Jennifer Schuetze-Reymann

International Criminal Justice on Trial

Schriftenreihe des Max-Planck-Instituts für
ausländisches und internationales Strafrecht

Strafrechtliche Forschungsberichte

Herausgegeben von Ulrich Sieber

Band S 155

Max-Planck-Institut für ausländisches
und internationales Strafrecht

International Criminal Justice on Trial

The ICTY and ICTR Case Referral Practice to National Courts and Its Possible Relevance for the ICC

Jennifer Schuetze-Reymann

Duncker & Humblot • Berlin

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.ddb.de> abrufbar.

DOI https://doi.org/10.30709/978-3-86113-797-9

Umschlagbild: © izzetugutmen, Fotolia
Foto der Autorin: Andrea Keller, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg
Druck: Stückle Druck und Verlag, Stückle-Straße 1, 77955 Ettenheim
Printed in Germany

ISSN 1860-0093
ISBN 978-3-86113-797-9 (Max-Planck-Institut)
ISBN 978-3-428-15136-3 (Duncker & Humblot)
Gedruckt auf alterungsbeständigem (säurefreiem) Papier
entsprechend ISO 9706

Acknowledgements

This dissertation was conceptualized within the context of the International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS-REMEP) and was accepted by the Albert-Ludwigs-University in Freiburg i. Br. in early 2015. Any subsequent developments have not been considered. Throughout this research project, I had the great privilege of receiving insight and support from a number of persons, whom I would like to thank at this juncture.

First of all, I would like to offer particular thanks to my supervisor, Prof. Dr. Dr. h.c. mult. *Ulrich Sieber*, for his continued guidance, support, and encouragement. This project would not have been possible without the benefit of his erudite and thoughtful supervision and unique perspective. I also wish to thank my second supervisor, Prof. Dr. *Walter Perron,* for his support and advice. Particular thanks goes to Dr. *Serge Brammertz*, a role model and mentor, whose steady encouragement, insight, and guidance significantly helped this project.

I am greatly indebted to the following individuals for the support of this project either intellectually, logistically or emotionally: the Research School's coordinator, Dr. *Carolin Hillemanns*, for her competence and resourcefulness, my mentor, Dr. *Andrew Drzemczewski*, for being a guiding light in the darkest of hours, my dear friends, *Pavan Dhillon, Nandor* and *Mandana Knust*, and *Lilja Gretarsdottir*, for their boundless sincerity and generosity, *Meng-Chi Lien* and *Jing Lin* as well as *Ines Hofmann* and *Hildegund Schaab*, from the Max Planck Institute's *Lektorat*, for their time, patience and expertise in formatting matters, the President of the International Institute of Human Rights, *Jean-Paul Costa*, for graciously providing me with a Strasbourg-based office to finalize my manuscript, and finally, Dr. *Inge Onsea, Eleni Chaitidou* and *Nicole Samson*, for their expertise and enthusiasm in the project.

Most of all, I wish to thank my wonderful family, my parents, *Heather* and *Hans Schuetze*, my three brothers, *Christopher*, *Benjamin* and *Jeremy*, and my sisters-in-law, *Claire* and *Shannon*, for their unconditional love, their unwavering faith in me, and for always giving me much-needed perspective; with particular thanks to my dear father, a brilliant scholar, for instilling in me a keen passion for international justice; my darling husband, *Philippe Reymann*, for his unlimited patience and loving encouragement, and my beautiful, lively and ever curious daughter *Amélie*, for inspiring and surprising me every single day; my devoted Godmother, *Wendy Rader-Konofalski*, for always taking interest in my life's projects, and last but not least, to my parents-in-law, *José* and *Fanny Reymann*, as well as *Robert, Diva*, and *Sarah Reymann*, for their continued support and involvement over the years.

Freiburg, August 2015 *Jennifer Schuetze-Reymann*

I wish to dedicate this thesis to our deeply beloved beautiful son *Max*, who died most unexpectedly and tragically at seven months of age. His delightful rosy-cheeked smile and glowing bright blue eyes will continue to live on in our hearts and minds and will guide us *forever*.

Max Frank Reymann (8 August 2013 – 16 March 2014)

Contents

Chapter 2
The referral practice to national courts as a crucial component of the ICTY and ICTR Completion Strategy and legal problems resulting from its implementation

Chapter 3
Possible root causes of legal problems resulting from the implementation of the ICTY/ICTR referral practice to national courts

Chapter 4
The ICTY/ICTR referral practice: impact and possible solutions

Chapter 5
ICTY/ICTR referral practice: What relevance for the ICC?

List of abbreviations

AC	Appeals Chamber
ACHR	African Charter on Human and Peoples' Rights
AFP	Agence France Press
Afr. Stud. Q.	African Studies Quarterly
AI	Amnesty International
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
ASIL	American Society of International Law
ASP	Assembly of States Parties
ASQ	African Studies Quarterly
art.	Article
AU	African Union
BD	Brčko District
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporting Network
CAR	Central African Republic
CC	Criminal Code
CCP	Code of Criminal Procedure
Chi. Kent L. Rev.	Chicago-Kent Law Review
CICC	Coalition of the International Criminal Court
Crim. L. Bull.	Criminal Law Bulletin
Crim. L. F.	Criminal Law Forum
CSIS	Center for Strategic and International Studies
Doc.	Document
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Court of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR	European Court of Human Rights
Ed(s).	Editor(s)
EJIL	European Journal of International Law
ESIL	European Society of International Law
etc.	et cetera
ETS	European Treaty Series
EU	European Union
f.	following
FBiH	Federal Republic of Bosnia and Herzegovina
FICJC	Forum for International Criminal Justice and Conflict
fn.	footnote
GC	Grand Chamber
HJPC	High Judicial and Prosecutorial Council of Bosnia and Herzegovina
HRC	Human Rights Committee
HRW	Human Rights Watch
Hum. Rts. L. Rev.	Human Rights Law Review
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICD	International Crimes Division
ICG	International Crisis Group
ICJ	International Criminal Justice
ICL	International Criminal Law
ICLS	International Criminal Law Services
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTs	International Courts and Tribunals
ICTY	International Criminal Tribunal for the Former Yugoslavia
i.e.	id est
IJTJ	International Journal of Transitional Justice
IMT	International Military Tribunal
int'l	international

Int'l L. J.	International Law Journal
Int'l L. Rev.	International Law Review
Iss.	Issue
IWPR	Institute for war and peace reporting
J.	Journal
JICJ	Journal of International Criminal Justice
JORF	Jounal officiel de la République française
JuS	Juristische Schulung
L.	Law
LRA	Lord's Resistance Army
Mel. J. Int'l L.	Melbourne Jounal of International Law
Mich. L. Rev.	Michigan Law Review
Mil. L. Rev.	Military Law Review
MPI	Max-Planck Institut
mtg.	meeting
NGOs	non-governmental organizations
NILR	Netherlands International Law Review
No./Nos.	number/numbers
N. Y. U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
ODIHR	OSCE Office for Democratic Institutions and Human Rights
O.G.R.R.	Official Gazette of the Republic of Rwanda
OHR	Office of the High Representative
OL	Organic Law
OSCE	Organization for the Security and Co-operation in Europe
OTP	Office of the Prosecutor
p., pp.	page, pages
PACE	Parliamentary Assembly of the Council of Europe
Para.	Paragraph

PRI	Penal Reform International
PRIO	International peace research institute
RB	Referral Bench
Res.	Resolution
Rev.	Review
RoR	Rules of the Road
RPA	Rwandese patriotic army
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RS	Republika Srpska
RULAC	Rule of Law in Armed Conflicts Project
S.C.R	Supreme Court Review
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federal Republic of Yugoslavia
SNJG	National Service of the Gacaca Jurisdictions
SRK	Sarajevo-Romanija Corps
supp.	supplement
Temp. L. Rev.	Temple Law Review
TJR	Transitional Justice Review
TJRC	Transitional Justice and Reconciliation Commission
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICRI	United Nations interregional crime and justice research institute
UNMICT	United Nations Mechanism for International Courts and Tribunals
UNSC	United Nations Security Council
UNSCR	Search Engine for the UNSC Resolutions
UNSCOR	United Nations Security Council Official Records
UNTS	United Nations Treaty Series
UNYB	United Nations Yearbook
USAID	United States Agency for International Development

Vol.	Volume
VRS	Army of Republika Srpska
vs.	versus
WCC	War Crimes Chamber
WSJ	Wall Street Journal
WWII	World War II
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

Introduction

I. Research topic

The 20th century has witnessed the rapid proliferation of a variety of *ad hoc* international and mixed or internationalized criminal courts and tribunals (ICTs), whose creation has been justified by the international community's resolve to punish perpetrators of the gravest international crimes (the so-called core crimes: genocide, crimes against humanity and war crimes) so as to contribute to restoring peace and justice to conflict and post-conflict regions.[1] A comparison between the various international courts and tribunals reveals a range of different justice models, with specific legal frameworks and jurisdictional features determining each tribunal's or court's relationship with relevant sources of law, national judicial institutions and, where applicable, alternative justice mechanisms. The specific contours of the relationship between the various ICTs and relevant national accountability mechanisms continue to be the subject of some uncertainty, not least in light of the fact that national courts have now increasingly begun to prosecute crimes of an international character.[2] This increased prosecution of international crimes by national accountability mechanisms ("nationalization of international criminal law") is also consonant with the jurisdictional set-up of the new permanent International Criminal Court (ICC), which is premised on the understanding that national courts are best suited to prosecute international crimes themselves.

Given the sheer scale of the crimes committed, and the limited resources of the ICTs, it is crucial that these courts function in parallel with national and/or local courts in a pluralistic integrative system of international criminal law. At the same time, parallel judicial activities on the international, national and, in some instances, local levels, are giving rise to an array of complex legal conundrums. Contemporary legal discourse is therefore increasingly focusing on the practical and theoretical implications of a certain "diversification" (frequently also referred to in a

---

[1] These were created directly by or with fundamental involvement of the United Nations Security Council, whose increasingly frequent intervention over the last decade in matters, which are directly or indirectly juridical in nature, inevitably is the result of a general increase in activity since the 1990s.

[2] Indeed, many recent examples demonstrate that national courts are taking on the arduous challenge of prosecuting genocide and modes of participation in genocide. See, for instance, the Canadian Supreme Court's judgment in the *Léon Mugesera* case of 2005: *Minister of Citizenship and Immigration v. Léon Mugesera et al*. (2005) 2 S.C.R. 100, 2005 SCC 40, available at: http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/2273/1/document.do [accessed: 8 July 2014].

more negative sense as "fragmentation") of the body of international criminal law (ICL), not just on an institutional level but on a procedural and substantive one as well.[3]

Many academic contributions have focused on the *deferral* of cases from national courts to ICTs. For instance, the international *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, ICTY and ICTR respectively, are authorized to order national courts to defer cases to them on the basis of the subsidiarity principle. However, less attention has been paid to the opposite occurrence, namely the *referral* of cases from these international tribunals to domestic courts.[4]

The referral practice of the ICTY and ICTR to national courts as a crucial component of the UN-Security-Council-formulated Completion Strategy, which sets a date by which the ICTY and ICTR are meant to wind down definitively trial and appellate activities,[5] illustrates – in a highly concrete manner – various legal challenges arising out of pluralistic accountability mechanisms in the prosecution of interna-

---

[3] These two terms have been employed by the Grotius Centre (Netherlands), which has recently held two conferences on the "Diversification and Fragmentation of International Criminal Law" and has subsequently launched a research agenda on fragmentation of international criminal justice, which has also resulted in a recent publication: *van den Herik*/*Stahn* (eds.), The Diversification and Fragmentation of International Criminal Law. The word "fragmentation" was originally used by the International Law Commission (ILC) in its comprehensive report on the issue as it relates to international law generally, for further information see: Report of the Study Group of the International Law Commission, finalized by *Martti Koskenniemi*, Fragmentation of ICC: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702 [accessed: 8 July 2014]. This research project will employ both terms throughout.

[4] It is noteworthy at this juncture that the term "referral" in the Statutes of the ICTY/ICTR connotes the transfer of a case *from* the international tribunals *to* national states, whereas *deferral* signifies the transfer *from* national courts *to* the tribunals. In the context of the Rome Statute of the ICC, *referrals* and *deferrals* have an altogether different meaning. That is, in the Rome Statute, *referral* connotes the act of a State Party referring a situation in which crimes are allegedly committed *to* the ICC Prosecutor under article 14, whereas *deferral* signifies the act of putting on hold an investigation or prosecution, following the request by the UN Security Council, under article 16.

[5] Set forth in UN Security Council resolutions 1503 (2004) and 1534 (2004). The Completion Strategy generally refers to the method of steadily reducing trial and appellate activities by the date foreseen. The date has been changed on several occasions, and while the most current date for "closure" is 2014, the Completion Strategy report of 2013 indicates that many trials, such as that of *Radovan Karadžić*, for instance, will reach beyond that date. See assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 16 November 2012 to 23 May 2013, Annex I, § 14 f., available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2013_en.pdf [accessed: 21 June 2014]. See also UNSC, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at 5 May 2014, S/2014/343, 15 May 2014, Annex II, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_343.pdf [accessed: 26 June 2014].

tional crimes. In essence, the effective Completion Strategies of the ICTY and ICTR are contingent on the tribunals' very ability to transfer cases and investigative files to national jurisdictions for prosecution. With respect to the former category, one particularly pertinent problem is the disparate definition of core international crimes between the ICTY/ICTR and national legal systems, which can, where these legal systems are directly juxtaposed, engender prosecutorial challenges related to the principle of legality as a vital pre-condition to *jus puniendi*. In fact, the ICTR found the disparity in the definition of crimes between its own constitutive statute and national law to result in incompatibility and thereby to impede the successful transfer of cases to the domestic courts in question.[6] Although the ICTY had significantly more "success" in transferring cases to courts of countries of the former Yugoslavia (notably to Bosnia and Herzegovina, BiH) than the ICTR in the beginning phase of the practice,[7] the national prosecution following referral has unveiled some important divergences. Such discrepancies are particularly apparent in sentencing practices between the ICTY and the BiH State Court (the latter of which is mandated to receive transfer cases) as well as between the various national courts themselves.[8] Other legal problems impeding the successful referral of cases – notably in Rwanda – include national courts' lack of jurisdiction over the crimes in question, and the inability to provide sufficient procedural guarantees (such as fair-trial rights).

Although the ICTY and ICTR have, from the time of their creation, been *ad hoc* in nature, the exact dates and modalities for the termination of their work were proffered only years later by the UN-Security-Council-imposed Completion Strategy. This may explain, in part, some of the legal conundrums that are now being faced as the tribunals are in a race against time to terminate their work. It also suggests that

---

[6] See, for instance, the case of *The Prosecutor v. Bagaragaza*, Decision on Rule 11*bis* Appeal, Case No. ICTR-05-86-AR11*bis*, 30 Aug. 2006.

[7] Eight cases were referred to national jurisdictions, six to BiH, one to Croatia and one to Serbia (status: June 2013). As observed by *Petrig*, the transfer of some of these cases was arguably based purely on formalistic considerations, which did not take into account the reality – both political and judicial – of the referral states, such that in some cases, the referral requests should have been denied. *Petrig*, 45 Crim. L. Bull. 25 (2009).

[8] See, for instance, the *Prosecutor v. Gojko Janković*, Decision on Referral of Case pursuant to Rule 11*bis*, Case No. IT-96-23/2 PT, 22 July 2005; see also the ICTY's discussion in *Prosecutor v. Milan and Sredoje Lukić*, Decision on Referral of Case pursuant to Rule 11*bis* with Confidential Annex A and Annex B, Case No. IT-98-32/1-PT, 5 April 2007, §§ 58–59. See also discussion in *Diekmann/Kerrl*, 8 Int'l. Crim. L. Rev. 100 (2008). In the case of Rwanda, for instance, while the death penalty was abolished, Rwandan courts (including the *Gacaca* courts) impose life imprisonment in isolation, a punishment highly criticized by human-rights-based organizations. See, for instance, Human Rights Watch, Letter to Rwanda Parliament regarding the Penalty of Life Imprisonment in Solitary Confinement, 29 Jan. 2009, available at: http://www.hrw.org/en/news/2009/01/29/letter-rwanda-parliament-regarding-penalty-life-imprisonment-solitary-confinement [accessed: 1 July 2013]; see also in this context, Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda [accessed: 1 July 2013].

the nationalization process – *via* the referral practice – is motivated more by time constraints (and the objective to try a number of "big fish" before ultimately closing their doors) than by efforts to "leverage the benefits of domestic trials".[9] Despite this, the interaction of plural accountability processes, and the interplay of normative actors and sources of law in the adjudication of international crimes, is part of a greater trend in the international criminal justice system, which is becoming increasingly relevant as the ICC starts building its case law. In the different contexts of Bosnia and Herzegovina and Rwanda, this nationalization process, resulting from concerted international efforts to strengthen national accountability mechanisms, has taken the regrettable shape of disjointed and even incoherent criminal law reform, leading to a fragmented legal framework for the adjudication of international crimes. The European Court of Human Rights' (ECtHR) recent judgment in the case of *Maktouf and Damjanović*[10] has by no means clarified this situation. This will be discussed in significant detail in chapters 2 and 3.

A cursory examination of the different experiences in the referral practice by the ICTY and ICTR to national jurisdictions[11] reveals that the legal conundrums must be viewed in a much greater context, that is, against the backdrop of various root causes, notably socio-political factors, all of which are in complex interaction with each other in a legally pluralistic criminal accountability structure. In both BiH and Rwanda, international, national, and local judicial processes are actively engaged in war crimes prosecutions at various levels. Emblematic of the "nationalization of the accountability process",[12] the referral practice of the ICTY and ICTR lends itself well to a detailed examination as it evinces the complex interplay between normative actors, legal orders, sources of law and other normative projections, against the backdrop of a growing debate regarding the diversity of international criminal law norms.

---

[9] *Petrig*, 45 Crim. L. Bull. 9 (2009).

[10] *Maktouf and Damjanović v. Bosnia and Herzegovina* (GC), Nos. 2312/08 and 34179/08, 18 July 2013, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716 [accessed: 1 July 2014].

[11] The ICTY has transferred eight cases to countries of the former Yugoslavia. In the beginning the ICTR managed to transfer only two cases (to France). After failed attempts with Rwanda, Norway and the Netherlands, the ICTR has now succeeded in transferring eight cases to Rwanda. With a total of ten cases transferred, the ICTR has in the meantime transferred more cases than the ICTY.

[12] *Petrig*, 45 Crim. L. Bull. 8 (2009).

II. Research objectives and scope

While the referral of cases from the *ad hoc* international criminal tribunals to national judicial institutions appears to be a useful mechanism *in theory*, its *practical* implementation is at times accompanied by some rather adverse results. In light of the fact that the referral practice is a novel instrument of "highly experimental character",[13] the legal complexities resulting from its implementation have not been subject of much in-depth academic analysis to date.[14]

Although the referral practice sheds light on the diversification or fragmentation of ICL norms on a number of levels, this project's primary focus will be on the substantive aspects of this phenomenon, namely the interaction between different legal systems and norms in the prosecution of international crimes. In light of the fact that this complex interplay is intricately tied to the functional relationship between international and national courts adjudicating international crimes, some discussion of this relationship is inevitable as it sets the backdrop against which the referral practice must be viewed. This discussion, however, will be marginal.

While this research project focuses on the practical parameters of one relevant aspect of the *ad hoc* tribunals' Completion Strategy, the issues and considerations arising therefrom are emblematic of the complexities resulting from an increased legal pluralism in the international criminal law sphere as a consequence of the nationalization process generally. Consequently, and drawing on the analysis of the concrete referral practice from the ICTY and ICTR to national courts, this project's ultimate goal is to participate – to some small extent – in a much broader discussion about legally pluralistic interactions in international criminal law today.

As a result of the foregoing, this research project's four main research objectives are the following:

(1) The research project's *first research objective* is to identify the most significant substantive and procedural legal issues that have arisen in the implementation of the referral practice to national courts both *pre*-transfer, and to the extent relevant, *post*-transfer.

For the purposes of this study, *referral* shall be construed broadly to describe both the transfer of cases, requiring a judicial decision under rule 11*bis* of the Rules of Procedure and Evidence (RPE), as well as the transfer of investigative files (the

---

[13] *Ibid*., 25.

[14] It is noteworthy that while at the beginning of this research project, little in-depth academic research appeared to exist on the topic. By the time of its conclusion in 2014, this topic had attracted more attention in the academic world (see in this context: *Lindemann*, Referral of Cases from International to National Criminal Jurisdictions). A particularly interesting aspect of *Lindemann*'s project is her exploration of the applicability of extradition law to ICTY and ICTR referrals, and the influence of the referral practice, notably in the context of the ICTR, on national extradition decisions of genocide suspects to Rwanda (see in particular pp. 188 ff., 213 ff.).

so-called "category II" cases in the ICTY context), which is based on Prosecutorial discretion and which is administrative in nature.[15] These files can either be trial-ready or in need of additional investigations before adjudication by domestic courts of referral states.[16] As will be discussed, the distinction between these two categories of "cases" has a decisive impact on the extent to which the *ad hoc* tribunals can participate in the adjudication of the crimes at the national level.

In support of the *first research objective* (chapter 2), this research project will examine formal criteria for referral under rule 11*bis* RPE, which comprise the need for a jurisdictional basis on the part of a referral state (including through universal jurisdiction), procedural aspects, such as adequate fair-trial guarantees, and additionally, in the context of the ICTY's rule 11*bis* RPE, the substantive aspect of the gravity of the crimes and the level of responsibility of the accused. The latter set of criteria acts as a bar against transfer to national jurisdictions, criteria also prominently reflected in the Rome Statute as a threshold for admissibility of a case before the ICC. The ICTR's rule 11*bis* RPE does not include these criteria, and any examination thereof in the case law has to date been entirely absent. Nevertheless, the ICTR Completion Strategy Report of May 2007 states that in coming to a decision about which individuals to try at the ICTR, "the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership and those who allegedly bear the greatest responsibility for the genocide."[17] In examining these dual criteria closely, some interesting trends may be gleaned about the profile of persons being prosecuted at the international as opposed to the national level. The relevance of this issue is particularly apparent in the ICTR context, where members of the Rwandan Patriotic Front (RPF), who are allegedly responsible for a large number of killings immediately following the 1994 genocide, have not been indicted by the ICTR.[18]

Although not explicitly stated in the ICTY and ICTR's rule 11*bis* RPE, but prominently discussed by the respective ICTY and ICTR referral benches, preconditions for the referral of a case include another substantive aspect, which will be subject of extensive analysis in chapters 2 and 3, namely the need for an adequate

---

[15] *Møse*, 6 JICJ 672 (2008). While the ICTR felt unable to transfer cases to national courts in Rwanda under rule 11*bis* RPE, the Prosecutor transferred a total of 60 investigative files to Rwanda and one to Belgium.

[16] *Ibid*., 672.

[17] ICTR Completion Strategy Report, S/2007/323, 31 May 2007, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Tribunals%20S2007%20323.pdf [accessed: 2 July 2013], § 15.

[18] See in this context the exchange of letters between Human Rights Watch and ICTR Chief Prosecutor, *Hassan Jallow*, available at: http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime [accessed: 19 June 2013].

legal framework, which "criminalizes the alleged conduct of the accused and provides an adequate penalty structure" at the national level.[19]

In light of the fact that the ICTY and ICTR may monitor the judicial proceedings of transferred cases in receiving states under rule 11*bis* (D)(iv) of both tribunals' RPE, this research project will incorporate an analysis of these national proceedings post-referral, where relevant, into its research ambit. The monitoring function is not only crucial to avoid unfortunate discrepancies in the treatment of these cases, but has concrete relevance by virtue of rule 11*bis* (F), under which the Referral Bench may, before the accused is found guilty or is acquitted by a national court, ask for an already transferred case to be deferred back to the Tribunal. Questions about what recourse, *if any*, the Tribunals have, *after* the national court's decision has been rendered, such as where the punishment is inadequate, or where the verdict does not reflect the evidence, are dubiously left unanswered in the rule itself.

Underlying this *first research objective* is the working hypothesis that rule 11*bis* RPE and its judicial interpretation have been at least partially inadequate to meet the various challenges posed by this complex process.

(2) Based on the examination carried out pursuant to the *first research objective*, this project's *second research objective* (chapter 3) will be to scrutinize some possible root causes behind the aforementioned legal conundrums.

Although the ICTY has also transferred cases to other countries of the former Yugoslavia, namely one case to Croatia, and one case to Serbia (the latter of which was never tried due to the fact that the accused, *Kovačević*, was deemed unfit to stand trial),[20] the great majority of its cases have been sent to Bosnia and Herzegovina (BiH), the place where the bulk of the crimes in question were committed. As a result, the focus of this research project is on Bosnia and Herzegovina's experience with prosecuting such crimes, notably that of the BiH State Court to which such transfers were made.

While the relationship between international and national judicial mechanisms is inevitably complex and gives rise to a myriad of different considerations of relative weight, depending on the particular situation, some general tendencies can nevertheless be gleaned when analysing and comparing the singular contexts of Bosnia and Herzegovina and Rwanda. The causes for arising legal conundrums can be divided into two general categories: *normative* and *contextual*.

Normative causes include, *inter alia*, the use of different legal traditions, norms, and sources of law. *Contextual* causes include, *inter alia*, the presence of a working

---

[19] *Prosecutor v. Bagaragaza*, Decision on Rule 11*bis* Appeal (AC), Case No. ICTR-05-86-AR11*bis*, 30 Aug. 2006, § 9.

[20] *Prosecutor v. Vladimir Kovačević*, Decision on Referral of Case under Rule 11*bis*, Case No. IT-01-42/2-I, 17 Nov. 2006.

and independent judiciary as well as financial and logistical assistance from the international community.

While it is understood that the conceptual frameworks of both fora are distinct in many fundamental ways, an inquiry will be made on what basis such a "mechanical" transfer can be justified without compromising important legal notions, such as the principle of legality and the right to equality before the law. The working hypothesis in chapter 3 is therefore that a mechanical transfer of cases from the international to national forum, without consideration of the comprehensive (socio-political) context in which the referral practice is embedded, presents difficulties to the effective implementation thereof.

(3) The project's *third research objective* (chapter 4) is to devise lessons learned from the ICTY and ICTR referral practice and to formulate tangible solutions to some of the legal conundrums identified *(first research objective)*, based on a careful, albeit non-exhaustive, examination of possible root causes *(second research objective)*. Viewing the referral practice as a symbol for the shifting dynamic between the main actors (ICTs and domestic courts) in the adjudication of international crimes, in turn, will allow for a better understanding of the interaction of pluralistic accountability processes.

Underlying this *third research objective* is the working hypothesis that despite the inevitable diversity between international and national criminal law norms (*basic assumption*) and the fact that some solutions will be case-specific,[21] the body of international law dictates a minimum standard of fundamental human rights, including fair-trial rights, which are applicable to *all* transfer cases, irrespective of the country of referral. In this context, this research project will explore whether and upon what basis states are under an obligation to incorporate core international crimes into their domestic legislation and to provide for adequate punishment structures, an issue which has taken centre stage preceding and following the coming into force of the Rome Statute of the ICC. The *first research objective* will already provide some discussion of this issue in the concrete context of the referral practice. What "margin of appreciation" individual states have to divert from such standards (even to go further than the international ones), however, is far from clear in present-day legal discourse[22] and merits a brief analysis in the scope of this

---

[21] For instance, in the concrete setting of Rwanda, one solution has been to await an authoritative clarification about the interplay between relevant laws (the Transfer Law, March 2007, on the one hand and the Death Penalty Abolition Law, July 2007, on the other), so as to indicate which respective penalty structure (imprisonment vs. imprisonment in isolation) is applicable to transfer cases.

[22] The "margin of appreciation" has been coined by the European Commission and European Court of Human Rights and plays a prominent role in the jurisprudence of the ECtHR. One prominent author argues that reliance on this doctrine impedes unity of international norms at the European level. For a critical appraisal of this doctrine see: *Benvenisti*, 31 N.Y.U. J. Int'l L. & Pol. 843 (1998–1999).

research project. In this sense, the discussions may glean some insight into the ardent debate about the "ideal" international criminal justice model.

Another aspect that will be briefly examined is how the referral practice can contribute to the achievement of the assorted (and highly ambitious) aims of the international criminal courts, notably the secondary goals of promoting national reconciliation. To this end, a discussion must consider the overall merits of sending cases back to the country where the conflict occurred versus sending them to "neutral" third countries.

(4) The research project's *fourth research objective* (chapter 5) is to ascertain the pertinence of the ICTY and ICTR experience for the work of the ICC, the latter of which could face a number of similar referral-related legal issues in the future. Underlying this research objective is the working hypothesis that the referral practice bears great relevance for the future work of the ICC. Situations in which referral to national systems may become relevant include: 1) case referral following a successful challenge by a state to the ICC's admissibility under article 19 of the Rome Statute, 2) case referral as part of an ICC Completion Strategy to end a situation, and 3) referral of investigative materials and other evidence under article 93(10) of the Rome Statute. Not only do these three referral scenarios have a formal basis in the ICC legal framework, but recent ICC case law has already deliberated referral in the first and third scenarios listed above.[23]

III. Research methodology and proceedings

In a first step, and in a highly preliminary manner, in order to convey the context in which the referral practice is embedded, the introduction includes a brief description of the goals of the ICTY and ICTR, justifications for their establishment, the formal relationship between the ICTY and ICTR, and the respective national

---

[23] *First scenario:* See in this context Situation in Libya: Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11, 11 Oct. 2013, available at: http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf [accessed: 10 June 2014]. See also: Situation in Libya: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdulla al-Senussi, ICC-01/11/-01/11, 11 Oct. 2013. *Third scenario:* In this context see Situation in Kenya: Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-63, 29 June 2011, available at: http://www.icc-cpi.int/iccdocs/doc/doc1100546.pdf [accessed: 10 June 2014], §§ 33–34. See also Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-97, 12 July 2012, available at: http://www.icc-cpi.int/iccdocs/doc/doc1440979.pdf [accessed: 10 June 2014], § 17.

accountability mechanisms. To this end, this research project briefly examines the provisions of the constitutive Statutes of these international tribunals, and where relevant, case law. As noted previously, a comparison between the jurisdictional framework of the *ad hoc* tribunals and the permanent ICC is of some importance in this context as it lays the groundwork for the discussion about the relevance of the ICTY/ICTR referral practice to the ICC.

In order to identify the various legal problems arising prior to the transfer of cases from the *ad hoc* tribunals to national courts (*first research objective*, chapter 2), an analysis of judicial decisions on the various criteria set forth in the oft-amended rule 11*bis* of the respective tribunals' Rules of Procedure and Evidence will be undertaken. Aspects of publicly available transcripts of deliberations throughout the judicial proceedings, which are oftentimes lengthy and detailed, as well as other relevant legal documents are examined where relevant.

Due to the fact that legal problems, notably in the ICTY context, are thoroughly discussed and dealt with in judicial decisions (referral decisions) and deliberations (transcripts), an in-depth analysis primarily of these judicial sources is most suitable to effectively achieve the *first research objective*.

To further supplement the initial research phase, face-to-face interviews have been undertaken with practitioners (judges and prosecutors) who work directly with the referral of cases and investigative files at the ICTY and ICTR and those working at the national level with rule 11*bis* RPE cases. A research visit to the ICTY in The Hague was made in October 2009, and an interview with the War Crimes Unit of the State Prosecutor's Office in Paris, France, was held in October 2011. Telephone interviews and extensive email communications with various experts from the ICTY and ICTR (both the Office of the Prosecutor and Chambers), national courts and national prosecutors' offices, as well as OSCE staff members have been carried out throughout the entire research period. The primary purpose of these interviews was to gain background information in the initial research phase on the modalities of the ICTY and ICTR referral practice, and to explore significant problems encountered throughout, so as to more concretely focus the research objectives of the project. Of the thirteen interviews conducted, only one interview led to information relied upon in this research project, which was not otherwise readily available through publicly redacted sources.[24]

In a second step, in seeking to assess possible root causes behind the aforementioned legal conundrums *(second research objective)*, a broad analysis of relevant documents, such as academic contributions, NGO reports and empirical studies, has been embarked upon, and some discussions with experts were held. At this

---

[24] Interview with a member of the French War Crimes Unit of the State Prosecutor's Office, Paris, October 2011 [interview transcript with author], see also footnotes chapter 3, I.B.4. However, no confidential information was obtained in the course of the interview, nor have any statement or personal views expressed in the interview been directly cited.

juncture, it must be stated that throughout much of the research phase, a number of major difficulties were encountered with regard to access to information. In the context of the former Yugoslavia, locating reliable translations of legal documents (notably old codes and laws) proved to be a very cumbersome and time-consuming undertaking. In the context of Rwanda, locating transcripts and/or local information about the *Gacaca* justice system (the *Gacaca* court system's official website having been shut down definitively in early 2012) significantly hampered the research process.

In a third step, in attempting to glean "lessons learned" and to devise possible tangible solutions to the practical conundrums identified in the *third research objective*, this research project relies on relevant documents, such as academic contributions, NGO reports, empirical studies (where available) and discussions held with experts.

In this context, certain questions will be evoked in the specific context of the ICTY and ICTR referral practice that could in turn be relevant for a more general debate about pluralistic interactions of different legal systems and norms in international criminal law. Complex questions surrounding the relationship between international and national/local criminal law norms against the backdrop of an increasingly inter-connected global legal community include, *inter alia*, the impact of international criminal accountability mechanisms on national reconciliation, and the scope to which genuine diversity can and should be made compatible with a certain degree of uniformization. To this end, chapter 4 draws on findings made in the first three research objectives, as well as upon jurisprudence emanating from the ICTY and ICTR generally, commentaries thereto, as well as NGO reports and empirical studies.

In a fourth step, in attempting to ascertain the relevance of the ICTY/ICTR experience for the work of the ICC, despite its different jurisdictional features *(fourth research objective)*, the research project engages in large part in a textual analysis of the Rome Statute.

Chapter 1

The international criminal courts and tribunals and their relationship to national accountability mechanisms

I. The core mandates and current practice of the ICTY and ICTR

A. Contextual background

1. The former Yugoslavia

The term "former Yugoslavia" refers to the territory that was known as the Socialist Federal Republic of Yugoslavia (SFRY).[1] Composed of six republics, Bosnia and Herzegovina (BiH), Croatia, Macedonia, Montenegro, Serbia and Slovenia, the SFRY broke up following the declarations of independence of Croatia and Slovenia on 25 June 1991.[2] Macedonia declared independence on 8 September 1991, BiH on 3 March 1992.[3] Serbia and Montenegro, the two remaining republics, formed the Federal Republic of Yugoslavia on 27 April 1992.[4]

While the complex history of this former multi-ethnic state remains beyond the confines of this section, suffice it to say that the BiH's declaration of independence in March 1992, following a referendum, can be considered the trigger that set a brutal war in motion between Serb, Croat and Bosniak populations.[5] That is, shortly following BiH's declaration of independence, in April 1992, the Yugoslav People's Army and Bosnian Serb paramilitary forces descended into BiH, took control of a majority of the territory, and declared their own *de facto* independent state: the *Republika Srpska*.[6] The war that ensued was initially fought between a majority of Bosnians in the Army of the Republic of BiH and Bosnian Serb forces of the Army of the Republika Srpksa.[7] Bosnian Croats were themselves interested in the territory;

---

[1] ICTY website, http://www.icty.org/sid/321 [accessed: 21 June 2014].

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] The Center for Justice and Accountability, available at: http://www.cja.org/article.php?id=247 [accessed: 1 July 2013].

[7] Insight on Conflict, BiH, available at: http://www.insightonconflict.org/conflicts/western-balkans/conflict-profile/ [accessed: 1 July 2013].

backed by Croatia, they also declared their own *de facto* republic.[8] As such, essentially, the state was largely divided along ethnic lines, with separate armies fighting for territories on behalf of each of the three main ethnic groups, the Serbs, Croatians and Muslim Bosniaks.[9] Civilians from all sides became victims of a large array of horrific crimes.[10]

Widely considered one of the most brutal wars in Europe since the Second World War,[11] it is estimated that 150,000 to 250,000 persons were killed,[12] in addition to contributing to a mass uprooting and displacement of populations.[13] Furthermore, abductions and enforced disappearances[14] as well as the organized and systematic enslavement, torture (and rape) of women on a mass scale were carried out.[15] As noted by *Hartmann*, "the conflict in Bosnia and Herzegovina [...] has come to be seen as the model for wars of ethnic cleansing throughout the world."[16] According to her, "this 'cleansing' was the goal of the war, not the unintended consequence. It was not the inability of the different ethnic groups to live together that brought on the conflict, but rather the political aim of separating them."[17]

The ongoing commission of wide-scale crimes on the territory of the former Yugoslavia, notably in Bosnia and Herzegovina, led the international community to establish an international criminal tribunal in 1993 with the mandate to prosecute persons for serious violations of international humanitarian law, which had occurred on this territory since 1 January 1991, and thereby to "put an end to such crimes"[18] and

---

[8] ICTY website: http://www.icty.org/sid/321 [accessed: 21 June 2014].

[9] Insight on Conflict, BiH, available at: http://www.insightonconflict.org/conflicts/western-balkans/conflict-profile/ [accessed: 1 July 2013].

[10] ICTY website: http://www.icty.org/sid/322 [accessed: 21 June 2014].

[11] *Hartmann, Florence*, Bosnia. Crimes of War, 2011. Available at: http://www.crimesofwar.org/a-z-guide/bosnia/ [accessed: 20 June 2013].

[12] While the Sarajevo-based Research and Documentation Centre estimates the final figure not to exceed 150,000, the majority of the estimates range between 200,000 and 250,000. Source: OSCE, War Crimes Trials, p. 3, fn. 2.

[13] *Ibid.*, p. 3.

[14] Amnesty International, The Right to Know [accessed: 8 July 2014].

[15] UNSC resolution 827, S/RES/827 (1993) 25 May 1993, § 3, available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf [accessed: 16 May 2013]. See, for example, ICTY press release, Gang rape, torture and enslavement of Muslim women charged in ICTY's first indictment dealing specifically with sexual offences, CC/PIO/093-E, 27 June 1996, available at: http://www.icty.org/sid/7334 [accessed: 7 Feb. 2013]. See also the following Amnesty International report: Media Briefing, Amnesty International's work in Bosnia and Herzegovina, AI Index: EUR 63/014/2012, 19 Oct. 2012, available at: https://www.amnesty.org/en/documents/eur63/014/2012/en/ [accessed: 7 Feb. 2013].

[16] *Hartmann, Florence*, Bosnia. Crimes of War, 2011. Available at: http://www.crimesofwar.org/a-z-guide/bosnia/ [accessed: 20 June 2013].

[17] *Ibid.*

[18] UNSC resolution 827, preamble.

to ultimately "contribute to the maintenance and restoration of peace".[19] The ICTY represents the first international criminal accountability mechanism since the Nuremberg and Tokyo tribunals following World War II.

While in the beginning it was unthinkable that national courts would be in a position to prosecute atrocities nationally, the idea was that the ICTY would function in parallel with national courts and would have *primary* but *concurrent* jurisdiction regarding these national courts.[20] This jurisdictional arrangement will be discussed in more detail below.

Indeed, the ICTY's establishment was the first in a line of actions taken by the international community to respond to the war in the former Yugoslavia. That is, on the political plain, in 1995, the *General Framework Agreement for Peace in Bosnia and Herzegovina* (also known as the *Dayton Accord*, *Dayton Peace Agreement*, *Paris Protocol* or *Dayton-Paris Agreement*)[21] was negotiated under the auspices of the Contact Group (a six-nation grouping created in response to the conflict in the Balkans)[22] and put a halt to the three-and-a-half-year conflict. In particular, it set up a central multi-ethnic democratic government with a rotating Presidency (composed of three members, each from one of the three main ethnic groups respectively) as well as a two-entity state: the joint Bosniak-Croat Federation of Bosnia and Herzegovina on the one hand, and the Bosnian-Serb-led Republika Srpksa on the other.[23] Both entities have separate presidents and governments (including parliaments, judiciaries, police forces, etc.).[24] The Office of the High Representative (OHR), which was set up under the Dayton Accord, is mandated to oversee the implementation of civilian aspects thereof.[25] The OHR can therefore be seen as a sort of international

---

[19] *Ibid.*

[20] ICTY statute, article 9.

[21] As the name suggests, the Dayton Agreement was negotiated in Dayton, Ohio, and signed in Paris on 14 December 1995.

[22] The Contact Group, which was formed in April 1994, is made up of six countries, namely the US, Russia, Britain, France, Germany and Italy and coordinates policies regarding the conflict in the former Yugoslavia. See in this context: AFP News item, Six-nation Contact Group discusses Balkan tensions in Paris, 11 April 2001, available at: http://www.balkanpeace.org/index.php?index=article&articleid=7069 [accessed: 23 June 2013].

[23] UN Mission in BiH, Background, available at: http://www.un.org/en/peacekeeping/missions/past/unmibh/background.html [accessed: 2 July 2013].

[24] *Ibid*.

[25] 1(a) of Annex 10 of the Dayton Peace Agreement stipulates that "The High Representative shall: Monitor the implementation of the peace settlement"; further, article V constitutes that "The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement." See: http://www.ohr.int/?page_id=63269 [accessed: 20 June 2013].

protectorate in BiH. An independently governed and multi-ethnic administrative unit, the *Brčko District*, was also established by the Dayton Accord.[26]

Instead of appeasing ethnic tensions over time, however, criticism has been voiced over the fact that the Dayton Accord has actually reinforced such tensions by "establishing a loose federation along ethnic lines."[27] Indeed, on the 20th anniversary of the start of the Bosnian war, there are still disquieting reports about ethnic tensions running high. Human Rights Watch details in a report that "ethnic fissures in Bosnia's political landscape have grown deeper and more pronounced."[28]

While the BiH judicial system slowly started prosecuting war crimes cases at the national level following the establishment of the ICTY, many difficulties accompanied this task. A report from the Organization for the Security and Co-operation in Europe (OSCE) details the many juridical and logistical challenges facing these trials in the early days following the conflict, due, *inter alia*, to the two-entity state, which was built on two different legal systems and relied on separate law enforcement agencies and government bodies, including ministries of justice.[29] As noted by the OSCE:

> "…ineffectual investigations, excessive and systematic delays in the resolution of trials and dubious decisions, compounded by a lack of public faith in the judicial system, brought into serious question the applicability of the rule of law."[30]

The international community's fear over arbitrary arrests and unfair trials in the early days of post-conflict BiH led to the adoption of the *Rome Agreement* (a tripartite political agreement signed between BiH's President *Izetbegović*, Croatia's President *Tuđman* and the Federal Republic of Yugoslavia's President *Milošević* on 18 February 1996).[31] This agreement foresaw an international oversight mechanism for crimes investigated and prosecuted nationally.[32] In particular, the "Rules of the Road" (RoR), annexed to the *Rome Agreement*, ensured that the ICTY would review and approve the planned arrest and indictment by the relevant authority by advising whether or not "the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect, or the continued detention of a prisoner".[33] The

---

[26] Dayton Accord, article V, available at: http://www.ohr.int/?page_id=1252 [accessed: 20 June 2013].

[27] *Gall, Lydia*, Too little to celebrate – Dayton Continues to Fail Bosnia's Minorities. Human Rights Watch, 21 Nov. 2012, available at: http://www.hrw.org/news/2012/11/21/too-little-celebrate-dayton-continues-fail-bosnia-s-minorities [accessed: 20 June 2013].

[28] Human Rights Watch, Justice for Atrocity Crimes [accessed: 20 June 2013], p. 3.

[29] OSCE, War Crimes Trials, p. 4.

[30] *Ibid.*, p. 5.

[31] Rome Agreement, available at: http://www.nato.int/ifor/rome/rome2.htm [accessed: 24 June 2013].

[32] OSCE, War Crimes Trials, p. 5.

[33] *Ibid.*, p. 5. Due to lack of access to annexes of the Rome Agreement of 18 May 1996, a secondary source was relied upon for this citation.

planned closure of the ICTY, originally foreseen to take place in 2010,[34] however, led to the revocation of the international monitoring mechanism (RoR procedures), such that the Prosecutor's Office of BiH took over the review of cases at national level from that point forward.[35] From this time onwards therefore, there was a marked increase in trials at national level, despite the fact that, as the OSCE laments, a significant backlog of war crimes cases in BiH remains.[36]

In 2003, an internationally supported and funded State Court was created in BiH (BiH State Court), and following the ICTY Completion Strategy's urgent recommendation,[37] a specialized War Crimes Chamber (WCC) was established and made operational in 2005, *inter alia*, in order to facilitate the transfer of cases from the ICTY.[38] A vital aspect of this Court's mixed international/national nature was the initial presence of international judges, a presence that has been contentious over the years.[39] This latter aspect will be discussed in more detail in chapter 3.

The ICTY and BiH State Court therefore function in parallel with purely national courts, of which there are the cantonal and municipal courts (Federation of BiH), district and basic courts *(Republika Srpska)* and the Basic Court of Brčko District.[40] In addition, article VI(3)(b) of the BiH Constitution grants the BiH Constitutional Court appellate jurisdiction concerning constitutional issues that come up as part of a decision of any BiH court.[41] The Constitutional Court has on numerous occasions been appealed to in the context of war crimes cases from the BiH State Court. While the ICTY has primary jurisdiction over national courts, its relationship vis-à-vis these courts is "*concurrent* rather than *exclusive*."[42]

---

[34] UNSC resolution 1503 (2003), preamble.

[35] OSCE, War Crimes Trials, p. 5.

[36] OSCE website: http://www.oscebih.org/Default.aspx?id=70&lang=EN [accessed: 24 June 2013].

[37] UNSC resolution 1503 (2003), preamble. Paragraph 11 of preamble stipulates: "Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber')."

[38] For more information, see the official website of the BiH State Court: http://www.sudbih.gov.ba/?jezik=e [accessed: 5 June 2013].

[39] *Šarić, Velma*, Bosnia: Future of International Judges and Prosecutors in Doubt, available at: http://iwpr.net/report-news/bosnia-future-international-judges-and-prosecutors-doubt [accessed: 3 July 2013].

[40] High Judicial and Prosecutorial Council of BiH, Chart Judicial Structure of BiH, Communications with Spokesperson of High Judicial and Prosecutorial Council on 8 Jan. 2013.

[41] Constitution of the Federation of Bosnia and Herzegovina, 18 March 1994, article VI(3)(c), available at: http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/FBH/FBH%20CONSTITUTION%20FBH%201-94%20and%2013-97.pdf [accessed: 7 May 2013].

[42] OSCE, Delivering Justice in BiH [accessed: 10 April 2014], p. 5.

As chapter 3 will illustrate in detail, complicating the already highly complex governance structure of BiH is the fact that both entities (BiH's Bosniak-Croat Federation and the Bosnian-Serb-led *Republika Srpska*) have a separate legal framework and court system, which is problematic regarding the uniform prosecution of war crimes at the national level.[43] In other words, each entity's multi-leveled court system (at the cantonal, district and municipal level) applies different laws and legal codes for the prosecution of war crimes.[44] Despite the fact that the 2008 National War Crimes Strategy seeks to resolve these problems in BiH, great discrepancies continue to exist between the various courts, which are by no means resolved by recent ECtHR case law on the applicable law in *Maktouf and Damjanović*. The fact that a national referral practice from the BiH State Court to cantonal courts has been implemented to help alleviate the heavy caseload of the BiH State Court, serves to further aggravate this uneasy relationship.

2. Rwanda

The 1994 genocide in Rwanda claimed the lives of between 800,000 and 1,000,000 ethnic Tutsi and moderate Hutus at the hands of Hutu militia and government forces in a three-month period alone,[45] although it is generally accepted that the preparation of the genocide started significantly before that time.[46] Considerable tension between the Hutu majority and Tutsi minority and many complex sociopolitical factors and events preceded the genocide.[47] However, the actual genocide is said to have started on 7 April 1994, a day after the plane carrying the Presidents of Rwanda and Burundi, *Juvenal Habyarimana* and *Cyprian Ntayamira*, returning from negotiating a peace agreement between the predominant Hutu-led government and the Tutsi-minority-led rebel army,[48] was shot down over Kigali. The nearly 100-day period was not only marked by killings on a massive scale, but by heinous acts

---

[43] OSCE, War Crimes Trials, p. 4.

[44] OSCE, Delivering Justice in BiH, pp. 70–71.

[45] Outreach Programme on the Rwanda Genocide and the United Nations, available at: http://www.un.org/en/preventgenocide/rwanda/about/bgpreventgenocide.shtml [accessed: 25 June 2013].

[46] The fact that the military tribunals and *Gacaca* courts had jurisdiction over crimes committed during the genocide for a significantly longer period (from 1991 to 1994) is confirmation thereof. See also in this context: Human Rights Watch, briefing report, The Rwandan Genocide: How it was prepared [accessed: 25 June 2013]. See also: Human Rights Watch, Genocide in Rwanda, April – May 1994 [accessed: 25 June 2013], p. 2.

[47] See Human Rights Watch, The Rwandan Genocide; see also *Des Forges*' (HRW) extremely detailed report, Leave None to Tell the Story [accessed: 25 June 2013]; and Hirondelle News Agency, available at: http://www.hirondellenews.com/images/therwanda genocide.pdf [accessed: 25 June 2013].

