Evidence of the commission of crimes, regarded as routine in the Tribunal, is presented by the prosecution wherever possible in writing in lieu of live testimony of witnesses. Even when witnesses are brought to court, the policy of the Office of the Prosecutor is to rely on written statements for most of the evidence-in-chief, and to restrict the examination of witnesses to key points before cross-examination. It is now a feature of all trials that strict time limits are set and accepted for the length of the parties' cases and for the examination of individual witnesses. These time limits are closely monitored and adjusted as trials progress."[31]

Rules 73*bis*, 89(F) and 92*bis* are part of the attempts of the ICTY to complete its work within the timeframe stipulated by the Security Council.

"Concerns about how many witnesses remain to be heard and how long this will take are not only perfectly legitimate; they are positively necessary."[32] Nonetheless, it is important that, when dealing with time constraints, the implications that new regulations can have for victim-witnesses are not overlooked. "Judicial 'effectiveness' may mean for them [the victims] that significant events and emotions are glossed over"[33].

The substitution of oral testimony for written testimony also has an impact on the public, as it makes it more difficult to follow the

[31] Assessment and report of Carla Del Ponte, Prosecutor of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of resolution 1534 (2004), UN Doc S/2007/283, 16 May 2007, Annex II, [The Prosecutor Completion Strategy Report May 2007], para. 11.

[32] M. Dembour & E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials', 15 *European Journal of International Law* (2004) 1, 151, 159.

[33] *Id*.

proceedings.[34] "The public no longer hears the victims, no longer sees the victims"[35]. As recalled by the Prosecutor in her observations to the report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the ICTY, the credibility of the ICTY among the international community and the victims "partly depends upon whether their proceedings are seen to have a powerful impact in bringing home the responsibility of individuals for horrendous crimes"[36].

Unfortunately, the completion strategy reports of the ICTY seem to have overlooked the implications of these measures to the victims and the public. The reduction of the space provided for the victims to articulate their experiences has been presented in the completion reports of the ICTY as a history of success. The ICTY perceived these amendments as time-saving measures. The reports of the prosecutors have been more cautious. Nonetheless, their careful approach does not seem to have been motivated primarily by the negative impact that these measures can have on the victims, but on their possible impact on the independence and discretion of the OTP.[37]

The amendments to the RPE reflect an instrumental approach to the testimony of witnesses. The participation of the victims depends not only on its usefulness to the overall strategy of the prosecution or the defense, but also on its impact on the ability of the ICTY to complete its work within a specific timeframe. The following section indicates that an instrumental perspective has also informed the discussion of protective measures.

II. 'Target Dates' and the Protection of the Victims Called to Testify

Art. 22 of the Statute of the ICTY provides that "[t]he International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses". In drafting the rules related to the protection of witnesses, the judges of the ICTY took into account that

34 Harmon, *supra* note 4, 691.

35 *Id*.

36 Comments on 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 A/54/850, 27 April 2000, Annex I, para. 54.

37 See, for instance, The Prosecutor Completion Strategy Report May 2007, *supra* note 31, para. 10.

> "the unbearable abuses perpetrated in the region have spread terror and deep anguish among the civilian population. It follows that witnesses of massacres and atrocities may be deterred from testifying about those crimes or else be profoundly worried about the possible negative consequences that their testimony could have for themselves or for their relatives."[38]

Attempting to incorporate the concerns of witnesses, the ICTY established a Victims and Witnesses Section (VWS) to provide protection and support to all witnesses who appear before them, whether called to testify by the prosecution, the defense or the judges. The services provided by the VWS include: (1) counseling and assistance for victims and witnesses; (2) ensuring that the safety and security needs of witnesses are adequately met; (3) informing witnesses of the proceedings and their rights; (4) making travel, accommodation, financial and other logistical and administrative arrangements for witnesses and accompanying persons; and (5) maintaining a close contact with the trial teams regarding all aspects of the witnesses' appearances before the tribunal. In some instances the Section also assists victims and witnesses to relocate, sometimes abroad. To this end, the ICTY has entered into relocation agreements with cooperating States. Various other measures have been adopted by the ICTY to ensure that participation by victims as witnesses does not amount to a second round of victimization.[39]

As witnesses who fear for their security could decide not to testify, the provisions on protective measures in the constitutive instruments of the ICTY can be seen as a means of securing the work of the tribunal.[40] They are instrumental to the work of the ICTY. This seems to have been the primary understanding of protective measure that informed the first completion strategy reports of the ICTY.

