

Completion or Creation: Is the closure of international courts promoting the creation of domestic courts to enforce international criminal law?

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The Rhetoric of Responsibility

Over the last century indomitable rhetoric is associated with the enforcement of international criminal law. Following World War I the ‘Welsh Wizard’ David Lloyd George promised to “Hang the Kaiser” and “Make Germany Pay” for the violations of the laws of war committed by them.¹ Less than thirty years later, the perpetrators of Nazi atrocities were warned by the three Allied Powers of their intention to “...pursue them to the uttermost ends of the earth and...deliver them to the accusers in order that justice may be done.”² The statements of George W. Bush about fighting the war on terror are reminiscent of those utterances as are his assurances that “[w]e are deliberately and systematically hunting down these murderers, and we will bring them to justice.”³ From the robust speeches made during the World Wars it would seem that equally strong tribunals – be they national or international – would be created to ensure accountability. History dictates that this was not the case; as a leading commentator remarked “[i]n many respects the punishments meted out against German war criminals by Allied and German courts alike bore no relation to the horrible crimes that had been perpetrated.”⁴

Bringing the perpetrators of international crimes to justice – if they are brought to justice at all – is a fraught process involving legal, diplomatic, political and financial stakeholders. Pursuing, investigating and if successful arresting and trying suspects is overtly costly, complex and time-consuming. Equally difficult is reaching agreement on who to prosecute and deciding whether an international or national court is the appropriate forum for trials. In 1919 the Allies tasked the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties to determine what tribunal would be suitable for trials. They recommended the creation of a

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¹ Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill University of North Carolina Press, 1998, p.175.

² Moscow Declaration, 1 November 1943.

³ President George W. Bush Discusses War on Terrorism in Address to the Nation, 8 November 2001.

⁴ Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill University of North Carolina Press, 1998, p.247.

‘High Tribunal’ composed of jurists from all of the Allied Countries.⁵ Article 227 of the Treaty of Versailles reflected their recommendations providing for the creation of “a special tribunal” to try the Kaiser for “a supreme offence against international morality and the sanctity of treaties.”⁶ Other German suspects were to be tried before military tribunals. Despite the guarantees of accountability and the provisions of the Treaty of Versailles – the “special tribunal” was never created and the Kaiser never tried. Instead, a compromise was reached with the Germans in 1920; they would try suspects nationally in Leipzig. Although the Allies provided a list of forty-five suspects for prosecution finally there were only 12 proceedings. The national trials “proved a great fiasco...[t]he few accused persons who were convicted were not even made to serve their sentences.”⁷ Robert Cryer identifies that the Leipzig trials have a broader legacy – it is “...the fear that a State is unlikely to engage in active prosecution of its own nationals before its own courts, and that therefore international supervision or proceedings are needed, or prosecution before another State’s courts.”⁸ Since that time this trepidation has influenced the debates on how to prosecute the perpetrators of genocide, war crimes and crimes against humanity.

The disastrous outcome of the Leipzig trials was not forgotten when it came to formulating policy on the punishment of war criminals during World War II. Although the governments-in-exile wanted to “judge and punish the culprits with extraordinary and the most rigorous sentences” the three Allied powers were hesitant to act.⁹ In fact the only substantive agreement reached by them during the war years is found in the 1943 Moscow Declaration – warning the “Hitlerite Huns” that they would be “brought back to the scene of their crimes and judged on the spot by the peoples they have outraged.”¹⁰ The question of the major war criminals remained open and would be decided after the war by “a joint decision of the Governments of the Allies.”¹¹ In August 1945 that decision was contained in the agreement “for the prosecution and punishment of the major war criminals of the European Axis” and the Nuremberg Charter attached to it. Major war criminals would be tried by the Nuremberg International Military Tribunal. The trial of other war criminals was regulated by Control Council Law No.10 empowering Allied military commanders to conduct trials and to permit German courts to try cases when the crimes were committed against Germans, or stateless persons.¹² Like the Nuremberg Charter the Charter of the International Military Tribunal for the Far East

⁵ Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46, A Documentary History*, The Bedford Series in History and Culture, Bedford/St. Martin’s 1997, p.3.

⁶ *Ibid.*, pp. 10 – 11.

⁷ Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill University of North Carolina Press, 1998, pp. 2-5.

⁸ Robert Cryer, *Prosecuting International Crimes, Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005, p.35.

⁹ Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill University of North Carolina Press, 1998, p.25.

¹⁰ Moscow Declaration, 1 November 1943.

¹¹ *Ibid.*

¹² Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46, A Documentary History*, The Bedford Series in History and Culture, Bedford/St. Martin’s 1997, pp. 39-57.

concentrated the jurisdiction of the international court on major war criminals; other war criminals were tried by military commissions or national courts.