[48] For more information on the Arusha Peace Accord, see Government of Rwanda website: https://peaceaccords.nd.edu/sites/default/files/accords/Arusha_Peace_Accord____.pdf [accessed: 2 July 2013].

of torture, mutilations, rape, and sexual-violence crimes, all of which were committed for a common purpose, namely to exterminate the Tutsi ethnic group.[49] Nearly three quarters of the Tutsi ethnic group did in fact perish during the genocide.[50]

The genocide ended when the Rwandan Patriotic Front (RPF) (a Tutsi-led army) defeated the interim Hutu government and army in July 1994.[51] The RPF soldiers have been accredited with ending the brutal genocidal spree of the Hutu extremist government and militia. However, the track record of their own brutal crimes committed against innocent civilians following the genocide is well-documented and can be considered no less grave, despite the fact that the level of planning of such crimes was considerably less complex than the genocidal campaign waged by the Hutu extremists.[52] The fact that the ICTR has not indicted any individual for RPF crimes – despite abundant evidence thereof – has been subject of much controversy, and has led to accusations, notably on the part of Human Rights Watch, of one-sided justice.[53]

Given both the great volume of crimes committed and the astonishingly high number of potential perpetrators (representing just a little under half of the adult Hutu male population in 1994)[54] as well as the virtual destruction of the Rwandan justice system (including the deaths of a majority of legal professionals),[55] Rwanda's legal system was wholly incapable of taking on the mammoth task of prosecuting crimes nationally.

While the international community, including the United Nations, passively stood by without taking any concrete action, despite early warning signs of a pending genocide,[56] the international community eventually expressed "its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law" had been committed, and deemed this situa-

---

[49] *Des Forges*, Leave None to Tell the Story [accessed: 25 June 2013]. See also: Human Rights Watch, Shattered Lives [accessed: 20 Sept. 2011].

[50] *Ibid.*, Executive Summary.

[51] *Ibid*., chapter: The Rwandan Patriotic Front, http://www.hrw.org/reports/1999/rwanda/Geno15-8-03.htm [accessed: 26 June 2013].

[52] *Ibid*.

[53] See in this context the exchange of letters between Human Rights Watch and ICTR's Chief Prosecutor, *Hassan Jallow*, available at: http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime [accessed: 19 June 2013].

[54] Human Rights Watch, Rwanda Country Summary, available at: http://hrw.org/wr2k6/pdf/rwanda.pdf [accessed: 20 Sept. 2011], p. 1. National Service of Gacaca Jurisdictions (SNJG): http://www.inkiko-gacaca.gov.rw/pdf/Achivements%20in%20Gacaca%20Courts.pdf [accessed: 21 Sept. 2011].

[55] Human Rights Watch, Justice Compromised, pp. 13 ff.

[56] *Des Forges*, Leave None to Tell the Story [accessed: 25 June 2013], Executive Summary.

tion to "constitute a threat to international peace and security", warranting the establishment of an international tribunal to try the genocidal masterminds.[57] As a result, the International Criminal Tribunal for Rwanda (ICTR) was created in November 1994 by United Nations Security Council resolution 955.[58]

Much like the ICTY, the idea was that the ICTR would take on the arduous task of prosecuting high-level perpetrators, while national efforts at rebuilding the justice system would take place on a parallel plain. Again like the ICTY, the ICTR has *primary* but *concurrent* jurisdiction vis-à-vis these national courts.[59]

As chapters 2 and 3 will illustrate in some detail, the fact that the international community was not as proactive in assisting the re-building of the Rwandan legal system as it was in the context of the former Yugoslavia, has several reasons, which are beyond the scope of this section. When Rwanda *did* start prosecuting genocide crimes at the national level, a number of significant legal problems arose, which the ICTR implementation of the referral practice ultimately exposed. Like in the context of BiH, many of the difficulties have to do with the fact that a multitude of different courts prosecuting genocide-related crimes were functioning at a parallel level, having different jurisdictional arrangements and drawing on different laws. Such a set-up bears the inevitable risk of endangering important legal notions, such as legal certainty and equality before the law.[60]

Contrary to BiH, however, in Rwanda, the added complexity is that the multitude of accountability mechanisms are of a fundamentally different nature and philosophy altogether: on the one end of the spectrum, there are the conventional criminal courts, the Rwandan High Court, an ordinary court, which is mandated to receive ICTR transfer cases, and the military courts, specialized courts, which had exclusive jurisdiction over the most serious genocide-related cases ("category 1" cases) until 2008, *except* for ICTR transfer cases. A crucial distinction must be made between the aforementioned "category 1" cases, which refer to the highest category of genocide-related crimes as designated by the Rwandan judicial system on the one hand, and "category II" cases of the ICTY, which are investigative files that have not led to an indictment yet and are subject to its referral practice as part of the Completion Strategy. On the other hand of the spectrum are the *Gacaca* courts, specialized and informal courts based on community practice (discussed in more detail below).

---

[57] UNSC resolution 955 (1994), preamble §§ 4–5.

[58] *Ibid*.

[59] Article 8, ICTR Statute.

[60] BiH National War Crimes Strategy, December 2008, available at: http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf [accessed: 5 May 2013], p. 4.

While this research project does not intend to discuss in detail the particularities of the *Gacaca* system,[61] a few things must be noted for an understanding of the complexity of the national accountability mechanisms seen as a whole. These *Gacaca* courts are referred to as "people's courts", which were originally used for small civil disputes between neighbours.[62] The system was only later revamped to try genocide crimes by the *Kagame* government, when it became clear that conventional courts were simply overwhelmed by the huge volume of cases to be tried nationally.[63] In an official statement, the Rwandan government argued that the choice of the *Gacaca* tribunals was made considering the context of a shattered post-genocide society.[64] According to the government, the advantage of this system, unlike formal courts, is that it treated everyone equally, "empowering previously marginalized people, such as women, to play a role in the process" as well as "maximising the community's sense of ownership over the process and its consequences."[65]

The particularity of the *Gacaca* courts is that they amalgamate elements from the traditional alternative-dispute-resolution mechanisms, seeking truth and reconciliation, with elements from the formal conventional criminal justice system, with strong retributive aspects. *In concreto*, this means that they base themselves on a mixture of formal laws and informal practice. They have a strong emphasis on community participation, and proceedings are led by lay judges elected by the community.[66] This particular model, while unique in its kind, has been severely criticized by many human rights organizations, given the seriousness of genocide charges, and the fact that the untrained judges of *Gacaca* courts can hand down prison sentences.[67] This will be discussed in more depth in chapter 3.

---

[61] For a brilliant analysis on the pluralistic legal model employed in the Rwandan context following the genocide, see *Knust*, Strafrecht und Gacaca: Entwicklung eines pluralistischen Rechtsmodells am Beispiel des ruandischen Völkermordes.

[62] Human Rights Watch, Justice Compromised, pp. 17–18.

[63] Republic of Rwanda, Ministry of Justice, The 9th and 10th Period Report of the Republic of Rwanda under the African Charter on Human and Peoples' Rights, Period covered by the Report 2005 until July 2009, July 2009, available at: http://www.achpr.org/files/sessions/47th/state-reports/9th-10th-2005-2009/staterep9and10_rwanda_2009_eng.pdf [accessed: 3 July 2013], § 28.

[64] Republic of Rwanda, Ministry of Justice, Government of Rwanda response to today's Human Rights Watch report on Gacaca: 31 May 2011, available at: http://www.gov.rw/Government-of-Rwanda-response-to-today-s-Human-Rights-Watch-report-on-Gacaca [accessed: 1 July 2013].

[65] *Ibid*.

[66] *Bornkamm*, The Implementation of Modern Gacaca, pp. 2 ff.

[67] See, for instance, *Haile*, Rwanda's Experiment in People's Courts (Gacaca) and the Tragedy of Unexamined Humanitarianism [accessed: 14 May 2013], pp. 20 ff. See also various Human Rights Watch publications, *inter alia*, Justice Compromised or Law and Reality; Amnesty International, Rwanda, Gacaca: A Question of Justice [accessed: 3 July 2013].

Until the closure of the *Gacaca* courts in 2012,[68] all of these courts functioned in parallel with each other in prosecuting genocide-related crimes. And as such, there were four levels of courts: the international court (ICTR), the Rwandan High Court (for transfer cases from the ICTR and other states), the military/conventional courts, and the *Gacaca* courts.

Much like in BiH, a national referral practice was also put into place to help alleviate the heavy caseload of high-level courts. The particular difficulty in this context, however, was that the referral took place from the military courts to the *Gacaca* tribunals, reinforcing great cleavages in the legal framework and applicable laws, in short: *the entire legal philosophy.* To illustrate, the fact that after 2008, these most serious "category 1" cases, which were previously heard by the military courts, were subsequently transferred to *Gacaca* courts, gives a whole new meaning to the notion of "legal transplantation". Contrary to the BiH referral practice, where only less sensitive cases are eligible for transfer to lower courts, in this particular situation, the most sensitive ones were referred to the *Gacaca* courts. The fact that highly sensitive sexual violence crimes were among cases that were referred, greatly reinforced human rights groups' critiques of the *Gacaca* system.[69]

3. Comparative analysis

The foregoing sections have briefly laid out the fragmented socio-political climate preceding the establishment of the ICTY and ICTR and have explained the complex setting in which they have been operating following the respective conflicts in BiH and Rwanda. In both contexts, large-scale reforms have been made to the political, social, institutional and legal frameworks following the conflicts, and the work of the international *ad hoc* tribunals must be seen in light of these dynamic – albeit volatile – settings. Chapter 3 will build on this examination by trying to establish how these contexts are vital to understanding certain difficulties experienced by the ICTY and ICTR in the implementation of their respective completion strategies.

---

[68] See in this context: Speech by President *Paul Kagame* before the Rwandan Parliament, 18 June 2013, available at: http://www.paulkagame.com/2010/index.php?option=com_content&view=article&id=691%3Aspeech-by-he-paul-kagame-president-of-the-republic-of-rwanda-at-the-official-closing-of-gacaca-courts&catid=34%3Aspeeches&Itemid=56&lang=en [accessed: 3 July 2013].

[69] Human Rights Watch, Justice Compromised, p. 112.

B. Overall goals of the ICTY and ICTR

In order to be able to evaluate the Completion Strategy and its goals for the continuing legacy of the tribunals overall, it is vital to understand from the outset the stated primary and secondary goals of the ICTY and ICTR.

Former United Nations Secretary-General, *Kofi Annan*, listed the main purposes of international criminal law as:

> "bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace."[70]

One thing is for certain, as *Drumbl* so eloquently stated: "International criminal law dazzles by dint of its ambition."[71] Clearly, these idealistic objectives are both highly ambitious and can, in certain circumstances, be mutually exclusive, as the "peace versus justice" debate pertinently exemplifies.[72] A cursory examination of case law emanating from the ICTY and ICTR reinforces both the breadth and the sometimes conflicting goals of international criminal law.

1. Primary goals

In the absence of its own express punishment philosophy, international criminal law has borrowed (perhaps too uncritically) the predominant justifications for punishment from domestic national law: *retribution* and *general deterrence*.[73] According to the theory of just desert, retribution requires the punishment to be proportionate to the nature and scale of the crime committed.[74] The rationale underlying general deterrence, on the other hand, is based on the utilitarian notion that "prosecuting and punishing those who commit mass atrocity is to dissuade others from doing so in the future", and thus has the consequence of minimizing recidivism[75] (though seemingly not that of the actual offender but rather of future would-be offenders). While *retribution* can be viewed as *retrospective*, *deterrence* is considered *prospective*.[76]

---

[70] UN Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, S/2004/616, 23 Aug. 2004, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 [accessed: 27 June 2013], p. 13.

[71] *Drumbl*, 10 Mel. J. Int'l L. 38–45 (2009) [accessed: 2 June 2013].

[72] For an interesting discussion of this issue, see *Hiéramente*, Internationale Haftbefehle in noch andauernden Konflikten, pp. 84 ff.

[73] *Koller*, 40 N.Y.U. J. Int'l L. & Pol. 1025 (2008) [accessed: 1 June 2013]; *Drumbl*, 99 Nw. U. L. Rev. 539–611 (2005) [accessed: 1 June 2013].

[74] *Drumbl*, *ibid*., 559–560.

[75] *Ibid.*, 560.

[76] *Ibid*.

Although the primary goals of retribution and deterrence are often cited both in case law[77] and in scholarly articles,[78] as *Drumbl* pertinently argues, the international *ad hoc* criminal tribunals "vacillate when it comes to prioritizing the weight to accord to retribution and deterrence in sentencing", such that "considerable indeterminacy and confusion persist".[79]

To add to the confusion, other counter-balancing objectives often enter the debate. In the *Čelebići* case of the ICTY, for instance, in discussing goals of punishment for the purposes of determining an appropriate sentence, the Trial Chamber deemed that one of the goals, namely retribution, as "an inheritance of the primitive theory of revenge", is counter-productive to the UN Security Council's principle of *reconciliation* and the philosophy underlying the *Dayton Peace Agreement*.[80] As stated by the Trial Chamber: "Retributive punishment by itself does not bring justice."[81] How to reconcile retribution and reconciliation on an equal playing field, however, is never evoked. Ultimately, however, the Trial Chamber felt that the goal of deterrence "is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law."[82] However, even there, a tempered stance should be taken, as the first ICTY Prosecutor, *Goldstone*, posits when he says that it is "hopelessly idealistic" to believe in international criminal law's deterrent purpose.[83] The ICTY Appeals Chamber in the *Tadić* case also sought to manage expectations by stating that "undue prominence" should not be bestowed on deterrence as a purpose of international criminal law.[84] The fact that the gravest crimes occurred during the *Srebrenica* massacre in 1995, well *after* the creation of the ICTY, is a convincing attest to this position. To complicate matters, as persuasively argued by *Damaška*, "[d]eterrence and retribution are themselves in need of balancing, and it remains uncertain how these two conventional aims of punishment relate to the special goals of international criminal courts."[85]

Given the aforementioned, one is left with some confusion about the relative importance of the primary punishment purposes in the concrete setting of a particular case. More generally speaking, it appears that this "balancing act" is invariably a part

---

[77] See, for instance, *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, 10 Dec. 1998, § 288.

[78] See, for instance, *Koller*, 40 N.Y.U. J. Int'l L. & Pol. 1025 (2008).

[79] *Drumbl*, 99 Nw. U. L. Rev. 560 (2005).

[80] *Prosecutor v. Zejnil Delalić et al.*, Judgment, Case No. IT-96-21-T, 16 Nov. 1998, § 1231.

[81] *Ibid.*

[82] *Ibid*.

[83] See *Goldstone*, Letter to the Editor, WSJ 2000, At3, in *Damaška*, 83 Chi.-Kent L. Rev. 339, fn. 16 (2008).

[84] See *Prosecutor v. Tadić*, Judgment in Sentencing Appeals, Case Nos. IT-94-I-A and IT-94-l-A*bis*, 26 Jan. 2000, § 48.

[85] *Damaška*, 83 Chi.-Kent L. Rev. 339 (2008), 339.

of the discourse surrounding international criminal justice's goals. Even *Annan*'s belief that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives,"[86] must be qualified by his own concession that:

> "*achieving and balancing the various objectives of criminal justice is less straightforward* and there are a host of constraints in transitional contexts that limit the reach of criminal justice, whether related to resources, caseload or the balance of political power."[87]

2. Secondary goals

Additional or secondary goals of international criminal law (and, by extension, those promoted by international criminal courts and tribunals) have included the didactic message that criminal trials send, the protection of society, rehabilitation of the accused, giving victims a voice, national reconciliation and promoting peace and security in (post)conflict societies.[88] The sheer breadth of different goals is staggering. As pertinently observed by *Damaška*:

> "It does not require much pause to realize that the task of fulfilling all these self-imposed demands is truly gargantuan. Unlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks. Even national systems of criminal justice, with their far greater enforcement powers and institutional support, would stagger under this load."[89]

Koller further helpfully points out that "[t]o date, there has been very little in the way of empirical study of how international criminal law achieves any of these purposes."[90] The debate about the ability of international criminal law to realize any of these objectives has thus been primarily limited to a theoretical and *post hoc* sphere, and, according to *Koller*, "probably cannot be resolved given the current limited empirical record."[91] In other words, there is no concrete evidence that international criminal trials will have any future deterrent effect on potential perpetrators or that not prosecuting perpetrators of international crimes will promote peace in a conflict region. To this end, *Damaška* laments that "the performance of international criminal courts cannot be assessed reliably"[92] and concludes that "perplexing ambiguities

---

[86] United Nations, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, S/2004/616, 23 Aug. 2004, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 [accessed: 27 June 2013], Executive Summary.

[87] *Ibid.*, 13–14. Emphasis added.

[88] *Damaška*, 83 Chi.-Kent L. Rev. 329 (2008). See in this context also *Delalić et al.*, §§ 1231–1234.

[89] *Damaška*, *ibid.*, 331.

[90] *Koller*, 40 N.Y.U. J. Int'l L. & Pol. 1024 (2008).

[91] *Ibid.*, 1024.

[92] *Damaška*, 83 Chi.-Kent L. Rev. 330 (2008).

about the proper mission of international criminal courts persist."[93] While this is inevitably so, calling into question the entire *raison d'être* of international criminal justice clearly cannot be the aim of such criticisms. Indeed, *Damaška* himself suggests that "reducing aspirations" and thereby perhaps lowering expectations in the Tribunals' overabundance of conflicting goals and focusing more on "advancing the sense of accountability for egregious human rights violations" may be the way to improve the situation.[94] This latter point will be picked up again in greater detail in a discussion surrounding the impact of international courts on national reconciliation in chapter 4.

However fertile this topic is for an in-depth analysis, this section's objective was merely to highlight the multitude of (often competing) goals that have been cited in relation to the mandates of international criminal courts and tribunals, so as to provide an understanding about *if* and *how* the Completion Strategy – and the referral practice in particular – contributes to these goals (chapter 4).

C. Jurisdictional ambit of the ICTY and ICTR and relationship to national accountability mechanisms

1. Temporal and territorial jurisdiction

Regarding temporal jurisdiction, both the ICTY and ICTR are *ad hoc* in nature, signifying that they are set up to try cases arising out of a specific conflict and for a specific time frame. Article 8(1) of the ICTY Statute stipulates that the ICTY will have jurisdiction over persons suspected of having committed serious violations of international humanitarian law in the territory of the former Yugoslavia since 1 January 1991. No end date for ICTY's temporal jurisdiction is provided, which is explained by the fact that the Tribunal was set up when the conflict was still ongoing.

Article 7(1) of the ICTR stipulates that the Tribunal has jurisdiction for "serious violations of international humanitarian law committed both in Rwanda and by Rwandans in neighbouring states, between 1 January and 31 December 1994. Starkly noticeable is the short temporal jurisdiction of one year exactly, which, as will be described in detail in chapters 2 and 3, is not only problematic regarding preparatory crimes, which are an inevitable part of genocide (and are not caught in its ambit),[95]

---

[93] *Ibid*., 339.

[94] *Ibid*., 330–331.

[95] For instance, the ICTR identified *Léon Mugasera* as having played a crucial role in the planning of the genocide (through incitement to genocide) before 1994. Because the ICTR's jurisdictional ambit was limited, however, it was up to Canada to prosecute him for incitement to genocide. In this context see: *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100, available at: http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2273/index.do [accessed: 2 July 2013].

but also sets the ICTR apart from national courts, most of which have jurisdiction for a significantly longer period of time (starting October 1990).[96] This inevitably creates great discrepancies between the accused, depending on which court they are tried by.

2. Personal and subject-matter jurisdiction

Both the ICTY and ICTR have jurisdiction over natural persons suspected to have committed serious violations of international humanitarian law (article 2, ICTY, article 1, ICTR), such as: grave breaches of the Geneva Conventions of 1949 (article 2 ICTY), violations of article 3 Common to the Geneva Conventions of Protocol Additional II (article 4, ICTR), violations of the laws or customs of war (article 3, ICTY), genocide (article 4, ICTY, article 2, ICTR) and crimes against humanity (article 5 ICTY, article 3, ICTR).

As chapter 2 will expound in detail, contrary to other international courts and tribunals, which state this explicitly in their founding documents, the superiority or level of responsibility of the accused is not a jurisdictional element in the ICTY and ICTR Statutes. For instance, the International Military Tribunal for Nuremberg (IMT Nuremberg) targeted "*the major war criminals of the European Axis*",[97] the Special Tribunal for Sierra Leone focuses on "*persons who bear the greatest responsibility*",[98] and the Extraordinary Chambers in the Courts of Cambodia on both "*senior leaders [...] and those who were most responsible*."[99] Indeed, these criteria only started becoming an explicit jurisdictional element when the referral practice of the ICTY and ICTR Completion Strategy was formulated. As a result, ICTY's rule 11*bis* RPE, the rule governing referrals, stipulates explicitly that this criterion must factor into any determination of whether or not to send a case to national courts for prosecution. While the ICTR rule remains silent on the matter, the issue of gravity as a jurisdictional criterion has entered into discussions at some level, albeit significantly less than at the ICTY. Reasons therefor, and a proper analysis of this element, are discussed in chapter 2.

While national courts in both contexts generally have jurisdiction over certain international crimes, they are often more limited than those over which the *ad hoc*

---

[96] The military courts and *Gacaca* tribunals both had temporal jurisdiction from 1 October 1990 until 31 December 1994.

[97] Charter of the International Military Tribunal for Nuremberg, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945), article 1.

[98] Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; U.N. Doc. S/2002/246, appendix II, article 1.

[99] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [accessed: 8 July 2014], article 2.

international criminal tribunals have jurisdiction. For instance, in the context of BiH, cantonal (BiH) and district courts (RS) have generally applied a code (Criminal Code of the Socialist Federal Republic of Yugoslavia, "SFRY CC"), which does not give them jurisdiction over crimes against humanity. In practice too, oftentimes war crimes are tried as ordinary crimes.[100] Clearly, however, the 2013 judgment of the European Court of Human Rights in the *Maktouf and Damjanović* case[101] will have significant repercussions on the applicable law and practice of these courts, notably as regards the prosecution of crimes against humanity.

In the Rwandan context also, jurisdiction over international crimes is more limited at national level than at the ICTR. For instance, the specialized military courts do not have jurisdiction over war crimes, and problematically, the courts who were trying the vast majority of crimes committed during the genocide, the *Gacaca* tribunals, also did not have jurisdiction over war crimes.[102]

As will be analysed in detail in chapters 2 and 3, these discrepancies in the legal qualification of crimes between various accountability mechanisms is most problematic.

3. Primary and concurrent jurisdiction of the ICTY and ICTR vis-à-vis national courts

As previously stated, the ICTY and ICTR have *primary* jurisdiction vis-à-vis national courts and are *concurrent* but not *exclusive*.[103] Concretely, this means that the *ad hoc* tribunals share jurisdiction to prosecute those responsible for having committed serious violations of international humanitarian law, but that in the event of a conflict, the ICTY and ICTR have the authority at "any stage of the procedure" to "formally request national courts to *defer*" cases to the *ad hoc* tribunals in accordance with the respective Statutes and RPE.[104] Rules 9, 10 and 11 of the ICTY RPE carve out situations which justify a deferral from a national system, namely:

1. where the national investigation or prosecution of the alleged act is treated as an ordinary crime,
2. where the investigation or prosecution
   a) lacks impartiality or independence,
   b) is intended to protect the accused from international criminal responsibility,
   c) or the prosecution of the case is not carried out diligently,

---

[100] OSCE, War Crimes Trials, p. 20.

[101] ECtHR (GC), *Maktouf and Damjanović v. BiH*.

[102] Human Rights Watch, Justice Compromised, p. 5.

[103] OSCE, Delivering Justice in BiH, p. 5. This is regulated in article 9 of the ICTY Statute and article 8 of the ICTR Statute.

[104] ICTY, article 9(2); ICTR, article 8(2). The wording here is taken from the ICTY rule but the ICTR is nearly identical. Emphasis added.

d) or, finally, the "issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal" (rule 9, ICTY RPE).

Rule 9 of the ICTR's Rules of Procedure and Evidence focuses less on the willingness or ability of the national authorities to adequately investigate or prosecute crimes and focuses more on the necessity for the ICTR to obtain the case where the crimes in question:

1. are subject of an investigation by the Prosecutor,
2. should be the subject of an investigation by the Prosecutor based on several factors,[105] or finally,
3. are the subject of an indictment by the Tribunal.

Rule 10, which is identical in the ICTY an ICTR RPE, stipulates that a request for *deferral* shall signify a transfer by the national court of the results of the investigation, a copy of the court's records and the judgment, if already rendered, and requires that any subsequent trial will necessarily be held before the *ad hoc* tribunal. Finally, rule 11 sets out the consequence of non-compliance within sixty days of the Tribunal's request for *deferral*, which allows the Trial Chamber to request the Tribunal President to report the matter to the UN Security Council. Both tribunals have used this mechanism a number of times successfully,[106] with the ICTY using it the first time in 1994 to formally request the *deferral* of *Duško Tadić* from Germany.[107]

A *referral*, governed by rule 11*bis* of the ICTY and ICTR RPE, the subject of this research project, describes the opposite phenomenon, namely the *referral* of cases back *to national jurisdictions* for prosecution by the respective Tribunals as part of their Completion Strategies. Both the practice of *deferral* and *referral* can be viewed as a practical implementation of the concurrent jurisdictional relationship. Both the terms *referral* and *deferral* within the Rome Statute of the ICC have a completely different meaning, which will be explored in chapter 5.

---

[105] a) The seriousness of the offences, b) the status of the accused at the time of the alleged offences, or c) the general importance of the legal questions involved in the case.

[106] To date, four deferral procedures were successfully initiated by the Office of the Prosecutor, and Trial Chambers subsequently issued requests for deferrals to the authorities of Germany (8 Nov. 1994, *Tadić* case), Bosnia and Herzegovina (*Lasva* River Valley investigation, 11 May 1995, and Bosnian Serb leadership investigation, 16 May 1995) and the Federal Republic of Yugoslavia (*Erdemović* case, 29 May 1996). Available at: http://www.icty.org/sid/7611 [accessed: 28 June 2013]. In the ICTR context, for instance, in the *Alfred Musema* case, where a request for deferral to the government of Switzerland was made, and the case against *Radio Télévision Libre des Mille Collines*, where a request for deferral to the government of Belgium was made, see "Statement of Dr. *Andronico O. Adede*, Registrar of the ICTR announcing the Decision of the Tribunal on two Deferral Applications by the Prosecutor, ICTR/Info-9-9-2-03, 12 March 1996, available at: http://unictr.unmict.org/en/news/statement-dr-andronico-o-adede-registrar-international-criminal-tribunal-rwanda [accessed: 28 June 2013].

[107] *Dusko Tadić ("Prijedor")*, Case No. IT-94-1, Case Information Sheet, available at: http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf [accessed: 1 July 2013].

In addition to the aforementioned formal mechanisms that exist between the international *ad hoc* tribunals and national courts of BiH and Rwanda, there are a number of additional mechanisms of formal cooperation and judicial assistance, governed by the ICTY and ICTR Statutes respectively, such as states' duty to cooperate with and to provide judicial assistance to the *ad hoc* tribunals under article 29 of the ICTY Statute and article 28 of the ICTR Statute. Additionally, other forms of cooperation and judicial assistance exist in practice, such as ICTY and ICTR cooperation on requests for legal assistance from national jurisdictions for ongoing investigations and prosecutions, knowledge transfer to national jurisdictions, local capacity building as well as the referral of investigative materials ("category II" cases) to national jurisdictions. The latter will be subject of this research project and discussed in some detail in chapters 2 and 4.

II. The core mandate and current practice of the ICC

A. Contextual background

The permanent International Criminal Court (ICC), whose constitutive treaty was negotiated in Rome in 1998 and came into being on 1 July 2002, has been hailed one of the most important achievements in international criminal law today. The Coalition for the ICC even goes so far as to argue that the "ICC represents one of the most significant opportunities the world has had to prevent or drastically reduce the deaths and devastation caused by conflict."[108] Whether this idealistic statement can be backed in reality remains to be seen, but one thing is for certain, this institution is the first of its kind – both in terms of its jurisdictional ambit and the strong collaborative efforts underlying its creation, cumulating in a multi-lateral treaty to which a total of 122 States are now party.[109]

The ICC is the result of a long-standing aspiration on the part of the international community to create a permanent independent mechanism to investigate and try international crimes "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", and "recognizing that such grave crimes threaten the peace, security,

[108] Coalition for the ICC, available at: http://www.iccnow.org/?mod=court [accessed: 28 June 2013].

[109] To date, 122 countries are States Parties to the Rome Statute of the ICC. Of these states, 34 are African, 18 are Asia-Pacific, 18 are from Eastern Europe, 27 are from Latin America and the Caribbean, and 25 are from Western European and other states: ICC website: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [accessed: 8 July 2014].

and well-being of the world".[110] Other than the *ad hoc* international tribunals, therefore, the ICC is a response not to one specific conflict in particular but to the accumulation of many such conflicts since WWII.

B. Overall goals

Although the ICC's jurisdictional ambit is significantly different from its predecessors, the ICTY and ICTR, as will be discussed below, many of the goals justifying its mission are fundamentally the same as those of most international criminal courts and tribunals. As such, they will be treated below in less detail.

1. Primary goals

In the very first lines of its preamble, the Rome Statute of the ICC professes itself to be "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[111] As such, the traditional punishment goals of *retribution* and *deterrence* are explicitly highlighted from the outset.

Retribution as a traditional criminal law theory does not appear to provoke great controversy. Regarding the amorphous notion of *deterrence*, however, much ink has been spilled both by proponents and critics about whether such a punishment goal, in the concrete context of the ICC's work, is realistic.[112] *Grono* suggests that although "there are plenty of examples in which the threat of criminal prosecution has failed to deter perpetrators of crimes against humanity or atrocities, this does not mean that deterrence has not worked or could not work."[113] He argues that critics' focus on *specific deterrence* (namely that international prosecutions will deter leaders, who have already committed crimes, from doing so again), is the wrong approach: "[T]hese are, in fact, the very situations where prosecutions are most unlikely to deter" since "[i]n such situations, prosecution by the [ICC] will more likely represent an existential threat to a ruler, or ruling party, and is thus more likely to cause

---

[110] Rome Statute, preamble, §§ 2–3. Indeed, in the Genocide Convention of 1948, the UN recognized the need for the establishment of an international institution since; UN resolution 260, UNTS No. 1021, Vol. 78 (1951), p. 277, available at: http://www.fordham.edu/halsall/mod/UN-GENO.asp [accessed: 9 July 2014]. Article 6 stipulates: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, *or by such international penal tribunal as may have jurisdiction* with respect to those Contracting Parties which shall have accepted its jurisdiction." Emphasis added.

[111] Rome Statute, preamble, § 5.

[112] *Grono, Nick*, The deterrent effect of the ICC, 5 Oct. 2012, available at: http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx [accessed: 30 June 2013].

[113] *Ibid.*, p. 2.

national leaders to seek to entrench themselves, and hence maintain or even escalate an abusive or criminal campaign."[114] The situation in Darfur and South Kordofan, where ICC prosecutions did not concretely prevent further attacks on civilians, are examples of this assertion.[115] *Grono* therefore proposes a middle ground arguing for a focus on "longer-term legal deterrence" (or *general deterrence*). He does, however, concede that:

> "A central difficulty for those seeking to establish a deterrent effect for criminal prosecutions is that while it is easy enough to list cases where deterrence hasn't worked, its *[sic]* very difficult to identify cases in which it has – a difficulty magnified in an international setting. […] Successful […] deterrence[,] means, in effect, that nothing happens. And it is difficult to prove a counterfactual. But there is significant anecdotal evidence to suggest that the risk of prosecution by the ICC – which today is one of the few credible threats faced by warring parties – may influence their calculations and policy choices."[116]

Unfortunately, the first ICC conviction (and sentence) in the *Lubanga* case in 2012, has not elaborated in any meaningful way on the ICC's purposes of punishment generally, aside from mentioning the preamble's explicit objectives of retribution and deterrence, and focuses exclusively on an examination of aggravating factors and mitigating circumstances in order to arrive at a sentence proportional to the crime committed.[117]

The foregoing brief discussion illustrates that *deterrence* – especially in a volatile international context – is, like many of international criminal law's goals, most complex to measure concretely. Rather than attempting to resolve the debate, this projects's goal is merely to briefly depict the similar objectives underlying the mandates of the ICTY and ICTR on the one hand, and the ICC on the other, despite the differences in their jurisdictional set-ups. This will set the backdrop for a discussion in chapter 5 about the possible relevance of the ICTY and ICTR's referral experience for the ICC.

2. Secondary goals

Regarding one of the purposes of punishment already mentioned above, namely the role of international criminal trials in giving a voice to the victims, the ICC has been highly innovative. That is, to concretely ensure this goal, the ICC has gone one step further than previously established international tribunals in allowing – for the first time ever – victims to participate as a *partie civile* in the criminal trial process.[118]

---

[114] *Ibid*.

[115] *Ibid*.

[116] *Ibid*.

[117] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/06, 10 July 2012.

[118] This is regulated under article 68 of the Rome Statute.

Aside from the numerous goals of punishment cited above in the context of discussions about international criminal law in general, several competing objectives have complicated the work of the Prosecution in selecting cases, notably in the beginning years of the ICC's work. It is not this section's intention to delve into this highly contentious debate, suffice it to say that much ink has been spilled over article 53(1)(c) of the Rome Statute, which stipulates that:

> "in deciding whether to initiate an investigation, the Prosecutor shall consider whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

This article has taken very concrete implications in the Uganda and Darfur investigations, where the ICC Prosecutor was heavily criticized from various sides for having gone ahead with investigations and the issuance of arrest warrants when fragile peace processes were allegedly ongoing.[119] Putting the credibility of these peace processes aside, as pertinently argued by Human Rights Watch member *Dicker*:

> "[d]owngrading justice to achieve other objectives does not work well. It undermines the rule of law and slights the victims of injustice. Moreover, a peace based on impunity is unlikely to be durable. The peace-justice nexus must be examined carefully and objectively because the issue will surface again and again."[120]

C. Jurisdictional ambit and relationship to national accountability mechanisms

Probably the most unique feature of the ICC is its jurisdictional ambit, which is both broad and limited at the same time. This was the subject of contentious debate among parties negotiating the Rome Statute in 1998 and again at the Review Conference in Kampala in 2010, notably regarding the definition of and the ICC's jurisdiction over the crime of aggression.[121]

---

[119] See in this context ICG, Sudan: Justice, Peace and the ICC, Africa Report No. 152 – 17 July 2009, http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/Sudan%20Justice%20Peace%20and%20the%20ICC.pdf [accessed: 1 July 2013]. See also: *Dicker, Richard*, When Peace Talks Undermine Justice, Human Rights Watch, 4 July 2008, available at: http://www.hrw.org/print/news/2008/07/04/when-peace-talks-undermine-justice [accessed: 1 July 2013]. For an in-depth discussion of this issue, also see: *Hiéramente*, Internationale Haftbefehle in noch andauernden Konflikten.

[120] *Dicker*, *ibid.*

[121] In particular, proposals for primary jurisdiction were made but rejected in favour of a significantly more circumvented complementarity jurisdiction. See the American position detailed various contributions: Coalition of the ICC, available at: http://www.iccnow.org/index.php?mod=usaicc [accessed: 3 July 2013], see also: Carr Center for Human Rights Policy Work Paper T-00-02, "The United States and the International Criminal Court", available at: https://www.innovations.harvard.edu/sites/default/files/ICC.pdf [accessed: 3 July 2013], pp. 9 ff.

1. Temporal and territorial jurisdiction

Other than the ICTY and ICTR, which are *retrospective*, the ICC's jurisdiction is *permanent* and *prospective*. That is, its temporal jurisdiction is limited to crimes committed after its coming into effect on 1 July 2002 and onwards.[122] Regarding States having ratified after that date, the ICC only has jurisdiction from the date of ratification onwards, unless the State specifically agrees to earlier jurisdiction, that is, from 1 July 2002 onwards.[123] The ICC can also have jurisdiction over non-State parties, where these have agreed to such jurisdiction under article 12(3) of the Rome Statute. Contrary to its *ad hoc* predecessors, whose geographical scopes are limited to a specific region, the ICC's territorial jurisdiction is potentially limitless, that is, it theoretically has jurisdiction over crimes committed in *any* region of the world, albeit with significant restrictions imposed by the complementarity principle (discussed below). Currently, the ICC is trying 21 cases in eight situations.[124] The fact that they are all in African countries has garnered much criticism over the years.[125]

There are three principal ways in which the jurisdiction of the ICC can be triggered. The first is by referral of a State Party, so-called self-referrals (article 13(a) Rome Statute). Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali have each referred crimes committed on their territories to the ICC.[126] The second way is by virtue of a referral by the UN Security Council acting under chapter VII of the UN Charter (article 13(b) Rome Statute). This was done in the case of Sudan (Darfur) and Libya, two non-state parties.[127] Third, the Prosecutor may initiate an investigation on his/her own initiative *(proprio motu)* "on the basis of information on crimes within the jurisdiction of the Court" (articles 13(c) and 15). The Prosecutor has made a request to initiate investigations in both Kenya and *Côte d'Ivoire*, which was subsequently granted by two different ICC Pre-Trial Chambers in 2010 and 2011 respectively.[128]

---

[122] Article 11(1), Rome Statute.

[123] *Ibid*., article 11(2).

[124] ICC website: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [accessed: 9 July 2014].

[125] See in this context: Human Rights and International Criminal Law, Office of the Prosecutor, ICC Forum, Current Question on Africa, Topic for March 2013 – July 2013, available at: http://iccforum.com/africa [accessed: 3 July 2013].

[126] ICC website: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [accessed: 9 July 2014].

[127] *Ibid*.

[128] *Ibid*.

2. Personal and subject-matter jurisdiction

Article 1 of the Rome Statute stipulates that the ICC shall have jurisdiction over "persons for the most serious crimes of international concern". This phrasing is reiterated in article 5. Other than its *ad hoc* predecessors, the Rome Statute contains an explicit requirement for the gravity of a case under article 17, governing issues of admissibility. Article 5 sets out the crimes over which the Court has jurisdiction, namely genocide, crimes against humanity, war crimes, and, unique in history: the crime of aggression.[129] Even within the category of previously well-established crimes, such as crimes against humanity, the Rome Statute is highly innovative in codifying certain gender-based offences, such as forced prostitution and sexual slavery, for the first time.[130] As such, the Rome Statute embodies the idea that "[i]t is not anymore acceptable to argue that, in the absence of the express criminalisation of this conduct under domestic law, it is illegitimate to make findings as of their binding nature to a given case directly under international law."[131]

However positive such progressive provisions are as a reflection of the continuing development of international criminal law norms,[132] the dissonance between the crimes within the Rome Statute and definitions contained in national laws remains a major problem. As such, the practical implementation of the complementarity principle – insofar as many states have either not ratified the Rome Statute at all or have not effectively implemented the Rome Statute into their national legal systems – is great cause for concern.[133] The result is that this gap "promulgates a dissimilar definition of crimes and, as a result, an incongruent prosecutorial standard between the ICC and national criminal jurisdictions."[134] To illustrate this point, the definition of torture serves as a good example of the dissonance between the Rome Statute and

---

[129] Since the crime of aggression had been a very contentions issue at the Rome Conference in 1998, it was decided to hold off on giving the ICC jurisdiction over this crime until a definition was negotiated. This was successfully done in Kampala in 2010. See in this context the definition adopted and a number of valuable academic contributions: http://www.iccnow.org/?mod=aggression [accessed: 3 July 2013].

[130] For instance, article 7(g) of the Rome Statute lists a variety of gender-based offences as crimes against humanity, such as "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

[131] *Lattanzi*, in: Roy S. Lee (ed.), p. 187.

[132] *Däubler-Gmelin, Herta*, Parliamentary Assembly of the Council of Europe, Cooperation with the International Criminal Court (ICC) and its universality, Committee on Legal Affairs and Human Rights, Doc. 11722, 3 Oct. 2008. Available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=12150&lang=en [accessed: 29 June 2013], § 9.

[133] *Ibid.* § 10.

[134] *Ibid*. See in this context: Human Rights Watch, Making the International Criminal Court Work [accessed: 9 July 2014]. See also: Amnesty International, International Criminal Court: The failure of states to enact effective implementing legislation. The report documents frequent problems encountered in the draft legislation prepared by national jurisdictions.

the definition contained in a number of national laws.[135] That is, the definition of torture contained in the UN Convention against Torture is satisfied only where it is committed for a specific purpose and by a public official or someone acting in an official capacity.[136] The Rome Statute, however, recognizing a growing practice of torture being committed outside of the contexts captured by the UN Torture Convention (i.e. by belligerents in internal and international armed conflicts),[137] contains a reformulated and significantly broader definition: it no longer requires torture to be carried out for a *specific purpose* (Human Rights Watch posits that it could be committed for reasons that are "purposeless or merely sadistic"),[138] nor that it have *any state-action component* whatsoever (all that matters is that the individual be "in the custody or under the control of the accused").[139] Human Rights Watch argues that the Rome Statute's progressive definition "better reflects the how and by whom torture is committed."[140] As such, the employment of different definitions depending on the forum in which international crimes are tried, endangers important legal principles, such as legal certainty and equality before the law.

The foregoing demonstrates that proper implementation of the Rome Statute into national law is crucial to avoid gaps in the prosecutorial standard to which would-be-perpetrators are exposed in both fora.[141] While many ICC State parties have implemented the Rome Statute into their domestic law following ratification, a great number of States are still lacking proper implementation.[142] Former ICC President *Kirsch* thus argued that: "[i]n order for the principle of complementarity to work, national jurisdictions need to adopt domestic legislation prohibiting crimes within the jurisdiction of the Court."[143]

---

135 PACE, Co-operation with ICC, § 11.

136 "[f]or such purposes as obtaining … information or a confession", punishment, intimidation, coercion, "or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity", UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. resolution 46, UN GAOR, 30th Session, Supp. No. 51, p. 197, 23 UN Doc. A/39/51, I.L.M. 1027 (1948), as modified, 24 I.L.M. 535 (1985), available at: http://www.un.org/documents/ga/res/39/a39r046.htm [accessed: 3 July 2013].

137 PACE, Co-operation with the ICC, § 11. See in this context: *Burgers/Danelius*, A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

138 Human Rights Watch, Making the ICC Work, p. 28.

139 Article 7(2)(e), Rome Statute.

140 Human Rights Watch, Making the ICC Work, pp. 17 and 28.

141 PACE, Co-operation with the ICC, § 12.

142 *Ibid*.

143 *Kirsch*, 28 Fordham Int'l L. J. 300 (2005). See also the CICC's website at: http://www.iccnow.org/ for concrete guidance to implement legislation, as well as examples of certain country implementing legislation. See also: Amnesty International, The International Criminal Court: Summary Checklist for Effective Implementation, AI Index: IOR 40/15/00, 1 Aug.

This now brings the discussion to the complex issue of the carefully carved-out complementarity regime, which lies at the heart of the ICC's jurisdictional arrangement with national States.

3. Subsidiary and complementary jurisdiction vis-à-vis national systems

In the very first lines of its preamble, the Rome Statute already sets the tone for the relationship between the ICC and national jurisdictions. In particular, it recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and emphasizes "that the International Criminal Court established under this Statute shall be *complementary* to national jurisdictions".[144] Article 17 lays out in detail the conditions under which the ICC can assume jurisdiction, a national state's "unwillingness" or "inability" lying at the crux of the test for admissibility.

Indeed, article 17(2) determines "unwillingness" to pertain to three main situations: firstly, where the trial was carried out "for the purpose of shielding the person concerned from criminal responsibility", second, where "there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice", or third: where "the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice".[145]

"Inability" is defined as a situation where after "a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[146]

As such, the ICC grants national States primary jurisdiction to investigate or adjudicate international crimes, and only intervenes as a last resort, where States are either "unwilling or unable genuinely" to do so as per article 17.

In comparing the primary jurisdiction of the *ad hoc* tribunals and the complementarity jurisdiction of the ICC, *Newton* argues that the "total defiance" that international *ad hoc* tribunals have faced on the part of national courts who hesitate to cede

---

2000, available at: https://www.amnesty.org/en/documents/ior40/015/2000/en/ [English version accessed: 9 July 2014] and Amnesty International, International Criminal Court: Guidelines for Effective Implementation of the Rome Statute, Introduction, AI Index: IOR 40/013/2004, 1 Sept. 2004, available at: https://www.amnesty.org/en/documents/ior40/013/2004/en/ [English version accessed: 9 July 2014].

144 Rome Statute, preamble, §§ 6 and 10. Emphasis added.

145 Rome Statute, article 17(2)(a)–(c).

146 *Ibid*., article 17(3).

their own jurisdiction over cases, may weaken the primacy principle in practice.[147] As a result, he argues that "in reality, the gap between primacy and complementarity as organizing jurisdictional principles may not be so expansive", because "to date [there is] no clear evidence that either primacy or complementarity claim inherent functional superiority as a core organizing principle."[148]

Be that as it may, it is undoubtedly premature to make any effective comparison between the jurisdictional regimes, at least concretely, since the *ad hoc* tribunals are currently winding down whereas the ICC is only just starting to embark on its onerous mission.

Chapter 5 will attempt to lend strength to the working hypothesis that the ICTY/ICTR referral practice experience is relevant for the Court's work, despite the ICC's different jurisdictional set-up. A formal basis for a type of case referral can be found in the ICC's legal regime under article 19 of the Rome Statute, dealing with challenges to the jurisdiction of the ICC or the admissibility of a case, in conjunction with article 17, which sets out the ICC's admissibility criteria of "unwillingness" and "inability". The recent unprecedented decision by the ICC Pre-Trial Chamber in the *Al-Senussi* case, in which the Pre-Trial Chamber relied on article 19 of the Rome Statute to "refer" the case back to Libya, marks the tangible beginning of this practice at the ICC. As regards a possible referral of investigative files or other evidence, akin to the pre-indictment investigative files sent by the ICTY and ICTR to BiH and Rwanda respectively, the Rome Statute contains explicit and rather expansive provisions to this effect under article 93(10), in conjunction with rule 194 of the ICC Rules of Procedure and Evidence. Given the foregoing, it is argued that certain lessons learned from the ICTY and ICTR referral practice can be transposable into the ICC context. The ICC itself has acknowledged the relevance of the ICTY and ICTR Completion Strategies to its work.[149]

III. Concluding remarks

The foregoing chapter has sought to describe in some detail the formal jurisdictional arrangements between the *ad hoc* tribunals and national courts in BiH and Rwanda respectively, and to compare and contrast these with the jurisdictional arrangement between the permanent ICC and national courts. While the principles of primacy and complementarity appear fundamentally different in theory, they may not be all that different in practice, especially given the fact that the sheer lack of

147 *Newton*, 167 Mil. L. Rev. 43 (2000).

148 *Ibid.*, 42.

149 ICC-ASP, Report on Complementarity: Completion of ICC activities in a situation country [accessed: 10 June 2014].

capacity of the ICTY, ICTR and the ICC forces these institutions to rely heavily on national courts to prosecute the majority of international crimes. Be that at is may, as noted earlier, any in-depth comparison of the two organizational principles in practice is pre-mature given the still young age of the ICC.

The foregoing chapter has also sought to illustrate that the magnitude and complexity of international crimes require a holistic accountability approach at all levels: international, national and local. As this research project will demonstrate, however vital such a pluralistic accountability model is, the interaction between the various courts in practice is often complex and fraught with legal challenges. The novel and highly experimental referral practice conceived by the ICTY and ICTR as part of their respective Completion Strategies, demonstrates this amply. The goals of the referral practice will be explored in chapter 2. Building on this, whether these goals have been satisfied, and what concrete contribution the referral practice may be making to the overall goals of the *ad hoc* tribunals will be explored in chapter 4, as well as the potential usefulness of the ICTY and ICTR's referral experience to the ICC (chapter 5).

Chapter 2

The referral practice to national courts as a crucial component of the ICTY and ICTR Completion Strategy and legal problems resulting from its implementation

Having briefly examined the mandates and overall goals of the ICTY and ICTR, and the formal relationship between the ICTY/ICTR and national courts in chapter 1, a closer look into the origins and objectives of the ICTY/ICTR Completion Strategies and the referral practice as a crucial element thereof will now be embarked upon. This examination will set the backdrop against which the implementation of the referral practice must be viewed in light of the Tribunals' overall goals. The integral part of this chapter will be devoted to an examination and analysis of the various legal problems resulting from the referral practice's implementation. In particular, there are a number of substantive and procedural legal problems that have arisen throughout the referral practice of cases under rule 11*bis* of the Rules of Procedure and Evidence, the rule governing the referral practice, some of which merit a thorough analysis.

The selection of legal problems to be analysed is principally guided firstly by an examination of the rule 11*bis* criteria itself, and by the frequency with which certain issues have been discussed by the respective Referral Benches at the ICTY and ICTR. With this analysis, this discussion seeks to unveil certain inadequacies in the criteria of rule 11*bis*, both formally and as regards its judicial interpretation, prior to and following transfer to national jurisdictions. A basic hypothesis is that the referral practice regime has been at least partially inadequate to respond to the many factors (both normative and contextual) underlying this novel and complex procedure.

The referral practice also comprises more broadly the transfer of investigative materials to national jurisdictions. Contrary to transfers under rule 11*bis*, this is an informal and non-judicial process initiated by the ICTY and ICTR Prosecutor. Given that this type of transfer may become highly relevant in the ICC context (this hypothesis will be explored in chapter 5), and in light of the fact that it has also exposed some legal challenges, this chapter will inevitably briefly analyse the referral of investigative files. Finally, it will seek to expose notable differences between the ICTY and ICTR experiences, particularly regarding the judicial referral practice under rule 11*bis* in the beginning phase, so as to lay the groundwork for chapter 3, which tests the hypothesis that a mechanical application of rule 11*bis* criteria, without consideration of the comprehensive context in which the referral practice is embedded, presents difficulties to the effective implementation thereof.