The threats faced by the victims and the inability of the local legal system to deal with them were perceived and presented as threats to the ability of the ICTY to complete its work through the transfer of the cases of

[38] First Annual Report of the ICTY, *supra* note 3, para. 75.

[39] See RPE, Rule 75.

[40] A. C. Lakatos, 'Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights', 46 *Hastings Law Journal* (1994-1995) 909, 920.

low and middle rank accused to different jurisdictions of the former Yugoslavia.[41] The protection of the witnesses, one of the conditions needed for the successful prosecution of the cases transferred, could not be guaranteed by the competent national jurisdictions. As a result, the ICTY had to engage in a variety of training initiatives to develop the capacity of the national courts to process war crimes cases.[42]

The need to deal with allegations of intimidation of witnesses and the illegal disclosure of confidential information of witnesses were also presented as an obstacle to the completion strategy. Contempt cases were said to consume time additional to that used by the trial to which they relate. Furthermore, they were said to "place an additional burden on the already heavy workload of the permanent and *ad litem* Judges, who must conduct these contempt proceedings in addition to their primary cases"[43].

It seems unduly restrictive to consider protective measures exclusively from an instrumental perspective. If situated in a broader legal framework, protective measures can be considered to be part of the gradual recognition of the interests and needs of the victims by the ICTY. They attempt to create a procedural framework that is fair not only to the defendant, but also to witnesses. In other words, they attempt to design an international criminal process in which the rights to life, security and liberty of those called to testify are not imperiled.

Fortunately, the understanding that the protection of witnesses is a function that needs to continue after the ICTY is formally terminated has (re)situated the privacy and safety of the victims that testified before the tribunal in the center of the debates on protective measures. The discussion

41 See, for instance, the 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 (2004), UN Doc S/2004/42, 24 May 2004, Enclosure II, para. 35, [The Prosecutor Completion Strategy Report 24 May 2004] and ICTY Completion Strategy Report May 2004, *supra* note 2, para. 29.

42 Reference to training related to the protection of witness is found, for instance, in the ICTY Completion Strategy Report December 2005, *supra* note 20, para. 28; ICTY Completion Strategy Report November 2006, *supra* note 20, para. 24; ICTY Completion Strategy Report May 2007, *supra* note 22, para. 26.

43 Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 November 2008 to 15 May 2009, UN Doc S/2009/252, 18 May 2009, Annex 1, [ICTY Completions Strategy Report November 2008], para. 35.

of the protective measures outside the legal proceeding represented the recognition of the human value of the victims called to testify before the ICTY. It avoided the reduction of the witnesses to instruments whose utility is considered and finished with the proceedings.

This recognition certainly requires a great degree of institutional responsibility towards victims and witnesses. It is this responsibility that the Residual Mechanism for Criminal Tribunals, created by the Security Council Resolution 1966,[44] will need to assume.

The following section considers some of the challenges that the judges of the Residual Mechanism will face to ensure that the victims are treated with concern and respect to which they are entitled not because they are valuable participants in the prosecution of war crimes, but in virtue of their humanity.[45]

III. Witnesses and the Residual Mechanism

The Residual Mechanism established by the Security Council has two branches, one for the ICTY and one for the ICTR. The ICTY branch of the Mechanism will begin functioning on 1 July 2013. Among the various functions attributed to the Mechanism, two of them seem to have a direct impact on victims that testified before the ICTY: the prosecution of contempt and false testimony cases and the protection of witnesses.