As noted above bringing the perpetrators of international crimes to justice is a politically complex and costly process. Despite the vast criticism of both the Nuremberg and Tokyo tribunals they set the precedent for the enforcement of international criminal law in both international and national tribunals. Discussing their creation the eminent scholar and judge of the Tokyo tribunal B.V.A. Roling remarked:

Human affairs are always rather confused, with positive and negative elements mixed together. Positive developments in history are seldom caused only by honest and noble motives. It is true that both trials had sinister origins; that they were misused for political purposes; and that they were somewhat unfair. But they also made a very constructive contribution to the outlawing of war and the world is badly in need of a fundamental change in the political and legal position of war in international relations.¹³

The trials of Germany suspects before national courts were farcical. The Nuremberg and Tokyo models of accountability – attempting to avoid a repeat of Leipzig – managed the prosecution of international crimes in both national and international courts. Almost fifty years later two ad-hoc international criminal tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda – were created and mandated to do the same thing. Yet “...the dire state of funding for war crimes tribunals demonstrates frustration with the efficiency of such tribunals in practice. This ambivalence is epitomized by current attitudes towards the ICTY and, in particular, its Completion Strategy.”¹⁴ As a result of the lack of budgetary support for the ad-hoc tribunals they are now working towards closure in 2010. Thus there is a shift in the enforcement of international criminal law – to end impunity for the perpetrators of genocide, crimes against humanity and war crimes in the Yugoslav wars and Rwanda – away from the ad hoc international tribunals to hybrid and national courts. I posit that the outcome of this paradigm shift is the progressive development of national criminal laws to ensure accountability for international crimes and guarantee the application of international human rights norms during trials. This theory is analysed within the context of the ‘completion strategy’ of the international tribunal for the former Yugoslavia. This paper will analyse the tribunals’ *in vivo* jurisprudence – to identify the standards required by an international court of a national criminal justice system to enable the transfer of indictees to it for trial. The War Crimes Chamber of Bosnia and Herzegovina will be presented as an example of a post-conflict justice project driven by the shift from international to national trials.

¹³ B.V.A Roling and Antonio Cassese, *The Tokyo Trial and Beyond*, Polity Press, 1993, p.89.

¹⁴ Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals’, (2005) *Journal of International Criminal Justice* 3, pp. 82-102

Creation of the first United Nations Criminal Court – the International Criminal Tribunal for the Former Yugoslavia

Unwilling to intervene militarily in the Balkan wars, major world powers pushed for a political settlement to end the conflict. In 1992 countless diplomatic efforts to halt the violence failed – the carnage continued.¹⁵ Endless reports of widespread atrocities and the use of ‘ethnic cleansing’ campaigns to gain territory pushed criminal accountability onto the international agenda together with the search for a political resolution. In October 1992, under increasing international pressure the Security Council requested the Secretary-General to establish a Commission of Experts to determine if evidence existed of “grave breaches of the Geneva Conventions and other violations of international humanitarian law” in the former Yugoslavia.¹⁶ Five months later the Commission presented its interim report, calling for the establishment of an international tribunal.

The following month, having considered the interim report of the Commission and expressing its serious concern at continuing reports of widespread atrocities, the Security Council agreed. As clearly stated in Resolution 808, the Security Council did so “to put an end to such crimes” and “to bring to justice the persons who are responsible for them.”¹⁷ The US Permanent Representative to the UN, Madeleine Albright linked the creation of the international tribunal to post-war reconciliation, remarking that “[b]old tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom or if we hope to encourage the emergence of peaceful multi-ethnic democracies, our answer must be a resounding no.”¹⁸ But post-war reconciliation and the search for justice were not the only factors motivating the Member States. With no viable political resolution and no agreement between the US and Europe to intervene militarily, it was an opportune moment to deflect attention from these failed efforts to stop the war. As noted by the first President of ICTY, “[t]he establishment of a Tribunal was thus seized upon during the conflict not only as a belated face-saving measure but also in the pious hope that it would serve as a deterrent to further crimes.”¹⁹ In May 1993, acting under Chapter VII of the UN Charter, the Security Council established the ICTY,²⁰ which was operational by 1994 and issued its first indictment later that year.

When the ICTY was established there was no meaningful or impartial national criminal justice process to respond to the war’s atrocities in Bosnia; indeed, if the authorities had “initiated proceedings against their adversaries, probably such proceedings would have been highly biased.”²¹ It was in part the absence of any such process that made the case for an international court with primacy over national courts

¹⁵ Laura Silber and Allan Little, *The Death of Yugoslavia* (London: Penguin Books and BBC Books, 1996), pp.286-288.

¹⁶ S.C. Res. 780, U.N. Doc. S/RES/780 (October 6, 1992).