I. Origins of the Completion Strategy

The referral practice is a crucial element of the Completion Strategy and can thus be considered a barometer of the effectiveness of the implementation of the Completion Strategy as a whole. Indeed, former ICTY President *Pocar* stated that "the effective transfer of the International Tribunal's historical work of bringing to justice perpetrators of genocide, war crimes and crimes against humanity to national jurisdictions in the region will be a key component of its legacy."[1] As such, a cursory examination of the Completion Strategy's origins, justifications and overall goals allows a contextualization that sets the backdrop against which the referral practice must be viewed, and through which the legal problems arising from its implementation are better understood.[2] Having examined the mandates and overall goals of the ICTY and ICTR in chapter 1, it is thus crucial to also scrutinize the overall goals of the Completion Strategy, and the referral practice as a vital component thereof. This, in turn, will lay the foundation upon which an assessment of the impact of the referral practice on the overall goals of the Tribunals can be undertaken in chapter 3.

Although the ICTY and ICTR have, from the time of their creation, been *ad hoc* entities with finite mandates, their respective duration is not specified in the constitutive Statutes themselves. However, given that the tribunals were established by the Security Council as enforcement measures under chapter VII of the UN Charter,[3] from which flow important limitations as described earlier, the assumption was from the outset that their life spans would invariably be linked to the maintenance and restoration of international peace and security in the territories of the former Yugoslavia and Rwanda.[4] As a result, one ICTY practitioner notes that the "articulation

---

[1] Assessment and report of Judge *Fausto Pocar*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to § 6 of Council resolution 1534 (2004), U.N. Doc. S/2006/353, Annex I, 31 May 2006, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_31may2006_en.pdf [accessed: 10 May 2013].

[2] For a highly detailed account of the historical development of the referral practice provisions, including a discussion of the various amendments of rule 11*bis* RPE of the ICTY and ICTR respectively, see *Lindemann*, Referral of Cases from International to National Criminal Jurisdictions, pp. 70 ff.

[3] Article 39 of the UN Charter stipulates: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 41 in turn sets out that: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Available at: http://www.un.org/en/sections/un-charter/chapter-vii/index.html [accessed: 5 June 2013].

[4] In the context of the ICTY, see in particular: Report of the Secretary General pursuant to § 2 of Security Council resolution 808, S/25704 (1993), 3 May 1993, available at: http://

and adoption of completion strategies by the International Tribunals was a necessary step in the eventual conclusion of their mandates."[5] In this vein, the exact dates and modalities for the termination of their work were proffered only a decade later by the so-called Completion Strategy, put forward by the ICTY, and subsequently endorsed by the UN Security Council.[6] UNSC resolution 1503 (2003) called on the ICTR to formalize a Completion Strategy following the ICTY model,[7] which was subsequently endorsed in UNSC resolution 1534 (2004).[8]

Generally, discussions within the international community about the need to gradually close down the Tribunals were driven by an accumulation of several factors. Some can be seen as symptomatic of a certain "tribunal fatigue", such as dissipating memories of *Srebrenica* and the perception by those who are particularly critical that the Tribunals consume a major slice of the UN financial pie, which is disproportionate not only to the tangible results they produce, but also to their respective geographical scopes.[9] Other more external factors included new challenges and threats to international peace and security, notably in the wake of 9/11, with which the international community is confronted.[10]

In its Completion Strategy Proposal to the UN Security Council, the ICTY alluded to a "new context", through the convergence of two factors, which indicated that the contemplation of a Completion Strategy was indeed timely.[11] The first factor was gradual progress in the reform of the judicial system in countries of the former Yugoslavia with the assistance of the international community, suggesting that national courts may at some point be able to take on the task of war crimes investigations themselves.[12] The second factor was the rising amount of arrests of high-level political and military persons, allowing the Tribunal to give priority to the prosecution of the most serious crimes, which is consonant with its original mandate.[13] It is important to note at this juncture, however, that while commending the reform of the judicial system in Bosnia and Herzegovina, the ICTY also alluded to "shortcomings too great for [the BiH judicial system] to constitute a sufficiently solid judicial foundation to

---

www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf [accessed: 5 May 2013], § 28.

5 *Mundis*, 99 AJIL 143 (2005).

6 UNSC resolution 1503 (2003).

7 *Ibid*., preamble.

8 UNSC resolution 1534, REF S/RES/1534 (2004) 26 March 2004.

9 *Raab*, 3 J. Int'l Criminal Justice 84 (2005).

10 *Ibid*.

11 Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, S/2002/678, June 2002, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf [accessed: 5 June 2013], §§ 2–3.

12 *Ibid.*, § 2.

13 *Ibid*.

try cases referred by the Tribunal."[14] Following the recommendation of the UNSC-endorsed ICTY Completion Strategy,[15] an internationally supported and funded War Crimes Chamber within the BiH State Court was created in 2004 as a feasible venue for receiving ICTY transfer cases.[16] Indeed, this War Crimes Chamber addressed a number of the "existential" issues previously identified by the ICTY as an obstacle to referral.[17] Nevertheless, a number of legal problems persisted throughout the referral practice of the ICTY, some of the most significant ones will be analysed in section III of this chapter.

Although legal reforms of the judicial system were also underway in Rwanda at the time of the Completion Strategy discussions,[18] there was a far lesser degree of international participation in this process than in BiH.[19] Perhaps at least as a result thereof, the ICTR was not in the same position as the ICTY to refer cases to national jurisdictions rapidly, in particular to the *locus delicti*. This was due to a number of issues, notably the imposition of the death penalty in Rwanda at the time of the adoption of the Strategy, which has since been replaced by "imprisonment in isolation",[20] and the general lack of fair-trial rights provided by the Rwandan judicial system (including the unavailability of defence witnesses). As observed by *Schabas*, "whereas the justice system in [BiH], with its substantial international involvement, was quickly deemed acceptable by judges of the [ICTY], there was great resistance to transfer in Arusha."[21] The difference in experience between the ICTY and ICTR is

---

[14] *Ibid.*, § 49.

[15] UNSC resolution 1503 (2003), preamble. Paragraph 11 of the preamble stipulates: "Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber')."

[16] For more information, consult the official website of the BiH State Court: http://www.sudbih.gov.ba/?jezik=e [accessed: 5 June 2013].

[17] Report on the Judicial Status of the ICTY and the Prospects for Referring certain Cases to National Courts, S/2002/678, 19 June 2002, §§ 49 ff., available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf [accessed: 1 July 2013]. For instance, the ICTY had set out as obstacles for referral the following factors: "risk of dependency and partiality of the judiciary", "lack or ineffectiveness of witness protection provisions", "lack of training for the judiciary and law professionals", "inefficient financial and logistical resources", "slowness of judicial system" and "incomplete compatibility of national substantive law with international law". See in this context also: *Bohlander*, 14 Crim. L.F. 68 (2003).

[18] In this context see: Human Rights Watch, Law and Reality.

[19] *Schabas*, 13 Max Planck UNYB 31 (2009) [accessed: 8 July 2014].

[20] It has since been abolished in 2007, but has been replaced by "life imprisonment in isolation", a punishment deemed to constitute cruel and unusual punishment by many. In this context, see Organic Law No. 05/2009/OL of 21 Dec. 2009 modifying and complementing Organic Law No. 31/2007 of 25 July 2007 relating to the abolition of the death penalty, O.G.R.R. No. 4 of 25 Jan. 2010.

[21] *Schabas*, 13 Max Planck UNYB 36 (2009).

aptly illustrated by the fact that the ICTY has been able to transfer eight cases involving thirteen accused to countries of the former Yugoslavia, mostly BiH, in the first years of the practice's implementation, while it took the ICTR Referral Bench considerably longer to authorize its first transfer to Rwanda, seven years after the implementation of the practice.[22] The root causes for the legal problems encountered and the difference in experiences between the ICTY and ICTR will be analysed in some detail in chapter 3.

II. Goals of the Completion Strategy

The ICTY/ICTR Completion Strategy was set out in UNSC resolution 1503 (2003),[23] followed and supplemented by UNSC resolution 1534 (2004),[24] reflecting an endorsement of dates and modalities proposed by the ICTY and the ICTR themselves. The Strategy sets a date by which the tribunals should conclude definitively their trial and appellate activities, calling on "the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010", and urges each Tribunal to plan and act accordingly.[25] Taking into consideration the sheer volume of cases and investigative materials before the ICTY and ICTR at the time of their adoption, the Security Council resolutions set forth precise modalities for the steady reduction of trial and appellate activities by emphasizing a focus on high-level perpetrators and encouraging the referral of mid-to-lower-level accused to "competent national jurisdictions, as appropriate".[26] Despite this prioritization, the overly optimistic character of these dates is exemplified by the fact that by mid-2013 the Tribunals are still "winding down" their work, and in the case of the ICTR, still transferring cases under rule 11*bis* RPE.[27]

---

[22] While the *Uwinkindi* case was initially approved for transfer by the Trial Chamber in June 2011, the case was appealed (the appeal was rejected in December 2011) and *Uwinkindi* was not physically transferred to Rwanda until April 2012. See in this context: Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at 5 May 2014, S/2014/343, 15 May 2014, available at: http://www.unictr.org/Portals/0/English/FactSheets/Completion_St/S-2014-343e.pdf [accessed: 26 June 2014], Annex II. The ICTR *did* transfer its two first cases to France under universal jurisdiction in 2007: *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, 20 Nov. 2007; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, 20 Nov. 2007.

[23] UNSC resolution 1503 (2003).

[24] UNSC resolution 1534 (2004).

[25] *Ibid.*, § 3.

[26] UNSC resolution 1503 (2003), preamble, § 8.

[27] In this context, see, for instance, the latest wave of referrals in 2012: http://www.unictr.org/Diary/LatestDecisions/tabid/76/Default.aspx [accessed: 5 June 2013]; the most recent

There are many reasons for this delay. In the ICTY context, the late arrests of remaining high-ranking accused (notably *Ratko Mladić* and *Goran Hadžić* in May and July 2011 respectively), and complex problems with specific cases have significantly contributed to the delay.[28] In the ICTR context, delays relate to the fact that the *first* case referral to Rwanda was only made in 2011,[29] such that the wave of referrals to Rwanda commenced only subsequently, and that judgment for one of the cases on appeal *(Butare)* is not expected until mid-2015.[30] Inevitably, the foregoing difficulties are an attest to the true complexity of the *ultimate* completion of the ICTY and ICTR mandates.

Two primary goals of the Completion Strategy are frequently cited – one *pragmatic*, namely the reduction of the ICTY/ICTR caseload, and one *idealistic*, namely the nationalization of the accountability process. These goals will be discussed in turn below.

A. Reduction of the ICTY and ICTR caseload

Given that the ICTY and ICTR were at the peak of their judicial activities when the joint Completion Strategy was implemented,[31] overburdened both by the number of

---

Appeals decision regarding a referral to Rwanda was in *Bernard Munyagishari v. The Prosecutor*, ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11*bis*, 3 May 2013.

[28] Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 19 November 2013 to 16 May 2014, S/214/351, 16 May 2014, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16may2014_en.pdf [accessed: 7 May 2013], § 6; Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 15 November 2011 to 22 May 2012, S/2012/354, 23 May 2012, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2012_en.pdf [accessed: 7 May 2013], §§ 3, 13 ff.

[29] Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at 5 May 2014, S/2014/343, 15 May 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_343.pdf [accessed: 26 June 2014], Annex II.

[30] *Ibid*., § 23, referring to the *Butare* "mega trial" in the *Butare* case [accessed: 26 June 2014].

[31] Report on the Judicial Status of the ICTY and the Prospects for Referring certain Cases to National Courts, S/2002/678, 19 June 2002, § 1, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf [accessed: 1 July 2013].

cases and the average length of proceedings,[32] perhaps the most obvious goal of referrals was to ease the Tribunals' caseload.[33] Having previously alluded to the temporary mandate of the ICTY and ICTR and the multiple factors leading to the adoption of the Completion Strategy, the reduction of the ICTY/ICTR caseload was an inevitable next step in the process of winding down the Tribunals' work. In this spirit, the Security Council resolution called on the ICTY and ICTR Prosecutors to undertake a review of the caseload in particular, with the objective of assessing which cases should be tried at the tribunals and which should be referred to competent national jurisdictions for trial.[34] Regarding the review and confirmation process of any new indictments at the Tribunals, the Security Council resolutions encouraged the Tribunals to "concentrate on *the most senior leaders* suspected of being *most responsible* for crimes within the jurisdiction of the relevant Tribunal",[35] a standard which has been further elucidated in the ICTY case law and which will be discussed below.

1. Focus on high-level perpetrators and level of responsibility of accused

As noted in chapter 1, the Statutes of the ICTY and ICTR do not make explicit reference to the level of responsibility of the accused as opposed to other international or hybrid tribunals, such as the IMT Nuremberg, which targeted "the major war criminals of the European Axis",[36] the Special Court for Sierra Leone (SCSL), which targets "*persons who bear the greatest responsibility*",[37] and the Extraordinary Chambers in the Courts of Cambodia (ECCC), which focuses on both "senior leaders […] and those who were most responsible."[38] Nor was seniority a determinant pre-condition for trying an accused at the ICTY. Indeed, throughout the early years of the ICTY's activities, many intermediate or low-ranking persons were indicted and tried, a strategy which is sometimes referred to as the "Pyramid Indictment Strategy".[39] An infamous example is *Dušco Tadić*, a brutal, albeit low-level,

---

[32] *Ibid*.

[33] *Gradoni*, 54 Netherlands Int'l L. Rev. 2 (2007).

[34] UNSC resolution 1534 (2004), § 5.

[35] *Ibid*., emphasis added.

[36] Charter of the International Military Tribunal for Nuremberg, 82 UNTS 279; 59 Stat. 1544; 3 Bevans 1238; 39 AJILs 258 (1945), article 1.

[37] Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; U.N. Doc. S/2002/246, appendix II, article 1.

[38] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf [accessed: 7 June 2013], article 2.

[39] ICTY Manual on Developed Practices [accessed: 7 June 2013], p. 167, § 1.

reserve police officer,[40] who would no longer be the target of the prosecutorial priorities set by today's Completion Strategy.[41] As argued by the ICTY, this initial Pyramid Indictment Strategy was justified by a need to facilitate building a case from the bottom up by gradually leading "investigators up the chain-of-command to the highest-level suspects."[42] The fact that the ICTY's work commenced when the conflict in the former Yugoslavia was still ongoing, inexorably increased the level of complexity in obtaining custody of high-level accused right from the outset.[43] Evidently, the Pyramid Indictment Strategy was also meant to allow the Tribunal to gain credibility in the eyes of the international community, which was expecting speedy results in the prosecution of crimes committed in the territories of the former Yugoslavia and Rwanda.[44] Despite the fact that the UN Completion Strategies make an explicit distinction between high-level accused on the one hand, and mid-to-lower-level accused on the other, as mentioned above, the criteria to make such a determination are not revealed. Rule 11*bis* of the respective ICTY and ICTR RPE does not expand in a meaningful way on this aspect.

2. Referral of intermediate and lower-level accused to national jurisdictions

Deferral and *referral*, common terms in international criminal law, both connote the "transfer of jurisdiction from one level to another".[45] The *deferral* of cases from national courts to the ICTY and ICTR for trial has been an important feature of the primary and concurrent relationship of the ICTY and ICTR vis-à-vis national courts from the beginning of their mandates and is an explicitly recognized practice in the ICTY and ICTR Statutes. Conversely, the concept of *referral* of cases to national courts for trial was only explicitly mentioned in rule 11*bis* RPE at a much later stage in the Tribunals' lives, representing a novel practice of "highly experimental character,"[46] which has been described as a product of the Security Council's judicial and

---

[40] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997.

[41] This was indicated by many experts during an ICTY research visit, The Hague, October 2009 [interview transcripts with author].

[42] ICTY website: http://www.icty.org/sid/103 [accessed: 5 June 2013].

[43] ICTY research visit, October 2009 [interview transcript with author].

[44] *Ibid.* As argued by *Alvarez*, there are many sound practical reasons to commence with trials where the stakes are not perceived to be that high, such as allowing the parties to the proceedings "to gain confidence in the procedures and the deliberative process itself" as well as permitting them "to test the scope of the substantive Rules of humanitarian law." See: *Alvarez*, 96 Mich. L. Rev. 2092 (1998).

[45] *Bekou*, 33 Fordham Int'l L. J. 730 (2010).

[46] *Petrig*, 45 Crim. L. Bull. 3–27 (2009).

financial pragmatism.[47] Acknowledging that the referral practice is a new measure, untested not only by the ICTY but also by its predecessors, the ICTY argues that it is nevertheless consonant with the "original spirit of the Tribunal as a body with primacy over national courts enjoying concurrent jurisdiction".[48] While this is arguably a sound interpretation in theory, the formal relationship to national courts – provided under article 9 of the ICTY Statute and article 8 of the ICTR Statute – does not itself provide the legal basis for the referral practice.[49] While the implementation thereof without a formal amendment of the Statutes has garnered criticism from some scholars,[50] others are of the view that the adoption of a UN Security Council resolution is sufficient to modify the Statute without formally amending it.[51]

As noted previously, the referral of cases to national courts constitutes a key component of the Completion Strategy, as is expressly set out in Security Council resolutions 1503 (2003) and 1534 (2004). This is because the effective implementation of the Completion Strategy is contingent, *inter alia*, on the tribunals' ability to transfer cases and investigative materials to national jurisdictions for prosecution.[52]

The question as to whether the goal of reducing the respective tribunals' caseloads has been or is being achieved by the Completion Strategy's referral practice is best approached by analysing the different referral experiences of the ICTY and ICTR. That is, the different referral experiences (and the legal problems associated with them) provide basis for the argument that the referral practice cannot be viewed as an automatic workload reduction measure; rather, it must take into account the specific contexts in which it takes place if it is to meet the said goal. This will be discussed in more detail below.

B. Nationalization of the accountability process

In addition to the foregoing aim, a much more idealistic objective has been voiced in connection with the referral practice, namely the nationalization of the accountability process. By fortifying national judicial systems and bestowing on them the responsibility of prosecuting the majority of international crimes, the practice seeks to promote the national reconciliation process. The idea of national prosecution of international crimes by competent national courts is the very essence on which the

---

[47] *Gradoni*, 54 Netherlands Int'l L. Rev. 2 fn. 3 (2007), citing *Lambert-Abdelgawad*'s description of the process as a: "Produit juridique du pragmatisme judiciaire et financier du Conseil de sécurité".

[48] ICTY Manual on Developed Practices [accessed: 7 June 2013].

[49] ICTY research visit, October 2009 [interview transcript with author].

[50] *Bekou*, 33 Fordham Int'l L.J. 733–34 (2010).

[51] ICTY research visit, October 2009 [interview transcript with author].

[52] *Pocar*, Assessment and Report to the Security Council, U.N. Doc. S/2006/353, § 37.

permanent ICC structure is built and inevitably had a significant influence on discussions surrounding the idea of a referral practice of the *ad hoc* tribunals.[53] As noted by *Meron*, President of the ICTY and the Residual Mechanism for International Courts and Tribunals (UNMICT),[54] referrals to national courts are intended to enhance "the essential involvement of national Governments in bringing reconciliation, justice and the rule of law in the region."[55] A criticism voiced with regard to this particular objective is that while the nationalization may be a beneficial by-product of the referral practice, exploiting the benefits of national trials was not the pushing factor behind the implementation of the Completion Strategy in the first place.[56] In other words, the nationalization process – *via* the referral practice – is often viewed as "a reactive measure to the cost and expense of the *ad hoc* tribunals",[57] motivated more by the objective to try a number of "big fish" before closing than by genuine efforts to "leverage the benefits of domestic trials".[58] This criticism is expounded by the unfavourable perception of the local population towards the practice, at least in the beginning phase of its implementation. This is made clear by the former ICTY Prosecutor, *Carla Del Ponte*, in 2006, who argues that this practice "is not well-understood, nor accepted by groups of victims, in particular in Bosnia and Herzegovina", due to a sentiment of "deep mistrust" towards the BiH State Court.[59] Recent empirical findings show that even today, more than five years after the creation of the War Crimes Chamber of the BiH State Court, there is widespread reticence about the Court's impact on the national reconciliation process.[60] The OSCE Mission to Bosnia and Herzegovina (OSCE BiH Mission), mandated to monitor national war crimes proceedings, including ICTY transfer cases to the BiH State Court, has pointed to the "systemic shortfalls in the witness protection and support system in

---

[53] *Bekou*, 33 Fordham Int'l L.J. 759 (2010). "This provision of Rule 11*bis* was inserted after the adoption of the Rome Statute, *so the influence of the latter is evident*." Emphasis added.

[54] See UNMICT online: http://unmict.org/en/about.html [accessed: 20 May 2013].

[55] Assessment 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 UNSC resolution 1534 (2004), U.N. Doc. S/2005/343, 25 May 2005, Annex I, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/Completion Strategy/completion_strategy_25may2005_en.pdf [accessed: 5 June 2013], § 12.

[56] *Williams*, 17 Crim. L. F. (2006), 214. As noted by *Williams*, "the process of referral of cases to national courts has arisen from the need to end the judicial activities of the ICTY, not due to a sense of the benefits of trial before national courts."

[57] *Ibid*., 215.

[58] *Petrig*, 45 Crim. L. Bull. 9 (2009).

[59] Assessment of *Carla del Ponte*, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Provided to the Security Council Pursuant to § 6 of the UNSC resolution 1534, U.N. Doc. S/2006/353, 31 May 2006, Annex II, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_31may2006_en.pdf [accessed: 9 July 2014], § 12. Emphasis added.

[60] *Hodžić*, 8 J. Int'l Criminal Justice, 122 (2010).

BiH", and criticizes the fact that "BiH has not advanced the situation of victims and-witnesses *and gained their trust or ensured their willing participation in war crimes proceedings*".[61]

What the true impact of such legal reforms has been on nationalizing the accountability process (and in furthering national reconciliation) is impossible to measure concretely, not least without consideration of the complex socio-political context in which the referral practice operates. As the following discussion will expose, in both BiH and Rwanda, normative and contextual factors interact in complex socio-political settings, and any attempt of quantifying the level of national reconciliation would be overly simplistic and academically imprudent.

The concern that the objective of the ICTY/ICTR Completion Strategy to reduce the Tribunals' caseload in fact overshadows other, more idealistic goals, risks overlooking preliminary results. That is, the referral practice nevertheless *may* have contributed – at least to some extent – to initiating the nationalization process through significant legal reforms, despite numerous problems. This applies mainly to BiH, but also in Rwanda important legislative changes have been made in response to the Completion Strategy's implementation, notably the abolition of the death penalty in 2007[62] (even though the ICTR has been unwilling to send cases to the Rwandan High Court until mid-2011 due to persisting legal problems).

III. The Completion Strategy's referral practice: features and legal problems

For clarity's sake, it is important to briefly reiterate that there are two separate categories of cases eligible for transfer to national jurisdictions: the first category of cases refers to indictments containing charges that have been confirmed by the Pre-Trial Chamber and are trial-ready. The transfer of these confirmed indictments (which would have been tried by the ICTY and ICTR themselves in the absence of the Completion Strategies) is part of a formal procedure and requires a judicial decision by the ICTY and ICTR under rule 11*bis* RPE to allow for transfer. These cases are referred to as "rule 11*bis* RPE cases". The second category of cases refers to investigative files not having yet led to an indictment (the so-called "category II" cases), the transfer of which is based on the discretion of the Prosecutor and is considered to be administrative in nature. From these different characteristics flow at

---

[61] OSCE, Witness Protection and Support in BiH Domestic War Crimes Trials, p. 8 [accessed: 6 June 2013].

[62] See in this context: Organic Law No. 05/2009/OL of 21 Dec. 2009 modifying and complementing Organic Law No. 31/2007 of 25 July 2007 relating to the abolition of the death penalty, O.G.R.R. No. 4 of 25 Jan. 2010.

least two important legal consequences: firstly, while rule 11*bis* RPE calls for a national criminal trial, and the ICTY and ICTR may monitor transferred cases until a final verdict is reached, the tribunals have no continued "control" over how the investigative files are administered at national level following the transfer, or whether these investigations lead to a national criminal trial. Second, and significant for the discussion in chapter 2, the different status of these cases before the international criminal *ad hoc* tribunals may help explain why national courts are held to a significantly higher standard regarding the adjudication of confirmed indictments of the ICTY and ICTR under the respective rule 11*bis* RPE than regarding their actions – or inactions – with respect to investigative files.[63]

It is noteworthy that both the BiH and Rwandan laws governing transfers from the ICTY and ICTR respectively, require that the indictments reflect the charges laid out in the ICTY and ICTR. At the same time, in both contexts the indictment shall be adapted so as to comply with national codes of criminal procedure.[64] However, there is one striking difference: article 2(2) of the BiH Transfer Law allows for the addition of charges and accused by the BiH Prosecutor, subject to confirmation of the additional elements of the indictment by the BiH State Court, whereas the Rwandan law does not, explicitly noting in article 3 that: "a person whose case transferred *[sic]* by the ICTR to Rwanda shall be liable to be prosecuted *only for crimes falling within the jurisdiction of the ICTR*".[65]

A. Referral of cases under rule 11*bis* RPE of the ICTY and ICTR

The referral practice is regulated by the oft-amended rule 11*bis* RPE of the ICTY and ICTR respectively.[66] Essentially, the rule sets out precise criteria – both of a procedural and substantive nature – that must be established *before* a case can be referred to a national system, and provides for a monitoring and revocation mechanism *after* a referral has taken place. There are two distinct phases involved in the

---

[63] See in particular the discussion in chapter 2 concerning the investigative files sent by the ICTR to Rwanda on crimes committed by the RPF.

[64] Article 2(1) of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the use of Evidence collected by ICTY in Proceedings before the Courts in BiH (BiH Transfer Law); articles 3 and 4 of the Organic Law No. 11/2007 of 16 March 2007 concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States (Rwanda Transfer Law).

[65] Emphasis added.

[66] ICTY Rules of Procedure and Evidence, IT/32/Rev. 49, 22 May 2013, see appendix; also available at: http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf [accessed: 6 June 2013]; and ICTR Rules of Procedure and Evidence, adopted on 29 June 1995; as amended on 1 Oct. 2009, see appendix; also available at: http://w.unictr.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf [accessed: 6 June 2013].

application of rule 11*bis* RPE, each of them raising different considerations. As a result, they will each be examined separately below. Certain formal aspects apply from the outset.

1. Formal features

Rule 11*bis* RPE of the ICTY provides that after an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the ICTY President may appoint a so-called "Referral Bench", consisting of three permanent judges from the Trial Chamber, mandated to determine whether to refer the case to national jurisdictions for trial. The ICTR rule 11*bis* RPE, although nearly identical, displays two notable differences in this regard. The first one pertains to the timing at which such a referral can take place: the Trial Chamber has the ability to make a referral at *any* moment or phase during the proceedings, and not merely *preceding* the trial. It must be noted, however, that this divergence has never come into play since the two ICTR cases were transferred to France prior to trial. The second difference is that at the ICTR, there is no specifically appointed Referral Bench dealing solely and exclusively with referral cases; instead, a Trial Chamber is appointed on an *ad hoc* basis for every referral decision. As will be briefly alluded to in the analysis of the cases below, some perceivable divergences in the holdings can be gleaned from the various ICTR trial benches, suggesting that a permanent bench dealing with referrals on a regular basis may create more consistency in the case law, as is the ICTY practice.

According to the ICTY/ICTR rule 11*bis* (B), the ICTY Referral Bench and/or ICTR *ad hoc* Trial Chamber "may order such referral on its own motion *(proprio motu)* or at the request of the Prosecutor." While the provision does not envisage the possibility of the accused making a request for referral,[67] there have been some attempts by accused to choose the forum in which to be tried,[68] spurring scholarly debate about the interpretation of the rule's omission.[69] In its case law, however, the ICTY Referral Bench has clearly enunciated its position that the referral provision does not bestow a substantive right on the part of the accused to be tried at the Tribunal or not to be transferred to another state for trial.[70] According to the Referral Bench, rule 11*bis* simply sets out the procedural powers of the Tribunal to determine whether the case should be heard before it or before a competent national tribunal,

---

[67] *Prosecutor v. Mejakić et al*., Referral Bench, Decision on Prosecutor's Motion for Referral of Case pursuant to Rule 11*bis*, Case No. IT-02-65-PT, 20 July 2005, § 125.

[68] See, for instance, *Prosecutor v. Paško Ljubičić*, Referral Bench, Decision to Refer the Case to BiH pursuant to Rule 11*bis*, Case No. IT-00-41-PT, 12 April 6, §§ 26–27.

[69] See, for instance, *Grant*, Vers la fin des Tribunaux Pénaux Internationaux, pp. 47 ff. and fn. 204; see also *Williams*, 17 Crim. L. F. 188 (2006).

[70] *Prosecutor v. Mejakić et al.*, Case No. IT-02-65-PT.

and as such is compatible with the Security Council resolutions setting out the Tribunal's Completion Strategy.[71] As held by the ICTY Referral Bench in the *Mejakić* case, certain advantages and disadvantages of holding a trial in a given national court may vary "between accused and competent jurisdictions, because of many factors including inevitable differences in laws and procedures."[72] However, according to the same Referral Bench, such variations do not affect the accused's substantive rights or create an entitlement to choose the forum to be tried in as long as his or her right to a fair trial is respected.[73] While the accused does not have standing to choose the state to which s/he is referred, the Referral Bench is not limited to consider solely the country listed in the Prosecutor's request, signifying that it can order referral to another state *proprio motu.*[74] What considerations come into play in the case of competing claims for jurisdiction will be discussed in section 2.a) below.

ICTY's rule 11*bis* RPE foresees that the referral of a case can only follow, *inter alia*, where the Prosecutor *and*, *where applicable*, the accused have been given the opportunity to be heard and after the Referral Bench has satisfied itself that a fair trial will be conducted and that the death penalty will not be carried out. The wording of rule 11*bis* of the ICTR is different and appears much broader than the ICTY equivalent, always giving the Prosecutor *and* the accused the opportunity to be heard, *provided the accused is in the custody of the tribunal*. However, given that in the ICTY practice, the accused have all had the opportunity to be heard during referral deliberations,[75] in the outcome there is no significant difference in the wording of the ICTY and ICTR rule.

While rule 11*bis* foresees the Prosecutor and accused's right to be heard in the ICTY and ICTR context, the rule is silent on the potential referral state's (or states' as the case may be) right to be heard. ICTY and ICTR practice, however, illustrates that states are habitually given the opportunity to be heard in order to determine their "willingness" and "ability" to receive a transfer case, which are crucial criteria for determining whether to refer a case in the first place.[76]

According to rule 11*bis* (I) ICTY/ICTR RPE, the Prosecutor and the accused can appeal the decision of the Referral Bench or *ad hoc* designated Trial Chamber. Where an order is issued pursuant to rule 11*bis*, the accused must be handed over to the authorities of the State concerned ((D)(i)), or if the accused is not in the custody of the Tribunal, the Referral Bench may issue an arrest warrant, detailing the state to which the accused is to be transferred for trial (rule 11*bis* (E)). In this context, the Prosecutor

---

[71] *Ibid.*, §§ 125, 127.

[72] *Ibid.*, § 129.

[73] *Ibid.*, §§ 129, 131.

[74] *Prosecutor v. Gojko Janković*, Referral Bench, Decision on Referral of Case under Rule 11*bis*, 22 July 2005, § 23.

[75] *Williams*, 17 Crim. L. F. 188 (2006).

[76] *Grant*, Vers la fin des Tribunaux Pénaux Internationaux, p. 49.

is required to "provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment" (11*bis* (D)(iii)). Another important feature, which will be discussed in greater detail under the post-referral features, is that the Prosecutor has the right to send observers to monitor the proceedings in the national courts on his/her behalf (11*bis* (D)(iv)). In the ICTY context, the OSCE has been elected to monitor national trials, including 11*bis* proceedings, on the Prosecutor's behalf.

2. Pre-transfer criteria

a) Determination of the state of referral

Rule 11*bis* RPE sets out that in determining whether to transfer a case, there must be a jurisdictional basis on the part of a referral state. As noted by the ICTY Prosecutor, the purpose of referring a case to the authorities of a State is to allow those authorities to designate the appropriate court for trial within that State; it does not allow the Trial Chamber to make a referral directly to a court.[77] In its current version, the ICTY and ICTR rule 11*bis* RPE provides for three bases upon which a case can be referred: to a country

i. in whose territory the crime was committed; or

ii. in which the Accused was arrested; or

iii. having jurisdiction and being willing and adequately prepared to accept such a case, so that [the] authorities [of that country] should forthwith refer the case to the appropriate court for trial within that State.

At the ICTY, of the eight cases transferred to countries of the former Yugoslavia, seven were transferred on the basis of the first jurisdictional principle, that is, the country where the crimes were committed. Only one case, *Kovačević*, was transferred on the second basis, the place of arrest of the accused, and no case has been transferred on the third basis, nor was this ever seriously envisaged. At the ICTR, the first two cases that were referred (to France) have been justified on the basis of the third principle under universal jurisdiction (to be discussed below).

Interestingly, the rule does not specify which State would have jurisdiction in case of competing claims for referral. In fact, competing claims of jurisdiction mainly by BiH and Serbia and Montenegro, but also by Croatia, were examined in the majority of the ICTY transfer cases.[78] To determine this issue, the Referral Bench employed the "nexus approach", evaluating the links to the crimes and considering several factors, such as the best possible conduct of the trial, including the proximity to victims,

---

[77] *The Prosecutor v. Rahim Ademi and Mirko Norac*, Referral Bench, Request by the Prosecutor under rule 11*bis*, Case No. IT-04-78-PT, 2 Sept. 2004, § 7.

[78] See, for instance, the discussion in *Mejakić*, §§ 40–41 and *Ljubičić*, §§ 25 ff.

the safety of witnesses, the availability of evidence, and the prospects of a fair and expeditious trial for the accused.[79] Although the Referral Bench specified that there is no hierarchy between the three bases of jurisdiction, it did pronounce a general preference for referring a case to the state where the crimes were committed rather than the place where the accused was arrested, because the former satisfied the nexus approach more closely.[80] Despite the fact that the aforementioned jurisdictional principles are well recognized in the body of customary international law, their relative priority is still topic of some dispute.[81] As a result, this aspect of the referral practice must be examined at some length below.

The third basis for jurisdiction, in which a country, without any apparent territorial or *in-personam* connection to the alleged crimes, has "jurisdiction and [is] willing and adequately prepared to accept such a case", was only added in 2004 after the first two bases in order to "expand the available national jurisdictions to which cases involving intermediate and lower-level accused could be referred."[82] This option requires a State to have some form of jurisdiction recognized in international law, such as universal jurisdiction, for instance.

While all referral cases from the ICTY were transferred to countries of the former Yugoslavia under the first two jurisdictional bases of rule 11*bis* RPE, reliance on universal jurisdiction has been crucial for the ICTR, which until 2011 (technically April 2012 as the case was appealed)[83] had not been able to transfer any cases to Rwanda, the *locus delicti commissi* (the place where the crimes were committed), despite Rwanda's repeated pronouncements of willingness to receive these cases.

Major difficulties pertain to a state's ability to prosecute international crimes allegedly committed by a non-national outside its territory under the universal jurisdiction principle, as was prominently demonstrated by the Netherlands' failed endeavour to try an ICTR transfer case. In 2007, the ICTR referred its first case, the *Bagaragaza* case, to the Netherlands,[84] after an unsuccessful attempt to transfer it to Norway in 2006. The Netherlands had implemented the 1948 Genocide Convention

---

[79] See, for instance, *Ljubičić*, §§ 27–30.

[80] *Ljubičić*, §§ 27–30.

[81] *Williams*, 17 Crim. L. F. 196 (2006).

[82] Annual Report of the ICTY to the General Assembly and the Security Council, U.N. doc. A/59/215-S/2004/627, 16 Aug. 2004, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2004_en.pdf [accessed: 6 June 2013], § 10.

[83] Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at 5 May 2014, S/2014/343, 15 May 2014, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_343.pdf [accessed: 7 July 2014], Annex II.

[84] *The Prosecutor v. Michel Bagaragaza*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, Trial Chamber, Case No. ICTR-2005-86-11*bis*, 13 April 2007.

into its domestic legal system, and had the ability to prosecute genocidal acts having been committed outside its territory under the Genocide Implementation Act and the Dutch Criminal Code. However, article 4(1) of the Dutch Criminal Code required: i) the accused to be a Dutch national or ii) the case to be transferred to the Netherlands from another state in accordance with article 4(a) of the Dutch Criminal Code.[85] In this sense, article 4(a) stipulates that: "the Dutch criminal law is applicable to anyone against whom prosecution has been transferred from a *foreign State* to the Netherlands on the basis of a treaty from which the power of the Netherlands to prosecute follows".[86]

Given that the accused is not a Dutch national, the ability of the Dutch courts to hear the *Bagaragaza* case depended on the second criterion. Shortly after referring the case to the Netherlands, however, the District Court of The Hague held in another Rwandan case *(Joseph Mpambara)* that the formal requirements of universal jurisdiction were not met to prosecute genocide charges despite the fact that the ICTR had requested the Dutch government to try this case.[87] Finding that the ICTR could not be considered a "foreign state" *strictu sensu*, the District Court declined the possibility for Dutch courts to hear genocide cases of this nature.[88] The Dutch Supreme Court later confirmed this finding.[89] Given that the Dutch Prosecutor had intended to try the *Bagaragaza* case on much the same jurisdictional basis as the *Mpambara* case, following the decision in *Mpambara*, the Dutch Prosecutor was forced to suspend the proceedings in the *Bagaragaza* case.[90] As a result, the ICTR revoked the referral decision under rule 11*bis* (F) in 2007 and the case was completed in Arusha in 2009.[91]

This issue also came up before the ICTR Referral Bench in determining whether to refer indictments to France. In order to exercise jurisdiction under the 22 May 1996 Law, the accused must be physically present on French territory.[92] The French

---

[85] *Ibid.*, § 16.

[86] Replicated *verbatim* in *Bagaragaz*a, § 17. Emphasis added.

[87] Hague Justice Portal News, Hague District Court declares genocide complaint inadmissible, 8 Aug. 2007, available at: http://www.haguejusticeportal.net/index.php?id=8037 [accessed: 7 June 2013].

[88] *Ryngaert*, The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands [accessed: 7 June 2013], pp. 2–3.

[89] *Ibid*.

[90] Hague Justice Portal News, Hague District Court declares genocide complaint inadmissible, 8 Aug. 2007, available at: http://www.haguejusticeportal.net/index.php?id=8037 [accessed: 7 June 2013].

[91] *Ibid.* See also: *Ryngaert*, The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands [accessed: 7 June 2013], p. 2.

[92] Article 2 of the 1996 law, relegating to article 2 of the 1995 law regarding the adaptation of French law to the UNSC resolution 827 (1993). It notes: "Les auteurs ou complices des infractions mentionnées à l'article 1er peuvent être poursuivis et jugés par les juridictions françaises en application de la loi française, s'ils sont trouvés en France."

Cour de Cassation held that France is competent to hear cases of Rwandan nationals for genocide and crimes against humanity committed in Rwanda in 1994, provided the accused is present on French territory.[93] Article 689-1 of the Code of Criminal Procedure, covering notably torture and terrorist acts, also makes mention of the physical presence link as a basis for universal jurisdiction over foreign accused for crimes committed outside the French territory.[94] In the case of the two accused whose indictments were transferred from the ICTR, the ICTR Trial Chamber did not consider the presence criterion to pose particular problems as they were already on French territory.[95] However, a recent amendment to the French Code of Criminal Procedure incorporates significant changes to France's ability to exercise universal jurisdiction over foreign accused for crimes under the Rome Statute of the ICC, requiring not only a simple physical presence but "usual residence" *(résidence habituelle)* instead.[96] It is unclear as of yet what "usual residence" means, but there is some basis for fearing that such a standard will be interpreted as meaning something permanent.[97] As noted by the French Coalition of the ICC:

> "[A]s the text […] stands, individuals suspected of having committed genocide, crimes against humanity or war crimes will be able to come and go freely in France without hindrance, as long as they do not settle on French territory on a permanent basis, contenting themselves instead with relatively long stays."[98]

How this will be determined and what repercussions such a limitation would have on the 1996 Law and France's ability to exercise universal jurisdiction over accused for international crimes committed in the former Yugoslavia and Rwanda is highly speculative and thus beyond the scope of this section. Suffice it to say at this point, however, that the adoption of this law creates some rather paradoxical discrepancies in France's ability to prosecute international crimes, should all other current laws relating to France's ability to prosecute international crimes relating to specific conflicts, discussed above, remain in force. As further argued by the French Coalition of the ICC:

---

[93] Cour de Cassation, Chambre Criminelle, 6 Jan. 1998, 96-82.491; http://www.easydroit.fr/jurisprudence/Cour-de-Cassation-Chambre-criminelle-du-6-janvier-1998-96-82-491-Publie-au-bulletin/C73598/ [accessed: 6 May 2012].

[94] Article 689-11 of the Code of Criminal Procedure, created by Law No. 2010-930 of 9 Aug. 2010 adapting penal law to the institution of the International Criminal Code, available at: www.legifrance.gouv.fr [accessed: 22 Sept. 2010].

[95] *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, 20 Nov. 2007, § 17; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, 20 Nov. 2007, § 17.

[96] Article 689-11 of the Code of Criminal Procedure.

[97] Coalition française pour la Cour pénale internationale, Those accused of International Crimes must be tried in France at last, Concerning new article 689-11 of the Criminal Procedure Code adopted by the Senate, available at: http://www.cfcpi.fr/IMG/pdf_Those_accused_of_international_crimes_must_be_tried_in_France_at_last.pdf [accessed: 10 Jan. 2014], p. 3.

[98] *Ibid*.

> "while the French courts can declare themselves competent in the case of the Rwandan genocide, this would not be the case for perpetrators of genocides committed in other places and at other times. Whilst the legal incriminations are the same, legal intervention would be subject, on one case, to the simple presence, and, in another, to the usual residence of the suspect. This difference in treatment is inexplicable."[99]

This is starkly noticeable when comparing the plain text of articles 689-1 and 689-11 of the French Code of Criminal Procedure.

In addition to a state having jurisdiction, an important pre-condition of the third jurisdictional basis under rule 11*bis* is a State's willingness and ability to try transfer cases, a criterion for the inadmissibility of a case which is prominently featured in the Rome Statute of the ICC. While this dual criterion is only explicitly required for the third jurisdictional basis of rule 11*bis* RPE, the ICTY Referral Bench deemed it to be an implicit criterion for all three separate jurisdictional bases, noting that any other reading would be illogical. That is, in *Mejakić et al*., the Referral Bench held that "Finally, the logic of the rule appears to suggest that the receiving State must be 'willing and adequately prepared to accept such a case'",[100] irrespective of the type of jurisdictional link to the alleged crimes. However, the Referral Bench did not elaborate on how to transfer a case to a country, which is unwilling or unable to try a case before its courts.[101] It also never discussed the parameters of "willingness" for the purpose of this threshold. Rule 11*bis* RPE does not give much guidance on how to measure "willingness" and "ability".

b) Determination of adequate national framework

Rule 11*bis* RPE does not expressly require a substantive law analysis of the receiving state's juristiction. However, a persuasive reason to engage in such an examination is to determine whether an accused will receive a fair trial and that the death penalty will not be imposed under rule 11*bis* (B) and to assess the adequate preparedness or capacity of a state to try a case under rule 11*bis* (A)(iii),[102] the latter of which, as noted above, is deemed to be implicit criterion for all three jurisdictional bases.

Rule 11*bis* does not provide any guidance on the exact criteria to evaluate "adequate preparedness".[103] In making this assessment, the ICTY and ICTR Referral Benches noted that there is the need for an "adequate legal framework", which proscribes the alleged conduct of the accused and provides a satisfactory penalty structure at the

---

[99] *Ibid*.

[100] *Mejakić et al.*, Preliminary Order in Response to the Prosecutor's Request under Rule 11*bis*, Case No. IT-02-65-PT, 22 Sept. 2004, § 4.

[101] *Petrig*, 45 Crim. L. Bull. 14 (2009).

[102] *Bekou*, 33 Fordham Int'l L. J. 764 (2010).

[103] *Ibid*., 764.

national level.[104] According to ICTY and ICTR case law, this means that the national jurisdiction receiving transfer cases must criminalize the acts contained in the confirmed ICTY or ICTR indictment. As noted by the ICTR Appeals Chamber, the Tribunal only has authority to refer cases where the State "will charge and convict [or acquit] only for those international crimes *listed in its Statute*", as opposed to "ordinary crimes", such as homicide.[105] One particularly pertinent problem therefore is the disparate definition of core international crimes between the ICTY/ICTR and national legal systems, which can, where these legal systems are directly juxtaposed, engender prosecutorial challenges related to the principle of legality as a vital precondition to *jus puniendi*. The danger of disparate standards is persuasively summed up by *Bergsmo*, who argues that:

> "[w]ithout such offences in national criminal law it may not be possible to bring cases with the proper international legal classification, forcing prosecutors and judges to fall back on ordinary national crimes which may not adequately capture the interests that are protected by the core international crimes."[106]

In addition to the foregoing, rule 11*bis* RPE does not prescribe exactly *how* a national court may modify or adapt a confirmed indictment to its own national law provisions. Bosnia and Herzegovina and Rwanda have both adopted transfer laws, which specifically govern the transfer of ICTY and ICTR cases to national courts. These laws set out that transferred indictments shall be adapted to conform to national criminal procedure codes.[107] Interestingly, under the BiH Transfer Law, allowance is made for the addition of charges or accused to the ICTY indictment, subject to confirmation of the additional elements by the BiH State Court as per article 2(2). However, it remains unclear in the BiH Transfer Law whether the crimes added to the indictment must necessarily be punishable under the ICTY Statute and/or which national criminal code is directly applicable (some difficulties faced in the national adaptation of an ICTY indictment by Croatia will be discussed in more detail below). Conversely, article 3 of the Rwanda Transfer Law, which does not expressly allow for any additional charges or accused to the indictment, clearly stipulates that: "a person whose case *[sic]* transferred by the ICTR to Rwanda shall be liable to be prosecuted *only for crimes falling within the jurisdiction of the ICTR*".

---

[104] This has been reiterated throughout most of its case law, see, for instance, *Mejakić et al.*, § 43 at the ICTY, and *The Prosecutor v. Bagaragaza*, Decision on Rule 11*bis* Appeal, Case No. ICTR-05-86-AR11*bis*, § 9, at the ICTR [hereafter *Bagaragaza* (AC)].

[105] *Bagaragaza* (AC), § 16. Emphasis added.

[106] *Bergsmo et al.* (eds.), Importing Core International Crimes into National Criminal Law, [accessed: 9 July 2014], Preface by the Editor, p. 3.

[107] Article 4, Rwanda Transfer Law stipulates that: "(1) The Prosecutor General's Office of the Republic shall adapt the ICTR indictment in order to make them compliant with the provisions of the Code of Criminal Procedure of Rwanda, and it shall be forwarded to the President of the High Court of the Republic. (2) The High Court of the Republic shall accept the indictments after verifying they fulfil the formal requirements of the Code of Criminal Procedure of Rwanda.", available at: http://www.geneva-academy.ch/RULAC/pdf_state/Organic-Law-11-2007-Transfer-ICTR-Other-Cases-to-Rwanda.pdf [accessed: 13 May 2013].

The national prosecution of international crimes following a transfer from the ICTY and ICTR is where the crux of the problem exposed in this research project lies: in both contexts, multiple conflicting laws may apply to ICTY/ICTR indictments.[108] Indeed, the extent to which such a criminalization should mirror the international standards has been viewed somewhat differently by the ICTY and ICTR themselves.

aa) ICTY jurisprudence: Bosnia and Herzegovina

Given that Bosnia and Herzegovina has undergone a wide-scale criminal justice reform since 2003, there are several applicable criminal codes and codes of civil procedure at work simultaneously at the various court levels for the prosecution of crimes committed during the 1992 conflict. While the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC)[109] which was in force at the time of the conflict is no longer in effect in Bosnia and Herzegovina, the principle of legality requires its application to war crimes prosecutions today, unless specific conditions are met.

Given the importance of this principle to the rather contentious debate that has arisen in BiH national legal proceedings in war crimes cases, a very brief explanation is necessary here. The principle of legality is based on the Latin maxim *nullum crimen sine lege* ("no crime without law") or a variant *nullum poena sine lege* ("no punishment without law"), which requires that the law must be certain and thus foreseeable (legal certainty). It connotes the theory that an individual should not be subject to criminal punishment if the conduct in question was not criminal before the time that it was committed, since "[c]riminal behaviour can only be deterred if citizens are aware of the criminalising law prior to commission of the censured conduct."[110] Practically speaking, this means that the law, which was in force at the time of the commission of the crime(s), shall be applied. As such, the non-retroactive application of later implemented laws (*ex post facto*) is generally prohibited, although there is an important exception where the later laws are more lenient *(lex mitior)* and thus more favourable to the accused.[111] How difficult it is to put this seemingly simple principle into practice, however, can be gleaned from the fervent debate that has arisen around this issue in BiH national courts and at the ECtHR.

---

[108] Rwanda Transfer Law, article 3.