The power to prosecute contempt and false testimony cases is established by Article 1(4) of the Statute of the Mechanism. According to this provision, the Mechanism is competent to prosecute any person "who knowingly and willfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt"[46]. It is also competent to prosecute "a witness who knowingly and willfully gives or has given false testimony before the Mechanism or the Tribunals"[47]. The power of the Mechanism to prosecute contempt and

44 SC Res. 1966, 22 December 2010. On the negotiation history of the residual mechanism, see: T. W. Pittman, 'The road to the establishment of the international residual mechanism for criminal tribunals: from completion to continuation', 9 *Journal of International Criminal Law* (2011) 4, 797.

45 P. Roberts, 'Theorising Procedural Tradition: Subjects, Objects and Values in Criminal Adjudication', in A. Duff *et al.* (eds), *The Trial on Trial*, Volume II (2006), 41.

46 Art. 1(4)(a) of the Statute of the Residual Mechanism, SC Res. 1966, 22 December 2010, Annex I, [Statute of the Residual Mechanism].

47 Art. 1(4)(b) of the Statute of the Residual Mechanism.

false testimony cases reflects the understanding that "the continued protection of victims and witnesses and the effective administration of justice require a judicial capacity to sanction any breaches of […] [ICTY's] orders"[48].

Trials of contempt and false testimony cases are the only cases where new indictments may be issued by the Mechanism.[49] However, Article 1(4) of the Statute of the Mechanism provides that "before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State […,] taking into account the interests of justice and expediency". This provision is in line with the preamble of Resolution 1966, which emphasizes that 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"[50].

Article 1(4) raises various legal and practical questions.[51] One of these questions concerns the grounds for the exercise of such extra-territorial jurisdiction by the national courts. It has been argued that only the nationality principle and the passive principle are relevant for the determination of the jurisdiction in these cases.[52] From the witnesses' perspective, it could be argued that the nationality principle seems more favorable in cases of false testimony, as it might result in the case being tried by a tribunal to which the witness accused of false testimony has greater connections. The witness would not have to overcome any language barrier or to travel to The Hague, the seat of the ICTY branch of the Residual Mechanism. It could be argued, on the other hand, that in contempt cases initiated to punish, for instance, the willful disclosure of the identity of a protected witness, the passive nationality principle would be more favorable to the witness who has been the victim of the wrongful conduct.[53]

48 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, 21 May 2009, [Report of the Secretary-General], para. 23.

49 See Art. 1(5) of the Statute of the Residual Mechanism.

50 Preamble of SC Res. 1966, 22 December 2010.

51 C. Denis, 'Critical overview of the 'residual functions' of the mechanism and its date of commencement', 9 *Journal of International Criminal Law* (2011) 4, 819, 827.

52 *Id.*

53 It is acknowledged that the principle of passive nationality is controversial and might offer a weak basis for the determination of the jurisdiction of the national courts.

From the witnesses' perspective, this would be the case if they were to be heard in the proceedings. In these cases, practical aspects could facilitate their attendance and participation.

It is, nonetheless, unclear which principle(s) will inform the Residual Mechanism's decisions on referral. Actually, one might argue that, in light of the nationalist character of the conflict in the former Yugoslavia, the determination of the jurisdiction of the national courts to prosecute contempt and false testimony cases in accordance with the nationality of the victim or the nationality of the perpetrator might not be in the interest of justice. Decisions reached by national tribunals in contempt and false testimony cases might be perceived as biased.

In this context, the prosecution of contempt and false testimony cases by the Residual Mechanism might be a better option. From the witnesses' perspective, the competence of the Residual Mechanism has its benefits. It is expected that the judges will be more familiar with the constitutive instruments of the ICTY, its practice and case law.[54] This background knowledge facilitates the assessment of the wrongful conduct of the witness who gave false testimony as well as its impact on the administration of justice. In contempt cases, this background knowledge also assists in the analysis of the impact that a violation of a protective order might have had on the protected witness. Concerns related to the transferal of the proceedings to the national courts have also been indicated as an aspect that might impede the expedite prosecution of the case,[55] and, as a consequence, have a negative impact on the right of the accused to a speedy trial.

The Residual Mechanism also has the power to protect victims and witnesses in relation to the ICTY and the Mechanism.[56] As of 1 July 2013, the Mechanism will provide for the protection of victims and witnesses who have testified before the ICTY or witnesses who will testify before the Mechanism.