¹⁷ S.C. Res. 808, U.N. Doc. S/RES/808 (February 22, 1993).

¹⁸ S.C. Provisional 3175, U.N. Doc. S/PV.3175 (February 22, 1993).

¹⁹ Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 336.

²⁰ S.C. Res 827, UN Doc. S/RES/827 (May 25, 1993).

²¹ Cassese, *supra* n. 14, at 349.

compelling.²² Article 9 of the ICTY Statute provides that the tribunal and national courts have concurrent jurisdiction but at any stage in a case the tribunal may request that national proceedings be deferred in their favour.²³ Courts in the former Yugoslavia were not precluded from trying cases; in fact the Security Council encouraged them to exercise their jurisdiction using national laws.²⁴ Whether they were capable of or willing to do so, however, was a different matter.

Bosnian War Crimes Trials – A Return to Leipzig?

The rehabilitation of the Bosnian judicial system, which had been ravaged and corrupted by war, was an enormous challenge. The possibility of a war crimes suspect having “a fair and public hearing” before “an independent and impartial tribunal” during or immediately after the war was unlikely.²⁵ Civilian and military courts did process cases at that time, but many of the trials have subsequently been found by the Human Rights Chamber of Bosnia and Herzegovina to have been unfair.²⁶ An example of this is the case of Sretko Damjanović.²⁷ In 1993, Damjanović was found guilty by the District Military Court in Sarajevo of genocide and crimes against the civilian population. He was sentenced to death. In 1997, the Human Rights Chamber noted that the court “was operating in a situation of conflict where outside pressure on its members was likely” and considering judges could be dismissed “on the proposal of the Defence Ministry” this gave rise “to legitimate doubts as to whether they met the high standard of independence required in a case where life was at stake.”²⁸ The Chamber held that the District Military Court “lacked a sufficient appearance of independence and cannot therefore be regarded as a “court” for the purposes of Article 2 (1) of the Convention.” A retrial was ordered and in 2002 the conviction was quashed.²⁹

Arbitrary arrests were also common directly after the war, proving to be a formidable threat to the newly brokered peace deal. In February 1996, local police arrested two senior Bosnian Serb officers, General Djukić and Colonel Krsmanovic, who

²² Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 9, U.N. Doc. S/RES/827 (May 25, 1993). See also *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 (May 3, 1993): para. 65.

²³ *Ibid.*

²⁴ *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, *supra* n. 17, at para. 64.

²⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14, U.N. Doc. A/6316, 999 U.N.T.S 171 (March 23, 1976).

²⁶ Constitution of Bosnia and Herzegovina (November 21, 1995), Article II (1). For structure and jurisdiction of the Human Rights Chamber see the Framework, appendix, at Annex 6.

²⁷ *Sretko Damjanović v. The Federation of Bosnia and Herzegovina* (CH/96/30), Human Rights Chamber of Bosnia and Herzegovina, Decision on Admissibility, (April 11, 1997).

²⁸ *Sretko Damjanović v. The Federation of Bosnia and Herzegovina* (CH/96/30), Human Rights Chamber of Bosnia and Herzegovina, Decision on Merits of the Case, (September 5, 1997), para.40.

²⁹ For detailed information and analysis of domestic cases see Organization for Security and Cooperation in Europe (OSCE) Mission to Bosnia and Herzegovina, “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” (March 2005).

having misread a signpost, accidentally drove into Bosniac held territory near Sarajevo. Allegations circulated that the two men were war criminals, and they were detained in a Sarajevo prison. Politically this was a volatile period, with the first Dayton peace agreement compliance summit about to take place. The Bosnian Serbs refused to cooperate with IFOR³⁰ until the two men were freed, while the Bosniacs threatened to try them before a local court. The ICTY Prosecutor Richard Goldstone issued a warrant for the two officers, as he wanted them for questioning and possible indictment. Meanwhile, in Belgrade, Milosevic demanded their immediate release. The situation was defused when the two men were delivered to The Hague.

Securing peace was of paramount importance to the international community as was the holding of municipal elections in September 1996, and the risk of reprisals or arrest was preventing people from travelling in Bosnia. Freedom of movement in particular for refugees and displaced persons was critical to the success of the elections especially since candidates and voters were being encouraged to stand and vote in their pre-war constituencies.³¹ The international community had to counteract the growing tensions and did so with an agreement, known as the ‘Rules of the Road,’ which was designed to prevent arbitrary arrests like that of Djukić and Krsmanovic.³² It required that “[p]ersons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.”³³ Bosnian authorities could only arrest and detain persons after the Office of the Prosecutor had reviewed a case file and determined there was sufficient evidence – consistent with international standards – to believe that a suspect may have committed a serious violation of international law.³⁴

In determining whether there was sufficient evidence, the Prosecutor solely reviewed the case file and supporting evidence. Witnesses were not interviewed; no decision was made whether national authorities had complied with international legal standards; and national criminal laws were not reviewed for their compliance with international standards.³⁵ Considering the intent of the Rules of the Road agreement was to prevent arbitrary arrests the review process conducted by the Office of the Prosecutor appears to have been adequate and effective. Implementation of the agreement did help to curb arbitrary arrests and “threats of detention against politicians and officials as well

³⁰ The Framework at Annex 1A, art.I(1)(a). The multinational military Implementation Force (IFOR) assisted in the implementation of the territorial and other militarily related provisions of the Peace Agreement.