[109] The Criminal Code of the SFRY ("Official Gazette" of the SFRY, Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90), available at: http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm [accessed: 9 May 2013]. See in this context the Max Planck Institute's publication: *Sieber et al.* (eds.), National Criminal Law in a Comparative Legal Context. Vol. 2.1: General Limitations on the Application of Criminal Law.

[110] ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013, p. 39.

[111] *Ibid*.

The 2003 Criminal Code of Bosnia and Herzegovina (BiH CC),[112] although recognizing the principle of legality in article 4(1), provides for two important exceptions thereto: article 4(2) stipulates that if the law in force at the time of commission of the alleged acts has since been amended, the more lenient law will apply. Article 4(a) stipulates that articles 3 and 4 shall not prejudice the trial and punishment of a person for an act or omission, which was criminal according to the general principles of international law when it was committed. In fact, in the majority of the referral cases, the Prosecutor took the position that despite the fact that the SFRY Criminal Code does not contain express provisions criminalizing crimes against humanity or command responsibility, these concepts formed part of existing international law at the time of the commission of the offences and that the BiH Criminal Code is simply a codification of customary international law.[113]

While the BiH Criminal Code appears in many important substantive law aspects to align with the ICTY Statute, the SFRY Criminal Code displays potentially significant discrepancies in terms of categories of crimes, modes of commission of crimes and penalties. The question about which law will apply to transfer cases is highly relevant because the BiH State Court, receiving transfer cases, could potentially rely on either set of legal provisions to adjudicate the crimes set out in the ICTY indictment. Therefore, depending on which law will apply, the domestic law may not be able to provide equivalent charges to correspond to the conduct set out in the ICTY indictments.[114]

The ICTY, much like the ICTR, has faced the issue of disparate legal definitions of crimes throughout its referral deliberations. In *Stanković* and many subsequent cases, the ICTY Referral Bench has explicitly stated from the outset that it did not have the authority to decide in any binding manner which law should be applied as this determination was within the competence of the national court in the case of referral.[115] However, it did consider itself competent to examine

> "[…] the apparent position under each of the possibly applicable set of legal provisions, in order to determine whether there is any significant deficiency which may impede or

---

[112] The Criminal Code of Bosnia and Herzegovina ("Official Gazette" of Bosnia and Herzegovina, 3/03, as amended by "Official Gazette" of Bosnia and Herzegovina, Nos. 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10), available at: http://www.sudbih.gov.ba/files/docs/zakoni/en/krivicni_zakon_3_03_–_eng.pdf [accessed: 7 May 2013].

[113] *Mejakić*, § 44.

[114] *Williams*, 17 Crim. L. F. 207 (2006).

[115] *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. IT-97-25/1-PT, Referral Bench, Decision on Referral of Case under Rule 11*bis*, 8 July 2005, § 34; *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Referral Bench, Decision on Referral of Case under Rule 11*bis*, 17 Nov. 2006, § 25; *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case under Rule 11*bis*, 17 May 2005, § 32; *Mejakić*, § 43; *Janković*, § 27; *Ademi and Norac*, § 32.

prevent the prosecution, trial, and if appropriate, the punishment of the Accused for the alleged criminal conduct which is charged in the present Indictment."[116]

In all of its referral decisions, the ICTY Referral Bench has taken a nearly identical position on this issue.[117] Regrettably, however, it does not provide direction on what it considers to be the "apparent position" or how to assess it.[118]

(1) Category of crimes

One of the most flagrant differences between the BiH and the SFRY Criminal Code is that the latter does not foresee the concept of crimes against humanity. Conversely, the new BiH Criminal Code is much more in line with the ICTY Statute, explicitly providing for crimes against humanity.[119] As regards possible differences in the category of international crimes between the ICTY and domestic jurisdictions, in *Stanković* and a number of subsequent cases, the issue of discrepancy between applicable legal provisions came up. To this end, the Referral Bench contemplated the applicability of article 142(1) of the SFRY CC, which enumerates violations of the laws or customs of war, to the charges set out in the ICTY indictment. The fact that the conduct was charged as crimes against humanity in the ICTY indictment, a category not covered by the SFRY CC, did not impede the Referral Bench to contemplate prosecuting such charges as war crimes instead. In the *Stanković* case, for instance, the Referral Bench held that while the SFRY CC does not incorporate crimes against humanity as reflected in article 5 of the ICTY Statute, article 142(1) of the SFRY CC covers the same conduct and therefore would "appear applicable".[120] As such, according to the Referral Bench, rape and enslavement charged as crimes against humanity under article 5(c) and (g) in the ICTY indictment would be covered by article 142 (1) of the SFRY CC.[121] The Referral Bench came to similar conclusions in other cases, such as *Janković* as regards acts of torture and rape,[122] in *Mejakić* and *Ljubičić* as concerns murder and inhumane acts,[123] and in *Rašević and Todović* as concerns torture, inhumane acts, murder, imprisonment, and enslavement,[124] all of which had been charged as crimes against humanity in the ICTY indictment.

---

116 *Stanković*, *ibid.*, § 37; an identical or similar formulation can also be found in subsequent cases: *Ademi and Norac*, *ibid*., § 32; *Janković ibid*., § 32; *Kovačević*, *ibid*., § 25; *Ljubičić*, *ibid.*, § 32; *Mejakić*, *ibid*., § 48.

117 *Bekou*, 33 Fordham Int'l L. J. 765 (2010).

118 *Ibid*., 765.

119 Criminal Code of Bosnia and Herzegovina (BiH CC), chapter XVII, articles 117 ff.

120 *Stanković*, § 34.

121 *Ibid.*, § 34.

122 *Janković*, § 34.

123 *Ljubičić*, *Mejakić*.

124 *Rašević and Todović*.

Where the conduct charged in the indictment was not specifically covered by the SFRY CC, the Referral Bench contemplated analogous national law provisions. In examining the two sets of applicable legal provisions, the SFRY CC and the BiH CC, the Referral Bench in *Mejakić* held that while the SFRY CC did not specifically provide for persecution as a crime against humanity, as contained in article 5(h) of the ICTY Statute and charged in the indictment, article 154 of the SFRY CC criminalizes "Racial and Other Discrimination".[125] The Referral Bench noted that while article 154 does not appear directly equivalent to persecution as a crime against humanity, also in terms of the punishment provided therefor, such matters are not necessarily an impediment to referral, due also to the alleged circumstances of the charge of persecution and the nature and range of other charges against the accused.[126] In other words, given that the accused were charged with a variety of other crimes having a corresponding counterpart in the SFRY Criminal Code, the Referral Bench satisfied itself that whichever set of legal provisions was applied by the BiH State Court, "there are appropriate provisions to address *most, if not all*, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure."[127] The Referral Bench took the same position in the *Ljubičić* case.[128] The same method was employed for war crimes not having an equivalent in the SFRY CC.[129]

(2) Mode of commission of crimes

The problem about discrepancies between the ICTY Statute and the applicable national laws also arose because the SFRY CC contains a significantly more limited understanding of command responsibility than the ICTY Statute.[130] Conversely, the new BiH CC envisages a broad notion of command responsibility as a mode of a commission of a crime, almost identical to the one provided in the ICTY Statute.[131] In the majority of the referral cases before it, the Referral Bench determined the issue whether the SFRY Criminal Code, if applied, was sufficient to cover the charges of

---

125 SFRY CC.

126 *Mejakić*, § 53.

127 *Ibid.*, § 63. Emphasis added.

128 *Ljubičić*, § 36.

129 See, for instance, *Stanković*, § 39. In that case, the Referral Bench held that outrages upon personal dignity as a violation of the laws or customs of war under article 3 of the ICTY Statute "would appear to be substantially analogous" to the prohibition against inhuman treatment and violations of bodily integrity in article 142(1) of the SFRY CC.

130 SFRY CC, article 142, see also ICTY Statute, article 7(3). See in this regard International Criminal Law & Practice Training Materials, Modes of Liability: Superior Responsibility: Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions, Developed by International Criminal Law Services, available at: http://wcjp.unicri.it/deliverables/docs/Module_10_Superior_responsibility.pdf [accessed: 10 April 2012].

131 *Janković*, § 43. See in this context: BiH CC, article 180(2).

command responsibility in the indictment, as reflected in article 7(3) of the ICTY Statute.[132] In other words, in the SFRY CC, the notion of "direct" command responsibility appears to be largely restricted to the notion of "ordering", "organizing" or "instigating" crimes,[133] which fall under article 7(1), dealing with individual criminal liability, rather than article 7(3), which deals specifically with command responsibility.[134] Article 7(3) of the ICTY Statute stipulates:

> "The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility *if he knew or had reason to know that the subordinate was about to commit such acts or had done so* and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[135]

Although appearing to "address most of the fields covered by article 7(3)," the Referral Bench held in *Mejakić*, and a number of subsequent cases, that it could not decide with certainty whether the SFRY Criminal Code "would permit the imposition of liability where a commander did not know that a crime had been, or was about to be, committed by persons under his command, but had 'reason to know', and yet failed to prevent the offence, or punish the offenders."[136] The Referral Bench admitted to the possibility that an accused may be acquitted where it cannot be proven that he had actual knowledge of the commission of a crime, but had reason to know. Taking this possibility into account, but relying on the fact that the accused were charged with individual criminal responsibility under article 7(1), and with command responsibility in the alternative under article 7(3), the Referral Bench decided that this "possible and limited difference in the law" should not be viewed as an impediment to the referral of any of these cases.[137]

It is curious that the Referral Bench did not seriously entertain the Prosecution's position that command responsibility formed part of customary international law at the time of the commission of the crimes, as later codified in the BiH CC.[138] The Referral Bench itself noted that "[w]ith respect to command responsibility, there is also relevant case law of this Tribunal which has confirmed that command responsibility was part of customary international law in its application to war crimes committed in the course of an internal armed conflict at the time relevant to the indictment."[139] Indeed, the Referral Bench's findings regarding the criminalization of crimes against humanity and command responsibility as a mode of liability are not

---

[132] *Rašević and Todović*, § 51; *Mejakić*, § 57; *Janković*, § 43; *Ademi and Norac*, § 45; *Ljubičić*, § 34; *Kovačević*, §§ 43–47.

[133] SFRY CC, article 142.

[134] *Kovačević*, § 43.

[135] ICTY Statute, emphasis added.

[136] *Mejakić*, § 45; *Rašević and Todović*, § 51; *Janković,* § 43; *Ljubičić*, § 34.

[137] *Mejakić*, § 57; *Rašević and Todović*, § 51; *Janković*, § 43; *Ljubičić*, § 34.

[138] See the Prosecution's submissions, for instance, in *Mejakić*, § 44.

[139] *Mejakić*, § 62.

unproblematic. A scenario could be envisaged – already alluded to by the Referral Bench itself – where a national court acquits an accused based on evidence that at the ICTY may have led to a conviction.[140] Such a discrepancy could discredit the decision to transfer cases to national states and could undermine confidence in the national judicial system,[141] notably on the part of the victims.

While as previously noted, the Law on the BiH State Court does not provide any indication of the law to be applied, in the beginning of the referral practice, the BiH State Court had consistently applied the 2003 BiH Criminal Code.[142] As regards the category of crimes and mode of commission of crimes, the 2003 BiH CC provides a corresponding charge for conduct charged in the ICTY indictments. In this sense, the adapted indictments have all mirrored the charges of crimes against humanity and command responsibility set out in the ICTY indictments. From 2009 onwards, however, a trend of applying the old SFRY CC to crimes before the BiH State Court has emerged, which has not only set a lopsided body of precedent for war crimes cases at the State Court itself, but has further aggravated the already discordant application of laws at the country-wide level, which the 2008 National War Crimes Strategy was specifically implemented to remedy. Regrettably, a recent finding of the ECtHR in the *Maktouf and Damjanović* case has seemingly legitimized this incongruent application of different laws to war crimes cases at national level, thereby sustaining the highly problematic patchwork legal regime in BiH.

Although the Croatian national legal provisions and case law on transfer cases is beyond the scope of this research project, the *Ademi and Norac* case before the Croatian Court (Zagreb County Court) is illustrative of the problems that can arise in the application of the SFRY CC to an ICTY indictment. In that case, two counts of crimes against humanity in the ICTY indictment were converted into war crimes in the Croatian adapted indictment,[143] charges of command responsibility were considerably reduced and any reference to joint criminal enterprise was fully omitted.[144] The Chief State Attorney's Office acknowledged that the Croatian indictment was "less harsh" than that of the ICTY.[145] The principal problem is that these converted charges are not an adequate reflection of the legal requirements underlying the crimes for which the accused was charged at the ICTY, which endangers the principles of legality and equality before the law. While an analysis of the case (and its

---

[140] *Williams*, 17 Crim. L. F. 210 (2006).

[141] *Ibid*.

[142] For more information on the cases, consult the official website of the BiH State Court: http://www.sudbih.gov.ba/?jezik=e [accessed: 5 June 2013].

[143] *Bekou*, 33 Fordham Int'l L. J. 767 (2010). OSCE News in Brief, Croatia indicts Ademi and Norac, case transferred from ICTY under Rule 11*bis*, 13 Dec. 2006 until 9 Jan. 2007, available at: http://www.osce.org/zagreb/23645?download=true [accessed: 7 June 2013].

[144] OSCE News in Brief, Croatia indicts Ademi and Norac, *ibid*., 1–2.

[145] *Ibid*., 1.

verdict) is beyond the scope of this research project, in light of the significantly diluted indictment, the fact that *Ademi* was acquitted of all charges at national level and that "[t]he Court's decision stands as the first *complete acquittal* of an accused in an indictment referred to a national jurisdiction from the ICTY under rule 11*bis*",[146] should at least be cause for some concern.

(3) Penalty structure

The discrepancy in the two sets of criminal codes in BiH is particularly striking. The maximum penalty set forth in the SFRY CC is the death penalty,[147] and alternatively up to 20 years of imprisonment;[148] given that the death penalty was abolished by Bosnia and Herzegovina in 2001 for all crimes,[149] the maximum penalty is limited to 20 years imprisonment. Conversely, the BiH CC does not provide for the death penalty, and the maximum penalty ranges between 20 and 45 years of imprisonment.[150] This signifies that an accused tried under the SFRY CC will be subject to the same or to a significantly lower sentence than someone tried under the BiH CC. This more "lenient" sentence was relied upon by the Defence in many of the referral cases before the ICTY to argue for the application of the SFRY CC to referral cases before the BiH State Court.[151]

As regards this issue, the ICTY Referral Bench held that the disparity that could arise in the sentence range at the BiH, depending on which set of domestic law is used, did not constitute an impediment to transfer.[152] Given the striking difference in the maximum imprisonment between the SFRY CC and the BiH CC, it is curious that the Referral Bench did not engage in a greater discussion about why it deemed

---

146 OSCE, Background report: Ademi-Norac trial concluded, 16 June 2008, available at: http://wcjp.unicri.it/proceedings/docs/OSCEHr_Ademi-Norac%20trial_2009_eng.pdf [accessed: 28 June 2014], p. 2. Emphasis added.

147 Article 37, SFRY CC.

148 *Ibid*., article 38.

149 BiH ratified Protocol 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which abolishes the death penalty for all crimes, on 7 July 2003. On 29 July 2003, this Protocol came into effect domestically (*Stanković*, § 49). See also the Constitution of Bosnia and Herzegovina, 18 March 1994, available at: http://www.ohr.int/dpa/default.asp?content_id=372 [accessed: 7 May 2013]. See further the European Commission, BiH 2012 Progress Report, SWD (2012) 335 final, Brussels, 10 Oct. 2012, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/ba_rapport_2012_en.pdf [accessed: 9 July 2011], p. 16. See Amnesty International overview, available at: http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes [accessed: 15 March 2013].

150 Article 42, BiH CC.

151 See, for instance, *Stanković*, § 34, *Janković*, § 29, *Kovačević*, § 28.

152 This applies to all eight transfer cases that were made pursuant to rule 11*bis* RPE, irrespective of their place of referral. See, for instance, referral to BiH: *Stanković*, § 46; referral to Serbia: *Kovačević*, § 47, and referral to Croatia: *Ademi and Norac*, § 46.

the application of either law to be appropriate. Criticizing the Referral Bench's formalistic approach to examining the applicable substantive laws, the Defence on Appeal in the *Lukić and Lukić* case argued that

> "[t]his methodology completely failed to address the issue raised by the Defence: that the State Court of BiH is applying a criminal code which permits greater sentences than the law in effect at the time of the alleged conduct, and is in fact imposing those greater sentences, in violation of international law."[153]

The fact that *Goijko Janković* was sentenced to 34 years imprisonment under the BiH CC – the longest term ever handed down by the BiH State Court – did not prompt a change in position by the Referral Bench.[154]

Relying on the fact that the SFRY CC is appropriate to adjudicate ICTY referral cases, despite its apparent deficiencies, the Referral Bench does not appear to satisfactorily address valid claims that could be made on the basis of the principle of legality or the retroactive application of criminal laws. For instance, given that the BiH CC provides for crimes that were not expressly criminalized at the time of the alleged acts, issues of retroactive criminal law may be raised in the context where the BiH CC is applied to the ICTY indictments.[155] The Referral Bench has consistently held that whether the BiH CC would have retroactive application, and if so, how to interpret and apply it, was for the BiH State Court to decide.

Relying on article 4(1) of the BiH CC, the Referral Bench stated that the SFRY CC, as it was in force in 1992, would likely be applicable to the alleged conduct of the accused in the case of referral.[156] It does leave open the possibility, however, to the retroactive application of the BiH CC.[157] As noted previously, the BiH, although recognizing the principle of legality, provides for two explicit exceptions to the application of the SFRY CC. Firstly, article 4(2) BiH CC requires a new law to amend the old one and to be more lenient to the perpetrator. This has been subject to dispute amongst all parties to the referral proceedings. The Referral Bench, relying on the BiH's submissions, has stated in the abstract that:

> "it has certainly not been established that leniency is determined by attempting to compare two different Codes overall for their general effect, rather than by considering separately each particular provision applicable at the time to the conduct charged and comparing it with the subsequent amendment as it affects, i.e., amends, that provision."[158]

---

[153] *Prosecutor v. Lukić*, Brief of Appellant *Milan Lukić*, Case No. IT-98-32/1-PT, 2 May 2007, § 39. Brief not publicly available, cited in *Diekmann/Kerrl*, 8 Int'l Crim. L. Rev. 87–108, fn. 61 (2008).

[154] *Diekmann/Kerrl*, *ibid*., 100.

[155] *Williams*, 17 Crim. L.F. 208 (2006).

[156] This was explicitly stated by the ICTY Referral Bench in *Stanković*, § 46; *Janković*, § 44; *Mejakić*, § 63 and *Rašević and Todović*, § 52.

[157] See, for instance, *Stanković*, § 41.

[158] *Mejakić*, § 47.

Second, article 4(a) requires the acts or omissions to be criminal according to general principles of international law at the time of their commission. In *Stanković* and subsequent cases, the Referral Bench held that if article 4(a) of the BiH CC – which has no equivalent provision in the SFRY CC – were to be applied in a retroactive manner, a determination would be necessary whether the conduct alleged in the indictment was criminal at the time of commission according to the general principles of international law.[159] As suggested by the Referral Bench, the State Court could find guidance in the Tribunal's relevant case law. Referring to the *Furundzija*,[160] *Kunarac*,[161] and *Aleksovski*[162] cases, the Referral Bench noted that:

> "In light of well-established precedent, it is clear that rape, enslavement, and outrages upon personal dignity were international crimes, both as war crimes and crimes against humanity, whether committed in international or non-international armed conflict, at the time relevant to the present Indictment without need for further elaboration."[163]

However, despite this firm finding, the Referral Bench did not expressly indicate its position on which set of legal provisions should be applicable to ICTY indictments. Regrettably, the BiH Transfer Law simply limits itself to expressly requiring that any ICTY indictments are adapted according to the BiH Code of Criminal Procedure.[164]

(4) Conclusion of pre-transfer criteria to Bosnia and Herzegovina

The relationship between the applicable substantive laws for transfer cases before the BiH State Court has always been uncertain – as can be seen by varying interpretations by the Prosecution and Defence in many of the ICTY referral cases – and is not resolved by the Referral Bench, which has to date not taken a stance on the matter.[165] This is regrettable, since, as *Lindemann* rightfully argues, providing greater guidance regarding the law to be applied would have been beneficial to national

---

[159] *Stanković*, § 44.

[160] *Prosecutor v. Furundžija*, Trial Chamber Judgment, Case No. IT-97-17/1, 10 Dec. 1998, §§ 165–69.

[161] *Kunarac, Kovač and Vuković*, Trial Chamber Judgment, Case No. IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001, §§ 518–543; *Kunarac, Kovač and Vuković,* Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, 12 June 2002, §§ 116–124 & §§ 127–132.

[162] *Prosecutor v. Aleksovski,* Trial Chamber Judgment, Case No. IT-95-14/1, 25 June 1999, § 54.

[163] *Stanković*, § 45. Emphasis added.

[164] Article 2(1) stipulates: "The BiH Prosecutor shall adapt the ICTY indictment in order to make it compliant with the BiH Criminal Procedure Code, following which the indictment shall be forwarded to the Court of BiH. The Court of BiH shall accept the indictment if it is ensured that the ICTY indictment has been adequately adapted and that the adapted indictment fulfils the formal requirements of the BiH CPC."

[165] *Bekou*, 33 Fordham Int'l L. J. 767 (2010).

prosecuting authorities and courts, although she also acknowledges the time-consumingness of the exercise.[166]

As it stands, the ICTY referral case law depicts how disparate the applicable laws can be to the same conduct charged in the ICTY indictments. Although the BiH State Court consistently applied the 2003 BiH CC to ICTY referral cases, this issue never arose concretely for ICTY indictments, *at least in the beginning*. However, starting in 2009, the BiH State Court Appellate Panel started using a mixed approach, relying on the 2003 BiH CC in some cases, and the old SFRY CC in others (depending on where the punishment was "more lenient"). The question of the applicability of these respective codes to war crimes cases before the BiH State Court was brought before the ECtHR, which, in a most surprising ruling in the *Maktouf and Damjanović* case, actually held the BiH State Court to be in violation of the legality principle under article 7 (no punishment without law) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) for applying the 2003 BiH CC to war crime charges.[167] The foregoing demonstrates just how complex, sensitive and topical this issue is. These recent developments and the far-reaching impact this ruling already has had at national level will be discussed in detail in chapter 3.

Suffice it to say at this point that rule 11*bis* RPE illustrates the limits of the Referral Bench's examination to a mere exposition of the law.[168] The first problem is that the Referral Bench's purely formalistic approach may actually overlook the practical implementation of these laws in the national courts.[169] Additionally, it does not provide national courts any guidance on which laws apply to transfer cases, which would inevitably be quite useful.[170] Given the foregoing, it is a missed opportunity that an amendment of rule 11*bis* RPE to explicitly include an inquiry of substantive law appears not to have been seriously envisaged.[171]

---

166 *Lindemann*, Referral of Cases from International to National Criminal Jurisdictions, p. 98.

167 ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013.

168 *Bekou*, 33 Fordham Int'l L. J. 769 (2010).

169 *Diekmann/Kerrl*, 8 Int'l Crim. L. Rev. 100 (2008).

170 *Bekou*, 33 Fordham Int'l L. J. 765 (2010).

171 *Ibid*., 769.

bb) ICTR jurisprudence

(1) Rwanda

Rwanda, as BiH, has undergone a wide-scale criminal justice reform since 2004.[172] Similarly to BiH, there are numerous courts at various levels prosecuting crimes committed during the genocide. While the exact interaction between these various courts will be alluded to in more detail in chapter 3, it is necessary to examine the applicable laws as regards ICTR indictments in the event of referral to Rwanda.

Much like the ICTY Referral Bench, the ICTR Referral Bench has been reluctant to decide, in a binding manner, which law should be applied at the national level, stating that this would be a matter within the competence of the High Court and the Supreme Court of Rwanda in the case of transfer.[173] It has, however, noted that it needs to satisfy itself that an adequate legal framework exists which criminalizes the conduct charged in the ICTR indictments.[174] As a result, the ICTR spent much time during its referral decisions examining the "ability" of various countries, including Rwanda, Norway and France, to prosecute transfer cases under rule 11*bis*.

As regards category of crimes or modes of liability, there is some uncertainty about which laws would apply *in concreto*. The Rwanda Transfer Law establishes a legal framework in order to facilitate transfer cases from the ICTR and other states.[175] Article 2 designates Rwanda's High Court of the Republic (High Court) as the first instance forum with primacy over other national courts for this limited category of cases. Although the High Court generally has jurisdiction over war crimes, crimes against humanity and genocide outside of transfer cases, its jurisdiction over genocide and crimes against humanity is limited to those that were not "committed in Rwanda between 1 October 1990 and 31 December 1994 which shall remain within the jurisdiction of Gacaca Courts and Higher Instance Courts."[176] In other words, the High Court only has jurisdiction over genocide and crimes against humanity not

---

[172] HRW News, Rwanda: Progress in Judicial Reform Falls Short, Technical Advances, but Insufficient Fair Trial Guarantees, 25 July 2008, available at: http://www.hrw.org/en/news/2008/07/23/rwanda-progress-judicial-reforms-falls-short [accessed: 22 Sept. 2010]; see also Human Rights Watch, Law and Reality.

[173] See, for instance, *The Prosecutor v. Gatete*, Case No. ICTR-2000-61-R11*bis*, 17 Nov. 2008, § 11, and *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, § 11.

[174] *Gatete*, *ibid.*, § 11.

[175] Organic Law No. 11/2007 of 16 March 2007 Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States, O.G.R.R. Special No. of 19 March 2007 [hereafter Transfer Law]; *Oosthuizen*, Notes on Rwanda's Transfer Law [accessed: 1 Feb. 2011], p. 2.

[176] Organic Law No. 51/2008 of 9 Sept. 2008 Determining the Organisation, Functioning and Jurisdiction of Courts, O.G.R.R. Special No. of 10 Sept. 2008, promulgation date: 9 Sept. 2008.

committed during this designated period, with the small exception of cases, which were transferred to it by the ICTR or other states. Article 3 of the Rwanda Transfer Law stipulates that "[n]otwithstanding the provisions of other laws applicable in Rwanda, a person whose case *[sic]* transferred by the ICTR to Rwanda shall be liable to be prosecuted *only for crimes falling within the jurisdiction of the ICTR*."[177]

There are two significant things to note about this article. Firstly, while the ICTR only has temporal jurisdiction for a period of one year (1 January until 31 December 1994), other courts adjudicating genocide cases in Rwanda (specialized courts, such as military courts and *Gacaca* courts, the latter of which are modelled on past customary conflict resolution practices) have temporal jurisdiction for a significantly longer period (1 October 1990 until 31 December 1994). Given that the High Court does not generally have jurisdiction over the crimes committed during this period, other than cases transferred to it by the ICTR and states, there is some doubt about whether article 3 of the Rwanda Transfer Law would apply to both temporal as well as subject matter jurisdiction.[178] This signifies that there could be a considerable discrepancy in the prosecution of accused based on the court in which their trial is heard. In particular, this creates unfair advantages for Rwandan fugitives who, had they not escaped Rwanda and been transferred to the ICTR by another state, would have had their cases heard before the courts trying the majority of genocide cases and having a significantly longer temporal jurisdiction.[179] In this regard, the difference in penalties is also particularly relevant. Interestingly, while the ICTR Trial Chamber left the determination about the temporal jurisdiction for the Rwandan courts to decide, it did not "consider the possibility that [the accused] might be charged with criminal acts falling outside the temporal jurisdiction of the ICTR to be fatal to the Referral Request" since "[t]his possibility does not, of itself, interfere with any of [the accused's] rights.[180] In other cases, the Trial Chamber curiously came to the exact opposite conclusion, holding that given that articles 1 and 7 of the ICTR Statute have an expressly defined temporal jurisdiction, "[t]he formulation in the Transfer Law indicates that [the accused], if transferred, *will not be prosecuted for acts committed before or after this period*."[181] Given that the transfer cases are still at a preliminary stage at this point in the Rwandan criminal law process, it is too early to know how this discrepancy might be dealt with.

The second thing to note about article 3 of the Rwanda Transfer Law is that it does not explicitly specify which substantive law provisions should be applied for the prosecution of these crimes. While at the time of the genocide, there was no legal

---

177 Organic Law No. 11/2007, article 3.

178 *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Trial Chamber decision, 19 June 2008, § 21.

179 *Oosthuizen*, Notes on Rwanda's Transfer Law, §§ 19, 38.

180 *Hategekimana*, § 21.

181 *Gatete*, § 20; *Kanyarukiga*, § 20. Emphasis added.

basis in Rwanda's laws for prosecuting and punishing the crimes committed, a law was enacted in 1996 to enable such prosecution retrospectively on the basis that, at the time of commission, such acts were explicitly criminalized in a number of international conventions, to which Rwanda was party.[182] However, the 1996 Genocide Law was replaced by the 2004 *Gacaca* Law and would thus not be applicable to transfer cases.[183] While the *Gacaca* Law specifically refers to genocide and crimes against humanity in articles 1 and 51, it does not itself provide any definition thereof.[184] However, the 2003 Constitution notes in article 190 that treaties to which Rwanda is party are "more binding than organic and ordinary laws."[185] Given that Rwanda was party to a number of international conventions, notably the 1948 Genocide Convention, as well as the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 at the time of the genocide,[186] the ICTR Trial Chamber was satisfied that "[t]his formulation [in article 190 of the Constitution] indicates that the conventions have been incorporated into national law and carry considerable weight."[187] In addition, the Organic Law No. 33*bis*/2003 (2003 Genocide Law) provides definitions that generally appear consonant with the ICTR Statute, including command responsibility as a mode of commission of an offence,[188] although the latter was the subject of some confusion in the *Hategekimana* case before the ICTR. This will be discussed directly below.

---

[182] Human Rights Watch, Law and Reality, p. 14. See in this context: Organic Law No. 08/96 of 30 Aug. 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990. O.G.R.R. No. 17 of 1 Sept. 1996 [hereafter 1996 Genocide Law].

[183] Organic Law No. 16/2004 of 19 June 2004 establishing the organisation, competence and functioning of *Gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 (O.G.R.R. Special No. of 19 June 2004) [hereafter *Gacaca* Law]. Article 105 of the 2004 *Gacaca* Law states that the 1996 Genocide Law, as well as another 2001 law setting up *Gacaca* courts and "all previous legal provisions contrary to this organic law, are hereby abrogated."

[184] This was also explicitly mentioned by the ICTR Trial Chambers in several cases, such as *Kanyarukiga*, § 15; *Gatete*, § 15.

[185] Constitution of the Republic of Rwanda (O.G.R.R. Special No. of 4 June 2003, p. 119) and its Amendments of 2 December 2003 (O.G.R.R. Special No. of 2 Dec. 2003, 2003, p. 11) and of 8 December 2005, available at: http://www.refworld.org/docid/46c5b1f52.html [accessed: 8 Feb. 2012].

[186] Genocide Convention: 16 April 1975; Four Geneva Conventions, 5 May 1964; Additional Protocols, 19 Nov. 1984.

[187] *Kanyarukiga*, § 16.

[188] Article 53 of the 2003 Gacaca Law (Organic Law No. 33*bis*/2003) provides for command responsibility, stipulating in § 2: "The fact that any of the acts aimed at by this organic law has been committed by a subordinate, does not free his or her superior from his or her criminal responsibility if he or she knew or could have known that his or her subordinate was getting ready to commit this act or had done it, and that the superior has not taken necessary and reasonable measures to punish the authors or prevent that the mentioned act be not committed when he or she had means." As held by the *Hategekimana* Appeals Chamber,

– *Category of crimes*

As regards the category of international crimes, in the *Bucyibaruta* case, the ICTR Trial Chamber made clear that "[a] case can be referred to the national courts of a State *only where the State concerned will charge and convict the persons responsible for those international crimes listed in the Statute as opposed to ordinary law crimes*."[189] As regards Rwanda's ability to accept a case, although the ICTR Trial Chambers appeared satisfied that the applicable Rwandan legal provisions essentially provided for a corresponding definition of genocide, not least due to the important position of international conventions in domestic law, as discussed above, more confusion appeared to reign about whether Rwandan law proscribed command responsibility as a mode of commission of a crime.

– *Mode of commission of crimes*

In the *Hategekimana* case, the accused was charged with individual criminal responsibility under article 6(1) of the ICTR Statute and with command responsibility under article 6(3) of the ICTR Statute for the same material facts.[190] While the Trial Chamber found that article 6(1) of the ICTR Statute appears to be satisfactorily covered by Rwandan law, it stated that it was unaware of any relevant provisions in Rwandan law to cover command responsibility under article 6(3) of the ICTR Statute. In particular it stated that:

> "Under such circumstances, Mr. Hategekimana will go free in Rwanda if the evidence does not show that he planned, ordered, instigated, committed, or aided and abetted the alleged crimes, even if it does show such involvement on the part of his proven subordinates and that Mr. Hategekimana knew or had reason to know of their actions."[191]

Proceeding on the basis that Rwandan law does not criminalize command responsibility or did not do so at the time pertaining to the amended indictment, the Referral Bench held that it "cannot ignore the possibility of an acquittal on this basis".[192] As a result, and given the significance of command responsibility to the conduct charged in the indictment, the Referral Bench was unable to satisfy itself that an adequate legal framework existed under Rwandan law that would allow for transfer.[193]

"the Appeals Chamber is satisfied that command responsibility is recognized under Rwandan law, in particular the Gacaca Law and the Organic Law No. 33*bis*/2003." *The Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Appeals Chamber decision, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 4 Dec. 2008 [hereafter *Hategekimana* (AC)], § 12.

189 *Bucyibaruta*, § 8. Emphasis added.

190 *Hategekimana*, § 4.

191 *Ibid.*, § 19.

192 *Ibid*.

193 *Ibid*.

Interestingly, the Trial Chamber's findings regarding this *lacuna* in the applicable laws was overturned by the Appeals Chamber, which was indeed satisfied that:

> "command responsibility *is* recognized under Rwandan law, in particular the *Gacaca* Law and the Organic Law No. 33*bis*/2003, and that the Trial Chamber therefore erred in assuming that Rwandan law does not recognize command responsibility, or that it did not do so at the time relevant to the amended indictment. […] Accordingly, the Appeals Chamber found that the Trial Chamber, […] erred in failing to consider these laws when making its findings on this issue."[194]

While it granted this ground of appeal, the Appeals Chamber dismissed the other grounds of appeal related to fair-trial rights, and thereby upheld the Trial Chamber's decision to deny referral of the *Hategekimana* case to Rwanda.[195]

– *Penalty Structure*

Although the criterion regarding the non-imposition of the death penalty is explicitly grouped with fair-trial rights under rule 11*bis*, it is deemed more logical to discuss it in the context of Rwanda's penalty structure.

There is international consensus that the death penalty constitutes cruel, inhuman and degrading treatment, in contravention of international human rights standards. Rwanda abolished the death penalty in 2007 by implementing the *Death Penalty Abolition Law*.[196] This is a very significant development in light of Rwanda's past hostility towards the ICTR for not imposing the death penalty.[197]

Despite the foregoing, the law abolishing the death penalty is not unproblematic and has created complex legal problems. The major such problem is that the Death Penalty Abolition Law creates two categories of life imprisonment, one without and one "with special provisions", the latter signifying life imprisonment in isolation or solitary confinement. Article 5 stipulates that "life imprisonment with special provisions" attaches to crimes, such as torture, murder, genocide and crimes against humanity, crimes also within the jurisdiction of the ICTR. Article 9 stipulates that "All legal provisions contrary to this Organic Law are hereby repealed." The various ICTR Trial Chambers noted – in a very brief statement and without any analysis – their satisfaction regarding the abolition not only as regards transfer cases under the Rwanda Transfer Law but as regards *all* crimes within the Rwandan legal system.[198]

---

194 *Hategekimana* (AC), § 12. Emphasis added.

195 *Ibid.*, § 41.

196 Rwanda Death Penalty Abolition Law, 2007.

197 *Boctor*, 10 Human Rights Rev. 102–103 (2009).

198 *Kanyarukiga*, § 25; *The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-01-67-R11*bis*, Trial Chamber, Decision on the Prosecutor's Request for Referral of Case to Republic of Rwanda, 16 Dec. 2008, § 25; *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36R11*bis*, Trial Chamber, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, § 24; *Gatete*, § 25. The only case where the Trial Chamber engaged in some brief analysis of the Defence position that Rwandan prison conditions were

While also welcoming the abolition of the death penalty, human rights organizations have heavily criticized this provision as being in violation of international standards, such as the prohibition against torture.[199] As noted in one commentary, "[w]hile Rwanda should be credited for abolishing the death penalty, from a human rights perspective the route it took appears to be littered with thorns."[200]

Until recently, there was uncertainty about which law would take precedence in governing the penalty structure for convictions of ICTR transfer cases – representing one of the main impediments for transfer to Rwanda on the part of the ICTR. Previously, despite the fact that article 25 of the Rwanda Transfer Law stipulated that "its provisions shall prevail in the event of any inconsistency with other legislation", there was uncertainty about the relationship between the Rwanda Transfer Law and later enacted legislation in the imposition of penalties. In other words, it was unclear whether the Rwanda Transfer Law, which came into force on 16 March 2007 and stipulates in article 21 that "[l]ife imprisonment shall be the heaviest penalty" would take precedence over the Death Penalty Abolition Law, which came into force on 25 July 2007, and substituted the death penalty with "life imprisonment".

In addressing the applicability of the two sets of laws, the Transfer Law and the later enacted Death Penalty Abolition Law, the Trial Chamber in the *Munyakazi* case held that "the Death Penalty Law does not prescribe a sentence that is inconsistent with the Rwanda Transfer Law, but rather provides further guidance on the sentence of life imprisonment and states when it is applicable."[201] As a result, the Trial Chamber considered that if the case was transferred to Rwanda, there was the possibility that the accused would be subject to life imprisonment with special provisions.[202] A similar finding was made in the cases of *Gatete*, *Hategekimana*, *Kanyarukiga* and *Kayishema*.[203]

The ICTR Appeals Chamber, dismissing this ground of appeal in the *Munyakazi* case, agreed with the Trial Chamber that:

> "[…] it would be possible for courts in Rwanda to interpret the relevant laws [Transfer and Death Penalty Laws] either to hold that life imprisonment with special provisions is applicable to transfer cases, or to hold that life imprisonment without special provisions

---

akin to the death penalty, an argument whose validity the Trial Chamber refused to accept, was in *Hategekimana*, §§ 26 ff.

199 Human Rights Watch, Law and Reality, p. 32.

200 *Mujuzi*, 9 Hum. Rts. L. Rev. 329–338 (2009).

201 *Munyakazi*, § 26.

202 *Ibid.*, § 28.

203 *Gatete*, § 87; *Hategekimana*, §§ 23–25, *Hategekimana* (AC), §§ 31–38, *Munyakazi*, §§ 25–32, *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Appeals Chamber, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 8 Oct. 2008 [hereafter *Munyakazi* (AC)], §§ 16–20; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Appeals Chamber, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 30 Oct. 2008, §§ 12–16 [hereafter *Kanyarukiga* (AC)]; *Kayishema*, §§ 26–29.

> is the maximum punishment. *Since there is genuine ambiguity about which punishment provision would apply to transfer cases*, and since, therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases, pursuant to the Abolition of Death Penalty Law, *the Appeals Chamber finds no error in the Trial Chamber's conclusion that the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11bis of the Rules."*[204]

To summarize, while the death penalty is not applicable to transfer cases in accordance with rule 11*bis* (C), imprisonment in solitary confinement also poses notable problems for the transfer of cases to Rwanda. Basing itself on international standards and referring to the position adopted by various human rights bodies,[205] the ICTR Trial Chamber held in *Gatete* that "[i]t is common ground that prolonged solitary confinement may constitute a violation of Article 7 of the ICCPR and other instruments prohibiting torture and inhuman and degrading treatment or punishment."[206] Citing case law of the European Court of Human Rights, however, the ICTR noted in *Hategekimana* that imprisonment in isolation for a limited time period does not per se constitute a violation of a detainee's rights, provided safeguards are employed.[207] In the *Kanyarukiga* case, the Appeals Chamber, relying on established jurisprudence of the ECtHR and the Human Rights Committee, formulated the following test: "the punishment of solitary confinement may constitute a violation of international standards if not applied *as an exceptional measure which is necessary, proportionate, restricted in time and includes minimum safeguards*."[208] As the Trial Chamber in *Hategekimana* noted, the fact that the Death Penalty Abolition Law permits imprisonment in solitary confinement for a period of twenty years or more, without any apparent safeguards in Rwandan law, makes it an inadequate penalty structure for the purposes of case referral to Rwanda.[209] The Death Penalty Abolition Law has since been amended to include an express exception of its provisions for transfer cases from the ICTR and other cases in its article 3.[210] In other words, this

---

[204] *Munyakazi* (AC), §§ 19–20. Emphasis added. See also *Kanyarukiga* (AC), § 16.

[205] *Hategekimana*, § 25.

[206] *Gatete*, § 86.

[207] *Hategekimana*, § 25.

[208] *Kanyarukiga* (AC), § 15. In *Kanyarukiga*, the Appeals Chamber relied on a statement made by the Human Rights Committee (HRC), that "…solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, § 1 of the [ICCPR]." Concluding Observations of the HRC: Denmark. 31 Oct. 2000, CCPR/CO/70/DNK, § 12. See also: *Ramirez Sanchez v. France*, ECtHR, Application No. 59450/00, 4 July 2006, § 121.

[209] *Hategekimana*, § 25.

[210] Article 3(2) was modified and complemented by Organic Law No. 66/2008 of 21 Nov. 2008, stipulating: "However, life imprisonment with special provisions as provided for by paragraph one of this Article shall not be pronounced in respect of cases transferred to Rwanda from the International Criminal Tribunal for Rwanda and from other States in accordance with the provisions of Organic Law No. 11/2007 of 16 March 2007 concerning

confusion appears to have been resolved through recent legislative amendments, stipulating that the Rwanda Transfer Law is the only one to apply to transfer cases.[211] As noted by the ICTR Appeals Chamber, the adoption thereof in its current form would appear to resolve the previously described ambiguity.[212] At the time of its most recent decision, however, the Referral Bench acknowledged this amendment but stated that it remained unclear whether this amendment had entered into law at the time of the decision.[213] In any event, while the punishment structure under the Transfer Law appears to align with the ICTR Statute, as amended in the Death Penalty Abolition Law, the discrepancy in treatment between accused being transferred back to Rwanda from the ICTR and other states, and those prosecuted nationally from the outset, is problematic.

Due to the fact that the ICTR had been unable to transfer cases to Rwanda until 2011 for a number of reasons, mainly procedural, it has had to look to other countries to refer cases as part of its Completion Strategy. Referral requests to the Netherlands and Norway were denied on different grounds. As a result, it is useful to examine the applicable laws of the Netherlands and Norway as they relate to pertinent issues under examination by the Referral Bench.

(2) Norway

– *Category of crimes*

The ICTR found the disparity in the definition of crimes between its own constitutive statute and Norwegian domestic law to result in incompatibility and thereby to impede the successful transfer of cases to the domestic courts in question.[214] In the *Bagaragaza* case, for instance, the first case involving a referral request under rule 11*bis* RPE at the Tribunal, Norway argued that it had universal jurisdiction over crimes committed by *Bagaragaza*, and filed an application to prosecute the alleged genocidal acts as "aggravated homicide" since its national laws did not provide for a specific crime of genocide. Holding that while Norway could in principle exercise universal jurisdiction over the alleged crimes committed by *Bagaragaza* in Rwanda in 1994, the ICTR Appeals Chamber upheld the Trial Chamber's finding that the absence of a specific crime of genocide in the Norwegian legal system made it impossible for it to exercise jurisdiction within the meaning of rule 11*bis*, because genocidal intent is considered a definitional element of the alleged crime with which the

---

the transfer of cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from other States" (Rwanda Death Penalty Abolition Law).

211 See the ICTR's first referral case to Rwanda, *Prosecutor v. Jean Uwinkindi*, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, Case No. ICTR-2001-75-R11*bis*, 28 June 2011, see in particular §§ 51, 161 and 224.

212 *Hategekimana* (AC), § 38.

213 *Ibid.*, §§ 37–38.

214 See, for instance, *Bagaragaza* (AC).

accused was charged.[215] As argued by the Appeals Chamber, the legal qualification is significant for two reasons: firstly because the rule against double jeopardy *(non bis in idem)*, reflected in article 9 of the ICTR Statute, requires that an accused may not be tried for the same acts twice; a plain reading of article 9(2)(a) of the ICTR Statute makes clear that referring the case to Norway would not prohibit the ICTR to subsequently try "acts constituting serious violations of international humanitarian law" if these acts were characterized as ordinary crimes at the national level.[216] Second, the legal qualification is important because the protected values are distinct: while the laws against homicide protect *individual life*, those concerning genocide seek to protect a *specifically defined group*.[217] As noted by the Appeals Chamber, both crimes are "significantly different in term of their elements and their gravity", genocide requiring "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", whereas this is not required for the crime of homicide.[218]

To sum up, referral requests to Norway and the Netherlands were denied for different reasons. While Norway technically had universal jurisdiction to try foreign nationals, until recently it lacked an express definition of genocide that would have made referral possible.[219] The Netherlands, on the other hand, while expressly criminalizing the conduct charged under the ICTR indictment as international crimes, did not have universal jurisdiction over these cases, due to a technical issue, described above.

(3) France

– *Category of crimes*

Another country whose "ability" the ICTR has had to examine is that of France, to which the very first two ICTR indictments have been transferred in 2007, four years before cases were transferred to Rwanda. France has expressly provided for the proscription of crimes within the jurisdiction of the ICTR as international crimes, such as genocide, crimes against humanity and war crimes in the 22 May 1996 Law

---

215 *Ibid.*, § 15.

216 ICTR Statute, also see the Appeals Chamber's discussion in *Bagaragaza* (AC), § 17.

217 *Bagaragaza* (AC), § 17.

218 *Bagaragaza*, § 16.

219 Although the current Norwegian Penal Code of 22 May 1902 does not contain any express prohibition of the crime of genocide, provisions criminalizing genocide, crimes against humanity and war crimes were added into the new code of 2005 (chapter 16) on 7 March 2008 with immediate effect. It has since become active in genocide prosecutions, see: The Associated Press, Norway: Rwandan Convicted for His Role in 1994 Genocide, 14 Feb. 2014, available at: http://www.nytimes.com/2013/02/15/world/europe/norway-rwandan-convicted-for-his-role-in-1994-genocide.html?_r=0 [accessed: 8 July 2014].

adapting French law to the provisions of the UN Security Council resolution 955.[220] Article 1 of the 1996 Law confirms its application to any individual charged with acts which, within the meaning of articles 2 to 4 of the ICTR Statute, constitute serious violations of article 3 Common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II thereto of 8 June 1977, or genocide or crimes against humanity.[221] While not providing a definition of these crimes in this law, an assumption can be made from the plain meaning of the provision that the definitions used in French courts would closely correspond to the ICTR Statute definitions specifically referred to in this law. In addition, France criminalizes these acts in its own penal code, and the crimes set out therein, notably genocide, appear to align closely with the crimes set out in the ICTR Statute.[222]

Although the ICTR did not go into much analysis regarding the particular provisions in French law, or the practical implementation thereof, the Trial Chamber noted that it was able to satisfy itself that France criminalized all the alleged conduct charged in the ICTR indictments as international crimes.[223]

The new law in France has been mentioned above as it relates to the universal jurisdiction requirements. Another problematic issue is the fact that in addition to the residency requirements, it introduces further elements that severely restrict France's ability to exercise universal jurisdiction over international crimes. In this sense, the law stipulates that the conduct with which the accused is charged in France must be penalized in the country where the crimes were allegedly committed.[224] That is to say, in order to prosecute a foreign national for international crimes, France can only do so if the country in which the alleged crimes took place also criminalizes such acts. As a result, this provision could potentially greatly limit France's ability to try

---

[220] 1996 Law adapting French law to the provisions of the UN Security Council resolution 955; Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins, NOR: JUSX9500141L, consolidated version of 7 Aug. 2013, available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742868 [accessed: 8 July 2014].

[221] *Ibid.*, article 3 § 3.

[222] Article 211-1 of the French Penal Code, modified by law No. 2004-800 of 6 Aug. 2004 – article 28 JORF 7 Aug. 2004, stipulates that: "Genocide occurs where, in the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group: wilful attack on life; serious attack on psychic or physical integrity; subjection to living conditions likely to entail the partial or total destruction of that group, measures aimed at preventing births; enforced child transfers" [unofficial translation].

[223] *Bucyibaruta*, § 17; *Munyeshyaka*, § 17.

[224] See article 689-11.

international crimes with which foreign accused are charged under universal jurisdiction, although again, it is entirely unclear what the effect of this amendment would be on ICTR transfer proceedings.

– *Penalty structure*

Under the French Penal Code, genocide is punishable by life imprisonment, which corresponds to ICTR's penalty structure under article 23. However, article 132-23 of the French Penal Code sets out that for the crime of genocide, life imprisonment is accompanied by a safety period, meaning that "the convicted person is not entitled to benefit from provisions governing the suspension or division of the penalty, posting to a non-custodial assignment, temporary leave, semi-detention or parole, during the safety period", which constitutes eighteen years.[225] While there is no counterpart to this notion in the ICTR case law, the ICTR Trial Chamber considered itself "satisfied that the French criminal justice system provides an adequate sentencing structure" for crimes set out in the ICTR indictments in the *Bucyibaruta* and *Munyeshyaka* cases.[226] It is regrettable that very little analysis accompanied this decision.