> "With more than 1400 witnesses at the ICTY [...], it is anticipated that this function will form an important part of the work of the Mechanism, including its various organs: the Registry, the Chambers and the Office of the Prosecutor, which may be directly involved in the protection of some witnesses."[57]

54 See Art. 9(1) of the Statute of the Residual Mechanism.
55 Denis, *supra* note 51, 827.
56 See Art. 20 of the Statute of the Residual Mechanism.
57 Denis, *supra* note 51, 831.

With regard to the victims called to testify before the Residual Mechanism, the chambers will need to ensure their safety, physical and psychological well-being in order to reduce the impact of coercion and intimidation in the legal proceedings. With regard to the victims who testified before the ICTY, the chambers of the Residual Mechanism will need to ensure that the protective measures ordered by the ICTY are being enforced and to deal with requests to vary or rescind protective measures. In dealing with these requests, they will need to carefully assess the veracity and reasonableness of the fears adduced by the witnesses at that moment and, therefore, the adequacy of the protective measures previously ordered. The legitimacy of the decisions that rescind, vary or augment protective measures by the Mechanism will rely on the witnesses' views being considered in the proceedings and their consent sought.[58]

Possible changes to the protective measures ordered by the ICTY will impact directly on the protected witnesses, but it might also have an indirect impact on all those victims that did not participate in the proceedings. Judicial records previously classified as confidential due to the protective measures adopted might, with the rescission of the measure, become available to the public.[59] These documents might clarify not only the issues discussed in that specific procedure, but also be relevant to the understanding of broader aspects of the conflict. A certain degree of coordination between the protective measures and the management of the archives[60] of the ICTY is, therefore, required.

D. All other Victims

Created by a Security Council Resolution, the ICTY was expected to contribute to the restoration and maintenance of peace in the former

58 See Rule 75(H) of the RPE of the ICTY.

59 See Section D.II bellow.

60 Three categories of ICTY records were identified in the Secretary-General's Report of 21 May 2009: (a) judicial records related to cases, such as: transcripts, exhibits, orders, decisions, judgments; (b) records not part of the judicial records but nonetheless generated in connection with the judicial process, such as: records of plenary meetings of judges and of other sub-organ or inter-organ meetings, diplomatic meetings, data on witnesses and detainees, contracts and commercial agreements, press releases, and interviews; and (c) administrative records – including human resources and financial records associated with managing the staff and the organization as a whole. Report of the Secretary-General, *supra* note 48, paras 44-50.

Yugoslavia. To the extent that this objective has been understood as enabling some sort of reconciliation,[61] it has required the ICTY to assist in the recognition of the humanity of all those involved in the conflict, including the victims.[62] This recognition, it has been said, transforms not only the individual victim, but also the traumatized society.

It was expected that the ICTY would contribute to reconciliation by expressing the international community's disavowal of the wrongdoing that violated the rights of the victims and harmed them. The ICTY would reject the devaluation of the victim.

> "The ascertainment and public recognition of indisputable facts before an impartial tribunal will help counter the distortions of demonization and ethnic hatred fomented by certain political élites in the former Yugoslavia. The truth will demonstrate that there was nothing inevitable or irreversible about the eruption of ethnic violence and that interethnic harmony is both possible and desirable."[63]

Nonetheless, the remoteness of the ICTY from the region has made it difficult for the truth established by tribunal to become a shared truth "– a moral or interpretive account – that appeals to a common bond of humanity transcending ethnic affinity"[64]. This section discusses how the completion strategy of the ICTY might have a positive impact on the further implementation of the rights of the victims and, ultimately, contribute to reconciliation.

I. Referral of the Cases: Strengthening National Jurisdictions

The outreach program of the ICTY was created soon after the tribunal started to work to reduce the overall misinformation about its mandate and

[61] The goal of national reconciliation, which is specifically mentioned in Resolution 955, is unique to the ICTR. It, nonetheless, can also be considered a precondition to a permanent peace; Barria & Roper, *supra* note 3, 362.

[62] K. Campbell, 'The Trauma of Justice: Sexual Violence, Crimes against Humanity and the International Criminal Tribunal for the Former Yugoslavia', 13 *Social & Legal Studies* (2004) 3, 329, 340.