³¹ “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” *supra* n. 31, at 47.

³² The Rome Agreement, signed by Presidents Izetbegovic, Tudjman and Milosevic (February 18, 1996) http://www.ohr.int/ohr-dept/hr-rol/thedep/war-crime-tr/default.asp?content_id=6093 (accessed July 2, 2007).

³³ *Ibid.* at 5.2.

³⁴ ICTY Office of the Prosecutor, Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia Under the Agreed Measures of February 18, 1996, on file with author.

³⁵ Mark. S. Ellis, “Bringing Justice to an Embattled Region – Creating and Implementing the “Rules of the Road” for Bosnia and Herzegovina,” *Berkeley Journal of International Law* 17 (1999).

as returnees,” thus ensuring freedom of movement and facilitating implementation of the municipal elections in 1996.³⁶

It did not, however, improve war crimes trials in Bosnia. Unless the ICTY exercised primacy by requesting the national courts to refer a case to the Tribunal, responsibility for further investigation and trial of that case remained with national police, prosecutors and courts. This effectively meant that cases were returned to a biased and frequently corrupt judicial system. Until 2003, war crimes cases were prosecuted at the Entity level before cantonal and district courts and before the Basic Court in the District of Brcko. During and after the war, Bosnian politicians had the authority to appoint judges and prosecutors, and this power was flagrantly abused. Politicians on all sides packed their Entity judiciary with individuals of the majority ethnic group. Most appointments were based on political affiliations and ethnicity rather than professional qualifications and experience. By 2002, eighty percent of the serving judges and prosecutors in the country had been appointed during the war. Politicians also controlled the purse strings. The level of funding allocated to the sector was conspicuously insufficient.³⁷ As a result, all too often the basic standards of a fair trial were trumped by the need to protect ethnic interests, and a weak judiciary could not provide an effective check on very profitable criminal activities and rampant corruption.³⁸

Interference by politicians and ‘representatives of the accused’ in the work of judges and prosecutors was particularly prevalent in cases involving serious violations of international human rights and humanitarian law; these were the high-risk investigations and trials. Judges, prosecutors and witnesses feared intimidation or violence if they diligently proceeded with a case or testified.³⁹ Almost eight years after the Dayton Peace Agreement the judiciary was at best in a state of paralysis due to a lack of funding and fear; at worst it was corrupt and completely controlled by interested politicians. Against this backdrop, a culture of impunity evolved, and the majority of war crimes suspects were immune from prosecution.

³⁶ “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” *supra* n. 31.

³⁷ United Nations Mission In Bosnia and Herzegovina - Judicial System Assessment Programme, *Thematic Report IX-Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina* (November 2000) <http://www.hjpc.ba/docs/jasp/Template.aspx?cid=2444,1,1> (accessed July 2, 2007); United Nations Mission In Bosnia and Herzegovina – Judicial System Assessment Programme, *Thematic Report X-Serving the Public: The Delivery of Justice in Bosnia and Herzegovina* (November 2000) <http://www.hjpc.ba/docs/jasp/Template.aspx?cid=2444,1,1> (accessed July 2, 2007).

³⁸ See Chapter by Bas van de Viet in this book.

³⁹ In the case of Zarko Pandurević (Sarajevo Cantonal Court) monitored by the OSCE, a witness expressed concerns about threats and intimidation from the defendant’s family. Explaining that if she did not give evidence to the court the only alternative for the judge was to arrest her and bring her to court. “War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles,” *supra* n. 31, at 24.