It appears *prima facie* logical that the ICTR opted to refer these two cases to France, notably in light of its inability to transfer them to other third countries (Norway, the Netherlands) or Rwanda itself until 2011. However, just how problematic the transfer of these two cases to a jurisdiction displaying a number of considerable legal differences with the ICTR Statute is, and the consequences this has on important legal concepts, such as equality before the law, will be discussed in more detail in chapter 3.

c) Fair-trial guarantees and non-imposition of the death penalty

Rule 11*bis* (B) specifically mandates the respective Tribunals to satisfy themselves that the accused will receive a fair trial following transfer to a national state and that the death penalty will not be carried out. Given that the death penalty has been abolished in both BiH and Rwanda, and has been discussed under penalty structure above, the real challenge is the assessment of fair-trial rights in both contexts. Fair-trial issues play a crucial role in the referral process under rule 11*bis*.[227] The right to a fair trial is generally recognized as constituting an integral part of any criminal

---

[225] Article 132-23, English translation available at: https://www.legifrance.gouv.fr/content/download/1957/.../Code_33.pdf [accessed: 22 Sept. 2010]. The French Penal Code notes in the second paragraph, however, that "The *Cour d'assises* or trial court may nevertheless by a special decision either extend this period up to two-thirds of the prison sentence or up to twenty-two years in the case of imprisonment for life, or may decide to reduce these periods.

[226] *Bucyibaruta*, § 13, and *Munyeshyaka*, § 13.

[227] *Bekou*, 33 Fordham Int'l L. J. 769 (2010).

proceeding. It is enshrined in a number of international conventions, notably the *International Covenant on Civil and Political Rights* (ICCPR),[228] to which both BiH and Rwanda are party, and the *European Convention on Human Rights* (ECHR),[229] to which BiH is party. It is also a principle expressly stipulated in the ICTY and ICTR Statutes. As such, while rule 11*bis* RPE itself does not expressly set out the exact aspects of what constitutes a fair trial, guidance has been derived by the respective Referral Benches from article 21 of the ICTY Statute and article 20 of the ICTR Statute, both of which contain next to identical wording. Stipulating that "[a]ll persons are equal before the International Tribunal", and in the determination of charges against him or her, the accused shall have the right to a fair and public hearing and to be presumed innocent until proven guilty.[230] In addition, the accused benefits from certain minimum guarantees, in full equality, such as the right:

– to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge;

– to adequate time and facilities for the preparation of a defence and to communicate with counsel of his or her own choosing;

– to be tried without undue delay;

– to be tried in the accused's presence, and to defend himself or herself in person or through legal assistance of his or her own choosing;

– to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

– to have the free assistance of an interpreter if he or she cannot understand or speak the language used at the Tribunals, and

– not to be compelled to testify against himself or herself or to confess guilt.[231]

This particular criterion of rule 11*bis* differentiates itself from all others in that, at the time of the hearing, the Referral Bench "has very limited insight as to whether the accused will *in fact* receive fair trial after the indictment has been transferred", given that the Referral Bench "is required to make a finding on a future judicial process, over which it has no control", such that "[i]ts examination would, inevitably, lie in the hypothetical sphere."[232] The dangers of this become clear when one considers the oftentimes rather stark gap between rights in *theory* and their implementation in *practice*. This danger is accentuated when one considers the "hybrid context"

---

[228] International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171 and 1057 UNTS 407 / (1980) ATS 23 / 6 ILM 368 (1967), article 14. BiH ratified the ICCPR on 1 March 1995, Rwanda on 23 March 1976.

[229] European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221, article 6.

[230] Article 21, ICTY Statute.

[231] *Ibid*.; article 20, ICTR Statute.

[232] *Bekou*, 33 Fordham Int'l L. J. 769–770 (2010). Emphasis added.

in which the transfers take place (i.e. the transfer from an international to a domestic court), which creates its own "specific problems".[233] As pertinently argued by *Petrig*:

> "A reading of the Referral Bench decisions suggests that the ICTY applies an abstract, global test when determining the prospects of fair trial: In comparing relevant domestic law to international standards, the Referral Bench decisions examine the former's abstract guarantees, without regard to the judicial reality in the respective State."[234]

aa) ICTY jurisprudence: Bosnia and Herzegovina

While rule 11*bis* RPE does not expand on the factors that constitute a fair trial, the Referral Bench appears to hold that article 21 of the ICTY Statute, which reflects article 14 ICCPR and article 6 ECHR, is implicit in rule 11*bis* RPE.[235] As pointed out by the Referral Bench, in addition to a number of fair-trial rights guaranteed under BiH domestic law, such as the Constitution, the Code of Criminal Procedure and the Criminal Code, BiH has ratified a number of international conventions guaranteeing fair-trial rights, such as the ECHR and the ICCPR.[236] Relying on the foregoing, it held that "[a]s a general matter to the question of fair trial, the Referral Bench is satisfied that the laws applicable to proceedings against the Accused in [BiH] provide an adequate basis to ensure compliance with the requirement for a fair trial."[237]

Despite this finding, the ICTY Referral Bench nevertheless engaged in some analysis of the Defence's submissions, which raise a number of specific fair-trial considerations. The formalistic nature of the Referral Bench's analysis is illustrated by way of use of two examples, namely the right to equality of arms, including through witness protection measures, and the right of an accused to a counsel of his or her own choosing. Both will briefly be discussed in turn.

With respect to the first specific fair-trial consideration, the Defence argued that Defence witnesses may be reluctant to testify because of a risk of arrest for criminal activity.[238] The ICTY Referral Bench did not consider there to be any merit to the Defence's submission, since there were laws in place to oblige witnesses to testify,[239] which exist "without regard to whether the witness is at risk of arrest for personal

---

233 *Petrig*, 45 Crim. L. Bull. 14 (2009).

234 *Ibid.*

235 See, for instance, *Mejakić*, §§ 68 ff.; *Rašević and Todović*, § 72.

236 Bosnia and Herzegovina, International treaties adherence, RULAC Project. Source: http://www.geneva-academy.ch/RULAC/international_treaties.php?id_state=32 [accessed: 9 July 2014].

237 *Mejakić*, § 81.

238 *Ibid.*, § 97.

239 In this context, the Referral Bench cites article 81(5) of the BiH CCP, ("Official Gazette" of the Federation of Bosnia and Herzegovina, No. 3/03); and article 5(1) of the Law on the Judicial Police of Bosnia and Herzegovina, 99, 24 Jan. 2003, available at: http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=29090 [accessed: 9 Aug. 2012].

criminal activity".[240] The Referral Bench thus concluded that: "[t]o the extent that Defence witnesses residing in [BiH] may fail to appear because of a (perceived) risk of arrest, the issue may be entirely hypothetical."[241] Whether such an issue may or may not be hypothetical does not render it obsolete. This reasoning disregards entirely the fact that whether or not such a law exists formally, there is no guarantee that Defence witnesses will feel obliged to come forward and engage in possible self-incrimination by testifying; logically, this goes especially for those potential Defence witnesses who have not been located (which is the case for many Defence witnesses).[242] As will be discussed in the section below, the ICTR Referral Bench came to a diametrically opposite conclusion on this particular issue, finding that the mere *perception* of the risk of arrest for criminal activity by the Defence witnesses – however hypothetical or unfounded it may be in reality – may be sufficient to dissuade them from coming forward, thereby endangering the accused's right to fair trial.

With respect to the second specific fair-trial consideration, the Defence argued that the accused would be denied adequate time and facilities to prepare a case, including the right to counsel of his own choosing, if the case was transferred to the BiH State Court because his current legal counsel would be unable to remain on the case due to lack of admission to the BiH state bar.[243] The Referral Bench rejected this claim, arguing that this right was not absolute and that there existed a law on the BiH State Court allowing for the special admission of a legal counsel not qualified to practice law in BiH.[244] However, whether it would be applied or not was not for the Referral Bench to decide since this was at the discretion of the State Court.[245] In the event that such a special admission was denied, the Referral Bench argued that the accused's fair-trial rights would not be violated because he would not be denied counsel.[246] However, the complexity of the case or the national lawyer's lack of knowledge of the case make this issue a crucial one, not least because it certainly creates delays in the trial procedures before the BiH State Court, which could violate the accused's fair-trial rights.[247] The Referral Bench's broad and abstract enumeration of the various provisions in the BiH State Constitution and the Code of Criminal Procedure guaranteeing trial without undue delay[248] seems to conveniently ignore any more in-depth discussion about the logistical and legal implications of changing counsel as a result of the transfer proceeding.

---

240 *Mejakić*, § 103.

241 *Ibid*.

242 This fact was acknowledged by various different ICTR Trial Chambers, see, for instance, *Hategekimana* (AC), § 31, and *Munyakazi* (AC), § 40.

243 *Mejakić*, § 110.

244 *Ibid.*, §§ 111–112.

245 *Rašević and Todović*, § 89; *Mejakić*, § 112.

246 *Mejakić*, § 112.

247 *Petrig*, 45 Crim. L. Bull. 14 (2009).

248 *Mejakić*, §§ 68, 75, *Rašević and Todović*, §§ 69–71.

The foregoing examples illustrate that the Referral Bench generally engaged in a purely formalistic examination of the laws applicable in BiH to the referral cases, without considering, at any point, that there may be a disparity between fair-trial rights in *theory* and in *practice* in BiH. In other words, the Referral Bench does not evaluate how these laws are applied *in concreto*. Indeed, the Referral Bench itself admitted that one difficulty in making an assessment about fair-trial rights is the fact that "there have been no cases referred from the Tribunal to the authorities of [BiH] which have yet been tried," such that "there is no basis upon which this issue can be evaluated by reference to past actual experience".[249] As a result, the Referral Bench limits itself to an examination, in the abstract, of the "legal structure […] as it now stands" finding it to be "sufficient to safeguard the right of the Accused to a fair trial."[250] The dangers of such a formalistic analysis become apparent in a recent OSCE report, which observes that despite the existence of formal laws guaranteeing witness protection and support measures, a practical implementation thereof is by no means guaranteed.[251] While the BiH State Court has in the meantime implemented these through rules of procedure, several years had passed between the coming into force of the laws and their practical application at the Court.[252]

bb) ICTR jurisprudence: Rwanda

Due to the fact that Rwanda is party to a number of international conventions guaranteeing fair-trial rights,[253] having incorporated many of these rights into its domestic law,[254] the ICTR Trial Chamber in *Gatete* held that "the Rwandan legal framework generally mirrors the right to a fair trial as embodied in Article 20 of the ICTR Statute."[255] In addition, article 13 of the Rwanda Transfer Law reproduces nearly *verbatim* the wording of article 20 of the ICTR Statute.[256] Despite the foregoing, however, the Trial Chambers identified important discrepancies between such rights

---

[249] *Mejakić*, § 81.

[250] *Ibid*.

[251] See generally: OSCE, Witness Protection and Support in BiH Domestic War Crimes Trials.

[252] *Ibid.*, p. 11.

[253] Rwanda is party to a number of international human rights treaties, such as the ICCPR (date of ratification: 16 April 1975); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (date of ratification: 15 Dec. 2008), as well as regional conventions, such as the African Charter on Human and Peoples' Rights (ACHR) (date of ratification: 15 July 1983).

[254] The 2003 Constitution contains a separate chapter on human rights, including fair-trial rights. Articles 11 and 16 (non-discrimination and equality before the law); article 15 (right to physical and mental integrity); article 18 (deprivation of liberty, information about charges); article 19 (presumption of innocence); article 20 (non-retroactivity of criminal laws) and article 44 (the judiciary as the guardian of rights and freedoms).

[255] *Gatete*, § 31.

[256] Rwanda Transfer Law, article 13.

in *theory* and in *practice*. In other words, the ICTR Trial Chamber has been more active than the ICTY Referral Bench about distinguishing formal law and the practical implementation thereof before the national courts having the potential to prosecute rule 11*bis* cases. As a result, the various ICTR Trial Chambers held certain aspects of the Rwandan fair-trial regime to be so deficient that they denied referral on that basis, amongst other reasons, which were previously discussed. As cautioned by the *Gatete* Trial Chamber, when making such a determination, the special legal regime specifically established for ICTR transfer cases under the Rwanda Transfer Law must be considered,[257] not the general regime applicable to all other genocide cases. Since no transfer of cases had been made to the High Court at this point, the difficulty is that the designated ICTR Trial Chambers could not, at least in the early cases, rely on existing practice,[258] and must in a certain sense, make their decision in the abstract.

Aside from the uncertainty about the type of penalty to which accused will be subject if transferred to Rwanda, the ICTR Trial Chambers identified two principle problems throughout their referral decisions. The first problem identified in most of the referral decisions relates to the accused's ability to prepare a proper defence by securing the attendance of Defence witnesses from *within* as well as from *outside* of Rwanda, as guaranteed in article 20(4)(e) of the ICTR Statute and article 13 (9) of the Rwanda Transfer Law.[259]

As regards the availability of defence witnesses within Rwanda, the Trial Chamber in *Kanyarukiga*, followed by *Gatete*, held that article 14 of the Rwanda Transfer Law provides for "explicit and elaborate" rules about the protection of witnesses,[260] similar to those of the ICTR's rules.[261] Although the various Trial Chambers in the majority of referral decisions accepted that in practice there have been incidents of witness harassment,[262] the Trial Chamber in *Kanyarukiga* expressly noted its reluctance to find the existence of a general risk to witnesses testifying in transfer proceedings.[263] Despite the foregoing, however, the *Kanyarukiga* Trial Chamber did concede that several factors could contribute to enhancing a sense of fear to testify on behalf of Defence witnesses.[264] In this connection, the Trial Chamber points out that the witness protection service forms part of the National Prosecutor's Office, responsible

---

257 *Gatete*, § 32.

258 *Ibid*.

259 *Gatete*, *Kayishema*, *Kanyarukiga*, *Hategekimana*, *Hategekimana* (AC).

260 *Kanyarukiga*, § 66; *Gatete*, § 57.

261 *Kanyarukiga*, § 65. Article 14 of the Rwanda Transfer Law states that in cases transferred from the ICTR, the High Court "shall provide appropriate protection for witnesses and shall have the power to order protective measures similar to those set forth in Rules 53, 69 and 75 of the ICTR Rules of Procedure and Evidence".

262 *Kanyarukiga*, § 69; *Gatete*, § 60, *Kayishema*, §§ 40 ff., *Munyakazi*, §§ 60 ff.

263 *Kanyarukiga*, § 69.

264 *Ibid.*, §§ 69 ff.

for the protection of *all* witnesses, which the Trial Chamber acknowledged could dissuade Defence witnesses.[265] In addition, the National Prosecutor's Office is obliged to refer all incidents of threats to the local police.[266] Finding that this reporting system does not necessarily render the witness protection service inadequate, the Trial Chamber nevertheless held that "the link between the witness protection service and the police may, in the Rwandan context, reduce the willingness of some potential Defence witnesses to testify."[267]

Another factor, which the Trial Chambers considered as contributing to Defence witnesses' fear of testifying were Rwandan laws criminalizing "genocide ideology". The 2003 Constitution refers to it specifically as "genocide ideology" in article 9, and makes "revisionism, negationism and trivialisation of genocide" punishable by law in article 13.[268] Further, Organic Law No. 33*bis*/2003 (2003 Genocide Law) also explicitly criminalizes public negation, minimization, attempts to justify or approve its grounds of genocide by ten to twenty years imprisonment.[269] While the Trial Chamber in *Kanyarukiga* noted that the existence of such laws "is in itself legitimate and understandable in the Rwandan context",[270] evidence that such laws are in some instances interpreted and applied in a broad manner may dissuade Defence witnesses to testify, despite the 2007 Rwanda Transfer Law's provisions for the protection of witnesses. As a result, the Trial Chamber in *Hategekimana* noted that "regardless of whether their fears are well founded, witnesses in Rwanda may be unwilling to testify for the defence as a result of the fear that they may face threats, harassment, arrest or accusations of harbouring "genocidal ideology."[271] The Appeals Chamber in *Hategekimana*, supporting this view, even went so far as to say that it is "therefore not necessary for the Trial Chamber to satisfy itself that individual Defence witnesses in this particular case are reluctant to testify for these reasons."[272]

---

[265] *Ibid.*, § 70.

[266] *Ibid*.

[267] *Ibid*.

[268] The 2003 Constitution sets out in article 9 that "The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof: – fighting the ideology of genocide and all its manifestations; – eradication of ethnic, regional and other divisions and promotion of national unity".

[269] In particular, article 4 reads: "Shall be sentenced to an imprisonment of ten (10) to twenty (20) years, any person who will have publicly shown, by his or her words, writings, images, or by any other means, that he or she has negated the genocide committed, rudely minimised it or attempted to justify or approve its grounds, or any person who will have hidden or destroyed its evidence. Where the crimes mentioned in the preceding paragraph are committed by an association or a political party, its dissolution shall be pronounced."

[270] *Kanyarukiga*, § 71.

[271] *Hategekimana*, § 67. Similar findings were made in other cases. In *Kanyarukiga*, for instance, it was held that it „cannot exclude that some potential Defence witnesses in Rwanda may refrain from testifying because of fear of being accused of harbouring 'genocidal ideology'" (§ 72).

[272] *Hategekimana* (AC), § 22.

Interestingly, at the time that the Trial Chambers rendered many of its decisions denying requests to send cases to Rwanda, the Law No. 18/2008 of 23 July 2008 Relating to the Punishment of the Crime of Genocide Ideology (Genocide Ideology Law), which arguably is *even broader* in scope and displays very vague language, had not been adopted yet.[273] While "genocide ideology" was captured by the previously mentioned instruments, the crime was not properly defined until the promulgation of the corresponding law in October 2008. Article 2 defines genocide ideology as:

> "an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing *[sic]* on ethnic group, origin, nationality, region, color, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war."

The potential danger of the breadth of this law is particularly striking when examining article 3, which proscribes any behaviour "manifested by acts aimed at deshumanizing *[sic]* a person or a group of persons with the same characteristics in the following manner:

> 1. Threatening, intimidating, degrading through diffamatory *[sic]* speeches, documents or actions which aim at propounding wickedness or inciting hatred;
>
> 2. Marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading createing *[sic]* confusion aiming at negating the genocide which occurred, stiring *[sic]* up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;

In its report, *Safer to Stay Silent*, Amnesty International criticizes the extreme vagueness of this law, which is in violation of the right to freedom of expression under international law, notably article 19(3) of the ICCPR, to which Rwanda is party.[274] In particular, Amnesty International notes that "[t]he vague language of the law on 'genocide ideology' fails to establish certainty as to what behaviour is prohibited."[275] In addition, it expresses great concern about the proportionality of the law, finding that "the extremely broad scope of conduct and speech that is, or may be, prohibited under this law, all of which are punishable by long terms of imprisonment, fail to meet the international requirement of proportionality, as they go well beyond that which is necessary to prevent hate speech or meet any other legitimate interest."[276] Another leading human rights organization, Human Rights Watch, has also expressed its concern about the law being so broad that it covers even "the most

---

[273] Law No. 18/2008 of 23 July 2008 Relating to the Punishment of the Crime of Genocide Ideology, publication date: 15 Oct. 2008.

[274] Amnesty International, Safer to Stay Silent: The Chilling Effect of Rwanda's Laws on "Genocide Ideology" and "Sectarianism", August 2010, available at: https://www.amnesty.org/en/documents/AFR47/005/2010/en/ [accessed: 1 Feb. 2011], p. 14. Rwanda acceded to the ICCPR on 16 April 1975, see: http://indicators.ohchr.org [accessed: 8 June 2013].

[275] Amnesty International, *ibid.*, p. 14.

[276] *Ibid.*

innocuous comments."[277] As a result, "[a]s many Rwandans have discovered, disagreeing with the government or making unpopular statements can easily be portrayed as genocide ideology, punishable by [long] sentences […]", which "leaves little political space for dissent."[278]

The aforementioned law, which was used as a basis to suppress dissent and prosecute individuals who expressed criticisms against the state, was revised and ameliorated in 2013.[279] However, as lamented by Human Rights Watch, the newer version, although clarifying the elements of the crime of genocide ideology and rendering intent a constitutive element of the crime, has nonetheless retained the idea that free speech could be criminalized and punished for up to nine years' imprisonment.[280] It is curious that the various ICTR Trial Chambers decided to refer the cases of *Uwinkindi* and *Munyagishari* to Rwanda *after* the adoption of the problematic "genocide ideology" law, and *before* the adoption of the "milder" version in 2013.[281]

Securing the availability and protection of Defence witnesses from *outside* Rwanda may be even more complex.[282] There is persuasive evidence to suggest that many of the potential Defence witnesses reside outside of Rwanda,[283] which, according to the Appeals Chamber, is "usual for cases before the Tribunal."[284] Pointing to article 14 (2) and (3) of the Rwanda Transfer Law, the Trial Chamber in *Kanyarukiga* notes that Rwanda provides for a legal framework for witnesses residing outside Rwanda, covering aspects, such as travel, security, immunity and assistance, emphasizing in particular the immunity from arrest and detention regarding testimony given

---

277 *Kenneth Roth*, The Power of Horror in Rwanda. Human Rights Watch, 11 April 2009, available at: http://www.hrw.org/en/news/2009/04/11/power-horror-rwanda [accessed: 28 Sept. 2010].

278 *Ibid.*

279 HRW News, Rwanda: Justice after Genocide – 20 years on, 28 March 2014, available at: http://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years [accessed: 8 July 2014]. See in this context: *Jansen*, Denying Genocide or Denying Free Speech? 12 NW. J. Int'l Hum. Rts. 191 (2014) [accessed: 8 July 2014]. See in this context: Law No. 84/2013 of 11 Sept. 2013 on the Crime Of Genocide Ideology and Other Related Offences, "Official Gazette" No. 43*bis* of 28 Oct. 2013, available at: http://www.moh.gov.rw/fileadmin/templates/HLaws/RFMA_Law_Published.pdf [accessed: 8 July 2014].

280 HRW News, *ibid.* [accessed: 8 July 2014].

281 *Uwinkindi*'s referral was approved in June 2011, confirmed by the Appeals Chamber in December 2011; *Munyagishari*'s referral to Rwanda was approved in June 2012, confirmed by the Appeals Chamber in May 2013 (ICTR website: www.ictr.org).

282 *Hategekimana*, § 68.

283 In the *Kanyarukiga* case, there was some debate about the actual percentage. In that case, the Trial Chamber noted: "Leaving aside the exact percentage of Defence witnesses residing abroad in the various trials, the Chamber accepts that it is generally high." (fn. 108, and § 76).

284 *Hategekimana* (AC), § 24. Similar statements were made by other trial chambers, such as in *Kanyarukiga*, § 76.

in Rwanda.[285] While accepting Rwanda's statements that such provisions will be strictly adhered to in all proceedings involving transfer cases, it is also persuaded, including as a result of the ICTR's own experience with this issue, that there is a widespread fear among many potential Defence witnesses to testify.[286]As noted by the Trial Chamber in *Hategekimana*, while Rwandan law in theory ensures protection for witnesses, as noted above, potential Defence witnesses may nevertheless be unwilling to return to Rwanda to testify, not least in light of the fact that many of them have claimed refugee status in their current countries of residence, such that a planned return to Rwanda could create a number of legal obstacles.[287]

While the ICTR Statute and Rules of Procedure and Evidence allow the ICTR to issue subpoenas to secure the live testimony of unwilling witnesses[288] with international assistance, the Chamber points out that there is no legal basis in Rwanda to provide for such an alternative method, such that it may render the securing of witnesses residing abroad difficult.[289] Stating its preference for live testimony in court, and in the absence of any legislation or jurisprudence addressing the basis for using such testimony or the importance to be accorded to it in Rwandan courts, the *Hategekimana* Trial Chamber noted that the video-link testimony should be regarded as an exceptional measure, which is unsuitable for key witnesses.[290] In light of the potential importance of Defence witnesses residing outside of Rwanda, and the risk that video-link testimony risks being accorded less weight, the Chamber considers that the discrepancy between the live testimony of Prosecution witnesses and the video-link testimony of the majority of Defence witnesses could violate the accused's rights to a fair trial, notably his right "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".[291]

As a result of difficulties in securing the attendance of witnesses living within and outside of Rwanda, the Chamber concluded that it was not satisfied that the accused will receive a fair trial in Rwanda.[292] Similar findings were also made by the Trial

---

[285] *Kanyarukiga*, §§ 74–75.

[286] *Ibid.*, § 75.

[287] *Hategekimana*, § 68.

[288] Pursuant to article 28 of the ICTR Statute and rule 54 of the ICTR RPE, the Tribunal may issue subpoenas with the assistance of international parties to obtain the live testimony of unwilling witnesses.

[289] *Hategekimana*, § 69. As noted by the Chamber, it is unaware of "Rwanda's participation in conventions concerning mutual assistance in criminal matters".

[290] *Ibid.*, § 70.

[291] *Ibid.*

[292] *Ibid.*, § 71.

Chambers in the *Gatete* and *Munyakazi* cases.[293] These findings were also upheld by the Appeals Chamber in the *Hategekimana*, *Kanyarukiga* and *Munyakazi* cases.[294]

Since these ICTR decisions, Rwanda has amended and modified the 2007 Transfer Law in 2009, in order to address the ICTR's concerns.[295] In particular, the new law provides detailed provisions on modes and the manner of obtaining testimony from witnesses who are not able or willing to appear before the court, such as:

1. by deposition in Rwanda or in a foreign jurisdiction, taken by a Presiding Officer, Magistrate or other judicial officer appointed/commissioned by the Judge for that purpose;

2. by video-link hearing taken by the judge at trial;

3. by a judge sitting in a foreign jurisdiction for the purpose of recording such viva voce testimony.

In particular, as regards the contentious video-link testimony for witnesses residing outside of Rwanda, article 3 of the new Transfer Law stipulates that "[t]estimony taken under this Article shall be transcribed and form part of the trial record and shall carry the same weight as viva voce testimony heard at trial."[296]

The second major problem identified by the Trial Chamber in *Munyakazi* as constituting a violation of an accused's right to be tried before an independent and impartial tribunal, is the fact that a single judge would be hearing the transfer case at the Rwandan High Court. While reiterating the fact that Rwandan legislation guarantees judicial independence and incorporates this notion into the 2007 Rwanda Transfer Law, the Trial Chamber held that there was some indication that the Rwandan government's previous actions could exert pressure on the judiciary, a pressure to which a single judge would be particularly vulnerable.[297] As evidence of such a danger, the ICTR Trial Chamber cites first of all, the Rwandan government's reaction to previous ICTR decisions, resulting in the possible obstruction of ICTR proceedings, *inter alia*, by denying sixteen witnesses scheduled to testify before the ICTR permission to leave the country.[298] Second, the Trial Chamber cites the Rwandan Governments' condemnation of foreign judges for adverse decisions, two pertinent examples being Rwanda's reaction to the infamous report of the French Judge *Bruguière's*, calling for indictments against former RPF members,[299] as well as the Spanish Judge *Andreu*, whose investigation resulted in the issuance of indictments against forty high-ranking RPF officers.[300] While the exact details of these reports or

---

[293] *Gatete*, §§ 64, 72; *Munyakazi*, §§ 62, 66.

[294] *Hategekimana* (AC), § 22; *Kanyarukiga* (AC), §§ 26–27, 31; *Munyakazi* (AC), §§ 37–38, 44–45.

[295] See Rwanda Transfer Law.

[296] *Ibid.*, article 3.

[297] *Munyakazi*, § 40.

[298] *Ibid.*, § 41.

[299] *Ibid.*, §§ 42 ff.

[300] *Ibid.*, § 45.

the reaction thereto on behalf of the Rwandan government are beyond the scope of this discussion, suffice it to say that the Trial Chamber considered them to be sufficiently worrisome to conclude that while Rwandan law contains safeguards against outside pressure, the Rwandan government's past actions indicate that they are not guaranteed in practice.[301] As a result, and referring to the single judge, the Trial Chamber noted that "this situation may lead to direct or indirect pressure being exerted on judges to produce judgements in line with the wishes of the Rwandan Government", so that "there is a real risk that a single judge will not be able to resist any such pressure".[302] In addition thereto, the Trial Chamber questioned the ability of the Supreme Court to review such decisions, on the grounds that the Rwanda Transfer Law only allows the Supreme Court to consider errors of fact where there has been a miscarriage of justice, and, according to the Trial Chamber, only allows it to order the High Court to review a case in "very limited circumstances."[303] According to the Trial Chamber, the situation is compounded by the seriousness of the crimes charged and the fact that trials will be held in the country where the crimes took place.[304] Finding that the composition of the High Court is not in conformity with the right to be tried by an independent tribunal, the Trial Chamber precluded referral on this basis.[305]

These findings were subsequently overturned by the Appeals Chamber in the same case, which held that although it shared the Trial Chamber's concern about a single judge hearing politically sensitive cases, such as genocide cases, it was not persuaded that the High Court's composition was as such a violation of the accused's right to a fair trial.[306] The Appeals Chamber pointed out that international legal instruments, including human rights treaties, do not set forth a requirement for the number of judges in the first instance or on appeal to meet fair-trial standards.[307] Further, it stated that no evidence on record in this case suggests that single judges are more vulnerable to outside pressure than panels of judges.[308] In addition thereto, the Appeals Chamber claimed that the standard of judicial review to which the Trial Chamber

---

301 *Ibid.*, § 46.

302 *Munyakazi*, § 48.

303 *Munyakazi*, § 47. Article 180 of the Rwandan Code of Criminal Procedure, to which article 17 of the Rwanda Transfer Law refers, stipulates that a case may be reviewed if: "(i) after a person is convicted of homicide, evidence is discovered indicating that the alleged victim was not killed; (ii) after a person is convicted of an offence, a judgment is discovered which punishes another person for the same offence and indicates the innocence of either one of the convicted persons; (iii) a witness is subsequently found to have given false testimony; or (iv) new evidence is discovered indicating the convicted person's innocence."

304 *Ibid.*, § 47.

305 *Ibid.*, § 49.

306 *Munyakazi* (AC), § 26.

307 *Ibid*.

308 *Ibid*.

alluded, is not uncommon, and is in fact the one used by the ICTR.[309] Further, the Appeals Chamber held that the Trial Chamber erred in establishing a serious risk of government interference with the courts in Rwanda, not taking into account more recent reactions by Rwanda towards ICTR cases, nor the continued cooperation provided by the Rwandan government to the ICTR.[310] As regards adverse reactions to foreign indictments, the Appeals Chamber suggests that such reactions themselves are no reliable indication of how the Rwandan courts would react to rulings of its own courts.[311] Finally, the Appeals Chamber held that the availability of the monitoring and revocation function under rule 11*bis* (D)(iv) and (F) was not taken into consideration by the Trial Chamber in the *Munyakazi* case.[312]

Interestingly, while the issue of the single judge was also raised before a number of other ICTR Trial Chambers making referral decisions, all of them came to the exact opposite conclusion than the Trial Chamber in *Munyakazi.*[313] This discrepancy in the findings of the ICTR Trial Chambers with regard to the exact same issue raises some concern about the internal coherence of ICTR referral decisions, suggesting that the designation of *ad hoc* Trial Chambers on a case-by-case basis may be a less favourable option than the ICTY model, in which a permanent bench makes all the referral decisions.

The amended 2009 Transfer Law confirms in article 1 that at first instance the case shall be decided by a single judge before the High Court, but adds the safeguard that "the President of the Court may at his/her absolute discretion designate a quorum of three (3) or more judges assisted by a Court Registrar depending on his/her assessment of the complexity and importance of the case".[314]

The amendments appear to address all of the ICTR's major concerns upon which the denial of referral requests was based. In fact, as demonstration of this, in June 2011, the ICTR agreed to transfer its first case to Rwanda, and following appeal, the accused was sent to Rwanda in April 2012.[315] By 2013, seven cases followed,[316]

---

309 *Ibid.*, § 27.

310 *Ibid.*, § 28.

311 *Ibid.*, § 28.

312 *Ibid.*, § 30.

313 *Gatete*, §§ 33 ff., *Hategekimana*, § 38 ff., *Kanyarukiga*, §§ 34 ff. While the Trial Chamber in *Hategekima* conceded that the notion of an independent judiciary was a relatively novel one in Rwanda, it also held that there was insufficient evidence to suggest that independence, impartiality and competence of the Rwandan judiciary were inadequate so as to prevent transfer (*Hategekimana*, § 46).

314 Rwanda Transfer Law, article 1.

315 Completion Strategy of the ICTR report, S/2014/343, 14 May 2014, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_343.pdf [accessed: 8 July 2014], Annex II.

316 http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1144 [accessed: 9 June 2014].

amounting to the same number of cases sent by the ICTY to countries of the former Yugoslavia,[317] and representing a higher number of cases than the ICTY sent to any given country.

d) Gravity of crimes and level of responsibility of the accused

As noted previously, although the concept of gravity is expressly granted a prominent role in the Rome Statute as a threshold for admissibility of a case before the ICC, the judicial examination thereof is fairly novel in the practice of the ICTY and ICTR,[318] having only recently gained increased attention as a result of the Completion Strategy.

Rule 11*bis* (C) of the ICTY RPE stipulates that in deciding whether to refer a case to a national system, the ICTY 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.*"[319] The ICTY rule 11*bis* refines the Security Council resolution's wording by adding an explicit reference to the gravity of the crime (such that the test is now "the gravity of the crimes charged and the level of responsibility of the Accused"). Although the ICTY and ICTR rule 11*bis* RPE are nearly identical, the ICTR's rule 11*bis* does not explicitly incorporate these elements of the Security Council resolutions.

aa) ICTY jurisprudence

Inevitably, there are a number of problems with the gravity criterion for determining a referral, not least of all the fact that there is a danger of creating a gravity scale among crimes that have already been determined to be so grave as to warrant proceedings before the ICTY. As a result, rule 11*bis*' gravity criterion places all parties to the proceedings in a dilemma.[320] The Prosecution, which typically emphasizes the seriousness of the crimes allegedly committed by the accused in the indictment, and which is obliged to conform to the legal principle *in dubio pro duriore* as regards charges in the indictment, must base its arguments on the fact that the crimes do not rise to the level of gravity warranted in cases before the ICTY,[321] thereby also discrediting the decision to investigate and indict these crimes in the first place. This is even more so when one considers, as one commentator did, that "[i]t is also unpalatable to attempt to distinguish between crimes that would in any national system be

---

317 ICTY website, Status of Transfer Cases, http://www.icty.org/sid/8934 [accessed: 9 June 2013].

318 *Bekou*, 33 Fordham Int'l L. J. 736–737 (2010).

319 Emphasis added.

320 *Williams*, 17 Crim. L. F. 201 (2006).

321 *Petrig*, 45 Crim. L. Bull. 12 (2009).

considered the gravest crimes that could be committed."[322] The somewhat odd result is that the Prosecution argues that while the crimes charged were sufficiently grave to be tried by the ICTY and were indeed tried by it in the *Krnojelac* case, "they cannot be characterized as grave to the extent that demands trial before the Tribunal in light of the Completion Strategy referred to in Security Council resolutions."[323]

The defence strategy also risks being incoherent, since the Defence has to emphasize the gravity of the crime and the accused's level of responsibility therein in order to prevent referral only to later have to build a defence against the ICTY charges.[324] In the *Milošević* case, for instance, the Defence submitted that:

> "…the crimes with which Dragomir Milošević has been charged are inherently very grave. […] The Defence contends that the gravity of the crimes charged does not support referring the present case. As regards the level of responsibility of the accused, the Defence argues that the position of Milošević, as SRK commander over 18,000 personnel answering 'solely to the Commander of the VRS Main Staff and the Supreme Commander of that Army' 'represents a commander of the highest level'. The Defence therefore argues that this does not support referral."[325]

Finally, the Referral Bench's determination is also delicate in light of the fact that it will have to justify why a case for which there is already a formal indictment at the Court is insufficiently grave to require further proceedings at the Court.[326] In fact, the ICTY Referral Bench has espoused a presumption of referral, meaning that instead of the Prosecution having to prove why the case should be referred, the Referral Bench has sought instead to prove that the level of responsibility of the accused and the gravity of the crimes are not *ipso facto* incompatible with the referral of the case.[327]

As noted previously, the ICTY rule 11*bis* formulated a two-prong test of "the gravity of the crimes charged and the level of responsibility of the Accused". The Referral Bench in the *Lukić and Lukić* case held that "[e]ither of these considerations, or both in combination, may, in a particular case, persuade the Referral Bench that it should refer the case, or that it should not do so."[328] Although the wording of ICTY's rule 11*bis* makes no explicit reference to the official rank of the perpetrator, the ICTY Referral Bench held in the *Lukić* case that the second prong of the test ("level of responsibility") comprised two elements, namely the "actual role of the Accused in

---

322 *Williams*, 17 Crim. L. F. 201 (2006).

323 *Rašević and Todović*, § 18.

324 *Petrig*, 45 Crim. L. Bull. 12 (2009).

325 *Dragomir Milošević*, Case No. IT-98-29/1-PT, Decision on Referral of Case pursuant to Rule 11*bis*, 8 May 2005, §§ 13–14.

326 *Petrig*, 45 Crim. L. Bull. 11 (2009).

327 *Williams*, 17 Crim. L. F. 201 (2006).

328 *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/I-PT, Referral Bench, Decision on Referral of Case pursuant to Rule 11*bis*, 7 April 2007, § 26 [hereafter *Lukić and Lukić* (RB)].

the commission of alleged offences" as well as his/her official rank.[329] The two-prong test will be discussed in turn.

Because rule 11*bis* is silent on how to establish the *gravity of a crime*, it has been up to the Referral Bench to formulate a workable test. The Referral Bench has consistently held that in assessing the gravity of the crimes and the level of responsibility of the accused, it will consider only the facts alleged in the indictment.[330] In contemplating the gravity of the crimes charged, the ICTY Referral Bench held that in addition to their legal qualification as genocide, crimes against humanity or war crimes under article 2 to 5 of the ICTY Statute, the following criteria, *inter alia*, may be considered: the number of victims, the time frame, the geographical area, the number of separate incidents in which an accused is charged, the way in which the criminal conduct was allegedly committed, and any other circumstances of the alleged crime.[331] However, the Referral Bench has not accepted distinctions based on the nature of crimes charged. For instance, in the *Ademi and Norac* case, the Referral Bench rejected Croatia's argument that the nature of the crimes, namely crimes against humanity and war crimes, were at the lower hierarchy level than genocide, thus meriting referral.[332] Instead, the Referral Bench held that "[w]hether or not the gravity of these particular crimes is so serious as to demand trial before the Tribunal […] depends on the circumstances and context in which the crimes were committed and *must* also be viewed in the context of other cases tried by this Tribunal."[333] The last part of the statement, namely the need to compare cases to be transferred with cases already tried at the Tribunal, appears in itself a logical way of proceeding. However, as suggested earlier, the pyramidal indictment strategy employed at the early stages of the ICTY's life, in which lower-level perpetrators were tried in an attempt to build a case from bottom up, would make a rigid comparison precarious. In several cases, the Defence sought to impede referral to national jurisdictions by comparing the gravity of crimes charged in the indictment with cases previously tried at the Tribunal. For instance, the Defence in the *Stanković* case based its position on the argument that *Vuković*, who was tried in the *Kunarac et al*. case before the ICTY, was charged with offences of a "much lesser scope" than the crimes with which *Stanković* is charged.[334] Seemingly retracting the force of the previous statement made by the ICTY Trial Chamber, the Appeals Chamber in *Janković* firmly established that, as a matter of law, it was not "obliged to consider the gravity of crimes charged and the level of responsibility of accused in other cases", but that it could be

---

329 *Lukić and Lukić*, § 28.

330 See, for instance, *Ljubičić*, § 18.

331 *Lukić and Lukić*, § 27.

332 *Ademi and Norac*, § 21.

333 *Ibid.*, § 28. Emphasis added.

334 *Stanković*, trial transcript, 4 March 2005, available at: http://www.icty.org/x/cases/stankovic/trans/en/050304ME.htm [accessed: 9 March 2011], p. 212, § 17.

"guided by a comparison with an indictment in another case".[335] However, the Referral Bench did not further elucidate which cases could provide such guidance[336] or when it would draw on them.

Regarding the application of the aforementioned criteria for assessing the gravity of the crime, the Referral Bench held in the *Janković* case that the crimes with which the accused was charged, namely seven counts of crimes against humanity and seven counts of war crimes under article 7(1) of the ICTY Statute, and two counts of crimes against humanity and two counts of war crimes under article 7(3) of the ICTY Statute, are all "serious offences."[337] However, the Referral Bench held that "the factual basis for the alleged crimes is limited in scope, both geographically and temporally, and also in terms of the number of victims affected," the gravity was not such to warrant trial before the ICTY.[338] This case follows the nearly identical *Stanković* case, in which the accused was charged with four counts of crimes against humanity and four counts of war crimes.[339]

While creating such criteria attempts to add an objectivity to the assessment of gravity, there is the danger that such an approach – when applied strictly – disregards crimes that could nevertheless qualify as being grave and warrant trial before the ICTY and ICTR. As noted by *Bekou*, "[w]hile the use of set criteria is welcome, a more inquisitive evaluation of the gravity of crimes should be encouraged."[340]

The Referral Bench determined that *the level of responsibility of the accused* is determined based both on the actual role of the accused in the commission of offences and his or her position or official rank in the relevant hierarchy structure, whether it be of a civil, political or military nature, considering the *de-facto* or *de-jure* authority he exercised.[341] In other words, a case may be considered sufficiently "grave" to bar referral but where the level of responsibility is considered to be low, the case could nevertheless be considered compatible with referral. However, the Referral Bench made clear that "most senior leaders" were not limited to the "architects" of an "overall policy", nor did it deem the Security Council resolutions to require this, since, according to the Bench, this would undermine the real power dynamics in the field. Instead, the Referral Bench considered that:

> "[…] individuals are also covered, who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree

---

335 *Prosecutor v. Janković*, Case No. IT-96-23/2-AR11*bis*.2, Appeals Chamber, Decision on Rule 11*bis* Referral, 15 Nov. 2005, § 26 [hereafter *Janković* (AC)].

336 *Bekou*, 33 Fordham Int'l L. J. 742 (2010).

337 *Janković*, § 19.

338 *Ibid*.

339 *Stanković*, § 11.

340 *Bekou*, 33 Fordham Int'l L. J. 746 (2010).

341 *Lukić and Lukić* (RB), § 28.

> of authority that it is appropriate to describe them as among the "most senior", rather than "intermediate".[342]

Interestingly, as the Referral Bench held in the *Janković* case, the mere fact of an accused being in command of others at a local level was not sufficient to bar referral.[343] Also insufficient to bar referral is the accused's involvement in a joint criminal enterprise, even where other participants of this same enterprise have been or may still be tried by the ICTY. For instance, in the *Rašević and Todović* case, the accused were charged, *inter alia*, for command responsibility under article 7(3) of the ICTY Statute, and are alleged to have engaged in a joint criminal enterprise together with a co-perpetrator, *Milorad Krnojelac*, who was already tried by the ICTY for comparable crimes.[344] Despite this, the Referral Bench held that:

> "In light of the positions of the Accused within the overall chain of responsible actors, and the relative gravity of their alleged crimes when compared to other pending cases before the Tribunal, it is apparent that neither Accused in the present case may be appropriately regarded as among the 'most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction'."[345]

However, the Referral Bench does not provide any satisfactory explanation for the distinction between *Krnojelac* and the two accused in the case in question. In the *Mejakić* case, the Referral Bench confirmed its position in *Rašević and Todović* and explained that the mere finding of a joint criminal enterprise in itself did not preclude referral, however far-reaching, where the accused had only limited functions in the enterprise. In other words, the Referral Bench considered it necessary to evaluate the level of responsibility of the accused "by reference to their particular positions and functions, not by reference to the responsibility of the political leadership."[346]

As regards *the level of responsibility of the accused* part of the two-prong test, the *Lukić and Lukić* case merits particular mention. In that case, the "level of responsibility" criterion was discussed in greater detail and some contention arose between the Referral Bench and the Appeals Chamber about the interpretation of the various factors pertaining to this criterion. The Referral Bench stated that:

> "a high level of responsibility may arise from the alleged level of participation in the commission of the crimes charged in the indictment. A person holding a high rank or position may have the authority to orchestrate the actions of other people: because he may inflict more damage than he would be able to inflict absent such a rank or position, he therefore bears a higher level of responsibility. The accused must be alleged to have exercised such a significant degree of authority that it is appropriate to refer to him as being among the 'most senior', rather than 'intermediate'."[347]

---

342 *Ibid*.

343 *Janković*, § 19.

344 *Rašević and Todović*, §§ 14 ff.

345 *Ibid*., § 23.

346 *Mejakić*, § 24.

347 *Lukić and Lukić*, § 28.

Relying on its previous findings in the *Milošević* and *Janković* cases, the Referral Bench reiterated the fact that "most senior leaders" does not limit itself to the "architects of an overall policy forming the basis of the alleged crimes."[348] In that case, the Referral Bench, conceding that the gravity of the crimes was "very serious",[349] and without much explanation, relied on the local character of the paramilitary group of which one of the accused was a leader and the other was a member to decide that "neither of the Accused can sensibly be characterized as one of the 'most senior leaders', as envisioned by the Security Council in resolution 1534"[350] to allow transfer to BiH. As held by the Appeals Chamber in the same case, the Referral Bench's reliance on the local character of the crimes charged seems to presume that "local" paramilitary leaders can never rise to the level of a "most senior leader".[351] This finding also seems to disregard the "alleged level of participation in the commission of the crimes charged in the indictment", which, according to the Appeals Chamber, does not reflect the factual evidence, namely that the accused did not only directly commit the crimes charged, but was also the "leader and orchestrator of the crimes – which were part of "one of the most notorious campaigns of ethnic cleansing in the conflict."[352] Stating that there was "no necessary nexus between, on the one hand, leadership responsibility for the most serious crimes and, on the other hand, a broad geographic area", and the number and nature of the alleged crimes, and the absence of any evidence indicating that the appellant had a higher authority, the Appeals Chamber held the appellant to constitute one of the "most significant paramilitary leaders."[353] As a result, finding that the Referral Bench had erred in determining the level of responsibility of the accused in light of the factual findings at hand, the Appeals Chamber revoked the Referral Bench's decision to transfer the case to BiH as regards *Milan Lukić* (the only one who appealed) by the Appeals Chamber.[354]

bb) ICTR jurisprudence

As noted previously, the ICTR's rule 11*bis* RPE does not explicitly require a consideration of the gravity of the crime charged and the level of responsibility of the accused. It has been suggested that this element is implicit,[355] although any examination thereof in the case law has to date been entirely absent. Nevertheless, the

---

348 *Ibid.*; *Milošević*, § 22; *Janković*, § 20.

349 *Lukić and Lukić*, § 29.

350 *Ibid.*, § 30.

351 *Ibid.*, Case No. IT-98-3211AR11*bis*.1, Appeals Chamber, Decision on *Milan Lukić's* Appeal regarding Referral, Appeals Chamber, 11 July 2007, §§ 21, 22, 25, 26 [hereafter *Lukić and Lukić* (AC)], § 21.

352 *Ibid.* (AC), § 21, citing the second amended indictment, §§ 1, 27, fn. 65.

353 *Ibid.*, § 22.

354 *Ibid.*, §§ 21, 22, 25, 26.

355 Den Haag research visit, October 2009 [interview transcript with author].

ICTR Completion Strategy Report of May 2007 states that in coming to a decision about which individuals to try at the ICTR, "the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership and those who allegedly bear the greatest responsibility for the genocide."[356] Curiously, in only two of the six cases that were refused for transfer and that were subsequently tried by the ICTR, considerations of gravity and level of responsibility of the accused were seriously contemplated, although any systematic or expansive attempts at categorization remains unachieved. In the *Munyakazi* and *Kayishema* cases, the Trial Chamber (perhaps not coincidentally the same composition in both cases) held that it was up to the Tribunal, as mandated under Security Council resolutions 1503 and 1534, to ensure the referral of cases involving *intermediate* and *low-ranking* accused to competent national jurisdictions.[357] In both cases, it held that the accused (one of them an *Interahamwe* leader – the militia significantly involved in the genocide – within a specific *préfecture*, the other a Police Inspector of a *commune*) "had neither a rank of any military significance, nor had any official political role".[358] Relying on the limited geographical area of their mandates and comparing their level of responsibility to others whose cases had been transferred to national jurisdictions, it held that the cases were suitable for transfer.[359] However, given that in the majority of referral deliberations the Trial Chambers did not engage in any analysis, any useful attempts at differentiating between high-level and intermediate and low-level accused cannot be clearly understood by an examination of these two cases. It is unfortunate that the Trial Chamber's inquiry limits itself only to the *official rank or role* of the Perpetrator rather than to examine also the *actual role* in the commission of the alleged offences, which the ICTY Referral Bench deemed to be an important part of assessing the responsibility of the accused.

In the first two referrals to France, the *Bucyibaruta* and *Munyeshyaka* cases,[360] no mention is made of the gravity of the crimes charged or the level of responsibility of the accused. This is particularly striking in the *Bucyibaruta* indictment, which emphasizes the high-level positions the accused enjoyed in his community during the time of the alleged commission of the crimes charged and the considerable degree of authority and control that he had by virtue of his various positions.[361] Without any specific explanation on the part of the Referral Bench, it is difficult to understand

---

[356] Report on the Completion Strategy of the ICTR, S/2007/323, 31 May 2007, § 15.

[357] *Munyakazi*, § 9; *Kayishema*, § 11.

[358] *Ibid.*, § 13; *Kayishema*, § 15.

[359] *Ibid.*, §§ 13–14; *Kayishema*, §§ 14–15.