[63] P. Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 4, 737, 741.

[64] *Id.*

work. It attempted to guarantee that information related to the proceedings reached, at the very least, the victims of the crimes under their jurisdiction. In other words, it aimed at making its work more comprehensible to a non-specialized and distant audience.

Whilst the relevance of the ICTY outreach program is uncontested, the success of its activities has been debated. It has been argued that the outreach activities of the ICTY have failed to provide the victims with information about the general work of the tribunal and, more specifically, about the development of the cases in the tribunal. It has been stated that the outreach program has "failed to bridge the gap in knowledge and appreciation of its work at the grass-roots level"[65]. The general misinformation and misunderstanding about the role of ICTY have not only questioned its ability to foster reconciliation, but have also provoked genuine anger and consternation among victims groups.[66]

There are, nonetheless, various references to the outreach program in the completion strategy reports of the ICTY. The outreach initiatives mentioned in the reports refer not only to those aimed at making the work of the tribunal accessible to the victims, but also to those aimed at developing the capacity of national courts to process war crimes. These capacity-building activities were, in practice, motivated by the completion strategy, i.e. by the need to assist in the development of local legal systems capable of prosecuting the cases transferred by the ICTY.[67] One could say that the diversion of resources from the outreach initiatives directed to the victims to those focused on national justice personnel might have contributed to failure of the ICTY in making its work accessible to the victim. Nonetheless, it seems important to note that the victims might also benefit from these capacity-building activities, once they bring justice closer to them.

In this context, it is worth recalling that the ICTY, in its Seventh Annual Report, the document that triggered the development of the completion strategy, has already acknowledged the potential benefit of the

65 *Id.*, 541.

66 R. Zacklin, 'The Failings of the Ad Hoc International Tribunals', 2 *Journal of International Criminal Justice* (2004) 2, 541, 544.

67 See ICTY Completions Strategy Report November 2008, *supra* note 43, para. 37; Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009, Un Doc S/2009/589, 13 November 2009, [ICTY Completion Strategy Report November 2009], paras 50-54.

local prosecution of war crimes. In that Report, the tribunal stated that the referral of cases to national jurisdictions might be useful for national reconciliation, as it would bring international justice closer to the peoples concerned and it would make case management more transparent to the local population.[68] However, at that time, the ICTY considered the idea of transferring part of the Tribunal's case load to national jurisdictions premature. It was suggested that "national courts lacked the capacity to try the ICTY's cases, and that the judicial systems of the former Yugoslav republics would have to be 'reconstructed on democratic foundations' before cases could be transferred from the ICTY"[69].

Nonetheless, already in 2002, the ICTY had to reconsider its perception of the national courts.[70] The referral of certain cases to national courts was considered necessary by the ICTY to achieve the objective stated in Judge Claude Jorda's report, i.e. to complete all trial activities at first instance by 2008.

The Security Council endorsed this understanding with Resolution 1534, which urged the Prosecutor of the ICTY to review the case load of the tribunal with a view to determining which cases should be transferred to competent national jurisdictions.[71] As a result, "the ICTY developed a prompt and strong interest in the capacity of the local legal systems"[72]. There are various references to capacity-building activities and training initiatives developed by the Prosecutor and the ICTY in the completion strategy reports. These initiatives indicate that the ICTY has assumed its position as "one element of a much broader institutional constellation"[73]

68 Seventh Annual Report of the ICTY, *supra* note 11, para. 338. See also D. Raab, 'Evaluating the ICTY and its completion strategy: efforts to achieve accountability for war crimes and their tribunals', 3 *Journal of International Criminal Justice* (2005) 3, 82, 98.

69 *Id*.

70 Letter dated 10 June 2002 from the President of the International Criminal Tribunal for the former Yugoslavia addressed to the Secretary General, UN Doc S/2002/678, 19 June 2002, Annex.

71 Drumbl indicates that comments by observers and some dissonance from local communities also contribute to the progressive change of the ICYT approach to the national institutions. M. A. Drumbl, 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order', 37 *New England Law Review* (2003) 4, 701, 706.