The Completion Strategy of the International Tribunal for the Former Yugoslavia

By creating the ICTY in 1993, the international community focused its interest on criminal accountability and prosecution at an international level. The Security Council Resolution establishing the Tribunal did not prescribe its date of termination; rather it stated that offences committed between “1 January 1991 and a date to be determined by the Security Council upon the restoration of peace” can be tried before the court.⁴⁰ During the first thirteen years of its existence, the ICTY grew exponentially, employing 28 judges and over eleven hundred staff, with budget allocations of over 1.2 billion USD.⁴¹ As for the temporal nature, it has been observed that “ad hoc tribunals are almost by definition confronted with the difficulty of knowing when to stop. Yet they develop a momentum of their own that soon becomes unhinged from the rationale that justified their creation in the first place.”⁴²

The Tribunal had a rocky start – little over a year after its creation the media were profusely pessimistic about its chances of success; anxious to commence trials the judges grew increasingly frustrated and as the war raged on victims desperately called for justice.⁴³ This may in part explain why the first prosecutor employed a ‘pyramidal prosecution strategy’ targeting lower-level suspects first, and then gradually selecting military and political leaders.⁴⁴ Prosecutions commenced, easing the political pressure on the prosecutor to deliver results, but there was not unanimous agreement in the Tribunal that targeting lower-level offenders first was the correct policy to be employed. Arguing that the ICTY Statute required the prosecution of persons responsible for “serious” violations, in an unprecedented move, the judges objected to the prosecution policy and insisted “on the need to disregard, as much as possible, minor perpetrators.”⁴⁵ Pragmatic factors such as the limited financial and human resources of the Tribunal (in 1993 a modest budget of US \$276,000), its ad hoc nature and its need to rely on state cooperation influenced the judges to conclude that the prosecutor should “concentrate on the leaders or at least on those who planned and ordered atrocities.”⁴⁶ By early 1998, the Prosecutor began to rework the strategy but by this time there were already a number of lower-level offenders to be tried by ICTY.⁴⁷

The Tribunal tried only six perpetrators during its first six years. Nevertheless, the institution was evolving into an “enormous and extremely costly bureaucratic”

⁴⁰ S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

⁴¹ David Wippman, “The Costs of International Justice,” *American Journal of International Law* 100 (2006): 861.

⁴² William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, (New York: Cambridge University Press, 2006), 40.

⁴³ Richard Goldstone, “A View from the Prosecution,” *Journal of International Criminal Justice* 2 (2004): 380.

⁴⁴ See Antonio Cassese, “The ICTY: A Living and Vital Reality,” *Journal of International Criminal Justice* 2 (2004).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See Louise Arbour, “The Crucial Years,” *Journal of International Criminal Justice* 2 (2004).

machine.⁴⁸ Member States were growing increasingly dissatisfied with the length of time offenders were spending in pre-trial detention as well as the slow pace of trials. Additionally, “[i]t may have been inevitable that political enthusiasm for the ICTY would wane over time.”⁴⁹ Growing concern about the size and cost of the ICTY culminated with a request to the Secretary General to conduct a review of its “effective operation and functioning” to guarantee the correct use of resources by it.⁵⁰ A group of five independent experts analyzed the operations of the Tribunal, and once again, the prosecution strategy became an issue as their report revealed a consensus among the ICTY judges and experts that leadership cases should be the priority of ICTY. They opined that,

despite the importance and the value of developing an international criminal jurisprudence and of victims seeing their immediate tormentors tried and punished, the major objectives of the Security Council are in large part not fulfilled if only low-level figures rather than civilian, military and paramilitary leaders who were allegedly responsible for the atrocities are brought before the Tribunals for trial....Devoting huge resources to the prosecution of “small fry” while vindicating the wholly understandable and justified emotions of individuals and families victimized by atrocities would leave major goals largely unattained. It is hoped that in time the low-level perpetrators can be tried fairly and properly for their crimes by national courts.⁵¹

Organizational and procedural improvements in the ICTY would contribute to more efficient trials but until the institution started “winding-down” the level of financial resources required by it would remain the same.⁵² The newly elected ICTY President announced that formulating a time frame for the Tribunal to end its work was a priority.⁵³ He questioned “[w]hat timeframe does the Tribunal set itself for fulfilling its mission?”⁵⁴ As a subsidiary organ of the Security Council, that timeframe had to be set bearing in mind the request of its parent organ “to expedite the conclusion of their work at the earliest possible date.”⁵⁵

The ICTY ‘completion strategy’ was presented two years later. Various structural reforms were proposed in conjunction with a focus on “trying the most senior offenders of crimes which most seriously violate international public order”. Confirming its agreement with the strategy the Security Council adopted Resolution 1503 which outlines

⁴⁸ Ralph Zacklin, “The Failings of Ad Hoc International Tribunals,” *Journal of International Criminal Justice* 2 (2004): 541

⁴⁹ Dominic Raab, ‘Evaluating the ICTY and its Completion Strategy Efforts to Achieve Accountability for War Crimes and their Tribunals’, (2005) *Journal of International Criminal Justice* 3, pp. 82-102.

⁵⁰ G.A. Res. 212, ¶ 5, U.N. Doc. A/RES/53/212 (December 18, 1998).

⁵¹ UN Doc. S/2000/597 Report of the Expert Group to Conduct a Review of the Effective Operations and Functioning of the International Tribunal for the Former Yugoslavia and Rwanda.