[360] *Bucyibaruta*, § 13 and *Munyeshyaka*, § 13.

[361] *Bucyibaruta*, Indictment, 16 June 2005, §§ 2–5. As detailed in the indictment, *Laurent Bucyibaruta* was *bourgmestre* of the Musage *commune*, *sous-préfet* in the Butare and Gisenyi *préfectures*, member of parliament, *préfet* of the Kibugo and Gikongoro *préfectures*, as well as head of the prefectoral committee of the *Interahamwe.*

how these criteria have been employed – even implicitly – in order to distinguish between cases which are eligible and those, which are not eligible for transfer.

3. Post-referral aspects

The foregoing part has sought to examine the most significant legal conundrums that have arisen during deliberations whether to transfer cases from the ICTY/ICTR to national courts; such legal problems have included discrepancies in the characterization of crimes, punishment structures at the national level, and fair-trial rights, some of which have been deemed so insurmountable as to impede the transfer of cases (notably to Rwanda until 2011). The referral practice, however, has also unveiled problems *following* the referral to national courts. Thus, in order to be able to properly assess the overall suitability of rule 11*bis* for the referral practice, it is vital to also consider the oft-overlooked post-referral aspects.

Rule 11*bis* (D)(iv) of the ICTY and ICTR RPE sets out that "the Prosecutor *may* send observers to monitor the proceedings in the national courts on [his or] her behalf".[362] What is troubling about this provision it that such a mechanism is *discretionary* rather than *mandatory*. Given the seriousness of the charges contained in the ICTY/ICTR indictments subject of the referral, the monitoring function following a referral for prosecution at the national level is crucial. Monitoring is not only important in order to avoid unfortunate discrepancies in the treatment of these cases, but has concrete relevance by virtue of rule 11*bis* (F), under which the Referral Bench may, at the request of the Prosecutor and before the accused is found guilty or acquitted by a national court, ask for an already transferred case to be deferred back to the Tribunal.

Questions about what recourse, *if any*, the Tribunals have, *after* the national court's decision has been rendered, such as where the punishment is inadequate, or where the verdict does not reflect the evidence, are dubiously left unanswered in the rule itself. This provision is troubling because it impedes revocation beyond the final verdict. In particular, a situation may be envisaged where the national court acquits or convicts a person on the basis of evidence that would have reared an entirely different result at the ICTY or ICTR. Chapter 3 will briefly touch upon this in the context of the French courts. Without considering the various scenarios that could justify the need for a deferral to the ICTY or ICTR following a final verdict, the ICTY Referral Bench has firmly established that the ICTY relinquishes its "jurisdiction" over the case following the final appeal. In fact, no revocation has ever been requested or seriously envisaged by either tribunal to date.[363]

---

362 Emphasis added.

363 ICTY research visit, October 2009 [interview transcript with author].

The limits of rule 11*bis* RPE over transferred cases following a final verdict was underscored in the ICTY's very first transfer case to BiH. In the *Stanković* case, the accused was convicted by the BiH State Court and sentenced to 20 years imprisonment.[364] Shortly after his imprisonment, a spectacular escape was orchestrated on the part of *Stanković* and a number of guards – one of them turned out to be his brother.[365] He currently remains at large, a fact which has been criticized by ICTY Chief Prosecutor *Brammertz*.[366]

Rule 11*bis* strictly does not cover inadequacies at the level of the law enforcement following completed judicial proceedings (final verdict). However, when one examines the normal enforcement of sentence procedures at the ICTY and ICTR, which allow for post-verdict "supervision" of prison conditions under which persons convicted at the ICTY and ICTR and subsequently transferred to a third country to carry out their sentences, a persuasive argument can be made for rule 11*bis* to be sufficiently flexible so as to allow for some sort of sentence monitoring mechanism. The current situation gives rise to an unfortunate discrepancy in the level of monitoring between cases transferred under rule 11*bis* to national systems prior to a final judgment, and those persons who were convicted at the ICTY or ICTR and are subsequently transferred to a third country to carry out their sentences by way of Enforcement Agreements with national systems. As an illustration of this point, the ICTR judges have on numerous occasions stated their unwillingness to send any rule 11*bis* cases to Rwanda for a number of fair-trial-related reasons, discussed above. However, an Agreement on the Enforcement of ICTR Sentence*s* between the ICTR and Rwanda was signed in March 2008,[367] and article 26 of the ICTR Statute specifically identifies Rwanda as one of the countries to which convicted persons can be sent to carry out their sentences.[368]

Interestingly, in contrast to article 26 of the ICTR Statute, the ICTY's equivalent rule on the enforcement of sentences does not stipulate specific countries that the

---

[364] ICTY website: http://www.icty.org/x/cases/stankovic/cis/en/cis_jankovic_stankovic_en.pdf [accessed: 20 April 2011].

[365] The Hague Justice Portal, http://www.haguejusticeportal.net/index.php?id=6073 [accessed: 20 June 2011].

[366] Justice Report News, *Brammertz*: More Work on Stankovic's Arrest Needed, 14 Dec. 2011, available at: http://www.justice-report.com/en/articles/brammertz-more-work-on-stankovic-s-arrest-needed [accessed: 8 Aug. 2014].

[367] See in this context: Agreement between the government of the Republic of Rwanda and the United Nations on the Enforcement of Sentences of the ICTR, 4 March 2008, available at: http://w.unictr.org/sites/unictr.org/files/legal-library/rwanda-en.pdf [accessed: 9 July 2014].

[368] Article 26 of the ICTR Statute, dealing with the enforcement of sentences stipulates: "Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda."

ICTY convicts can be sent to, and the Security Council has further decided that such persons could not be sent to their countries of origin to carry out the sentence.[369] It appears all the more odd that rule 11*bis* cases are not overseen in some minimal manner by the ICTY, especially in light of the fact that sentences are for the most part served in prisons in the person's country of origin. This situation was even more precarious in the case of *Stanković* because the accused did not only serve his sentence in his country of origin (BiH), but was actually transferred to a prison in Foča, the commune where he committed the crimes for which he was convicted. This arrangement became highly problematic at the very latest when he escaped and roamed free in an area where a large number of his former victims still resided.[370] The decision to send him to Foča was very much criticized, not least of all by victim groups.[371]

Given the foregoing, it is illogical that rule 11*bis* does not envisage a similar supervisory mechanism as that provided following a conviction by the ICTY and ICTR.

In conclusion, while post-transfer aspects appear *prima facie* to pose less difficulties than pre-transfer aspects under rule 11*bis*, the foregoing section has sought to highlight legal problems related to post-transfer aspects, which can have very real repercussions on the handling of cases at the national level.

B. Referral of investigative materials by the ICTY and ICTR

1. Lack of ICTY/ICTR monitoring function following the national court's final verdict

Unlike the many *formal* criteria regulating the transfer of cases, the transfer of investigative files to national jurisdictions is an *informal* procedure initiated at the discretion of the Prosecutor. Specifically, these investigative files have been compiled, but have not led to an indictment at the ICTY and ICTR. In the ICTY context, these files are frequently referred to as "category II" cases.

One of the fundamental differences in the transfer of these cases is the role played by the *ad hoc* tribunals *following* such transfer. While the ICTY and ICTR retain a certain "control" over the treatment of the rule 11*bis* cases at national level, at least

---

369 ICTY Statute, article 27.

370 ICTY research visit, October 2009 [interview transcript with author].

371 *Sadović, Merdijana*, Storm Over Escape from Bosnian Prison: Controversial Bosnian law under scrutiny after war crimes convict escapes from prison, TRI Issue 504, 2 June 2007, available at: http://iwpr.net/report-news/storm-over-escape-bosnian-prison [accessed: 10 June 2013].

until the final verdict has been entered, they entirely relinquish any kind of control over the handling of investigative files at the national level. Practically speaking, this means that ICTY and ICTR investigative files are absorbed into the national caseload and treated akin to the other investigations initiated nationally. The ICTY and ICTR have both made use of this type of transfer to alleviate their workload, with the ICTY having transferred a total of 13 cases involving 38 suspects between 2005 and 2009,[372] and the ICTR having transferred a total of 60 case files (as of 2013).[373]

These numbers are considerable when compared to the number of cases transferred by both courts under rule 11*bis* RPE. Inevitably, however, these numbers are also indicative of the fact that the transfer procedure is considerably simpler for the transfer of investigative files than for the transfer of confirmed indictments, which can lead to paradoxical results. For instance, while no single case regarding RPF crimes has been prosecuted at the ICTR, a fact which is vigorously criticized by Human Rights Watch in particular, current Prosecutor *Hassan Jallow* appears to justify this omission by relying on the fact that he has sent a number of investigative files involving high-ranking RPF officials to the Rwandan Prosecutor for prosecution.[374] Given the current composition of the Rwandan government members, many of whom are former RPF officials, the decision of sending these investigative files back to Rwanda is questionable. However, it is not this section's aim to engage in the intricate and highly political details of this situation, but merely to highlight the problems that can arise in the non-judicial transfer mechanism of investigative files as part of the Tribunals' Completion Strategies.

2. Divergences in the investigation and prosecution of crimes falling within the jurisdiction of the ICTY/ICTR and national prosecution offices

Regrettably, information is scarce about the exact investigative practices and the prosecutorial strategy applicable to these transferred investigative files, such that any discussion about discrepancies between files tried nationally and those retained by the ICTY or ICTR remains highly hypothetical. However, based on evidence of great

---

[372] Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of UNSC resolution 1534 (2004) and covering the period from 19 Nov. 2013 to 16 May 2014, S/2014/351, 16 May 2014, §§ 4 ff.

[373] Communication with Senior Officer of ICTR-OTP, 30 April 2013. See also: Statement by Justice *Hassan B. Jallow*, Prosecutor of the ICTR, to the United Nations Security Council, 18 June 2010, available at: http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1144 [accessed: 2 May 2013], where it is stated that by June 2010, 55 pre-indictment files had been transferred. In the meantime, this has increased to 60 files. See also the latest ICTR Completion Strategy report, S/2014/343, 15 May 2014.

[374] ICTR-OTP, Letter to *Kenneth Roth*, Executive Director of Human Rights Watch, by *Hassan Jallow*, ICTR Chief Prosecutor, ICTR Ref: OTP/2009/P/084, 22 June 2009, available at: http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response_0.pdf [accessed: 16 May 2013].

discrepancies that exist between the various laws and the different courts to prosecute war crimes cases at national level, it is only logical to assume that these files also risk being subject to great discrepancies between national approaches on the one hand, and the approach that would have been followed at the ICTY and ICTR. In addition, the scenario in which politically highly sensitive files are sent to a national Prosecutor, which a government could have a strong-vested interest not to pursue – such as those files sent by the ICTR Prosecutor regarding crimes committed by RPF officials –, would appear to entirely defeat the idealistic goals underlying the referral practice, namely to promote national reconciliation.

IV. The ICTY and ICTR experiences compared

The difference in experience between the ICTY and ICTR regarding the referral of cases under rule 11*bis* was most pronounced at the beginning phase of the referral practice. While the ICTY quickly referred cases to the countries of the former Yugoslavia, notably BiH, the ICTR was reluctant to send any cases to Rwanda, due to a number of fair-trial concerns, for nearly a decade. As a result, while the ICTY never had to seriously envisage sending the cases to countries outside of the former Yugoslavia, the various ICTR Trial Chambers spent the first years following the practice's implementation contemplating referral to a number of different third (European) countries (Netherlands, Norway, France), exclusively on the basis of universal jurisdiction. What impact, if any, the referral to an unconnected third country may have on national reconciliation is questionable, and will be contemplated in more detail in chapters 3 and 4.

The difference in experiences on behalf of the ICTY and ICTR may be explained, in some part, by the varying approaches to the suitability of national law provisions for the prosecution of referral cases. Both courts have been faced with discrepancies between the ICTY and ICTR statutes on the hand, and national laws on the other, regarding the substantive definition and legal qualification of crimes, modes of commission of crimes, fair-trial rights, as well as punishment structures.

Regarding in particular the legal qualification of crimes, the ICTY Referral Bench appears to have been willing to espouse a rather lenient standard, finding that the old SFRY CC, if applied, would be suitable to try "*most, if not all*, of the criminal acts of the Accused alleged in the present Indictment",[375] even if that meant changing the legal qualification of the crimes charged in the indictment, such as prosecuting crimes against humanity as war crimes, or using analogous national law provisions

[375] *Mejakić*, § 63. Emphasis added.

to prosecute crimes charged in the ICTY indictment.[376] The issue of discrepancies between the ICTY Statute and the SFRY CC also came up before the ICTY Referral Bench regarding modes of commission of offences, notably command responsibility. In *Mejakić* and other cases before it, the Referral Bench deliberated whether a very restricted notion of command responsibility could satisfy the charges set out in the ICTY based on article 7(3) of the ICTY Statute. While it is redundant to reiterate details at this point, suffice it to say: the ICTY Referral Bench held that were the SFRY CC applied to referral cases, there was a possibility of an acquittal where the very limited test set out by the SFRY CC was not satisfied.[377] Based on the fact that the accused were also charged with individual criminal responsibility under article 7(1), it nevertheless held that this risk was not an impediment to transfer.[378]

The various ICTR Trial Chambers, on the other hand, appear to have applied a more stringent standard throughout their referral deliberations. First of all, as was discussed in detail above, the ICTR Trial Chamber refused to allow for the qualification of genocide as an ordinary crime ("aggravated homicide") – as Norway had proposed, *inter alia,* because modifying the legal qualification of a crime disregarded the protected legal value.[379] The ICTY Referral Bench's more lenient approach certainly does not legitimize *as such* the prosecution of international crimes as ordinary crimes. In light of the ICTY Statute's clear stance on the matter, in which it makes an explicit distinction between international and ordinary crimes for the purposes of the principle of *non bis in idem* under article 10(2)(a),[380] the ICTY Referral Bench's point of view is not readily apparent. That is, the suggestion that crimes against humanity could be prosecuted as war crimes, or war crimes as analogous crimes, as was proposed in *Mejakić* and other cases, creates problems regarding the legal values protected by different categories of crimes (since the chapeau elements for prosecuting both crimes are different).

In addition, the ICTR Trial Chamber held in the *Hategekimana* case that the absence of command responsibility under Rwandan law – akin to article 6(3) of the ICTR Statute – impeded transfer due to the "possibility of an acquittal on this basis".[381]

---

376 *Mejakić*, § 53.

377 *Mejakić*, § 57.

378 *Ibid*.

379 *Bagaragaza* (AC), § 17.

380 Article 10 of the ICTY Statute stipulates as follows:

"*Non-bis-in-idem:* 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal. 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime".

381 *Hategekimana*, § 19.

The ICTR Trial Chamber's finding seems to contravene the ICTY's reasoning on this matter; despite the fact that the SFRY CC *does* provide for a very limited understanding of command responsibility (contrary to the Rwandan law), in the event that the stringent requirements could not be met, which appeared to present a very real possibility (according to the ICTY Referral Bench), the outcome would nevertheless be much the same. While the Appeals Chamber subsequently overturned the ICTR Trial Chamber's finding, it did so on the ground that there *were* indeed laws in Rwanda criminalizing command responsibility, not on the Trial Chamber's pronouncement that the absence of such a criminalization could hinder transfer.

Regarding the imposition of the death penalty, Bosnia and Herzegovina abolished the death penalty for all crimes even before the referral practice was implemented, such that this issue did not ever pose any tangible problem for the ICTY. Rwanda, however, only formally abolished the death penalty in 2007, such that the ICTR deemed it impossible to transfer cases to Rwanda before this date without any firm assurances that the death penalty would not be imposed. Both courts also faced problems with respect to alternative forms of punishment, that is, conditions and duration of imprisonment. While in BiH, there is a considerable difference in the duration of imprisonment depending on which criminal code is applied, the risk of such discrepancy was discussed by the ICTY, but did not impede the transfer of cases to national jurisdictions.

With respect to Rwanda, the very risk that an ICTR indicted person could be subject to "imprisonment in isolation" (for up to 20 years) was considered sufficient to block transfer until firm assurances existed that the accused of transfer cases would not be exposed to this type of imprisonment.

From a more *pragmatic standpoint*, and considering both the complex legal framework of BiH and Rwanda and the specific work-reduction rationale motivating the referral process, undoubtedly, a certain flexibility will necessarily have to accompany referral deliberations regarding the legal qualification of crimes. The matter is certainly one of *degree*, and dependent on the concrete circumstances of the case. Regrettably, the ICTY and ICTR referral case law does not provide a clear criterion and dogmatic reasoning about how to resolve difficult questions arising out of discrepant laws in the concrete setting of the referral practice.

Of course the foregoing analysis urges caution in comparing the two courts' approaches to referrals, given the highly complex and different socio-political contexts of BiH and Rwanda, through which the process must ultimately be understood and conceptualized.

V. Concluding remarks

The foregoing chapter has sought to elucidate certain deficiencies in the criteria of rule 11*bis* RPE both prior to the transfer and following transfer. The findings support the hypothesis that rule 11*bis* and its judicial interpretation have been at least partially inadequate to meet the various challenges posed by this complex process. Rule 11*bis* has in particular been deemed inadequate as regards the criteria for the assessment of national legislation as applied in practice, notably fair-trial rights, as well as the post-verdict monitoring functions.

The ICTY Referral Bench in particular has relied heavily on the fact that any problems arising from the referral at national level would be remedied through an effective monitoring function. However, this reliance ignores the fact that, despite its built-in monitoring function following a referral to the national jurisdictions, rule 11*bis* RPE may prove inadequate. For instance, a scenario in which a current government may have no political interest to try certain crimes within the jurisdiction of the international court in the context of a rule 11*bis* procedure is highly problematic. That is, the pre-conditional referral criteria do not adequately ensure a thorough review of whether a national framework would allow for the impartial and independent trial where there is no genuine political will on the part of the government to properly try these cases. As has been demonstrated in chapter 2, while the analysis about the adequacy of fair-trial rights has been made in the abstract by the Referral Bench throughout its case law, the fact that ICTR referral cases are still in the process of being tried by Rwanda and information about the prosecutorial strategy remains inaccessible, renders any analysis about the implementation of such guarantees *in concreto* impossible.

With respect to the second mode of referral by the ICTR, namely the transfer of investigative files to the Rwandan Prosecutor General, the risk of non-prosecution is even greater as such a transfer does not require any judicial analysis. While for rule 11*bis* referrals, the ICTR has a right to recall cases where fair-trial rights are not respected until the final verdict is pronounced, the ICTR relinquishes any such right over case files that are referred to national prosecutors' offices.

The foregoing chapter has also sought to expose both the different legal issues faced by the respective referral benches of the ICTY and ICTR regarding the determination of rule 11*bis* cases, as well as the different approaches to similar issues (qualification of crimes, etc.). It has thereby sought to offer at least a partial answer as to why it *may* have taken the ICTR considerably longer to refer cases to Rwanda. Ultimately, it has sought to lay the groundwork for the hypothesis tested in chapter 3, namely that while there are some universal deficiencies in the rule (i.e. post-referral monitoring aspects), a mechanical application of rule 11*bis* criteria, without consideration of the comprehensive context in which the referral practice is embedded, presents difficulties to the effective implementation thereof.

As such, the next chapter will examine possible root causes of legal problems encountered in this process (both normative and contextual) by the ICTY and ICTR Referral Bench, through which the complexities of the referral practice, as part of the Completion Strategy and the Tribunals' overall contribution to its stated objectives, must be understood.

Chapter 3

Possible root causes of legal problems resulting from the implementation of the ICTY/ICTR referral practice to national courts

The foregoing chapter has catalogued and analysed, sometimes in technical detail, the most significant legal problems that have resulted from the implementation of the referral practice from the international criminal tribunals to the respective national courts. It has illustrated that rule 11*bis* RPE and its judicial interpretation have been at least partially inadequate to meet the various challenges posed by this complex process. Although some literature exists on these problems, very little analysis has been directed towards understanding the possible underlying causes thereof.

This chapter intends to fill that gap by examining possible root causes that could help to explain these difficulties in practice. And in this vein, it seeks to support the hypothesis that any mechanical transplantation of cases from the international to the national forum, without consideration of the comprehensive context in which the referral practice is embedded, presents difficulties to the effective implementation thereof. The validity of this hypothesis is tested by comparing the application of the nearly identical rule 11*bis* RPE of the ICTY and ICTR in the different contexts of BiH and Rwanda: A comparative analysis which remains surprisingly unexplored in the scholarly literature to date. It is hoped that such an analysis may help lend some insight into the relative importance of various factors to the successful implementation of the practice and thereby to provide some guidance for future referrals.

In selecting possible root causes, two sets of factors will be taken into consideration: firstly, the factors which were highlighted by the respective ICTY and ICTR referral benches themselves, based, in large part, on the wording of rule 11*bis* RPE. Many of these have already been discussed in some detail in the analysis of the ICTY and ICTR jurisprudence in chapter 2. Second, certain other factors will be examined in light of their possible relevance to the referral practice, many of which are also mentioned – even if only peripherally – in the existing academic literature. To facilitate a coherent discussion, this chapter will group these factors according to whether they relate to the normative framework guiding the referrals *(normative factors)* or whether they form part of the overall context in which the referral practice takes place *(contextual factors)*. This categorization will be elaborated on in more detail below. Inevitably, the factors identified and discussed in the sections below are not intended to be exhaustive.

I. Normative factors: discrepancies in applicable legal norms

For the purposes of this research project, *normative factors* are understood as comprising normative elements relating to the legal frameworks in which the ICTY/ICTR referral practice operates. These normative factors focus on areas, which challenge the effective implementation of the referral practice in the concrete and unique contexts of BiH and Rwanda, and help account for the complexities engendered in the very notion of referral. That is, in both countries, the legal landscape has undergone a number of important reforms and revisions since the commission of the crimes over which the ICTY and ICTR have jurisdiction. Regrettably, the myriad of rapid reforms has – in both contexts – led to uncoordinated, disjointed and illogical laws governing the same criminal conduct, rendering an understanding of the respective legal landscapes in general, and as they relate to the ICTY/ICTR referral practices in particular, a complex undertaking. As a result, an examination of certain dominant normative factors may help to better understand the complexities resulting from the referral practice, albeit without professing to provide any exhaustive or definitive viewpoint on the matter.

One of the most significant problems regarding the relationship between international and national criminal courts and particularly among national courts themselves is that they often draw on diverse legal systems and norms. As chapter 2 has illustrated extensively and *in concreto*, the difficulty of referring cases among courts employing different laws is that it can engender significant discrepancies in the prosecution of the same criminal behaviour and rear wholly different results (including penalties). While it is laudable that both BiH and Rwanda have become highly active in prosecuting international crimes at the national level, one of the major difficulties in both contexts is the number of different laws and codes at work simultaneously in prosecuting the same type of crimes, creating the risk of generating wholly different results, which in turn threatens the firmly entrenched notions of the criminal trial process: *legal certainty* and *equality before the law* (also sometimes referred to as the principle of non-discrimination).

The absence of legal certainty is not only problematic with regard to the transfer of cases from the international criminal tribunals to national courts, but also poses great challenges regarding the prosecution of similar crimes at different courts at the national and local levels. This issue is also highly relevant because the referral between national courts has become a common practice in both BiH and Rwanda. This latter referral practice is not the research focus of this study per se since cases referred from the ICTY or ICTR are not further transferred from the respective national courts – the BiH State Court and the High Court in Rwanda – to lower courts. However, this parallel referral practice must be acknowledged as it lends important insight into the overall context generally and the problems associated with a multitude of different parallel accountability processes in particular.

In addition to disparate legal standards, the lack of communication between judicial bodies prosecuting the same type of crimes also poses a serious problem. This was affirmed by an OSCE report, which posits that the lack of harmonization in the prosecution of war crimes in BiH can also be attributable to the fact that there is virtually no communication regarding the practice and case law of war crime prosecutions between the legal professionals at state and entity levels.[1] What this could mean concretely, as pointed out by the ICTR Referral Bench in the *Uwinkindi* case, is that certain rights, such as the right against double jeopardy *(ne bis in idem)*, despite being universal and firmly enshrined in the national legal framework, "may sometimes be violated due to a *lack of effective communication between the relevant judicial authorities*."[2]

The issue of parallel criminal accountability processes and resulting discrepancies in applicable norms will only be marginally discussed at this juncture as chapter 2 has already treated it in much detail.

A. Different laws to prosecute the same crimes

In both BiH and Rwanda, a number of courts at different levels share jurisdiction over essentially the same type of crimes. In both contexts, a sort of three-tiered model has been embarked upon, at the international, national and local levels. This is a set-up, which due to the sheer volume of cases to be tried, appears both *prima facie* necessary and logical. However, the application of disparate legal standards across the various court levels, aggravated by the lack of effective communication among courts and judicial mechanisms, remains highly problematic. As has been pertinently observed in the context of Rwanda:

> "[…] the practice of multi-tiered justice [...] suggests that this idea looks better on paper than it does in reality, because we are assuming that we can coherently coordinate the efforts of these different levels."[3]

While chapter 1 has already examined in some detail the distinct nature of international and national courts generally as regards their origins, mandates and legal frameworks, and has analysed the general parameters of the relationship between specific courts – such as the ICTY and ICTR – to various national courts, some additional insight into the various layers of courts prosecuting the same type of crimes

---

[1] OSCE, Delivering Justice in BiH, p. 74.

[2] *Uwinkindi*, Decision on the Prosecutor's request for referral to the Republic of Rwanda, Case No. ICTR-2001-75-R11*bis*, 28 June 2011, § 33. Emphasis added.

[3] *Clark* interview in *Stefanowicz*, "One of the Lessons of Gacaca is that there has to be Accountability at the Community Level", Part 2, Think Africa Press, 11 March 2012, available at: http://umudendezo-news.blogspot.de/2012/02/one-of-lessons-of-gacaca-is-that-there.html [accessed: 6 Nov. 2012].

in BiH and Rwanda must briefly be provided. This will allow for a better understanding of the context in which the ICTY and ICTR operate, notably as regards the implementation of the referral practice.

1. Bosnia and Herzegovina

In the context of Bosnia and Herzegovina, the nationalization process, resulting from concerted international efforts to strengthen national accountability mechanisms, has taken the regrettable shape of disjointed criminal law reform, leading to an incoherent legal framework for the adjudication of international crimes. This is complicated by an important backlog of cases.[4] An OSCE report argues that Bosnia and Herzegovina "has perhaps the most layered and complex arrangement for prosecuting perpetrators of grave violations of international humanitarian law in history."[5]

As regards BiH alone, there are four levels of courts with first-instance jurisdiction over war crimes: the international court (ICTY), the (now purely) national Court (BiH State Court), as well as cantonal and municipal courts (Federation of BiH), district and basic courts (Republika Srpska) and the Basic Court of Brčko District.[6] In BiH, the BiH State Court has appellate jurisdiction,[7] whereas in the Federation of BiH as well as the Republika Srpska, the respective Supreme Courts have appellate jurisdiction.[8] In the Brčko District of BiH, appeals are brought to the Appellate Court of Brčko District.[9] In addition, article VI(3)(b) of the BiH Constitution bestows appellate jurisdiction on the BiH Constitutional Court regarding constitutional issues brought up in the decision of any BiH court.[10] As noted in chapter 1, despite its primary jurisdiction over national courts, the ICTY's relationship vis-à-vis these courts is *concurrent* instead of *exclusive*. The ICTY referral practice can certainly be viewed as a practical implementation of this jurisdictional relationship.

While the exact mandates of these various courts and their mutual interaction are beyond the scope of this analysis, suffice it to state only that there is a glaring discrepancy in the codes and laws applicable to the prosecution of crimes, with the potential for great discrepancies in the outcome. As chapter 2 has highlighted, in Bosnia and Herzegovina, a number of different criminal and procedural codes operate simultaneously at the various court levels to prosecute crimes committed during the 1992–1995 conflict. As rightly argued by the OSCE BiH Mission, the consequence of this

---

[4] OSCE, Delivering Justice in BiH, p. 7.

[5] *Ibid*., p. 11. Emphasis added.

[6] OSCE, Delivering Justice in BiH, "Structure of the Criminal Justice System of BiH" (adapted from original source HJPC BiH), p. 33.

[7] *Ibid*.

[8] *Ibid*.

[9] *Ibid*.

[10] Constitution of the FBiH, 18 March 1994, article VI (3)(c).

fragmentation is "a situation of manifest inequality before the law in war crimes cases tried before different courts in BiH."[11]

a) Substantive criminal laws

To restate briefly here, as regards substantive criminal laws: on the one hand, the old Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC) of 1976,[12] although no longer in vigour today, is still applied in some courts due to the fact that it was the law in force at the time of the commission of the crimes being prosecuted, as dictated by the legality principle. On the other hand, there are a number of new criminal codes in force today, such as the Criminal Code of BiH,[13] the Criminal Code of the Federation of BiH,[14] the Criminal Code of Republika Srpska,[15] and the Criminal Code of Brčko District.[16] Relevant for the purposes of the ICTY referral practice to the BiH State Court is the new Criminal Code of BiH of 2003, which respects the application of the old SFRY Criminal Code to the crimes committed during the period in question, but creates two important (problematic) caveats,[17] which have been discussed in detail already in chapter 2.

It is helpful to reiterate at this juncture that the SFRY Criminal Code and new BiH Criminal Code display great differences, notably as regards the criminalization of certain crimes (i.e. crimes against humanity and command responsibility) as well as the duration of applicable penalties.[18] The applicability of the different laws is relevant for the ICTY referral practice since the BiH State Court, designated to receive transfer cases, may draw on either legal regime to try the crimes in the ICTY indictment.[19] As a result, reliance on one law will directly determine whether the charges set out in the ICTY indictments have a corresponding counterpart in the domestic system or not,[20] or whether the punishment would be exponentially different than at the ICTY.

---

[11] OSCE, Delivering Justice in BiH, p. 19.

[12] SFRY CC.

[13] BiH CC ("Official Gazette" of BiH, 3/03). FBiH CC ("Official Gazette" of the Federation of Bosnia and Herzegovina, Nos. 36/03 and 37/03). RS CC ("Official Gazette" of the Republika Srpska, Nos. 49/03, 108/04). BD CC of Brčko District of BiH ("Official Gazette" Nos. 10/03, 45/04).

[14] FBiH CC.

[15] RS CC.

[16] BD CC.

[17] BiH CC, article 4 ("Time Constraints Regarding Applicability").

[18] See SFRY CC and BiH CC.

[19] See, for instance, the Referral Bench's first decision in *Prosecutor v. Stanković*, Decision on Referral of Case under Rule 11*bis*, Partly Confidential and Ex Parte, Case No. IT-96-23/2-PT, 17 May 2005, § 46.

[20] *Williams*, 17 Crim. L. F. 207 (2006).

Jurisprudence emanating from judicial mechanisms at all levels (the ICTY, BiH State Court, BiH Constitutional Court and, recently, the ECtHR), demonstrates the great complexity surrounding the applicability of the two sets of legal provisions. As chapter 2 sought to illustrate, the difficulty about the applicability of different and possibly conflicting codes was not satisfactorily resolved by the ICTY Referral Bench, which had the occasion to address this question in some detail throughout many of its deliberations. That is, the ICTY Referral Bench did not state a preference as to which law should be applicable at the BiH State Court, leaving it to the discretion of the State Court itself to decide on which set of legal provisions to draw. The ICTY Referral Bench addressed the resulting discrepancies by finding that for each code "there are appropriate provisions to address most, if not all, of the criminal acts of the Accused alleged in the present Indictment and there is an adequate penalty structure."[21]

The analysis in chapter 2 has sought to seriously question this finding. Regrettably, the Law on the BiH State Court gives no indication about which criminal code should apply in the case of conflict.[22] While the State Court has consistently applied the new 2003 BiH Criminal Code to ICTY referral cases,[23] which largely resembles the ICTY Statute and RPE, a new worrisome trend started in 2009 of applying the SFRY CC to cases that had initially been tried under the BiH CC. That is, in recent judgments the Appellate Panel of the BiH State Court "modified" the "legal evaluation and legal qualification of the offence in the Verdict", which had relied on the new BiH CC, and has resorted to finding that when deciding on a sentence, the more lenient law, *in concreto*, in this case the SFRY Criminal Code, should be applicable.[24] Utter confusion has resulted following a "test case" called *Maktouf and Damjanović*, which was initially heard by the BiH Court, appealed to the BiH Constitutional

---

[21] *Prosecutor v. Mejakić et al.*, Decision on Prosecutor's Motion for Referral of Case pursuant to Rule *11bis*, Case No. IT-02-65-PT, 20 July 2005, § 63.

[22] However, the ICTY Transfer Law does indicate the mandatory application of the BiH Code of Criminal Procedure (BiH CCP) to the adaptation of the indictment, for detention and custodial issues, and for the calculation of the sentence. See in this context: Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence collected by ICTY in proceedings before the Courts in BiH, available at: ("Official Gazette" of Bosnia and Herzegovina, Nos. 61/04, 46/06, 53/06, 76/06), available at: http://webcache.googleusercontent.com/search?q=cache:NWnQavTZSJ4J:www.sudbih.gov.ba/files/docs/zakoni/en/BH_LAW_ON_TRANSFER_OF_CASES_-_Consolidated_text.pdf+&cd=1&hl=en&ct=clnk&gl=de [accessed: 13 June 2013].

[23] *Radovan Stanković* (ICTY third amended indictment, 8 Dec. 2003), BiH State Court; *Gojko Janković* (ICTY first amended indictment, 7 Oct. 1999), BiH State Court; *Željko Mejakić*, *Momčilo Gruban*, *Dušan Fuštar*, *Duško Knežević* (ICTY consolidated indictment, 5 July 2002), BiH State Court; *Paško Ljubičić* (ICTY corrected amended indictment, 2 April 2002), BiH State Court; *Mitar Rašević and Savo Todović* (ICTY second joint amended indictment, 24 March 2006), BiH State Court; *Milorad Trbić* (ICTY indictment, 18 Aug. 2006), BiH State Court.

[24] *Prosecutor's Office of BiH v. Zijad Kurtović*, X-KRŽ-06/299, Second instance verdict, 25 March 2009, §§ 97 ff.

Court, and has recently been brought before the highest European instance, the European Court of Human Rights.

To start from the beginning, the *Maktouf* case was first heard by the BiH State Court in 2005,[25] and following an appeal decision at the same Court in 2006,[26] was appealed to the BiH Constitutional Court in 2007.[27] At issue was the BiH State Court's application of the 2003 BiH Criminal Code to the war crimes with which *Maktouf* was charged. In particular, the appeal raised the question whether the use of the new BiH CC violated the Appellant's rights under the BiH Constitution, notably article II (4) (the right against "non-discrimination"), as well as the European Convention on Human Rights (ECHR), notably article 7 ("no punishment without law")[28] and article 14 ("prohibition of discrimination").[29] In that case, basing itself on the general position of the ECtHR about the retroactive applicability of national law,[30] the Constitutional Court decided that *the applicability of the new 2003 BiH Criminal Code was constitutional and did not violate article 7 of the ECHR*.[31] In particular, the Court rejected the appeal on the grounds that the Appellant's acts, while perhaps not explicitly criminalized in the SFRY CC, were nevertheless already considered criminal "according to the general principles of law recognized by civilized nations", principles, which according to the Court's interpretation of article III (3)(b) of the BiH Constitution, "constitute an integral part of the legal system in [BiH]."[32]

Regarding the appeal on the basis of article 14 of the ECHR, based on the application of different laws at the state and Entity levels to similar cases, the Constitutional Court held that it could find no "legal foundation" for such an appeal in the

---

[25] BiH State Court: *Prosecutor's Office of BiH v. Maktouf Abduladhim*, K-127/04, First instance verdict, 1 July 2005.

[26] BiH State Court: *Prosecutor's Office of BiH v. Maktouf Abduladhim*, KRŽ 32/05, Second instance verdict, 4 April 2006.

[27] Constitutional Court of BiH, *Abduladhim Maktouf*, Decision on Admissibility and Merits, AP 1785-06, 30 March 2007.

[28] ECHR, as amended by Protocols Nos. 11 and 14, 4 Nov. 1950, ETS 5. Article 7 of the ECHR reads: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

[29] Article 14 ECHR reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[30] BiH Constitutional Court, *Maktouf* decision, §§ 30 ff.

[31] *Ibid.*, §§ 60 ff.

[32] *Ibid.*, § 70.

case at hand since the issue was whether the application of the BiH CC violated the Appellant's constitutional or ECHR rights, which it held it did not, rather than an assessment of the legal proceedings at the Entity level.[33] In a somewhat confusingly reasoned judgment, the Constitutional Court did concede, however, that the SFRY CC was deficient in its substantive law provisions (i.e. lack of provision of crimes against humanity),[34] and acknowledged that the disparate application of different laws *could* result in discrimination.[35] It found that "the laws applied by the Entities must be in harmony with the laws at the state level because other legal arrangements *would possibly result in discrimination of the persons who are subject to the criminal proceedings for the same criminal acts at the level of the Entities*."[36] In particular, it held that to avoid being in breach of the principle of legal certainty and the rule of law, these deficiencies obligated the Entity courts to apply the BiH CC "and other relevant laws and international documents" of BiH, and to follow the BiH State Court's case law.[37]

Despite the Constitutional Court's strong words regarding the need to uniformly apply the new BiH CC, it is curious, as noted above, that two years later in the *Kurtović* case of 2009[38] and subsequent cases,[39] the Appellate Panel of the BiH State Court opted to resolve legal conflicts in favour of the old SFRY CC, where it felt, on a case-by-case basis, that it was more lenient. It thus overturned the First Instance Panel's reliance on the new 2003 BiH CC on some occasions,[40] the First Instance Panels who had until that time consistently continued to apply the 2003 BiH CC.[41] For instance, in the *Mihaljević* case of 2011, the Appellate Panel held that when contemplating which one of the two criminal codes to apply, the starting point is the general rule, as per article 4(1) of the BiH CC, that the law in effect at the time of commission of the offence in question, should be the guiding law.[42] Such a rule can be derogated from, however, insofar as the new law provides more leniency to the perpetrator,[43] or, where the new law criminalizes conduct that was considered a crime under the general principles of international law but not prescribed under the

---

[33] *Ibid.*, §§ 85 and 90.

[34] *Ibid.*, §§ 87–90.

[35] *Ibid.*, § 80.

[36] *Ibid.*, § 87. Emphasis added.

[37] *Ibid.*, § 89.

[38] *Prosecutor's Office of Bosnia and Herzegovina v. Zijad Kurtović*, X-KRŽ-06/299, Second instance verdict, 25 March 2009, §§ 101 ff.

[39] See, for instance, *Prosecutor's Office of Bosnia and Herzegovina v. Zdravko Mihaljević*, Case No: X-KRŽ-07/330, Second instance verdict, 16 June 2011, §§ 39–41.

[40] *Kurtović*, Second instance verdict, §§ 101 ff.; *Mihaljević*, Second instance verdict, §§ 39 ff.

[41] ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013, § 29.

[42] BiH State Court, *Mihaljević*, § 35.

[43] Article 4(2), BiH CC.

old law.[44] A determination about which law is more lenient must, according to the Appellate Panel, be determined "*in concreto*" and take into consideration "all the relevant circumstances of the case".[45] Given that the Appellant was convicted of crimes against humanity, which were not prescribed as criminal offences under the old code, the Appellate Panel appears to go through quite some legal acrobatics in order to nevertheless apply the old SFRY CC. It appears to do so by arguing that while the derogation from the general rule under article 4(a) of BiH CC applies, such a loophole in the old law could be remedied through the application of the ECHR, which according to article 2 (II) of the BiH Constitution, is directly applicable in BiH law and has primacy over all other laws.[46] As a result, the Appellate Panel decided that "both the law at the time of the commission of the act and the currently effective law criminalize the acts for which the Accused has been convicted",[47] and opts for application of the old law because, according to it, the sentence for the crime is "more lenient" to the accused.[48] It is not at all clear – even after a thorough reading of the case – how the minimum sentence for a crime that was not criminalized under the old code can justifiably be measured – as a result of a sort of amalgamation of laws – against the minimum sentence of a crime that *is* criminalized in the new code. As such, reliance on the old SFRY CC in this context appears convoluted and tedious.

Interestingly, when looking at the case law of the Appellate Panel of the BiH State Court on the whole, the application of the 1976 SFRY CC by the Appellate Panel did not consistently result in a lower penalty. In two cases, the Appellate Panel simply confirmed the penalty imposed in First Instance under the 2003 BiH CC,[49] and in one case, the Appeals Chamber actually imposed a higher penalty from that imposed in First Instance under the 2003 BiH CC.[50]

Coming back to the *Maktouf* case, the 2013 judgment of the European Court of Human Rights had to decide whether the application of the new 2003 BiH CC to war crimes charges was in contravention of article 7 of the ECHR. Article 7 stipulates that:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

---

[44] *Ibid.*, article 4(a).

[45] BiH State Court, *Mihaljević*, Second instance verdict, § 39.

[46] BiH Constitution, article 2(II).

[47] BiH State Court, *Mihaljević*, § 43.

[48] *Ibid.*, § 50.

[49] BiH State Court, *Kurtović*; and *Prosecutor's Office of BiH v. Slavko Lalović*, Case No. S1 1 K 002590 11 Krž, Second instance verdict, 1 Feb. 2012.

[50] *Prosecutor's Office of BiH v. Novalić*, X-KRŽ-09/847, Second instance verdict, 14 June 2011.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

In other words, the ECtHR had to decide whether the cases before it endangered the principle of legality (prohibition against the retroactive application of law, *nullum crimen, nulla poena sine lege*) and the principle of mandatory application of a more "lenient" punishment *(lex mitior)*.[51]

Regrettably, the ECtHR's finding by no means clarifies the situation. In fact, it actually further obfuscates the matter by underscoring that reliance on either code may depend on the particular category of crimes charged. The Grand Chamber makes a distinction between those criminal offences which were not provided for under national law at the time of their commission but constituted offences under international law, such as crimes against humanity, and those crimes constituting criminal offences under national law, namely war crimes. As a result, in the former case, "The State Court and the Entity Courts […] *have no other option but to apply the 2003 Criminal Code in such cases*."[52] Conversely, as regards war crimes, and underscoring the fact that the definition of war crimes is the same in the SFRY CC and the 2003 BiH CC,[53] the Grand Chamber held that "it is of particular relevance in the present case which Code was *more lenient in respect of the minimum sentence"*.[54] For ease of reference, it is necessary to briefly reiterate the penalties under both the SFRY CC and the BiH CC regimes: under the SFRY CC, war crimes were punishable by imprisonment for a duration from 5 to 15 years, and the death penalty for the most serious cases, or, in the alternative, imprisonment for 20 years.[55] Conversely, under the 2003 BiH CC, war crimes are punishable by imprisonment for a duration of 10 to 20 years, or long-term imprisonment of 20 to 45 years for the most serious cases.[56] Under both codes, aiders and abettors, like *Maktouf*, are punished as if they themselves had committed the crimes, although their punishment could be shortened to one year under the 1976 SFRY CC[57] and to five years under the 2003 BiH CC[58] respectively. *Maktouf* was sentenced to five years' imprisonment, which represents the lowest sentence possible under the BiH CC. *Damjanović* was sentenced to 11 years' imprisonment, which, in the words of the ECtHR's Grand Chamber, was

---

[51] As noted by Judge *Pinto de Albuquerque*, joined by Judge *Vučinić*, "The prohibition of retroactive application of new penal offences logically implies the prohibition of retroactivity of a more stringent penal law *(lex gravior)*", ECtHR *Maktouf* decision, p. 39.

[52] ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013, § 55.

[53] *Ibid.*, § 67.

[54] *Ibid*., § 69.

[55] Article 142 § 1 in conjunction with articles 37 § 2 and 38 §§ 1–2 of the 1976 SFRY CC.

[56] Article 173 § 1 in conjunction with article 42 §§ 1 and 2 of the BiH CC.

[57] Article 42 in conjunction with articles 24 § 1 and 43 § 1 of SFRY CC.

[58] Article 49 in conjunction with articles 31 § 1 and 50 § 1 of BiH CC.

"only slightly above the lowest level set by the 2003 Code."[59] In analysing the minimum sentence possible under both codes, the Grand Chamber held that the "more lenient" sentence was "without doubt the 1976 Code."[60] The Grand Chamber *does* have to concede:

> "Admittedly, the applicants' sentences in the instant case were within the latitude of both the 1976 Criminal Code and the 2003 Criminal Code. It thus cannot be said with any certainty that either applicant would have received lower sentences had the former Code been applied. What is crucial, however, is that the applicants could have received lower sentences had that Code been applied in their cases […]."[61]

Due to the purely hypothetical nature of this above finding and the Court's disclaimer about its unwillingness to engage in an *in-abstracto* review,[62] the following statement is hard to comprehend:

> "Accordingly, since *there exists a real possibility* that the retroactive application of the 2003 Code operated to the applicants' disadvantage as concerns the sentencing, it cannot be said that they were afforded effective safeguards against the imposition of a heavier penalty, in breach of Article 7 of the Convention."[63]

Given the foregoing, the ECtHR's Grand Chamber held that the BiH State Court was in violation of article 7 of the ECHR for applying the 2003 BiH CC. In her concurring opinion, Judge *Ziemele* questions this finding, considering that: "the Court's speculation as to what the sentence might have been had the 1976 Code been applied goes beyond the scope of article 7."[64] In the concurring opinion, Judge *Kalaydjieva* feels that "in so far as the applicants' punishment in the present cases remained within the brackets foreseen by both of the operating Criminal Codes, the argument that [the application of the SFRY CC could have resulted in a lighter penalty] *appears to be as speculative as any contemplation as to whether the domestic courts could in fact have acquitted the applicants.*"[65] To further confuse matters, the Court held that "[t]his conclusion should not be taken to indicate *that lower sentences ought to have been imposed*, but simply that the sentencing provisions of the 1976 Code should have been applied in the applicants' cases."[66]

---

[59] ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013, § 69.

[60] *Ibid*. Emphasis added.

[61] *Ibid.*, § 70. Emphasis added.

[62] *Ibid.*, "…the Court reiterates that it is not its task to review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, per se, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant." (§ 65). Emphasis added.

[63] *Ibid.*, § 70. Emphasis added.

[64] *Ibid.*, concurring opinion, Judge *Ziemele*, p. 37, § 5.

[65] *Ibid.*, Judge *Kalaydjieva*, p. 38.

[66] *Ibid.*, § 65. Emphasis added.

To sum up the foregoing, according to the ECtHR, when the accused are charged with crimes against humanity, the 2003 BiH CC is obligatorily applicable because national laws criminalizing this category of crimes did not exist at the time of the commission therof. In all other cases regarding war crimes, the SFRY CC should be applicable where it *could* provide (but would not necessarily) a more lenient sentence. It is regrettable both that the ECtHR forges the way ahead for the continued "mixed approach" of both codes at the *same* Court, but does not provide any guidance of what happens within the *same* case before the *same* Court, for instance, where the accused are charged with both war crimes *and* crimes against humanity. In this sense, the Separate Opinion of Judge *Pinto de Albuquerque*, joined by Judge *Vučinić* clarifies that:

> "The finding of *lex mitior* under Article 7 § 1 of the ECHR also implies a global comparison of the punitive regime under each of the penal laws applicable to the offender's case (the global method of comparison). The judge cannot undertake a rule-by-rule comparison (differentiated method of comparison), picking the most favourable rule of each of the compared penal laws. Two reasons are traditionally given for this global method of comparison: first, each punitive regime has its own rationale, and the judge cannot upset that rationale by mixing different rules from different successive penal laws; second, the judge cannot exceed the legislature's function and create a new *ad hoc* punitive regime composed of a miscellany of rules deriving from different successive penal laws. Hence, Article 7 § 1 of the ECHR presupposes a concrete and global finding of *lex mitior*."[67]

In light of the foregoing, the ramifications of the ECtHR's finding in the *Maktouf and Damjanović* case have been considerable. The issue of the applicability of the 2003 BiH CC is of paramount relevance to the BiH State Court, which has until 2009 predominantly applied the BiH CC, and only after that point engaged in a "mixed approach" at the appeal level but not at the trial level. As such, the danger of differential standards based on the use of two fundamentally different codes between cases is very real. Following the ECtHR's finding in July 2013, the BiH State Court has not only ordered re-trials in the *Maktouf* and *Damanjović* case, but has ordered the retrial of a number of other cases, after the BiH Constitutional Court overturned the BiH State Court's verdicts.[68] Many more are likely to follow.[69] In fact, in November 2013, the BiH State Court freed ten convicts – pending a new trial – and converted their

---

[67] *Ibid*., concurring opinion by Judge *Pinto de Albuquerque*, joined by Judge *Vučinić*, p. 44.

[68] Balkan Insight, Bosnia quashes ten war crimes convictions. 24 Oct. 2013, available at: http://www.balkaninsight.com/en/article/ten-war-crimes-convictions-quashed [accessed: 29 June 2014]. The HRW World Report 2014 indicates that twelve convicts, including six involved in the *Srebrenica* massacre, were released from custody pending trial, available at: http://www.hrw.org/world-report-%5Bscheduler-publish-yyyy%5D/world-report-2014-bosnia-and-herzegovina [accessed: 29 June 2014].