72 A. Chehtman, 'Developing Bosnia and Herzegovina's capacity to process war crimes cases: critical notes on a 'success story'', 9 *Journal of International Criminal Justice* (2011) 3, 547, 558.

73 Drumbl, *supra* note 71, 703.

responsible for prosecuting the atrocities committed in the conflict in the former Yugoslavia.

As a result of the completion strategy, the ICTY has already referred a total of eight cases, involving 13 accused of intermediate or lower rank to national jurisdiction.[74] The last report of the ICTY available states that no cases eligible for referral according to the seniority criteria set by the Security Council remain before the ICTY.[75] It continues by stating that "[o]f the 13 persons transferred to national jurisdictions, proceedings against 12 have been concluded"[76]. The trial of the remaining accused has been suspended until the outcome of a determination as to whether he is fit to stand trial. The Prosecution continues to monitor this case.[77]

The successful prosecution of the cases transferred by the ICTY required a national criminal justice system with the capacity to deal with complex cases. It required a criminal justice system able to conduct a trial in accordance with international human rights standards. In this context, it can be said that the efforts of the ICTY to strengthen relevant national criminal justice systems contributed to the creation of institutions capable of bringing justice closer to the victims. The condemnation of the crimes suffered by the victims will be expressed not only by the ICTY, but also by national courts, opening the scope for the recognition of the different victimization processes that took place during the conflict.

As part of the process of bringing justice closer to the victims, it is important to note that the completion strategy reports of 2009 and 2010 have urged the Security Council to consider the legal basis for the implementation of the right of the victims to reparation.[78] The references to the victims' right to reparation recognize the wrongfulness of the harm inflicted on them, they acknowledge the losses the victims have suffered. In

[74] ICTY Completion Strategy Report June 2011, *supra* note 23, para. 81.

[75] *Id*, para. 82.

[76] *Id*., para. 83.

[77] *Id*.

[78] ICTY Completion Strategy Report November 2009, *supra* note 67, para. 57; Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc S/2010/270, 1 June 2010, para. 69; Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010, UN Doc S/2010/588, 19 November 2010, Annex I, [ICTY Completion Strategy Report November 2010], para. 78.

addition, they draw attention to the fact that, even though the ICTY has not been able to implement victims' right to reparation, such aspect should not be forgotten. Such references support the understanding of the completion strategy as a continuation strategy. As stated in the completion report of November 2010:

> "The Tribunal has received a wellspring of positive responses to this initiative from the victims of the atrocities that were committed during the destructive dissolution of the former Yugoslavia during the 1990s. On behalf of the victims, an appeal is again made to the Security Council to take action to implement paragraph 13 of the Declaration [of Basic Principles for Victims of Crime and Abuse of Power]. The failure to properly address this issue constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia. The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering."[79]

Among the various forms of reparations,[80] the following section explores the potential of the archives of the tribunal as a means of providing the victims with some sort of satisfaction. In other words, it draws attention to the symbolic value of the archives and their importance to the long-term memory of the conflict.

II. The Symbolic Value of Archives of the Tribunal

An authoritative description of the injustice to which the victims have been submitted has been considered necessary for the healing process. During the Security Council deliberations on the establishment of the ICTY, the Venezuelan representative suggested that the establishment of an authoritative description of the crimes committed in the former Yugoslavia should be one of the objectives of the tribunal. He proposed that the

[79] ICTY Completion Strategy Report November 2010, *supra* note 78, para. 78.

[80] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 16 December 2005.

Prosecutor "should not confine himself to bringing cases before the Tribunal, but should also present an overall report on all of the violations of international humanitarian law that come to his knowledge, which will provide him with an historical record of great importance"[81].