⁵² *Ibid.* at para. 262.

⁵³ *Statement By Judge Claude Jorda, PresIbident of the International Criminal Tribunal for the Former Yugoslavia*, ICTY Press Release, CC/P.I.S/466-E (January 27, 2000), <http://www.un.org/icty/latest-e/index.htm> (accessed July 5, 2007).

⁵⁴ www.un.org/icty/pressreal/p466-e.htm.

⁵⁵ UN Doc. S/RES/1329 (2000), preamble.

a plan involving “three interlocking components”.⁵⁶ Firstly “completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010”, secondly “concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction” and thirdly “transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.”⁵⁷ Rule 11 *bis* of the tribunals Rules of Procedure and Evidence was subsequently amended to provide for the transfer of cases from the ICTY to national courts.⁵⁸ A trial chamber may order a referral to states in whose territory the crime was committed; to states in which the accused was arrested; or to states having jurisdiction and agreeing to accept such a case.⁵⁹ Thus a case may be referred to any state within the territory of the former Yugoslavia as this is the territorial jurisdiction of the ICTY; to a state where the accused was arrested which may or may not be within the former Yugoslavia and finally to a state having jurisdiction and willing to take such a case. The latter option captures the principle of universal jurisdiction and broadens the number of states that a case may be transferred to by the ICTY. Rule 11 *bis* facilitates the ‘completion strategy’ permitting the transfer of suspects for trial to national courts. It also evidences the shift away from a policy of case deferral to the international tribunal to the now prevailing policy of case referral to national courts.

A referral order to any of the states mentioned above may only be granted if the tribunal is “...satisfied that the accused will receive a fair trial and that the death penalty will not be imposed”.⁶⁰ The referral bench must consider whether a national jurisdiction will hold a fair trial respecting international human rights standards and due process before a suspect is transferred to the authorities of that state.⁶¹ The ICTY ‘completion strategy’ presented in 2002 to the Security Council gives an indication of the criteria that the referral bench might examine. The report highlighted the intention of the tribunal to ensure firstly, that all crimes in the international indictment would be included in a national indictment. Secondly, that national courts respect protective measures ordered by the Tribunal for victims and witnesses and thirdly, that the national trials respect the international norms for the protection of human rights.⁶² Additionally, national Codes of criminal procedure would be scrutinized to ensure that they reflect the principles enshrined in the international conventions on the protection human rights especially guarantees of a fair trial. Subsequent ICTY 11 *bis* jurisprudence clearly stipulates the standards required in a national jurisdiction to enable a case transfer. The 11 *bis* cases indicate that the obligation of a fair criminal trial includes:

The equality of all persons before the court.

⁵⁶ Larry D. Johnson, ‘Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity’, (2005) 99 American Journal of International Law 158.

⁵⁷ UN Doc. S/RES/1503 (2003).

⁵⁸ ICTY Rules of Procedure and Evidence, Rule 11 *bis*.

⁵⁹ ICTY Rules of Procedure and Evidence, Rule 11 *bis* (A) (i),(ii), (iii).

⁶⁰ *Ibid.*, Rule 11 *bis* (B).

⁶¹ International Covenant on Civil and Political Rights, Article 14; European Convention on Human Rights, Article 6; ICTY Statute, Article 21.

⁶² U.N. Doc. S/678, (June 19, 2002).

A fair and public hearing by a competent, independent, and impartial tribunal established by law.

The presumption of innocence until guilt is proven according to the law.
The right of an accused to be informed promptly and in detail in a language which he understands the nature and cause of the charge against him.

The right of an accused to be tried without undue delay.

The right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

The right of an accused to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.

The right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The right of an accused not to be compelled to testify against himself or to confess guilt.⁶³

However, in June 2004 the President of ICTY Judge Meron reported to the Security Council that “the overarching problem, for the time being, was that the courts of the states of the former Yugoslavia were not yet in a position to try ICTY indictees in proceedings that would clearly satisfy international human rights and fair trial standards.” Yet less than three years later 10 accused had been successfully transferred for trial to the War Crimes Chamber of Bosnia and Herzegovina.

ICTY Completion Strategy – the Catalyst for Bosnian Reform

For almost ten years after the war the Bosnian judicial system failed to hold accountable the perpetrators of the grave atrocities committed during the conflict. The limited trials that did occur took place in a politicized environment casting doubt on the fairness of the verdicts. Bringing lower-level perpetrators, the “wartime ethnic cleansers” to justice in Bosnia is important for victims and the restoration of lasting peace. Building an independent and impartial domestic judicial system with sufficient resources was a critical element of that process.