[69] BIRN Justice Report, About twenty more BiH court verdicts under question. 19 Nov. 2013, available at: http://www.justice-report.com/en/articles/about-twenty-more-bih-court-verdicts-under-question [accessed: 29 June 2014].

status to "war crimes indictees as they undergo trials".[70] This turn of events is perplexing, due both to the gravity of the crimes for which they were *already convicted*, and the safety of the victim communities and the public at large.[71]

In light of the foregoing, the consequences of the ECtHR findings raise two major concerns: Firstly, given the already important backlog of cases at the BiH State Court, the prospect of a relatively large number of retrials could considerably prolong the slow process of war crimes at national level, a fact which has been criticized by the Chief Prosecutor of the ICTY in his briefing to the Security Council in June 2014.[72] Second, the re-trials may seriously endanger the criminal trial process by discouraging the participation of victims and witnesses. In particular, the wave of retrials by the BiH State Court have been regarded as a major set-back by victims of these crimes, many of whom have indicated that they would not be willing to retestify in retrials.[73]

For the purposes of the referral practice from the ICTY to the BiH State Court, the question about legal certainty and discrepancies between the ICTY indictment and the BiH domestic provisions also has concrete ramifications. The BiH State Court has applied the new BiH Criminal Code to all six ICTY referral cases. According to the ECtHR's standard, all cases involving charges of crimes against humanity would have to be tried under the 2003 BiH Criminal Code. Given the fact that the majority of ICTY indictments did indeed include charges of crimes against humanity, the issue is not relevant for these cases. However, in one case, the *Trbić* case, the accused was charged and convicted of genocide charges under the BiH CC and sentenced to 30 years imprisonment.[74] Given that the SFRY CC would be applicable in this case according to the ECtHR standard in the *Maktouf and Damjanović* case, a re-trial is likely,[75] and possibly a significant reduction of the sentence.

---

[70] *Zuvela, Maja*, Bosnian war crimes court frees 10 convicts, orders retrials, Reuters, 19 Nov. 2013, available at: http://uk.reuters.com/article/2013/11/19/uk-bosnia-warcrimes-idUKBRE9AI0Q220131119 [accessed: 29 June 2014].

[71] *Mackic, Erna*, Bosnian War Criminals' Release Sparks International Concern, BIRN-BiH, 20 Nov. 2013, available at: http://www.justice-report.com/en/articles/bosnian-war-criminals-release-sparks-international-concern [accessed: 29 June 2014].

[72] Address of *Serge Brammertz*, Prosecutor, International Criminal Tribunal for the former Yugoslavia to the United Nations Security Council, 5 June 2014, available at: http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/140605_proc_brammertz_un_sc_en.pdf [accessed: 1 July 2014] , p. 2.

[73] *Zuvela, Maja*, Bosnian war crimes court frees 10 convicts, orders retrials. Reuters, 19 Nov. 2013, available at: http://uk.reuters.com/article/2013/11/19/uk-bosnia-warcrimes-idUKBRE9AI0Q220131119 [accessed: 29 June 2014].

[74] *Prosecutor's Office of BiH v. Milorad Trbić*, First instance verdict: X-KR-07/386, delivered 16 Oct. 2009, published 29 April 2010; *Prosecutor's Office of BiH v. Milorad Trbić*, Second instance verdict, X-KRŽ-07/386, 21 Oct. 2010.

[75] Balkan Investigative Reporting Network, About Twenty More BiH Court Verdicts under Question, 19 Nov. 2013, available at: http://www.justice-report.com/en/articles/about-twenty-more-bih-court-verdicts-under-question [accessed: 29 June 2014].

The resulting discrepancy between sentences for crimes against humanity and those for genocide are bereft of any logic, especially when one considers genocide "the crime of crimes" due to its special intent requirement *(dolus specialis)* and the complexity of proving it. Practically speaking, this could mean that an accused charged with crimes against humanity could be sentenced to a maximum 45 years imprisonment, while an accused charged with genocide would be sentenced to a maximum of 20 years imprisonment.[76]

It is noteworthy that the applicants also brought a complaint on the basis of an unequal treatment before the law. Equality before the law has been referred to as "a firmly established principle […], which encompasses the requirement that there should be no discrimination in the enforcement or application of the law."[77] This principle (also frequently understood as the principle of non-discrimination) is reflected in a number of international instruments, such as the ICCPR,[78] the ECHR[79] as well as national instruments, such as the BiH Constitution[80] and BiH Criminal Code,[81] and, finally, in the BiH National War Crimes Strategy, which was specifically implemented to harmonize war crimes prosecutions nationally.[82] In particular, the applicants based their complaint under article 14 of the ECHR and article 1 of Additional Protocol 12 on the fact that their cases were heard at the BiH State Court, which applied the new BiH CC, while similar cases heard at lower courts were processed on the basis of the old SFRY CC, the latter code resulting in generally lower sentences in favour of the accused.[83]

Acknowledging this inequality, the ECtHR found, however, that "[i]n the present case, […] given the large number of war crimes cases in post-war Bosnia and Herzegovina, it is inevitable that the burden must be shared between the State Court and Entity courts" in order to satisfy BiH's obligation under the Convention "to bring to

---

[76] See in this context: *Buljugic, Mirna*, Misapplication of the Law – The Madness of Justice, BIRN, 27 Dec. 2013, available at: http://www.justice-report.com/en/articles/misapplication-of-the-law-the-madness-of-justice [accessed: 29 June 2014].

[77] *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, § 605.

[78] ICCPR, articles 4, 20, 24 and 26.

[79] ECHR, article 14, and article 1, protocol 12.

[80] BiH Constitution, article II(4).

[81] BiH Criminal Code, article 145.

[82] In the the National War Crimes Strategy, the rationale for drafting the strategy is made clear: "The lack of harmonization of court practice in war crimes cases prosecuted before the courts in the entities, Brčko District and the Court of BiH. The absence of mechanisms for harmonizing the court practice on the territory of BiH in the area of war crimes, as well as the application of several criminal codes, resulted in different courts adopting opposing views on the same legal matters, both in relation to the substantive law applied to war crimes cases and the pronouncement of criminal sanctions for identical or similar criminal offenses of war crimes. *This is a serious infringement on the constitutional principles of legal certainty and equality of citizens before the law*" (1.1(c)), available at: http://www.geneva-academy.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf [accessed: 10 May 2014].

[83] ECtHR (GC), *Maktouf and Damjanović*, 18 July 2013, § 83.

justice those responsible for serious violations of international humanitarian law in a timely manner".[84] The Court's dismissal of this complaint as "manifestly ill-founded"[85] is at odds with its finding of a clear violation of article 7 in the application of the BiH CC at the BiH Court level,[86] and the strong impact on the national caseload. It is also unclear on what basis the ECtHR prioritizes potentially conflicting obligations under the ECHR on the part of BiH.

Generally speaking, while equality before the law is understood as a basic tenet of criminal law within the *same* legal system, the referral practice has concretely exposed inequalities in the treatment of the same cases between *different* legal systems. What recourse, if any, a person whose case is being tried in both fora has (i.e. if the case commences at the international level and is subsequently transferred to the national level), is to date not entirely clear. The fact that the ECtHR did not engage in a more elaborate discussion of this question is disappointing, although in the *Maktouf* case the inequality complained of pertained to treatment within the *same* legal system.

When approaching the question about the treatment of the same or similar cases in different legal systems, no concrete guidance can be derived from the BiH and Rwanda Transfer Laws themselves. Although the ICTY and ICTR Statutes stipulate that penalties imposed (imprisonment) shall be determined in accordance with "the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda, as the case may be],"[87] this provision does not address discrepant standards between different courts of the same system (discussed at length in chapter 2). As regards the specific question of penalties, the Rome Statute, establishing the unique jurisdictional framework of the ICC, may actually obfuscate matters. For instance, article 77 of the Rome Statute "builds on the principle of equality of justice through a uniform penalties regime for all persons convicted by the Court."[88] No reference is made in this article to national law, and the penalty is to be determined without consideration of the nationality of the convicted person or the *locus delicti commissi*.[89] Although positive in theory, this "abstract international equality before the law",[90] shows deficiencies in practice, not least in light of the fact that in the context of the complementarity regime, "individuals of different nationalities condemned for *similar* crimes will receive *different* penalties, depending on where the trial took place."[91] As *Tallgreen* argues, the result is that "this does not change the *status quo* of various laws and practices of criminal justice in different states at all."[92]

---

[84] *Ibid.*, § 82.
[85] *Ibid.*, § 84.
[86] *Ibid.*
[87] Article 24, ICTY Statute; article 23, ICTR Statute.
[88] *Tallgren*, 13 EJIL, 581 (2002).
[89] *Ibid.*
[90] *Ibid.*, p. 582.
[91] *Ibid.* Emphasis added.
[92] *Ibid.*

Some guidance can be derived from national approaches based on a federal system: while the principle of equality generally has no bearing on criminal cases tried in federal states per se, as *Sieber* pertinently argues, a certain homogenization and minimal protection of fundamental rights must nevertheless be guaranteed not least in light of the proportionality principle.[93] This finding is helpful insofar as it suggests that any demand for equality before the law in the context of referral cases may not be based strictly on the existence of parallel legal systems per se, but on the fact that cases have transcended these systems (i.e. one case which started in one forum is being continued in another). As such, the greatest problem is not that *similar* cases are tried differently in different legal systems, but rather the fact that the *same* case is tried by two different legal systems possibly in a very different manner. In the context of the referral practice, the resulting discrepancies in outcome, depending on the forum in which the case is tried, appear arbitrary. Therefore, one may argue that at a minimum some form of equality should be guaranteed – for the sake of coherence, foreseeability, and proportionality of the law – in cases having commenced in one forum and being completed in another. The formal nature of the ICTY and ICTR indictments (confirmed by the Pre-Trial Chamber), and the fact that in the absence of the Completion Strategy these cases would have been tried by the international tribunals according to their own laws and rules of procedure and evidence, strengthens the argument in favour of trying these cases alike and relying on the same or largely similar legal standards.

b) Criminal procedure laws

As regards criminal procedure, the fundamental differences between the various criminal procedure codes applied to the prosecution of similar crimes may be even more flagrant, although the ICTY Referral Bench did not engage in much analysis thereof. That is, in 2003, BiH,[94] the Federation of BiH, the Republika Srpska and Brčko District adopted new codes of criminal procedure,[95] although the BiH Code of Criminal Procedure (CCP) is of greatest relevance for the referral practice – and to the discussion at hand – as it is the one employed by the BiH State Court.

The BiH CCP represents a major departure from old codes previously employed, *inter alia*, because it modifies the trial process from the previously predominantly inquisitorial system to align more closely with many aspects of the adversarial criminal trial process.[96] This will be discussed in greater detail in section 1.a). Suffice it

---

[93] *Sieber*, Europäische Einigung und Europäisches Strafrecht, p. 975.

[94] CCP BiH: ("Official Gazette" of Bosnia and Herzegovina, 3/03); CCP FBiH: ("Official Gazette" of the Federation of Bosnia and Herzegovina, 35/03); CCP of Republika Srpska: ("Official Gazette" of Republika Srpska 49/03, 108/04); CCP of Brčko District BiH: ("Official Gazette" of the Brčko District of Bosnia and Herzegovina, No. 10/03).

[95] *Ibid.*

[96] OSCE, War Crimes Trials, p. 12.

to note at this juncture that the introduction of these new features into the criminal procedure system create significant problems both in their own right and in their co-existence with previous procedure codes. According to the OSCE, while the new codes are being applied to certain war crimes trials in some instances, depending on the time the indictment was confirmed, other proceedings have and/or are still governed by the old codes.[97] Thus, depending on which code is applied, possible discrepancies in the cases' outcomes are stark.[98]

It is important to note that BiH's National War Crimes Strategy of 2008, which seeks the harmonization of court practice across the various court levels "in order to ensure legal certainty and equality of citizens before the law", the creation of a national centralized database of case law, and regulating the distribution of cases between the various courts at all levels[99] has – despite several deadlines – not yet been fully implemented. One reason cited for this has been the lack of sufficient financial support from the state.[100] Despite acknowledging important progress in early 2012, Amnesty International lamented that the Strategy is nevertheless "not being implemented at an adequate rate."[101]

2. Rwanda

As chapters 1 and 2 have sought to illustrate, much like in BiH, in Rwanda, there is a plethora of courts at various levels applying different laws to the prosecution of genocide crimes.[102] While in BiH different laws are applied at different court levels, creating great legal uncertainty, the courts are all conventional criminal courts. In Rwanda, conversely, the problem of legal uncertainty is of a completely different propensity because the types of accountability mechanisms at work both nationally and locally are of a fundamentally different nature and, as a result, they each have their own (very different) set of laws and procedures governing trials. On the one hand of the spectrum, there are the formal courts, the Rwandan High Court, an ordinary court, which receives ICTR transfer cases, and the military courts, specialized courts, which until 2008, had exclusive jurisdiction over the most serious genocide-related cases ("category 1" cases), except for transfers from the ICTR and other states. From a material jurisdiction perspective, a notable difference between the High Court and the

---

[97] *Ibid.*

[98] *Ibid.*

[99] National War Crimes Strategy, section 1.2 (Objectives).

[100] *Dzidic, Denis*, Bosnia "Needs More Money" to Prosecute All War Crimes, Balkan Transitional Justice, 26 March 2013. Available at: http://www.balkaninsight.com/en/article/calls-to-solve-major-war-crimes [accessed: 9 May 2013].

[101] Amnesty International, Bosnia and Herzegovina, Submission for the European Commission Progress Report [accessed: 18 March 2013], pp. 2–3.

[102] For a comprehensive analysis on the pluralistic legal model employed in the Rwandan context following the genocide, see: *Knust*, Strafrecht und Gacaca.

military courts is that while military courts have jurisdiction over genocide and crimes against humanity, they do not appear to have explicit jurisdiction over war crimes, which conversely the ICTR and the Rwandan High Court do. Clearly in terms of legal certainty and equality before the law, this differential jurisdictional arrangement is not unproblematic, notably in situations where cases are transferred among national courts. On the other end of the spectrum, there are the specialized *Gacaca* courts, which employ lay judges elected among the community, which draw on customary laws and base themselves on a mixture of formal laws and informal practice and which have a strong emphasis on community participation.[103]

The specific features of this accountability mechanism have been described in some detail in chapter 1 and do not require additional exposure here. It is, however, important to emphasize the novel nature of this mechanism. As noted by one scholar, "[w]hen Rwanda decided to entrust community-based tribunals with the prosecution of genocide, *the country embarked on a completely unprecedented experiment in transitional justice.*"[104] However logical this set-up may have been in light of the sheer number of crimes to be tried, doubts have been raised from many sides about the adequacy of this informal structure to try such crimes as grave as genocide.[105] In addition thereto, the *Gacaca* proceedings have given rise to a myriad of legal problems, which the referral practice – notably between national and local courts (the latter aspect is, however, beyond a detailed examination in this research project) – sheds an important light on.

a) Substantive criminal laws

As was briefly alluded to in chapter 2, Rwanda's criminal code in vigour at the time of the 1994 genocide did not expressly provide for the crime of genocide.[106] In the Organic law No. 8/96 of 30 August 1996, Rwanda expressly criminalized genocide for the first time, allowing for the retroactive application thereof due to the fact that Rwanda was party to international conventions, including the Genocide Convention, at the time of commission of such acts.[107] The law further created

---

[103] *Bornkamm*, The Implementation of Modern Gacaca, pp. 2 ff.

[104] *Ibid.*, p. 1. Emphasis added.

[105] See in this context: Amnesty International, Rwanda, Gacaca: A Question of Justice. In its report, Justice Compromised, Human Rights Watch argues that "[m]any of these shortcomings can be traced back to the single most significant compromise made in choosing to use Gacaca to try genocide cases: the curtailment of the fair trial rights of the accused." (p. 4). See also: UN Office of the High Commissioner for Human Rights, Report on the Situation of Human Rights in Rwanda, U.N. Doc. E/CN.4/1999/33, 8 Feb. 1999, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/108/89/PDF/G9910889.pdf?OpenElement [accessed: 16 May 2013], § 51.

[106] Human Rights Watch, Law and Reality, p. 14.

[107] *Ibid.*, p. 14. See in this context: 1996 Genocide Law, O.G.R.R. No. 17, 1 Sept. 1996.

four categories of perpetrators.[108] This definition and categories were further refined in the organic laws of 2001 and 2004.[109]

b) Fair-trial guarantees and applicable penalties

As described in chapter 2, the main concern for the ICTR Referral Bench has been the practical implementation of certain internationally protected fair-trial rights at the national level, as well as penalties. Up until recently, some confusion existed about the interaction – and *priority* – of the conflicting Transfer Law and the Death Penalty Abolition Law to ICTR referral cases, resulting in the refusal on the part of the ICTR Referral Bench to agree to the transfer of any cases to Rwanda until mid-2011. This confusion has been resolved by recent legislative amendments, leading the ICTR to transfer its eight cases to the Rwandan High Court and thus representing a positive development in terms of the cohesion between the ICTR and the Rwandan High Court.[110] That is, in the *Uwinkindi* case, the ICTR Referral Bench held that the High Court offered an adequate legal framework – notably an appropriate penalty structure – to try referral cases.[111]

A number of other cases have since followed suit.[112] While this can indeed be seen as a positive development on the whole, the fact that the legal regime applicable to cases that have been transferred from the ICTR or other states on the one hand, and those being prosecuted nationally on the other, is different (notably as regards penalties) is cause for some concern. In other words, cases transferred from other states that would ordinarily be heard nationally before military or *Gacaca* tribunals, are now under the exclusive jurisdiction of the Rwandan High Court and governed by

---

[108] 1996 Genocide Law, see chapter II: Categorization (articles 2–3).

[109] Organic Law No. 40/2000 of 26 Jan. 2001 setting up "Gacaca Jurisdiction" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 31, 1994, O.G.R.R. No. 6 of 15 March 2001, article 2; Organic Law No. 16/2004 of 19 June 2004 establishing the Organisation, Competence and Functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 (O.G.R.R. Special No. of 19 June 2004), article 2 [hereafter *Gacaca* Law]. See in this context: *Stainier et al.*, Vade-mecum [accessed: 8 July 2012], pp. 119–139.

[110] *Uwinkindi,* Decision on Prosecutor's Request for Referral to the Republic of Rwanda Rule 11*bis* of RPE, Case No. ICTR-2001-75R11bis, 28 June 2011.

[111] *Ibid*., § 51.

[112] Seven other cases have been transferred by the ICTR to Rwanda under rule 11bis RPE, despite the fact that all accused are currently fugitives. The Munyagishari case was recently approved for transfer to Rwanda by the ICTR Appeals Chamber in May 2013. See in this context: Report on the Completion Strategy of the International Criminal Tribunal for Rwanda as at 5 November 2012, 14 Nov. 2012, available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/121114-completion-strategy-en.pdf [accessed: 9 May 2013], §§ 14–16.

the Transfer Law rather than by national laws. Inevitably, this creates an unfair distinction between accused tried at the higher-level conventional courts on the one hand, and those tried at lower courts on the other. In particular, accused tried at lower courts (such as the military courts) were subjected to a penalty (which can include imprisonment in isolation) that has drawn criticism from human rights organizations as violating international human standards, such as the prohibition against torture.[113] In addition, the *Gacaca* courts, which have been prosecuting the majority of the genocide cases, including the highest category of offenders ("category 1" cases) since 2008, are applying a completely different trial procedure (and have been highly criticized for lacking international fair-trial standards, notably for the accused)[114] and penalty structure than the ICTR and High Court. In this sense, the legislative reforms confirming the position within the ICTR Transfer Law do not address or resolve the fact that cases tried nationally are subject to an entirely different standard than transfer cases. Given the fact that the ICTR is – for the most part – trying the highest-level accused, it is disturbing that lower-level accused being investigated and tried by national and local courts should be subject to a less "humane" standard of punishment than the masterminds of such crimes.

In addition to the foregoing, and other than in BiH, where the major discrepancies arise around substantive law provisions relating to the elements and definition of crimes, the main concern in the Rwandan context, briefly reiterated here, is the difference in temporal jurisdiction as well as the aforementioned procedural issues (including fair-trial rights and sentencing practices) between the ICTR and High Court on the one hand, and the military courts and the *Gacaca* system on the other. As discussed earlier, the ICTR and High Court merely have temporal jurisdiction for a period of one year (1 January until 31 December 1994),[115] while the military courts and *Gacaca* tribunals have a temporal jurisdiction for a considerably longer time

---

[113] Human Rights Watch, Law and Reality, p. 32.

[114] See, for instance, *Haile*, Rwanda's Experiment in People's Courts, pp. 20 ff. See also various publications, *inter alia*, Human Rights Watch, Justice Compromised & Law and Reality, and Amnesty International, Rwanda, Gacaca: A Question of Justice.

[115] Article 7, ICTR Statute, available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx [accessed: 9 May 2013]. See also Rwanda Transfer Law. Although the Rwandan Constitution and the Rwanda Transfer Law are silent on the exact temporal jurisdiction of the High Court with regard to its exceptional jurisdiction over crimes committed during the Rwandan genocide, a strong argument could be made that article 3 (stipulating: "Notwithstanding the provisions of other laws applicable in Rwanda, a person whose case *[sic]* transferred by the ICTR to Rwanda shall be liable to be prosecuted only for crimes falling within the jurisdiction of the ICTR.") suggests that this would not only refer to subject matter but also to the ICTR's temporal jurisdiction. As chapter 2 has set out, however, there may be a slight – but potentially important – nuance as regards the cases referred to the High Court by other states. In other words, it is possible that a state whose temporal jurisdiction is for a greater period may influence the temporal jurisdiction of the High Court, therefore creating a discrepancy in the category of transferred cases between those from the ICTR and those from other states. For more, see chapter 1.C.

period (1 October 1990 until 31 December 1994).[116] The concrete effect of such a discrepancy is vast. One merely has to consider the large array of preparatory crimes, such as incitement to genocide, which were decisive to the genocide that subsequently ensued – and which can be tried by one court but not the other – to fully understand the impact of such a difference.

For the purposes of the referral practice from the ICTR and other states to the High Court of Rwanda, the issue of discrepancies is highly concrete because, contrary to the ICTY referral practice, the ICTR referral practice is still ongoing. In addition, a second and even greater wave of referrals from the military courts to the *Gacaca* courts was completed in 2008, transcending not only the institutional framework but attempting – all too uncomfortably – to negotiate different legal traditions, thus creating a whole set of additional legal problems. In this sense, the fact that the national courts have a significantly greater temporal jurisdiction over which they can impose a considerably harsher sentence, is most disconcerting.

3. Comparative analysis

In conclusion, it is without doubt that much has been done in both BiH and Rwanda to start prosecuting grave international crimes domestically, although both countries have relied on different frameworks to do so. While BiH has relied exclusively on a formal criminal court structure, Rwanda has drawn on a number of different judicial and non-judicial mechanisms to try genocide crimes, including the so-called alternative dispute resolution mechanisms in the form of the re-modelled *Gacaca* courts. A cursory overview of these two frameworks – as measured by the success of the ICTY/ICTR referral practice both in the narrow and in the broader sense, and, to some extent, the respective national referral practices[117] – reveals that both are inherently fraught with complexities caused, in part, by the application of different laws to the same type of crimes by the various courts, resulting in great disparity and legal uncertainty. Concrete examples of such disparities have been outlined in both chapter 2 and the sections above. Additionally, the lack of coordination and communication between these respective mechanisms in both contexts is aggravating the already complex situation, one that is not easily remedied by reforms, including the BiH National War Crimes Strategy.

Another interrelated factor, which must be considered in the context of disparate norms in the adjudication of these crimes, is a certain clash between different legal

---

[116] See in this context: Organic Law No. 07/2004 of 25 April 2004 Determining the Organization, Functioning and Jurisdiction of Courts, article 72 ("Ordinary Courts"), article 137 ("Gacaca Courts"), article 138, O.G.R.R. No. 14 of 15 July 2004.

[117] It must be emphasized at this juncture that this dissertation does not intend to examine the success of the various criminal accountability mechanisms to the (amorphous) notions of "peace", "justice" and "national reconciliation" as a whole. This would be an entirely different undertaking, requiring extensive field research.

traditions, which has been the (perhaps unfortunate) result of rapid and reactive widespread legal reforms in both BiH and Rwanda following the respective conflicts.

B. System clashes: the inquisitorial versus the adversarial approach

In addition to the application of various different codes and laws discussed in detail in chapter 2 and more briefly in the section above, another problematic facet of the interaction between the international and national/local courts is the use of different legal traditions, which at times seem incompatible, notably during the investigative phase and criminal trial proceedings of war crimes prosecutions. In fact, the discussion about the differences between – and the advantages and disadvantages of – the adversarial versus the inquisitorial model of criminal proceedings in the adjudication of international crimes has been the subject of much debate over recent years.[118] Despite these two seemingly rigid categories, which came about as early as the 13th century,[119] it is contended by many scholars that today most national legal systems more or less incorporate at least some elements of both.[120] As noted by *Eser*, "[c]ommon as the confrontation of these two models may be, the increasing convergences between them should not go unnoticed."[121] According to another author, *Sijerčić-Čolić*, it is a certain mixed form, with more or less variations among it, which "constitutes the conceptual basis of the modern European continental criminal proceedings."[122] However, caution is advised about the existence of varying attribution of characteristics to one or the other category.[123] Despite certain variants, the greatest distinction between the inquisitorial and adversarial models is often cited as being that the former is "judge-led" while the latter is "party-driven".[124] In particular, the inquisitorial model is based on the "pro-active state", in which the state oversees and assists individuals in the resolution of their disputes,[125] whereas the adversarial model is based on the "reactive state", in which the state merely provides the framework in

---

[118] See, for instance, *Eser*, The "Adversarial" Procedure, pp. 207–227; See also, *Schabas*, 13.1 Revue québécoise de droit international [accessed: 9 May 2013], 287; and *Zappalà*, Accusatorial and Inquisitorial Elements, pp. 14–28.

[119] *Sijerčić-Čolić*, Pravo i Pravda, p. 2.

[120] *Ibid.*, p. 5.

[121] *Eser*, The "Adversarial" Procedure, fn. 2, making reference to the work of *Perron*, Rechtsvergleichender Querschnitt und rechtspolitische Bewertung, p. 560. At the beginning of the 19th century, a third category gained widespread appeal, not an independent category but rather the amalgamation of the two previous categories, known as the "accusatory-inquisitory" or "mixed criminal proceedings", *Sijerčić-Čolić*, Pravo i Pravda, p. 3.

[122] *Sijerčić-Čolić*, Pravo i Pravda, p. 5.

[123] *Ibid.*, p. 8.

[124] *Eser*, The "Adversarial" Procedure, p. 208.

[125] *Schwarz/Degen*, 117 ZStW 460–461 (2005).

which the parties as self-administering agents carry out their disputes.[126] This main distinction in turn provides fertile grounds for a debate about the superiority of one model over the other. While the adversarial model may be viewed as being superior because it allows the parties great freedom in carrying out their dispute in the courtroom, others view this same adversarial model as a biased "fight" accompanied by hostility,[127] in which the material truth is secondary.[128] On the contrary, while opponents of the inquisitorial model may feel that the role of the state in the criminal trial process is overly "pro-active"[129] or paternalistic, proponents feel that the important investigative function of the judge significantly increases the chances of finding the material truth about the case.[130] Although there are certainly advantages and disadvantages to both systems, a proper discussion thereof – however interesting it may be – is beyond the purview of this study. Rather, what is relevant here is the uneasy juxtaposition of both models leading to divergences in investigative practices and outcomes of trials depending on which system the case is tried under – a state of affairs made acutely visible by the ICTY/ICTR referral practice.

While in the international criminal courts and tribunals, a certain "mixed proceeding" is relied upon, essentially "depending on the more common law or more civil-law background of the judges and parties in a given case," generally the adversarial model predominates.[131] The question whether this model is appropriate at the international criminal court level is, according to *Eser*, particularly crucial given the "more grievous kind and higher complexity of crimes than in the case with everyday offences in domestic criminal practice."[132] Dare one say at this juncture that the referral practice makes this question even more crucial, shedding a stark light on the differences in the application of the legal systems for the prosecution of the same type of crimes? In other words, the very different legal traditions may be relied upon at different court levels to varying degrees in order to try the same crimes, with the great potential for stark differences in outcome. The experience of the two cases referred to by the ICTR to France in 2007 is a pertinent illustration of this point. While the allegations

---

126 *Ibid.*, 462.

127 *Eser*, The "Adversarial" Procedure, p. 219.

128 *Schwarz/Degen*, 117 ZStW 462 (2005).

129 *Ibid. Schwarz/Degen*, however, use the term "proactive state", without criticism, 460 ff.

130 *Eser*, The "Adversarial" Procedure, p. 225.

131 In the *Čelebići Camp* case, the ICTY Trial Chamber held that: "The procedural regime designed for the Tribunal and applied by the Trial Chamber consists of a synthesis which is an amalgam of the accusatorial features of the common law and the inquisitorial features of the civil-law systems. *It is conceded that the former predominates*." Emphasis added. *Prosecutor v. Mucić et al.*, Case No. IT-96-21 (1998), Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, dated 24 May 1998, § 31. See also *Eser*, The "Adversarial" Procedure, p. 207.

132 *Eser*, *ibid.*, p. 209.

were investigated and the indictments ultimately confirmed on the basis of predominantly adversarial procedures, the cases are being investigated and prosecuted by the *Procureur de la République de Paris* on the basis of exclusively French criminal procedure laws, which adhere strongly to an inquisitorial model. This referral has caused some rather significant problems, which will be discussed in greater detail below.

1. Bosnia and Herzegovina

As illustrated in the sections above, BiH has undergone important legislative reforms since the 1992 war. International pressure – including from international organizations, such as the Office of the High Representative (OHR) and the ICTY,[133] and states, such as the United States of America[134] – have led to the adoption of a new criminal code and code of criminal procedure in 2003.[135] As regards the Criminal Code of Procedure (CCP) in particular, many aspects represent an important departure from previous codes relying on the inquisitorial model, and incorporating notions characteristic of the Anglo-Saxon-American common law.[136] Given the important American influence in the criminal law reform of BiH, two authors have coined it the "Americanization of the law",[137] while another, *Bohlander*, refers to the process as "legal colonialism".[138] Critical reactions to these changes abound, with *Schwarz* and *Degen* arguing that the new criminal procedure code seems like a "non-adaptable foreign body".[139] While this section will focus on the specific elements of the new BiH CCP relating to this modified procedure, and not to lament the critical reactions thereto, suffice it to state at this point, that many legal practitioners trained in one legal culture were highly frustrated and disoriented with the imposition of these rather significant changes. As noted by one scholar, "[t]his widespread confusion among Bosnians concerning their country's new, mixed system of criminal procedure illustrates the negative consequences of international reform efforts that impose changes inconsistent with a country's legal traditions."[140]

---

[133] See in this context: ICTY Press release, OHR-ICTY Working Group on Development of BiH Capacity for War-crimes Trial Successfully Completed, The Hague, 21 Feb. 2003 OHR/P.I.S./731e, available at: http://www.icty.org/sid/8298 [accessed: 9 May 2013]. *Barria/Roper*, Hum. Rights Rev. [accessed: 10 May 2013].

[134] *DeNicola*, DePaul Rule of L. J. 36 (2010).

[135] BiH CC 2003 and BiH CCP.

[136] *Schwarz/Degen*, 117 ZStW 462–464 (2005).

[137] *Ibid.*, 459, 464, 473.

[138] *Bohlander*, 14 Crim. L. F. 80 (2003).

[139] From the German: "Ein nicht adaptierbarer Fremdkörper", *Schwarz/Degen*, Das neue Strafprozessrecht, p. 459.

[140] *DeNicola*, DePaul Rule of L. J. 4–5 (2010).

Turning now to the most notable elements of these reforms, the new BiH CCP of 2003 has introduced parts from the adversarial model into every aspect of the criminal investigation and trial procedure, though only some of the most significant ones will be mentioned here.

First of all, the new Code of Criminal Procedure of 2003 has eliminated the notion of the investigative judge in the investigative phase of proceedings, bestowing instead a much greater role on the Prosecutor.[141] That is, under the old SFRY Code of Criminal Procedure of 1986, while the Public Prosecutor can request that an investigation be initiated, as per articles 45(2) and 158(1), he or she could not conduct it him- or herself, and it is up to the investigative judge, based on the information provided by the Prosecutor, whether to grant the request as per article 159(1) SFRY CCP. Under the new code, a much greater role is granted to the Prosecutor, in which a much more extensive list of duties is to be carried out by him or her, including expansive investigative powers.[142]

Moreover, the new code has revamped the main trial proceedings, putting the Prosecutor and Defence lawyers on centre stage, and relegating the Trial Judge to a lesser role than previously.[143] That is, under the provisions of the old SFRY CCP, the Presiding Judge is the principal actor in the main trial process, steering the trial, examining the accused, hearing the witnesses and experts, etc.[144] The other parties (Prosecutor, Defence Counsel, etc.) are given the chance to question the accused directly only after his permission.[145] The Presiding Judge's explicit duty to "find the truth" as per article 284(2) is characteristic of the inquisitorial trial process.[146]

Conversely, while the new 2003 CCP code replicated the duty on the part of the Presiding Judge to "find the truth",[147] the main trial proceeding provisions as a whole appear in practice to place much more emphasis on the meting out of the case between the respective opposing parties, a feature typical of the adversarial trial process. The introduction of a cross-examination and plea bargaining option – both notions typical of the adversarial system – is a strong indicator thereof.[148] In fact, in the new code, only the parties decide on the evidence to present and the witnesses to

---

[141] OSCE, War Crimes Trials, p. 12.

[142] BiH CCP, article 35. See also broad investigative powers under articles 216 and 217 of the same code.

[143] OSCE, War Crimes Trials, p. 12.

[144] 1986 SFRY CCP, article 292.

[145] *Ibid.*, article 318.

[146] *Ibid.*, article 292(2).

[147] BiH CCP, article 239(2).

[148] BiH CCP, articles 261–262, in which the code introduces the ability of each party to cross-examine witnesses from both sides. Plea bargaining is covered by article 231 of the new BiH CCP.

question, the Presiding Judge merely acts as a moderator of the proceedings, exclusively judging over the elements that have been presented by the parties themselves.[149]

Indeed, many of these new features are causing quite some difficulties for lawyers – trained in the continental civil law – who are confronted with them for the first time.[150] A pertinent example of the difficulties for lawyers to make the transition to common-law concepts is the notion of the guilty plea, as illustrated in the *Erdemović* case before the ICTY. As stated by the ICTY Appeals Chamber in that case, the guilty plea

> "*per se* is the peculiar product of the adversarial system of the common law which recognises the advantage it provides to the public in minimising costs, in the saving of court time and in avoiding the inconvenience to many, particularly to witnesses."[151]

In that case, *Erdemović*, who was accused of having committed both war crimes and crimes against humanity, entered a guilty plea for one count of crimes against humanity.[152] While the Trial Chamber accepted it,[153] the Appeals Chamber quashed the guilty plea and ordered a new trial[154] because it felt that the legal requirements – notably that the accused be informed of what he is pleading to – were not met in this case.[155] In particular, on several occasions the Chamber expressed doubt as to whether the Defence counsel "truly understood the nature of a guilty plea",[156] ultimately finding that "there is no indication that the Appellant understood the nature of the charges."[157] As noted by *Zappalà* in his interpretation of the case, one must attribute "the mistake, if any" on the part of the Defence counsel, to the lack of familiarity of the common law in general and the guilty plea procedure in particular.[158] Irrespective of intentions, however, as the author argues, "the misinterpretation of the guilty plea proceedings may have damaged the accused substantially."[159] As

---

[149] *Schwarz/Degen*, 117 ZStW 462 (2005).

[150] *DeNicola*, DePaul Rule of L. J. 4 (2010). See also OSCE, Plea Agreements in Bosnia and Herzegovina [accessed: 9 May 2013].

[151] *Prosecutor v. Drazen Erdemović*, Appeals Chamber Judgment, Case No. IT-96-22-A, Joint Separate Opinion of Judge *McDonald* and Judge *Vohrah*, 7 Oct. 1998, § 2.

[152] *Prosecutor v. Erdemović*, Sentencing Judgment, Case No. IT-96-22-T, 29 Nov. 1996, § 2.

[153] *Ibid*.

[154] *Erdemović*, Appeals Chamber Judgment, p. 17.

[155] *Ibid.*, Appeals Chamber Judgment, § 20. In the Separate Opinion of Judge *McDonald* and Judge *Vohrah*, it was held that for a guilty plea "the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty", § 8(b).

[156] *Ibid.*, Separate Opinion, Judge *McDonald* and Judge *Vohrah*, § 16.

[157] *Ibid.*, § 18.

[158] *Zappalà*, Accusatorial and Inquisitorial Elements, p. 27.

[159] *Ibid.* This proceeding appears to be frequently used by the BiH state Prosecutor, see, for instance, http://www.tuzilastvobih.gov.ba/?id=1711&jezik=e [accessed: 7 Feb. 2013].

noted by *DeNicola*, "the code's more adversarial investigation and trial procedures have produced widespread uncertainty and, at times, unfair outcomes."[160]

Given the foregoing, it can be argued that the features of the new BiH code have fundamentally changed the theoretical foundations of the criminal trial process. In particular, the new features demonstrate a move away from the so-called pro-active state to a model of the "reactive state".[161] The imposition of this very different theoretical model on a country's already existing legal culture has been criticized as being neither natural nor historically necessary.[162] As noted by one author:

> "[a]lthough the OHR's reform efforts have had some positive effects on criminal justice in BiH, its introduction of foreign, common law procedural transplants has defied local actors' civil law culture, in many cases to the detriment of fair and efficient proceedings."[163]

And as if the situation was not already complicated enough with the introduction of the new mixed civil-law-common-law system, the fact that different courts at different levels rely on different codes, is all the more problematic. While so far it appears that the BiH State Court consistently applies the new CCP, at the level of the cantonal and district courts, oftentimes the old SFRY CCP is applied,[164] which can have significant differences in outcome.

2. Rwanda

Rwanda's legal system was greatly influenced by the European continental law system, having been under Belgian colonial rule until the late 1950s.[165] Like in BiH, Rwandan legal reforms after the 1994 genocide resulted in sort of a legal transplant from a predominantly civil-law system to a more mixed one, incorporating some important concepts characteristic of the common law's adversarial system.[166] In particular, certain notions, such as cross-examination and the right to remain silent have been incorporated into the Transfer Law governing cases transferred from the ICTR and other states to the Rwandan High Court,[167] notions which did not previously exist in

---

[160] *DeNicola*, DePaul Rule of L. J. 41 (2010).

[161] *Schwarz/Degen*, 117 ZStW 462 (2005).

[162] *Ibid*., 474.

[163] *DeNicola*, DePaul Rule of L. J. 28 (2010).

[164] OSCE, Delivering Justice in BiH, p. 70.

[165] UN Outreach Programme on the Rwandan Genocide and the UN, Rwanda: A Brief History of the Country, available at: http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml [accessed: 16 May 2013].

[166] *Musiime, Eunice,* Rwanda's Legal System and Legal Materials. GlobaLex, April 2007. Available at: http://www.nyulawglobal.org/globalex/rwanda.htm [accessed: 9 May 2013].

[167] Rwanda Transfer Law, article 13.

Rwandan law.[168] The difficulties with a "mechanical" incorporation of totally new legal concepts is pertinently illustrated in the accused's right to remain silent, which is formally included in the ICTR's Rules of Procedure and Evidence[169] and the Rwanda Transfer Law,[170] but has no equivalent in the Rwandan Code of Criminal Procedure.

In particular, this notion in the context of the first ICTR transfer case has illustrated the difference between law in *theory* on the one hand, and law in *practice* on the other. As one of the ICTR monitoring reports in the transferred *Uwinkindi* case to the Rwandan High Court demonstrates, the accused chose not to incriminate himself by giving a statement in response to the allegations against him.[171] While the Transfer Law guarantees the right to remain silent, the fact that it is current practice in Rwanda to make such a statement, led the Rwandan Prosecution to consider the accused's silence to be "deliberately obstructive" to the ongoing investigations.[172]

Another notion is the right of the Defence to conduct its own investigations, which is guaranteed in the ICTR's Rules of Procedure and Evidence,[173] but appears to have no formal equivalent under Rwandan law. There are a few articles in the Rwanda Transfer Law about the scope of the accused's rights relating to mounting his/her defence[174] and the Defence's "right to enter into Rwanda and move freely within Rwanda to perform their duties."[175] As stated in the ICTR monitoring report, while such a concept is not considered illegal per se, it is not common practice in Rwanda for the Defence to conduct its own investigations.[176] Instead, the practice provides two options: either to request the judicial police to obtain statements from potential witnesses, or, in the alternative, to request the court to treat Defence witnesses as witnesses of the court instead and to call them forward to provide evidence that way.[177] Because there is some confusion about the scope of the right of the Defence to conduct

---

168 Cross-examination: see report of the court monitor for the *Uwinkindi* case, July 2012, 1 Aug. 2014, available at: http://www.unmict.org/files/cases/uwinkindi/other/en/120801_JulyReport.pdf [accessed: 8 July 2014], § 17. Right to remain silent: see public report of the court monitor for the *Uwinkindi* case, June 2012, 4 July 2012, available at: http://www.unmict.org/files/cases/uwinkindi/other/en/120704_JuneReport.pdf [accessed: 8 July 2014], § 17 [hereafter *Uwinkindi* monitoring report].

169 ICTR RPE, rule 42.

170 Rwanda Transfer Law, article 13.

171 *Uwinkindi* monitoring report, June 2012, § 17.

172 *Ibid.*, § 17.

173 See in particular rule 39: conduct of investigations of the ICTR Rules of Procedure and Evidence.

174 Article 13 of the Transfer Law provides that the "accused shall be given adequate time and facilities to prepare his defense" and (§ 4) "to examine, or have a person to examine for him or her the witnesses against him" (§ 8).

175 Rwanda Transfer Law, article 15.

176 *Uwinkindi* monitoring report, June 2012, § 12.

177 *Ibid*.

its own investigations in the context of referral cases from the ICTR, notably the request for investigators, an application has been filed by the Defence in the *Uwinkindi* case but was denied in March 2013.[178] In particular, the court ruling based itself on the lack of such a provision in the Transfer Law itself, and held that the judicial police could conduct investigations on the Defence's behalf.[179]

Perhaps the most far-reaching common-law transplant in Rwandan criminal law is the notion of plea-bargaining. In order to facilitate the swift prosecution of a very high volume of genocide crimes at the national level in 1996, the Rwandan Parliament adopted a new law, which introduced plea-bargaining for the very first time.[180] The rationale behind this legal transplant was, according to Human Rights Watch, the ability to reduce the duration of sentences as a result of confessions and thereby to speed up genocide trials.[181] However, under the Organic Law of 1996, a plea bargain had a particularity in Rwandan law: it was only admissible where three conditions were met: firstly, where the accused admitted to his or her own guilt, secondly, and perhaps most notable, where *he or she denounced other accomplices or conspirators* or provided other useful information to the case, and thirdly, where he or she apologized for the offence(s) committed.[182] This three-fold requirement was retained in its entirety in subsequent criminal laws.[183] In fact, this notion of plea bargain under Rwandan law became a fundamental cornerstone of the *Gacaca* system in seeking to establish a balance between retributive justice (punishment) and restorative justice (reconciliation), and in ascertaining the truth in the process.[184] While it would be far too simplistic to criticize the (overambitious) aims of such a system, the sum of the various goals of the *Gacaca* system – epitomized by the plea bargaining process – seem no less ambitious and perhaps also mutually exclusive than those

---

[178] Report of the court monitor for the *Uwinkindi* case (20 Dec. 2012 – 31 Jan. 2013), 31 Jan. 2013, available at: http://www.unmict.org/files/cases/uwinkindi/other/en/130131_JanReport.pdf [accessed: 1 May 2014], § 25.

[179] Report of the court monitor for the *Uwinkindi* case (1 May – 30 June 2013), 30 June 2013, available at: http://www.unmict.org/files/cases/uwinkindi/other/en/130702_MayJuneReport.pdf [accessed: 8 July 2014], § 8(1).

[180] 1996 Genocide Law, O.G.R.R. No. 17 of 1 Sept. 1996, articles 10–13.

[181] Human Rights Watch, Justice Compromised, p. 19.

[182] 1996 Genocide Law, article 6. See also *Stainier et al*., Vade-mecum.

[183] Organic Law No. 33/2001 of 22 June 2001 modifying and completing Organic Law No. 40/2000 of 26 Jan. 2001 setting up "Gacaca Jurisdictions" and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity, Committed between October 1, 1990 and December 31, 1994, O.G.R.R. No. 14, 15 July 2001, article 54; Organic Law No. 10/2007 of 1 March 2007 modifying and complementing Organic Law No. 16/2004 as modified and complemented to date, available at: http://www.geneva-academy.ch/RULAC/pdf_state/2007-Gacaca-Crts-Organic-Law-10-2007-3-languages-.pdf [accessed: 13 May 2013]; Organic Law No. 13/2008 of 19 May 2007 modifying and complementing Organic Law No. 16/2004 as modified and complemented to date O.G.R.R No. 11 of 1 June 2008.

[184] Penal Reform International, Eight Years On [accessed: 9 July 2014], p. 34.

put forward by the international criminal courts in their constitutive documents (in this context, see the discussion in chapters 1 and 2). Suffice it to state at this juncture that the plea bargaining process as conceptualized in the informal *Gacaca* context, is rife with difficulty. The organization having monitored the *Gacaca* trials over the years, *Penal Reform International* (PRI), argues that the fact that a well-timed confession allows for a reduction of the sentence and the possibility of converting half of the leftover prison sentence into community service instead, creates a "powerful incentive for invoking this procedure".[185] The problem in this context, as PRI laments, is that a confession is only admissible where it implicates another person, which plays "its part in distorting the justice process".[186] Indeed, weaknesses in the plea bargain procedure included partial confessions and minimizations of guilt, distorted testimonies to exonerate some individuals while denouncing others, *inter alia*, those persons who were not in a position to defend themselves, either because they had died or lived in exile.[187] The fact that this testimony was in principle admissible even without corroboration by other sources,[188] against the backdrop of an informal procedure in which lay judges decided, is troublesome. As noted by PRI, "[i]t is clear that information provided by the accused – especially for crimes as serious as genocide – was always going to be problematic.[189]

In conclusion, the foregoing section has sought to demonstrate the awkward incorporation of "foreign" legal concepts into Rwanda's previously predominant civil-law system. While the Rwanda Transfer Law has a relatively limited scope regarding genocide prosecutions (presenting only a small number compared to the sum of genocide prosecutions tried nationally from the outset), its application creates uncomfortable discrepancies in the treatment of different cases at a procedural level between transfer cases on the one hand, and those heard nationally on the other. As the above section has demonstrated, despite the formal nature of these common-law notions via the Rwanda Transfer Law, current legal practice is sometimes in stark contradiction thereto.

As described above, the notion of plea-bargaining in its remodelled form has become a fundamental tenet of the Rwandan legal response to genocide prosecutions at all levels and all types of genocide trials, from the conventional criminal courts to the community-based *Gacaca* courts.

---

185 Penal Reform International, Eight Years On, p. 35.

186 *Ibid.*, p. 36.

187 *Ibid.*

188 *Ibid.*

189 *Ibid*.

3. Comparative analysis

The foregoing has demonstrated that the introduction of certain common-law concepts into previously predominantly civil-law systems was envisaged as a response to the mass atrocities following the 1991 ethnic war in BiH and the 1994 genocide in Rwanda. While in the context of BiH, these legal transplants have been effected through the adoption of a new criminal code and code of criminal procedure, in the Rwandan context, the introduction of these notions has been less systematic and has been scattered throughout various legal texts applying to different cases and courts. It cannot be observed, however, that this difference in the mode of incorporation has any major bearing on either the level of fragmentation of substantive and procedural laws among national courts or the (negative) perception of these legal concepts by the respective legal communities on the whole. In fact, in both contexts, the legal transplants that have been spurred, *inter alia*, by the ICTY and ICTR referral practice, have been too "mechanical" in character, and have been criticized for being imposed in a top-down fashion that resembles "extrinsic maximalism"[190] or some form of "legal colonialism",[191] and disregarding the existing whole-scale legal culture of these systems.[192] This, in turn, has created great challenges for actors in the respective legal landscapes on a practical level, as has been demonstrated via concrete examples in the sections above. The foregoing has therefore sought to support the hypothesis that a mechanical or automatic transfer of cases from the international to national fora, without consideration of the comprehensive legal context in which the referral practice is undeniably embedded, presents difficulties to the effective implementation thereof.

So far, this study has generally limited its comparative analysis to Bosnia and Herzegovina and Rwanda because these countries have been the most relevant in the context of the ICTY and ICTR referral practice. However, another legal system, which requires some attention at this particular juncture, is France. As noted above, France is currently trying two genocide cases referred to it by the ICTR in 2007 under rule 11*bis* RPE. Indeed, France is the only country to which an ICTR referral case has been sent by virtue of universal jurisdiction. Its unique experience is particularly valuable to a discussion about system clashes between the adversarial and inquisitorial model.

4. France

Despite complex jurisdictional issues that were raised before various courts in the past,[193] and recent legislative changes that may increasingly challenge the prosecution

---

190 *DeNicola*, DePaul Rule of L. J. 5 (2010).

191 *Bohlander*, 14 Crim. L. F. 80 (2003).

192 *DeNicola*, DePaul Rule of L. J. 3–73 (2010).