Even though the proposal was not accepted, the role of the ICTY in the construction of an historical record has not been negated. In fact, the ICTY seems to have endorsed this objective, stating that: "[o]ne should not be blind to the fact that, *from the victim's point of view,* what matters is that there should be public disclosure of the inhuman acts from which he or she has suffered"[82]. The establishment of an accurate record of the atrocities committed in the former Yugoslavia has been considered important to avoid the denial, in the future, that the crimes occurred.[83]

The denial of the atrocities committed in the former Yugoslavia is mentioned in the Prosecutor's completion strategy report of November 2004:

> "A serious problem […] is the general political climate throughout the region, which is fostered by some media outlets which are obviously serving the interests of alleged war criminals. These are often presented as national heroes, while neither the victims nor the crimes receive much attention, when the latter are not simply denied. In such a negative atmosphere, witnesses, in particular insider witnesses, refuse to testify for fear of reprisals."[84]

The archives, in particular judicial records related to cases, can provide a historical record which offers information about the circumstances in which the atrocities committed during the conflict in the former Yugoslavia occurred. As stated by M. Joinet, in his report on the Question of the impunity of the perpetrators of human rights violations (civil and political), "the knowledge of the oppression it has lived through is part of a

81 In P. Akhavan, 'Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 *Human Rights Quarterly* (1998) 4, 737, 783.

82 First Annual Report of the ICTY, *supra* note 3, 18. See also W. Richard, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia', 29 *Human Rights Quarterly* (2005) 3, 908 (emphasis added).

83 M. Schrag, 'The Yugoslav War Crimes Tribunal: An Interim Assessment', 7 *Transnational Law & Contemporary Problems* (1997) 15, 19.

84 ICTY Completion Strategy Report November 2004, *supra* note 20, para. 29.

people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right"[85]. For the victims, this information might help to contextualize their experiences and, as a consequence, alleviate their suffering. The archives might have information capable of vindicating their memory and status.[86] In addition, they might provide information about the fate of persons that disappeared during the conflict. In other words, access to the archives might assist in the implementation of the victims' right to the truth.

Therefore, it is never too much to emphasize the relevance of guaranteeing victims' access to the tribunal's archives. The address of Judge Pocar to the United Nations General Assembly from 2008 remains pertinent today. In that opportunity, he stressed the importance of ensuring that the public information contained in the archives is made easily accessible to the victims. In his words:

> "irrespective of the political decision on the physical location of the Tribunal's archives, it is of critical importance that open access to these archives be guaranteed. For this purpose, a suggested approach would be the creation of memorial centres in the main cities of the region, offering access to archives, historical information on the Tribunal's proceedings and cases, as well as interactive debates on international criminal justice and reconciliation in the former Yugoslavia. This would not only meet the primary objective of the archives project, which is easy and open access to our work by the interested public. It would also guarantee the seamless continuation of the longstanding work and achievements of the Tribunal's outreach programme."[87]

The relevance of easy access to the tribunal's archive seems to have been acknowledged by the Security Council. In the Resolution that created

[85] M. Joinet, 'Question of the impunity of perpetrators of human rights violations (civil and political) (1997) UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

[86] M. C. Bassiouni, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review* (2006), 203, 261.

[87] ICTY, Address of Judge Fausto Pocar, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, Press Release, (13 October 2008) available at http://www.icty.org/sid/9989 (last visited 23 December 2011).

the Residual Mechanism, the Security Council requested "the Tribunals and the Mechanism to cooperate with the countries of the former Yugoslavia and with Rwanda, as well as with interested entities to facilitate the establishment of information and documentation centres by providing access to copies of public records of the archives of the Tribunals and the Mechanism, including through their websites"[88]. It is argued, nonetheless, that the symbolic value of the archives requires a more pro-active attitude of the ICTY and the Mechanism. Both institutions should, whenever possible, promote the establishment of information centers in each of the concerned countries in order to facilitate the access to the documents by those who have been directly affected by the crimes. Such approach seems particularly relevant if one takes into account that "the wars in Croatia and Bosnia were above all a story of betrayal and denial that can only be fully repaired within the family, community and society at large"[89].

The access to the tribunal's archive requires, nonetheless, a careful identification of confidential documents by the Mechanism. The ICTY has received confidential documents and material on the presumption that they would not be made public, or, at least, not without the consent of the providers.[90] In addition, documents concerning protected witnesses might also have been classified as confidential upon judicial decisions. As discussed in Section C.III, the declassification of confidential documents concerning protective measures requires a judicial decision. This decision should take into account the safety, physical and psychological well-being of the witnesses concerned. In no circumstances, the fact that the archives of the ICTY have been considered property of the United Nations by the Security Council[91] should not lead to the automatic declassification of confidential decisions related to the protection of witnesses.[92] The judicial character of these documents requires the balance between ensuring the documents' availability to the public and the protection of witnesses to be achieved in relation to each specific case.