Arguably, the vast financial and human resources required by the ICTY diverted the discussion and funding away from building a domestic war crimes capacity in Bosnia, and only when the international community’s attention turned towards winding down the ICTY, did the need for a domestic process become more urgent. The enormous institutional growth of the ICTY created a forum for many of the most important war

⁶³ Mejakic et al. (IT-02-65-PT), Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11 *bis*, 20 July 2005.

crimes trials, though – due to the scale and number of crimes committed during the war – it could never handle all cases arising from the former Yugoslavia.

As previously discussed in May 2000, the ICTY President presented a report to the Security Council reviewing the conduct of trials – estimating the ICTY would not complete operations before 2016.⁶⁴ A number of options for improving the work of the Tribunal and reducing the number of cases before it were also proposed. One option was the creation of a new court in Bosnia with authority similar to the Tribunal. The ICTY would concentrate on higher-ranking officials and the new court on lower-ranking officials. The enormous cost of setting up a miniature ICTY in Bosnia was considered by the judges as a distinct disadvantage especially since its creation would not considerably reduce the cost of the Tribunal.⁶⁵ Another possibility was to induce Yugoslav states “to try persons indicted by the Prosecutor” and trials would be monitored by international observers. At that time, however trials could not be held in the region due to the hostile political climate and security issues for witnesses, accused and judges.⁶⁶

A year later discussion over which type of criminals the ICTY should focus on was yet again revisited, with both the Prosecutor and ICTY President suggesting that the ICTY focus more on the prosecution of crimes most prejudicial to international public order, and that some of its cases be referred back to national courts. The pertinent question was whether any national courts had the capacity to try accused that might be transferred. In 2001, the ICTY President answered that question negatively, noting that the judicial systems of the states created from the former Yugoslavia would have to be “reconstructed on democratic foundations” before any cases could be transferred.⁶⁷ With the Bosnian judicial system in a shambles and the Security Council pressuring the Tribunal “to expedite the conclusion of its work at the earliest possible date,” the concept of creating a special court in Bosnia to try cases transferred from ICTY was again put forward.⁶⁸ The Tribunal asked the Office of the High Representative (OHR) and the Bosnian Presidency to examine the feasibility of setting up a special court or propose other options within the existing Bosnian judicial system to enable the future referral of cases.⁶⁹ The position of OHR was clear. The creation of a special court composed solely of international judges ran a foul of the principle of local ownership and the state-building agenda in Bosnia at that time. OHR suggested focusing on the yet to be established Court of BiH, as the entity judicial systems did not have the capacity to appropriately try war crimes cases. OHR indicated that large-scale international support, including financial assistance, would be required to create a court that could cope with cases transferred from ICTY. There was a period of consultation and an expression of political consensus in the country supporting the proposal to transfer a number of cases from the Tribunal to national courts. The Bosnian Presidency and the Ministry of Civil Affairs and Communications both accepted the ICTY proposal and showed support for

⁶⁴ *Report on the Operation of the International Tribunal for the Former Yugoslavia*, (May 12, 2000) <http://www.un.org/icty/pressreal/RAP000620e.htm> (accessed July 1, 2007).

⁶⁵ *Ibid.* at paras. 57-61.

⁶⁶ *Ibid.* at paras. 55-56.

⁶⁷ S.C. Provisional 4429, U.N. Doc. S/PV.4429 (November 27, 2001).

⁶⁸ S.C. Res. 1329, U.N. Doc. S/RES/1329 (November 30, 2000).

⁶⁹ ICTY non-paper, (August 2001), on file with author.

building the capacity of the Court of BiH. They also identified the need for considerable financial support from the international community, and the participation of international judges and prosecutors as critical to the success of any future project.

Around this same time, one of the principal institutional players in judicial reform began to adopt a more assertive posture. In May 2002, Lord Paddy Ashdown replaced Wolfgang Petritsch as High Representative and succinctly summarized his priorities: “First Justice. Then Jobs. Through Reform.”⁷⁰ Since 1995, the international community had vowed to strengthen the rule of law in Bosnia, but very little had transpired and the repetitive rhetoric was not going to transform a justice system sculpted by war. The new High Representative was prepared to do more than his predecessors; he was willing if necessary to use his authority to impose laws if Bosnia’s legislative bodies failed to do so to implement the comprehensive judicial reform strategy.⁷¹ With consensus growing that the state court was the appropriate home institution, the OHR coordinated a consultancy project to examine domestic war crimes prosecutions and make recommendations on how to enable the Court of BiH to deal with war crimes cases. The report was presented in 2002 providing a solid starting point for the future multilateral negotiations.⁷² It proposed the creation of an International Humanitarian Law Division within the Court and Prosecutors Office of BiH to investigate and try war crimes cases in Bosnia, whether referred from the ICTY or serious Rules of the Road cases.