88 SC Res. 1966, 22 December 2010, para. 15.

89 E. Stover, *The Witnesses: War Crimes and the Promise of Justice in the Hague* (2007), 145.

90 Denis, *supra* note 51, 835.

91 See Art. 28 of the Statute of the Residual Mechanism.

92 *Id.*

E. Final Remarks

Judge Claude Jorda's report, which led to the development of a completion strategy, estimated that with changes in the work of the tribunal and the Prosecutor's policy, the ICTY would be able to accomplish its mission by about year 2007.[93] Since then, various measures were adopted by the ICTY to allow the tribunal to achieve its objective of completing all trial activities at first instance by the end of 2008. The latest report submitted by the ICTY in accordance with Security Council Resolution 1534 is from May 2011 and proceedings are still taking place before the tribunal. This does not mean that the measures adopted by the ICTY were inefficient. It, nonetheless, reminds us that our ability to predict the future is limited. The ICTY could not foresee and avoid, for instances, the cases of contempt that it had to deal with nor the various procedural issues that written evidence could raise.

This article has suggested that, similarly, the ICTY could not predict all possible effects that the measures adopted under its completion strategy could have had on the victims. In particular, it has indicated that the ICTY has not fully considered the consequences that the measures aimed at speeding up the proceedings might have had on perceptions of the legitimacy of the trials conducted before the tribunal. For the victims who felt they had a moral obligation to testify, these measures have not only limited the amount of information they could provide to the ICTY, but also limited their ability to "set the record straight about the suffering of their families and communities in the presence of the accused"[94]. Ultimately, such limitation indicates that, as witnesses, the relevance of the victims to the tribunal has been related exclusively to their ability to clarify the facts under judgment.

The perception of the victim as an instrument that could assist in the prosecution of the crimes committed in the former Yugoslavia has also been reflected in the discussions of protective measures. The need to ensure the protection of witnesses was presented as an impediment to the completion of the work of the tribunal in the timeframe established by the Security Council. It was only with the discussion of the protective measures in the context of the residual functions that the privacy and safety of the witnesses were at the center of the concerns of the ICTY. Therefore, the seriousness

[93] Seventh Annual Report, *supra* note 11, 5.
[94] Stover, *supra* note 89, 126.

with which the Residual Mechanism will consider the protection of witnesses will be essential to ascertain the inherent value of the victims that testified before the ICTY.

This article has also drawn attention to the broader impact that the measures adopted to facilitate the closing down of the ICTY might have on victims. The capacity-building initiatives of the ICTY aimed at allowing the referral of low and middle rank accused cases strengthened the national legal systems. National courts are able to judge not only the cases transferred by the ICTY, but all other war crimes that are pending or under investigation today. In the long term, the capacity-building initiatives of the ICTY might have assisted in bringing justice closer to the victims.

As part of this process of bringing justice closer to the victims, this article has also considered the relevance of the adoption of measures aimed at redressing the harm suffered by the victims. Among these measures, Section C.II highlighted the importance of the archives of the ICTY to victims. Complemented by the facts established by the courts of the former Yugoslav republics, the facts established by the ICTY will provide a significant overview of the conflict. The archives of the ICTY might also have a more specific role: they might provide the family members of disappeared victims with information about the fate of their loved ones. It is, therefore, important to reiterate the need to provide easy access to the archives of the ICTY.

The measures analyzed in this article indicate that the completion strategy of the ICTY had an impact on the victims. The pressure to complete the trials in the timeframe established by the Security Council has, in some cases, led to the *instrumentalization* of the victims. This article has argued, though, that the closing down of the ICTY does not need to affect negatively the victims. The rights and interests of the victims need, nonetheless, to be duly taken into account by the Residual Mechanism to ensure that the multi-faceted mandate of the ICTY continues to be legitimately implemented.