The Tribunal was also moving towards closure and in June 2002 presented its ‘completion strategy’ to the Security Council containing broad timelines and methods to complete its work.⁷³ By concentrating on the prosecution and trial of the highest-ranking political and military leaders and referring intermediate-level accused to national courts, it aimed to complete investigations by the end of 2004, all first instance trials by the end of 2008, and all of its work in 2010.⁷⁴ Thus an independent and impartial Bosnian court was required to handle intermediate-level cases during the completion phase. Yet despite the positive developments in reform up to that point, it was abundantly clear that the shortcomings of the existing Bosnian judicial system were still too great to try cases referred from ICTY. The Tribunal suggested a number of options to the Security Council to overcome these problems. Once again it was noted that a special international court by definition would have been ideally suited to take the cases. However, the ICTY completion strategy was a plan to end the work of an international tribunal, not to recreate a miniature version of it somewhere else. So, the spotlight shone on the Court

⁷⁰ *Inaugural Speech by Paddy Ashdown, the new High Representative for Bosnia and Herzegovina*, State Parliament of Bosnia and Herzegovina, (May 27, 2002) http://www.ohr.int/ohr-dept/press/presssp/default.asp?content_id=8417 (accessed July 5, 2007).

⁷¹ At the Bonn Peace Implementation Conference in 1997, the PIC requested the High Representative to remove officials from public office who violated the Peace Agreement and to impose laws if national legislative bodies fail to do so.

⁷² Consultants Report to the Office of the High Representative, *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina*, (May 2002). The report was prepared by OHR staff and the consultants; two ex-members of staff of ICTY and a former member of staff of the United Nations Judicial Systems Assessment Programme.

⁷³ U.N. Doc. S/678, (June 19, 2002).

⁷⁴ *Ibid.* at para. 75.

of BiH. It was the centerpiece of a new state justice sector and ultimately would be considerably cheaper than a special court. The Tribunal recommended the creation of a war crimes chamber within the Court of BiH with the jurisdiction to try accused referred by ICTY.⁷⁵

Without the political momentum to close the ICTY and the endorsement of the completion strategy by the Security Council, Bosnia would not have built a state justice sector with the ability to try war crimes cases respecting international standards of fair trial and due process of law. The ICTY completion strategy provided the desperately needed funds and political consensus to push forward national prosecutions and trials for the first time since the war.

Conclusion

Matters of accountability and reconciliation in post-conflict societies have dominated the transitional justice discourse in recent decades. The creation of the ad hoc tribunals for the former Yugoslavia and Rwanda, followed in 2002 by the establishment of the International Criminal Court has resulted in the growth of international criminal justice more than at any time since the Nuremberg Tribunal. Unlike Nuremberg, the purpose of the ICTY was not only to bring alleged perpetrators to justice, but also to “contribute to the restoration and maintenance of peace” in the former Yugoslavia. The effectiveness of the ICTY in dispensing justice and fostering reconciliation in the former Yugoslavia, however, has been contested as a result of its exorbitant cost, lengthy proceedings and the trial of lower-level perpetrators rather than the most senior. The Tribunal does not have the capacity to investigate and prosecute the thousands of perpetrators who committed atrocities and still live in the region; those suspects are the responsibility of domestic courts.

The Bosnian War Crimes Chamber was largely born from the desire to shut down the ICTY rather than a long-term strategic plan to prosecute war crimes cases in Bosnia. If the chamber had not been fundamental to meeting the timelines set out in the ICTY completion strategy, it is doubtful that it would ever have been created. However even though the impetus was not a commitment to domestic war crimes prosecutions for their own sake, the process of creating the chamber has nonetheless invigorated the state justice sector and prompted debate in the donor community about how to achieve the same success in other courts. By no means is the evolution or development of the sector complete or its ongoing success guaranteed. Like the Bosnian state itself, the sector is fragile, and its capacity can only be further enhanced by ongoing political and financial support from both the international community and the Bosnian government. The Chamber has rebuilt a level of confidence in the state judicial system that was eroded by war and subsequent political control and interference. It has permitted Bosnian judges, prosecutors and lawyers to prove the pessimists wrong by showing that they can, with appropriate assistance, combat impunity. The chamber, inaugurated ten years after Dayton, should be viewed as the start of an ongoing reform process rather than the end of one. Just as the ICTY completion strategy acted as the catalyst for the creation of the

⁷⁵ *Ibid.* at para.85.

chamber and the enforcement of international criminal law at national level, the War Crimes Chamber can be the catalyst for a broader war crimes reform agenda in Bosnia and a model for other post-conflict justice projects.⁷⁶

⁷⁶ See generally Justice: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia Fidelma Donlon in Dina Haynes (editor), “Deconstructing the Reconstruction of Bosnia” (Ashgate Publishing, 2008).