193 *Bourdon*, 3 J. Int'l Criminal Justice, 434–436 (2005).

of international crimes in France, French courts are working on international crimes today. For instance, a number of important Rwandan genocide cases are investigated and prosecuted before its courts under the principle of universal jurisdiction,[194] including the two cases referred to France by the ICTR under rule 11*bis* in 2007,[195] which are still currently at the pre-trial stage.[196]

In this context, France's strong reliance on the inquisitorial model poses a fundamental problem as regards the investigation and prosecution of international crimes before French courts in general, and, more pertinently for this analysis, as regards the ICTR referral cases in particular. While it is beyond the scope of this section to consider the overall merits of the French system for the prosecution of international crimes in general, suffice it to say at this point that the mere logistics of the inquisitorial model's search for "truth" is greatly complicated by a number of factors, such as the complexity of the cases, the limited availability of credible witnesses and material evidence, the distance to the *locus delicti*, the cost of investigating highly complex crimes abroad, etc.[197]

The fate of the two ICTR referral cases – which started out under the ICTR's predominantly adversarial system, and, following transfer to France, were subsequently submitted to the inquisitorial model – essentially renders the clash between the two systems highly visible. In effect, the confirmed ICTR indictment has a fundamentally different status in the French criminal justice system compared to the Rwandan system. That is, instead of simply adapting the confirmed ICTR indictments to the national criminal procedure code (after which point it is considered trial-ready), a mechanism that both Rwanda and Bosnia and Herzegovina foresee under their respective transfer laws governing such referral cases,[198] in the French system, the ICTR indictment has the status of an investigative file rather than a confirmed indictment. While the Rwandan High Court has wide discretion to use ICTR evidence (including documentary evidence and witness statements) in its own proceedings,[199] the French Prosecutor relies on the indictment as a mere starting point for *commencing* investigations and for determining, following a preliminary analysis by the investigative judge *(juge d'instruction)*, whether there is even enough evidence to warrant the

---

[194] The case of *Pascal Simbikangwa* represents the first trial on charges of genocide and crimes against humanity on the basis of universal jurisdiction in France. See in this context: *Macpherson, Caroline*, First trial of a Rwandan accused of genocide and crimes against humanity in France. International Criminal Law Bureau, 26 April 2013. Available at: http://www.internationallawbureau.com/index.php/first-trial-of-a-rwandan-accused-of-genocide-and-crimes-against-humanity-in-france/ [accessed: 11 May 2013].

[195] *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, 20 Nov. 2007; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I.

[196] Interview with a member of the French War Crimes Unit of the State Prosecutor's Office, Paris, October 2011 [interview transcript with author].

[197] *Ibid.*

[198] Rwanda Transfer Law: article 4 (1)–(2).

[199] *Ibid*., articles 9–12.

opening of the case in the first place.[200] In light of this procedure, one could envisage the possibility that the French Prosecutor may decide, based on his/her own preliminary investigations, not to pursue a case, despite the presence of an already confirmed ICTR indictment. As such, the referral practice as envisaged by the UN Security Council with the primary objective to "continue" the work of the ICTR in its stead, appears *prima facie* incompatible with the (burdensome) French inquisitorial model.

Even beyond the initial investigation phase, great differences mark the ICTR trial procedure on the one hand, and that of France on the other. That is, unlike the ICTR procedure, the French procedure prescribes a very different role to the parties in the proceedings than is habitual in the adversarial model. Concretely, this means that in the French system, proceedings are judge-led instead of party-led, and the inquisitorial system does not rely on typical common-law notions, such as cross-examination and plea-bargaining. Throughout its deliberations in the *Bucyibaruta* case, the ICTR Referral Bench pointed out the differences in the French legal system, stating in particular the fact that the French system does not provide for examination-in-chief or cross-examination.[201] The previously mentioned different outcomes that can result from the employment of such practices in one setting and not in another are pertinent in this context also. However, the Referral Bench nevertheless proclaimed itself satisfied that the accused's "right to examine witnesses and to have them examined" would be upheld and that "he will receive a fair trial before the competent French courts."[202] An identical finding was made in the *Munyeshyaka* case.[203]

Other than a brief analysis of the procedure for the examination of witnesses under French law, the ICTR Referral Bench did not go into any depth about other aspects of the inquisitorial system to which the ICTR transfer cases would be subject and/or possible differences in the outcome following a transfer to France. Since the French cases are still at the preliminary stage and information relating thereto is regrettably not public to date, it is still premature to speak about concrete consequences of the differences in procedures. However, the above sections analysing possible differences in the outcome of cases between both legal systems in the concrete settings of BiH and Rwanda, have amply demonstrated that system clashes in the context of the referral practice pose a very real concern.

---

[200] Interview with a member of French War Crimes Unit, Paris, State Prosecutor's Office, Paris, October 2011 [interview transcript with author].

[201] *The Prosecutor v. Laurent Bucyibaruta*, Decision on Prosecutor's Request for Referral of *Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, 20 Nov. 2007, § 24.

[202] *Ibid*.

[203] *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of *Wenceslas Munyeshyaka's* Indictment to France, § 24.

5. Comparative analysis: BiH, Rwanda and France

In conclusion, the foregoing section has sought to illustrate – by way of concrete cases – the difficult marriage between two different legal systems with jurisdiction over the same cases. While the "revamping" of the legal systems of BiH and Rwanda by awkwardly incorporating "foreign" legal concepts has engendered certain problems, the treatment of ICTR cases in the French inquisitorial system has exposed even greater discrepancies with the ICTR's proceedings. In other words, unlike in the French legal setting, the discrepancy is not particularly dramatic between the ICTY and ICTR on the one hand, and the national courts in BiH and Rwanda mandated to take on ICTY/ICTR referral cases on the other. This is because both the BiH State Court and the Rwandan High Court generally follow procedures that are more or less in line with the Rules of Procedure and Evidence of the ICTY and ICTR, which display important characteristics from the adversarial system.

What is noteworthy, however, are the great discrepancies caused at the national level between the BiH State Court and Rwandan High Court on the one hand, and among national and local courts in BiH and Rwanda on the other. This is due to the fact that in both contexts, considerable legal reforms have been embarked upon, which have given rise to a disjointed legal framework, in which certain typical elements of the Anglo-Saxon-American adversarial system have been introduced into formally predominantly continental civil-law systems. Some elements thereof will be discussed in the sections below.

C. Conclusion

A cursory examination of certain normative factors has provided concrete insight into some root causes underlying complex problems faced in the prosecution of international crimes by national courts. In particular, the foregoing sections have demonstrated concretely the difficulties that referral cases pose, which by design of the referral practice start out in an international court and continue in a national one. While BiH and Rwanda have started adapting their legal systems into an increasingly mixed inquisitorial-adversarial model, thereby starting to align more with the ICTY and ICTR procedures, France's unique experience with the two ICTR referral cases illustrates a significantly greater divide between legal systems and gives rise to some concrete legal conundrums that are not easily resolved on the practical level. Chapter 4 will attempt to propose some possible tangible solutions, against the backdrop of a theoretical framework, in which scholarly debates about the fragmentation of international criminal law and the permissible "margin of appreciation" are all but resolved.

II. Contextual factors: national context as a crucial criterion for referral

The above section has demonstrated that several important *normative factors* may be viewed both as the cause and consequence of the difficulties surrounding the implementation of the referral practice as envisaged by rule 11*bis* RPE of the ICTY and the ICTR. *Contextual factors*, although very challenging to quantify, also play an important role in explaining – at least partially – why rule 11*bis* RPE's referral practice has presented such complexities when implemented in practice. Four main contextual factors will be discussed in turn: 1) the presence of a functioning criminal justice system, 2) the scale of crimes, 3) political sensibility of cases and impact on judicial independence and impartiality, and 4) financial and logistical assistance from the international community. These oft-interconnected contextual factors will be briefly discussed below, although the list is by no means intended to be exhaustive. What lessons can be learned about how the practice can be improved for the future, notably in the ICC context, will be discussed in chapters 4 and 5. It is contended that a thorough examination of the national context in which the referral practice takes place – including through additional criteria outlined below – has to be a crucial pre-condition for referral.

Relying on the rule 11*bis* referral criteria of "willingness" and "adequate preparedness", the first three contextual factors essentially pertain to a state's "adequate preparedness" or ability, whereas the last factor, assistance from the international community, relates to its genuine "willingness".[204]

A. The presence of a functioning criminal justice system

The conflicts in both BiH and Rwanda destroyed much of any previously existing criminal justice systems. Particularly in Rwanda, a significant amount of members of the legal community were killed or fled during the genocide,[205] contributing to a breakdown of the national criminal justice system. Indeed, it was this near total destruction in both Rwanda and in the former Yugoslavia that prompted action on behalf of the international community and led to the UN Security Council decision to set up international *ad hoc* criminal tribunals in order to help fill this *lacuna* at the national level. As noted in chapter 1, the idea was that such tribunals would be temporary in nature and would eventually be replaced by functioning national criminal justice systems. The very notion of the referral practice appears to conceptualize this idea.

---

[204] The word "genuine" is an ICC standard for inadmissibility at the ICC, as is the concept of "ability", see articles 12, 17 of the Rome Statute.

[205] *Tiemessen*, 8 Afr. Stud. Q. 58 (2004).

As chapter 2 has sought to demonstrate, the presence of a functioning criminal justice system is vital to the effective implementation of the referral practice, and indeed is one of the official pre-conditions set by rule 11*bis* RPE. While it explicitly stipulates that "adequate preparedness" on the part of the national legal system is a pre-condition to referral, it does not provide further guidance as to what such a criterion actually entails. The respective referral benches have interpreted it as requiring a legal framework, which criminalizes the alleged conduct with which the accused is charged – and which must reflect the nature and elements of the crimes set out in the ICTY and ICTR Statutes respectively – and which provides a satisfactory penalty structure at the national level.[206] To what extent a national legal system must "mirror" the Statutes has been somewhat differently interpreted by the ICTY and ICTR, as illustrated in chapter 2.

The rule also renders the respect for fair-trial rights at national level a pre-condition for referral, and while individual fair-trial rights are not enumerated by the rule itself, the respective referral benches have analysed these rights in great detail in their case law. Despite this, as was argued in chapter 2, a glaring discrepancy between the respect for fair-trial rights can and regrettably *does* exist between *theory* and *practice* in both BiH and Rwanda. It is unfortunate that the various referral benches generally profess themselves to be satisfied that the formal legal frameworks provide for fair-trial rights,[207] seemingly without engaging in any profound deliberations about whether these are being respected in practice (despite disquieting reports of violations).

No mention is made in the rule or in the deliberations of the referral benches about qualified persons administering such justice, or other factors that pertain to the implementation of a functional legal framework. Given that these points were elaborated upon in chapter 2, the following section will only briefly outline the situation in BiH and Rwanda, as necessary.

1. Bosnia and Herzegovina

Chapter 2 has in large part addressed the problems that BiH's legal system continues to face in its prosecution of war crimes. It has also criticized rule 11*bis* RPE's overly lenient standard regarding the existence of such a system when contemplating a transfer of cases from the ICTY to countries of the former Yugoslavia. Suffice it to reiterate at this point only, as noted by the OSCE BiH Mission, that the BiH's "complex judicial system is remarkably fragmented", revealing "systematic deficiencies of the BiH judicial system".[208] One pertinent illustration of this complexity is that appeals can be

---

[206] This has been reiterated throughout much of the ICTY and ICTR case law, see, for instance, *Mejakić*, § 43 at the ICTY, and *Bagaragaza* (AC), § 9 at the ICTR.

[207] See, for instance, *Mejakić*, § 81.

[208] OSCE, Delivering Justice in BiH, p. 34.

heard before four different courts without any particular hierarchy among them.[209] Case allocation among the various courts for war crimes prosecutions remains a particular problem, due to, amongst other things, the complex nature of the institutions responsible for reviewing and deciding on case allocation, incongruent interpretation of case allocation criteria, and lack of coordination and co-operation between state and entity institutions.[210] As a result, according to the OSCE BiH Mission, "[i]ssues of conflict or overlap among the different jurisdictions […] represent a serious problem for the overall functioning of the BiH judicial system",[211] which have contributed to significantly hampering war crimes prosecutions in BiH for years.[212]

2. Rwanda

While Rwanda has specifically opted for a multi-tiered accountability mechanism in order to try the high volume of genocide crimes, its legal system is by its very conception highly fragmented, with both formal courts and alternative dispute mechanisms in the form of community-based courts prosecuting the same type of serious international crimes. As set out in detail in chapter 1, Rwanda has a four-tier court system to adjudicate genocide-related offences: at the international level there is the ICTR, and at the national level, there is the High Court of the Republic of Rwanda, which has exclusive jurisdiction to receive transfer cases from the ICTR and from other states, and the military courts with an appellate court (Supreme Court). In addition, and uniquely in this context, Rwanda relied heavily on alternative justice mechanisms in the form of *Gacaca* tribunals, which are community-based courts built on customary practices, encouraging "face-to-face interaction among entire communities",[213] and employing unremunerated laypersons as judges who are elected by the local population.[214] Human Rights Watch calls Rwanda's reliance on multi-layered accountability mechanisms "one of the most ambitious transitional justice experiments in history, blending local conflict-resolution traditions with a modern punitive legal system."[215] Before being mandated to hear complex genocide-related cases starting in 2001, *Gacaca* tribunals were relied upon in the resolution of small local disputes.[216]

---

[209] *Ibid.*, p. 32.

[210] *Ibid.*, p. 34.

[211] *Ibid.*

[212] *Ibid*.

[213] *Thomson/Nagy*, 5 IJTJ 11–30 (2011).

[214] *Ibid*.

[215] Human Rights Watch, Justice Compromised, Summary, p. 1. In this context, see *Knust*'s original analysis on the pluralistic legal model employed in the Rwandan context following the genocide: Strafrecht und Gacaca.

[216] BBC News Africa, Rwanda "gacaca" genocide courts finish work, available at: http://www.bbc.co.uk/news/world-africa-18490348, 18 June 2012 [accessed: 13 May 2013].

Despite the laudable goals in theory, the *Gacaca* courts have attracted significant criticism from various international and local NGOs over the years, *inter alia*, for not respecting internationally recognized fair-trial standards and witness protection measures.[217] The employment of unremunerated lay judges, the banning of lawyers for defendants, and the significant emphasis placed on hearsay evidence, are indicators thereof.[218] Other critiques have focused more generally on the politicization of the *Gacaca* process and state manipulation therein.[219] The complete ban on the prosecution of RPF crimes within the *Gacaca* reinforces this critique.[220] While an analysis of the ongoing debate relating to this human rights critique or a proper evaluation of the "success" of the *Gacaca* tribunals are beyond the scope of this study, it is important to understand – at a very basic level – how these tribunals position themselves in the Rwandan legal landscape, in which the ICTR and its referral practice also play a part. The legal challenges posed by the referral practice – both from the ICTR to the High Court and the national practice from the military to *Gacaca* tribunals, are exacerbated when examined on a whole-scale level. Trying to understand the interaction and trickle-down effects of these practices – taken together – and their consequences on the entire legal landscape may help to re-formulate a more informed and inclusive type of referral practice in the future.

The above mentioned fragmentation has become especially apparent since June 2008, when the formal military courts referred all remaining top-level "category 1" cases to the *Gacaca* courts.[221] While it is beyond the purview of this project to criticize these national referrals, the undeniable fact is that the formal or conventional courts and the community-based courts are built on fundamentally different philosophies and legal frameworks. It thus appears highly problematic to try the same cases before both courts in a deceivingly interchangeable manner. This will be discussed in more detail below.

But even regarding the formal court, Rwanda's High Court, specifically mandated to receive transfer cases from the ICTR and other states, the ICTR Referral Bench

---

[217] See in this regard: Human Rights Watch, Justice Compromised; Amnesty International, Rwanda, Gacaca: A Question of Justice [accessed: 8 July 2014]; Human Rights Watch, Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda [accessed: 8 July 2014]; *Haile*, Rwanda's Experiment in People's Courts, pp. 18 ff.

[218] *Thomson/Nagy*, 5 IJTJ 17 (2011).

[219] *Haile*, Rwanda's Experiment in People's Courts, pp. 25–28; *Powers*, 15 ASIL Insights 1 (2011) [accessed: 14 May 2013], p. 3. See also *Drumbl*, Atrocity, Punishment and International Law, p. 193.

[220] *Thomson/Nagy*, 5 IJTJ 20 (2011). *Stefanowicz*, *Gacaca* Highlights Failure to Deal with RPF Crimes, Interview with *Phil Clark*, Part 1: http://thinkafricapress.com/article/failure-deal-rwandan-patriotic-front-crimes-one-biggest-problems-gacaca-process-has-revealed, Think Africa Press, 11 March 2012 [accessed: 6 Nov. 2012].

[221] *Powers*, 15 ASIL Insights 1 (2011).

initially refused to refer cases to it, finding notable problems with the national legislation governing such transfers and witness protection measures, despite Rwanda's repeated assurances that it was able and willing to try transfer cases.

3. Comparative analysis

The purpose of this section was to underline the facility with which particularly the ICTY Referral Bench disposed of the issue of an adequate legal framework in its deliberations regarding referrals. As has been set out in chapter 2, the Referral Bench held that the formal laws in place were a sufficient guarantee that a functioning legal system was in place in order to allow for transfer, irrespective of disquieting reports regarding how these laws are applied in practice, notably fair-trial rights. In the ICTR context, this discussion took up a much larger part of the deliberations, and the ICTR was significantly more reluctant to transfer cases to Rwanda in the first years of the referral practice, even after the death penalty was abolished. Eventually, in April 2012, eight years after the referral practice was implemented, the first case was physically transferred to Rwanda.[222]

In addition to the foregoing, the referral practice as envisaged by rule 11*bis* RPE insufficiently addresses other contextual issues that could greatly influence the "adequate preparedness" at national level to take on the prosecution of these crimes. These are discussed below.

B. The scale of crimes

Even where there is the will and an adequate preparedness (including the necessary legal framework) to investigate and prosecute international crimes on the part of a certain state, the sheer volume and wide-scale nature of the crimes with which (post-)conflict societies are frequently confronted, can challenge any functioning domestic legal system, not to mention fragile ones that have been or are in the process of being re-constructed following a conflict. The reconstruction of a functioning judicial system capable of prosecuting crimes on a mass scale in a swift manner indeed poses a major challenge, however strong the political will of a given government may be to address these crimes. As noted in a recent Human Rights Watch report relating to Rwanda, given the scale of crimes committed during the

---

[222] See Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, 5 May 2014, S/2014/343, 15 May 2014, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_343.pdf [accessed: 26 June 2014], Annex II.

1994 genocide, "[t]he challenge [of prosecuting these crimes] would have overwhelmed even the world's most advanced justice system."[223]

To deal with this extraordinary situation, BiH and Rwanda – with the help of the international community – have both reconstructed their criminal justice systems by relying on a multitude of courts at various levels in order to address these crimes, with Rwanda opting for the use of an alternative dispute resolution mechanism on a significant scale. While such an inclusive pluralist legal approach to the prosecution of crimes at national level may be necessary to address more swiftly the great volume of crimes committed during the genocide, the evaluation of the *Gacaca*'s actual work in prosecuting genocide-related crimes has not been immensely positive on the whole.[224] In BiH, the setting up of an alternative dispute resolution mechanism to try grave crimes committed during the conflict appears to never have been seriously envisaged.

1. Bosnia and Herzegovina

The conflict in the former Yugoslavia between 1992 and 1995, which ended with the signing of the *Dayton Peace Accord* in December 1995, cost an estimated 150,000 to 250,000 lives,[225] and caused the mass uprooting and displacement of populations.[226] In addition to mass killings, the crimes included abductions and enforced disappearances,[227] and the organized and systematic enslavement, torture, and rape of women on a mass scale.[228] The ongoing commission of wide-scale crimes in the territory of the former Yugoslavia, notably in Bosnia and Herzegovina, led the international community to establish the ICTY. The ICTY's objective was therefore to halt and to prosecute persons for the commission of serious violations of international humanitarian law since 1 January 1991, and thereby to "contribute to the maintenance and restoration of peace".[229]

---

223 Human Rights Watch, Justice Compromised, p. 2. Emphasis added.

224 See in this context: *Stainier et al.*, Vade-mecum; Penal Reform International, Eight Years On; Human Rights Watch, Justice Comprised; Amnesty International, Rwanda, Gacaca, A Question of Justice. See also: Avocats sans Frontières, Monitoring des Juridictions Gacaca: Phase de jugement [accessed: 7 July 2014].

225 While the Sarajevo-based Research and Documentation Centre estimates the final figure not to exceed 150,000, the majority of the estimates range between 200,000 and 250,000. Source: OSCE, War Crimes Trials, p. 3, fn. 2.

226 OSCE, War Crimes Trials, p. 3.

227 Amnesty International, The Right to Know [accessed: 7 July 2014].

228 UNSC resolution 827, § 3. See, for example, ICTY press release, Gang rape, torture and enslavement of Muslim women, The Hague, 27 June 1996, CC/PIO/093-E, available at: http://www.icty.org/sid/7334 [accessed: 9 July 2014].

229 UNSC resolution 827, § 6.

Mindful of the massive scale of crimes and the sheer impossibility to try all these crimes at the ICTY, the international community conceptualized an international tribunal that would have *primary* but *concurrent* jurisdiction vis-à-vis national courts, so that national courts could also take on the cumbersome task of investigating and prosecuting these highly complex international crimes.[230] Indeed, despite the loss of many members of the legal community as well as the destruction of infrastructure, domestic courts did start investigating and prosecuting war crimes during and immediately following the conflict.[231] Chapters 1 and 2 have already elaborated in some detail the formal and actual relationship between international, national and local courts in BiH and require no further mention here. Suffice it to state that the difficulties of prosecuting these crimes at national level were manifold at the beginning and included great juridical and logistical challenges due, *inter alia*, to the complexity of the crimes in question, the massive scale on which they were committed, and the fragmented legal framework of the two-entity state.[232] As the previous analysis has demonstrated, these factors have to some extent remained challenges to this day. However, in the early days, as an OSCE report sets out, these difficulties led to a number of highly problematic outcomes in the investigation and prosecution of these crimes at national level, such as arbitrary arrests, ineffective investigations, unfair trials (including excessive and systematic delays) and what the OSCE Mission terms "dubious decisions".[233] This then led to a negative perception of the judicial system on the part of the local population, and in turn, risked the very notion of the rule of law.[234] While much appears to have improved since these early days, despite some fragmentation, a certain distrust in the judicial system remains present to this day.[235]

National trials started to increase substantially after the ICTY "Rules of the Road" (RoR) procedure was revoked as part of the Completion Strategy.[236] Despite these efforts, there is still a significant backlog of cases in BiH,[237] a problem that the National War Crimes Strategy was specifically adopted to resolve.

---

230 Article 9(2), ICTY Statute.

231 OSCE, War Crimes Trials, p. 4.

232 *Ibid*.

233 *Ibid.*, pp. 4–5.

234 *Ibid.*

235 See, for instance, *Kaletović*, BiH court prepares to close war crimes cases, Southeast European Times, Sarajevo, 13 April 2013, available at: http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/blogreview/2013/04/13/blog-03 [accessed: 16 May 2013].

236 OSCE, War Crimes Trials, p. 5. Amnesty International, Bosnia and Herzegovina: Submission for European Commission Progress Report [accessed: 18 March 2013].

237 For instance, the OSCE states that "[c]urrent estimates indicate that BiH has over 1,300 cases involving some 8,000 suspects in its backlog of war crimes cases", available at: http://www.oscebih.org/default.aspx?id=70&lang=EN [accessed: 15 May 2013].

2. Rwanda

While official numbers vary between 800,000 and 1,000,000 persons killed during the three-month genocide (either way representing a shockingly high number of deaths in such a short time period), there is consensus that the effects of the genocide took a devastating toll on Rwandan society, including the total destruction of the criminal justice system.[238] As noted by the Rwandan representative to the Security Council: "On the same scale, in a country the size of the United States this would be equivalent to the loss of over 37 million Americans in under three months."[239] Rwanda's legal system was not only overwhelmed by the great volume of genocide crimes committed but also by the extremely high number of potential perpetrators. Indeed, according to the Rwandan authorities' estimates in 2005, an astonishingly high number of persons – about 761,000 – representing a little under half of the adult Hutu male population in 1994, were suspected of being involved in the killings and would subsequently be accused of genocide-related crimes.[240]

As a result of the conventional criminal courts being overwhelmed by the number of genocide-related cases to try, and the generally "slow and costly pace of formal justice in Rwanda, constrained by the exigencies of due process",[241] (according to Human Rights Watch, only 222 cases had been concluded between January 2005 and March 2008),[242] Rwanda additionally opted for a model of "mass justice for mass atrocity".[243] The modalities of these community courts were discussed in some detail in chapter 1 and require no additional elaboration here.

Since 2005, *Gacaca* tribunals have been active on a massive scale, with over 12,000 *Gacaca* tribunals trying as many as 1.2 million cases,[244] so that the majority of the genocide-related cases is tried nationally. Initially, the cases were divided into four categories, as detailed in chapter 2: "category 1" cases being the most serious, were tried by conventional courts (specialized military tribunals), whereas "category 2–4" cases were tried at the *Gacaca* level.[245] As a result of looming deadlines for the

---

238 Human Rights Watch, Justice Compromised, pp. 13 ff.

239 See UNSC, The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States. 49th Sess., 3453 mtg., at 14, UN Doc. S/PV.3453 (1994), cited in *Akhavan*, 7 Duke J. Comp. & Int'l L. 328–329 (1996–1997).

240 Human Rights Watch, Rwanda Country Summary, available at: http://hrw.org/wr2k6/pdf/rwanda.pdf [accessed: 20 Sept. 2011], p. 1. National Service of Gacaca Jurisdictions (SNJG), available at: http://www.inkiko-gacaca.gov.rw/pdf/Achivements%20in%20Gacaca%20Courts.pdf [accessed: 21 Sept. 2011].

241 *Thomson/Nagy*, 5 IJTJ 16 (2011).

242 Human Rights Watch, Justice Compromised, p. 24.

243 See in this context: *Waldorf*, 79 Temp. L. Rev. (2006).

244 Human Rights Watch, Justice Compromised, p. 1.

245 *Ibid.*, pp. 19 ff.

completion of the *Gacaca* courts' work, pressure grew on the judges to speed up trials, the result being that sometimes very heavy sentences (life imprisonment) were imposed in trials conducted in less than an hour's time.[246] Criticisms mounted from human rights groups that the rapidity was prioritized over the quality of trials.[247] To add to this time pressure, not only were new "category 2–4" cases emerging, but the Parliament adopted a referral practice in which the remaining majority of "category 1" cases were transferred to *Gacaca* tribunals from 1 June 2008 onwards.[248]

The fact that 15,263 "category 1" cases were concluded between 1 June 2008 and May 2011 at the *Gacaca* level, compared to 222 cases at the ordinary court level in practically the same amount of time[249] – the former representing nearly 70 times the number of cases than the latter – is alarming evidence that some of the most serious and complex genocide-related cases were processed at spectacular speed.[250] This rapid processing is particularly disquieting given that about 90% of these cases were highly sensitive, involving charges of rape and sexual violence,[251] even though they were held behind closed doors *(huis-clos)* for the protection of the victims.[252] Compounding the complexity of the matter, the closed-door principle in this context has come under attack for not being congruent with the very idea underlying the community-based *Gacaca* system.[253]

In addition to the speed at which these cases were tried and serious concerns regarding the application of fair-trial standards to the *Gacaca* court proceedings, the latter which are only enhanced by the closed-door nature of the proceedings,[254] the transfer of cases from conventional criminal courts to the *Gacaca* courts starting in 2008 had an enormous bearing on the outcome: "category 1" cases tried at the formal military courts and those tried at the community-based *Gacaca* level are treated considerably differently, consequently endangering fundamental legal principles, such as equality before the law.

---

246 Human Rights Watch, Justice Compromised, p. 24.

247 *Ibid*. See also: Avocats sans Frontières, Monitoring des Juridictions Gacaca: Phase de jugement, p. 21 [accessed: 7 July 2014]; Penal Reform International, The Contribution of the Gacaca Jurisdictions to Resolving Cases Arising from the Genocide [accessed: 8 July 2014]. PRI notes that the "speed objective sought by the Gacaca is in opposition to the requirement for serenity and fairness in trials" (p. 42); Penal Reform International, Eight Years On, p. 63.

248 Information coming from the Human Rights Watch interview with SNJG Executive Secretary *Domitilla Mukantaganzwa*, Kigali, 11 March 2008, contained in: Human Rights Watch, Justice Compromised, p. 24. fn. 51.

249 *Ibid.*, pp. 24–25.

250 *Ibid.*, p. 24.

251 *Ibid.*

252 *Ibid.*, p. 112.

253 *Ibid.*, p. 113.

254 *Ibid.*, p. 112.

While the consequences of this purely national referral practice are not the focus of this study, it is crucial to emphasize that they do put into stark perspective the difficulties faced when multiple accountability mechanisms are simultaneously employed to investigate and prosecute international crimes of mass proportions at the national level. This is considerably aggravated by the fundamentally different approaches to "justice" of these various mechanisms. Against this very complex setting, in which the sheer scale of the crimes weighs heavily on the assorted mechanisms set up to prosecute genocide-related crimes, it is questionable whether the contours and execution of the national referral practice, implemented by the Rwandan government to speed up the pace of national genocide prosecutions, is not more detrimental than productive to its aims of "achieving truth, justice, and reconciliation."[255]

Given the foregoing context and the fact that until June 2011, the ICTR Referral Bench did not deem the Rwandan High Court capable of providing sufficient fair-trial guarantees to enable transfers, the ICTR referral practice did have the following concrete impact on the Rwandan legal landscape: it spurred a number of important legislative changes including the abolition of the death penalty, and clarified and/or imposed certain fair-trial standards for the transfer of cases to the Rwandan High Court. While this should be considered a tangible success for the ICTR referral practice per se, the fact that these legislative changes apply exclusively to the transfer of cases from the ICTR and other states, and not to the majority of genocide cases that are processed at the national level, is highly problematic. Given the fundamentally different legal philosophies underlying the various levels of the Rwandan court system, a solution that could be envisaged for Bosnia and Herzegovina's multi-tiered conventional court system, namely a certain harmonization of national criminal laws, is not envisageable as such in the Rwandan context.

3. Comparative analysis

Given that in both BiH and Rwanda, the criminal justice systems were severely compromised following the respective conflicts, as discussed above, the massive scale of crimes committed in both contexts compounded the complex problems related to the national prosecution of these crimes. In the foregoing section the scale of the crimes has been examined as one fundamental facet challenging the effectiveness of the national criminal justice systems. Thus far, neither the rule 11*bis* RPE criteria nor the respective Referral Bench deliberations have explicitly addressed this element in deciding whether the national criminal justice mechanism is able or not to receive transfer cases. While the scale of the crimes may not seem crucial in the context of the ICTR referral practice to the High Court itself, it is, as the foregoing section has demonstrated, an element that goes to the heart of many important legal

---

[255] Government of Rwanda website, available at: http://www.gov.rw/about-the-government/justice-reconciliation/ [accessed: 10 June 2012].

precepts, such as the fairness of the trials as well as equality before the law. Notably in the context of Rwanda, the large-scale nature of the crimes to be tried at the national level, against the backdrop of a weak and varied system, has had a major bearing on the quality of individual trials.

C. Political sensitivity of cases and impact on judicial independence and impartiality

Even where an adequate legal framework is generally in place, including a proper penalty structure, etc., the lack of judicial independence and impartiality – as a cornerstone of internationally recognized fair-trial rights – may still threaten the very foundation of a country's national justice system. One of the major challenges in prosecuting wide-scale international crimes at national level is that oftentimes trials are highly politically sensitive. This sensitivity can be attributable to a number of factors, such as tensions between ethnic groups at national level, or to the status of the accused (for instance, a former Head of State), or more generally to some form of state involvement in the commission of the crimes at some level.

As regards the latter reason, constellations abound which can lead to a lack of political will to prosecute these crimes nationally, such as, for instance, where the implicated state machinery remains in power following a conflict, or the incumbent government is a sympathizer of the previous one and/or has also committed serious crimes against the population in taking over power. Concrete examples of such constellations are numerous today, a prominent one being the genocide in Darfur, in which the current government is allegedly significantly implicated.[256] In fact, due to the government's unwillingness to genuinely prosecute these crimes at national level, the UN Security Council referred the case to the ICC in 2005.[257] As a result of its investigations, the ICC has issued an arrest warrant against the current president, *Omar Hassan Ahmad Al Bashir*, charging him with war crimes and crimes against humanity,[258] and has issued arrest warrants against other high-ranking government members.[259] Given the foregoing lack of genuine willingness on behalf of an allegedly seriously implicated government in the prosecution of crimes

---

[256] The fact that the ICC has issued a warrant of arrest against a number of current government officials, not least against the current Sudanese President, *Omar Hassan Ahmad Al Bashir*, for his alleged involvement in the genocide, is telling, see https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF [accessed: 15 May 2013].

[257] UNSC resolution 1593 (2005), S/RES/1593 (2005), 31 March 2005.

[258] Situation of Darfur, *The Sudan: Prosecutor v. Omar Hassan Al Bashir*, Warrant of Arrest, ICC-02/05-01/09, 4 March 2009, p. 7.

[259] For instance, the ICC has issued a warrant of arrest against *Abdel Raheem Muhammed Hussein*, currently Minister of National Defence and former Minister of the Interior and former Sudanese President's Special Representative in Darfur, ICC-02/05-01/12, 1 March 2012.

against its own civilian population, a referral practice as envisaged by rule 11*bis* RPE is merely unthinkable.

Where cases *are* indeed prosecuted nationally, the aforementioned scenarios can lead to undue pressure being exerted on the judiciary, thereby violating the judicial independence and impartiality of a trial. In both BiH and Rwanda, various international institutions and NGOs have indeed expressed concern about too much outside pressure being exerted on the judiciary for different reasons throughout trials at national level.

1. Bosnia and Herzegovina

In the case of Bosnia and Herzegovina, the issue of political sensitivity of cases stems, *inter alia*, from tensions between the three primary communities, the Serbs, Croats, and Muslims, which, to borrow the words of a former Senior Trial Attorney, *Saxon*, each generally view themselves "as a victim and not as a perpetrator of aggression and atrocities against the other parties."[260] Indeed, a study entitled "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors" illustrates that legal professionals taking part from each national community identified themselves more with members of their respective national groups as victims of the conflict than as members of the legal profession in general.[261]

While the situation is highly complex and the multifarious details lie beyond the scope of this section, suffice it to state here that these tensions have generally contributed to a lack of political support (to the extent of downright hostility) towards the BiH State Court and the BiH Prosecutor's Office.[262] Instances of interference with and undue pressure on the work of these institutions are detailed in a disquieting report by the OSCE BiH Mission in 2010.[263] In particular, according to the report, political and other prominent figures from both entities have attacked these institutions – as a result of investigations or proceedings having been initiated against them – for lacking jurisdiction, for being biased (anti-Serb), and for being controlled by the international community through the employment of international prosecutors and judges.[264] These concerns are reiterated by the OSCE BiH Mission, which observes continued "campaigns of political attacks on judicial institutions, interference

---

[260] *Saxon*, 4 J. Hum. Rts. 562 (2005).

[261] Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors, Human Rights Center, International Human Rights Law Clinic at the University of California and the Centre for Human Rights at the University of Sarajevo, May 2000, available at: http://www.law.berkeley.edu/files/IHRLC/Justice_Accountability_and_Social_Reconstruction.pdf [accessed: 15 May 2013], pp. 43–45.

[262] OSCE, Delivering Justice in BiH, p. 85.

[263] *Ibid*.

[264] OSCE, Independence of the Judiciary – Undue Pressure on BiH Judicial Institutions [accessed: 25 March 2013], p. 3.

in proceedings, attempts to undermine existing judicial and legal reforms, and denial of war crimes established to have occurred through binding legal decisions."[265]

Referring in particular to accusations about ethnic bias in the selection and treatment of cases, and the prominent claim that only Serbs are tried for crimes committed but that the crimes committed against them are not, the OSCE BiH Mission notes that it has found no evidence thereof throughout its monitoring activities.[266] The National War Crimes Strategy, adopted in BiH in 2008, which explicitly stipulates the Prosecutor's objective to prioritize the prosecution of persons "most responsible" rather than to satisfy an ethnic balance in prosecutions,[267] is a further attest thereto. How unfounded these allegations are in practice can be ascertained when looking at the distribution of judges and prosecutors in state-level judicial institutions, in which judges from all three national groups are equally represented and individuals of Serb ethnicity also have leadership roles in these institutions.[268] In addition to the foregoing, the OSCE BiH Mission addresses concerns (voiced by judicial officials) regarding the threatened or actual budget cuts made to the BiH justice sector. While it agrees that further budget cuts would inevitably impact the work of the judiciary in trying complex cases, the OSCE concludes that there is no evidence to suggest any intention to "exert pressure or to interfere with the state judicial institutions".[269]

This section will not elaborate on the controversies of what the OSCE BiH Mission terms the "campaign of de-legitimization of the judiciary".[270] Suffice it to state at this point that the overall political atmosphere is highly problematic as regards the perception of the ICTY in the region by certain groups in general,[271] and the referral practice as part of the ICTY Completion Strategy in particular. According to the OSCE BiH Mission, this "de-legitimization", while not in practice affecting the independence and impartiality of the work of these institutions per se, did have the detrimental consequence of undermining public support for its work in BiH.[272]

---

[265] OSCE, Delivering Justice in BiH, p. 8.

[266] OSCE, Independence of the Judiciary, p. 4.

[267] OSCE, Delivering Justice in BiH, p. 47. Article 1.2(b) of the National War Crimes Strategy stipulates the objective to "prosecute as a priority the most responsible perpetrators before the Court of BiH, with the help of the agreed upon case selection and prioritization criteria", p. 4.

[268] OSCE, Independence of the Judiciary, p. 4.

[269] *Ibid*.

[270] OSCE, Delivering Justice in BiH, p. 86.

[271] Interview study of Bosnian judges and prosecutors, pp. 34 ff. See also, *Fletcher/Weinstein*, 24 Hum. Rts. Q. 600 (2002).

[272] OSCE, Independence of the Judiciary, p. 4.

[272] *Ibid*.

Nevertheless, the OSCE BiH Mission still states that "[t]he Court has clearly demonstrated on several vital occasions that it can and will adjudicate cases impartially and independently from public and political pressure."[273]

Despite its built-in monitoring function following a referral to the national jurisdictions under rule 11*bis* RPE, the foregoing scenario in which undue pressure is exerted on the judiciary risks undermining one of the very objectives of referring cases back to national courts as a way of achieving reconciliation among the affected communities. Although the ICTY has been rather "successful" in sending cases to the BiH State Court, despite preliminary obstacles, these referrals do not appear to have lifted the general mistrust of the work of the BiH State Court among BiH citizens.[274]

2. Rwanda

As discussed in chapter 2, thus far the ICTR Referral Bench has only examined judicial independence in the context of a determination whether a single judge is appropriate to hear highly sensitive genocide cases. To briefly summarize, in the *Munyakazi* case, the ICTR Referral Bench refused transfer of a case to Rwanda, *inter alia*, on the basis that a single judge hearing the case at the High Court would violate the accused's right to be tried before an independent and impartial tribunal.[275] The Referral Bench recognized that guarantees of judicial independence exist in Rwandan law, and that this idea is incorporated in the Rwanda Transfer Law. However, it relied on previous actions by the Rwandan government in response to ICTR decisions and adverse decisions by foreign judges calling for indictments against high-ranking RPF officials for their involvement in the commission of serious crimes,[276] to infer a risk of pressure on the judiciary, with an increased risk in the case of a single judge.[277] Indeed, the Referral Bench deemed this risk to be disconcerting enough to distinguish between Rwanda's fair-trial rights in *theory* and those implemented in *practice*.[278] It found that the set-up of a single judge hearing a case "may lead to direct or indirect pressure being exerted on judges to produce judgements in line with the wishes of the Rwandan Government", such that "there is a real risk that a single judge will not be able to resist any such pressure".[279] The Referral Bench

---

[273] OSCE, Delivering Justice in BiH, pp. 46–47.

[274] *Martin-Ortega/Herman*, Hybrid Tribunals and the Rule of Law, available at: https://www.uel.ac.uk/~/media/Main/Images/RoyalDocksBusiness/CHRC-PDFs-Presentations-and-other-Documents/HybridTribunalsandtheRuleofLaw.ashx?la=en [accessed: 7 July 2014], p. 22; OSCE, Delivering Justice in BiH, p. 8.

[275] *Munyakazi*, § 40.

[276] *Ibid*., § 41.

[277] *Ibid*., § 40.

[278] *Ibid*., § 46.

[279] *Ibid.*, § 48.

held that the risk is increased by the gravity of the crimes and the fact that the adjudication thereof will take place in the country in which the crimes took place.[280] As a result, the Referral Bench held the High Court's composition to be in violation of the right to be tried by an independent tribunal, thereby justifying its decision not to transfer the case to it.[281]

As explained in chapter 2, this decision was subsequently overturned by the Appeals Chamber, which held that although single judges hearing highly politically sensitive cases was indeed worrisome, it relied on international legal instruments (which do not require a certain number of judges), and held that the accused's rights to a fair trial were not per se violated simply by the fact that a single judge would be hearing the case.[282] It also held that the Referral Bench did produce sufficient evidence to prove a heightened risk for single judges as opposed to a panel of judges.[283] It further held that the Referral Bench erred in establishing such a risk as regards Rwanda's (re)actions, since, according to the Appeals Chamber, the Referral Bench did not take into account more recent actions, which demonstrated cooperation by the Rwandan government towards the ICTR.[284] As regards adverse reactions to foreign (calls for) RPF indictments, the ICTR Appeals Chamber argued that such reactions themselves are not a reliable indication of how the Rwandan government would view verdicts of national courts.[285] While this issue was raised in subsequent decisions, the Referral Benches strictly followed the Appeals Chamber's findings after *Munyakazi*.

Although it is not the intention to resolve the issue of the single judge sitting in highly politically sensitive cases at national level per se, suffice it simply to state at this juncture that the Appeals Chamber's findings as regards Rwanda's actions appears at odds with reports of RPF crimes.[286] The relevance of this issue is particularly noticeable in the ICTR context, where members of the Rwandan RPF, who are allegedly responsible for a large number of killings following the 1994 genocide,[287]

---

[280] *Ibid.*, § 47.

[281] *Ibid.*, § 49.

[282] *Munyakazi* (AC), § 26.

[283] *Ibid.*, §§ 28–29.

[284] *Ibid.*, § 28.

[285] *Ibid.*

[286] Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994), S/1994/1125, 4 Oct. 1994, §§ 30, 79, 82, 146–147. See also Report on the Situation of Human Rights in Rwanda, submitted by *R. Degni-Ségui*, Special Rapporteur of the Commission of Human Rights, E/CN.4/1995/7 of 28 June 1994, §§ 22, 49, 63.

[287] The UN High Commission for Refugees (UNHCR) estimates that approximately 30,000 civilians were killed by RPF soldiers. This figure is cited in several reports, see, for instance, *Cooke, Jennifer G.*, Rwanda: Assessing Risks to Stability, Center for Strategic and International Studies (CSIS) Africa Program, June 2011, available at: http://csis.org/files/

have not been formally indicted by the ICTR, despite evidence of such crimes.[288] As such, a distinction between crimes committed by Hutu extremists against Tutsis and Hutu moderates on the one hand, and those committed by the RPF on the other, may be necessary when regarding Rwanda's actions towards ICTR and foreign judgments.

The fact that RPF crimes have been investigated but not prosecuted by the ICTR has been heavily criticized by a number of NGOs.[289] In addition, according to Human Rights Watch, the non-prosecution on behalf of the ICTR must be viewed as a "failure of justice" since "the choice is not between international and domestic justice but between international justice and impunity."[290] The ICTR's current Chief Prosecutor, *Hassan Jallow*, explained his choice to refer many of the investigative files to the Rwandan Prosecutor General on the basis of his belief that "the prosecution of cases of crimes committed by the members of the RPF, where amply supported by concrete evidence, have a potentially greater impact on national reconciliation if conducted effectively and in accordance with fair-trial procedures by the Rwandan authorities themselves."[291] While some low-level RPF soldiers have been prosecuted in Rwandan courts, the *Kabgayi* case has been criticized by NGOs, such as Human Rights Watch, as an example of the Rwandan government's reluctance to try more senior officials involved in the commission of the crimes tried, against whom there is, according to Human Rights Watch, "strong evidence".[292] For instance, in a "category 2" case transferred by the ICTR Prosecutor, and tried by a Rwandan military court in 2008, two most senior officers were acquitted,

---

publication/110623_Cooke_Rwanda_Web.pdf [accessed: 16 May 2013], p. 8. The actual report by the UNHCR has never been made public (fn. 15).

[288] See in this context: Letter to ICTR Chief Prosecutor *Hassan Jallow* in Response to His Letter on the Prosecution of RPF Crimes, 14 Aug. 2009, available at: http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime [accessed: 11 May 2011].

[289] Human Rights Watch has strongly voiced criticism, see, for example, exchange of letters with ICTR Chief Prosecutor, *Jallow*, and press release: "Rwanda Tribunal Should Pursue Justice for RPF Crimes, Failure to Act Risks Undermining Court's Legacy", 12 Dec. 2008, available at: http://www.hrw.org/news/2008/12/12/rwanda-tribunal-should-pursue-justice-rpf-crimes [accessed: 16 May 2012]; Amnesty International, Rwanda: Report of Killings and Abductions by the Rwandese Patriotic Army, April – August 1994, AI Index 47/16/94, 20 Oct. 1994, available at: http://www.amnesty.org/en/library/asset/AFR47/016/1994/en/39bce4f0-f8c1-11dd-b40d-7b25bb27e189/afr470161994en.pdf [accessed: 16 May 2013].

[290] Letter to ICTR Chief Prosecutor *Hassan Jallow* by Human Rights Watch Executive Director, *Kenneth Roth*, http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime [accessed: 11 May 2011].

[291] Letter to *Kenneth Roth*, Executive Director of Human Rights Watch, by *Hassan Jallow*, ICTR Chief Prosecutor, 22 June 2009, available at: http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response_0.pdf [accessed: 14 June 2013].

[292] Human Rights Watch, Letter to ICTR Chief Prosecutor *Hassan Jallow*, 14 Aug. 2009 [accessed: 14 June 2013].

while two low-level officers were sentenced to imprisonment of five years, leading Human Rights Watch to call the national prosecution of RPF crimes "political whitewash".[293]

While conceding that there are obvious advantages to domestic prosecutions in fighting impunity because they can help affected communities partake in these trials and thus have a greater impact, according to Human Rights Watch, the fact that many RPF officials behind the 1994 crimes are currently senior government or military officials gives the Rwandan government a strong-vested interest in not prosecuting them, thereby creating a glaring impunity gap.[294]

In addition to the foregoing, and as previously mentioned, the unique set-up of the *Gacaca* system as an informal community court employing lay judges has been severely criticized for not providing adequate safeguards against political influence and false testimony, etc.

3. Comparative analysis

The foregoing sections demonstrate that in both BiH and Rwanda, ethnic tensions are still very present at all levels of the social and political spectrum. These tensions are to a great extent influencing the perceptions of national and international war crime and genocide prosecutions. And perhaps, to some extent, they have had some bearing on the selection of cases before the national courts, and perhaps even the ICTR, the latter of which has regrettably not tried any RPF crimes, despite strong evidence.[295] There is, however, insufficient reliable evidence to determine whether the lack of trust in these institutions has had any bearing on the objectivity and impartiality of the judges, notably at the state court level.

---

[293] HRW News, Rwanda: Justice after Genocide – 20 years on, 28 March 2014, available at: http://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years [accessed: 8 July 2014], pp. 8, 12.

[294] Human Rights Watch, Letter to ICTR Chief Prosecutor *Hassan Jallow*, 14 Aug. 2009 [accessed: 14 June 2013].

[295] In addition to the foregoing, troublesome reports exist about former Chief Prosecutor of the ICTY and ICTR, *Carla del Ponte*, being removed from her post at the ICTR due to her plans to prosecute high-ranking RPF members for involvement in the 1994 crimes. See a very informative background discussion on the politics behind case-selection at the ICTR in *Reydams et al.* (eds.), International Prosecutors, pp. 319 ff. While it is beyond the scope of this section to engage in the polemics of this discussion, suffice it to say here that the political sensitivity of the crimes being tried at the ICTR may serve to complicate the implementation of the UN Security Council referral practice under rule 11*bis*.

D. Financial and logistical assistance from the international community

Assistance from the international community is an important element in helping conflict and post-conflict societies rebuild themselves, including oftentimes partially or fully destroyed criminal justice systems. Such assistance can take a number of different forms, from financial assistance to logistical assistance in judicial capacity building, etc. The experience regarding such involvement has been very different in Bosnia and Herzegovina on the one hand, and Rwanda on the other, and may help explain, at least in part, why the referral practice has initially, at least as regards its first objective, to reduce the caseload of the international tribunals, been more successful in BiH than in the context of Rwanda.

1. Bosnia and Herzegovina

In BiH, the international community mobilized itself in a number of significant ways. First of all, it injected a considerable sum of money (many billions of dollars) into the reconstruction of BiH.[296] In fact, according to one calculation, the BiH has benefitted from more per capita assistance than any of its European counterparts under the Marshall Plan.[297] Second, as noted above, it established the ICTY in 1993 in order to stop and to try individuals for the commission of serious violations of international humanitarian law, occurring on the territory of the former Yugoslavia since 1 January 1991, and thus to ultimately "contribute to the maintenance and restoration of peace".[298]

In addition to "indirectly" assisting BiH courts by taking on a number of complex cases through its own investigations and prosecutions, the ICTY directly assisted domestic courts with their investigation and prosecution of cases at national level by acting as an international oversight mechanism through its RoR Unit, as mentioned in detail in chapter 1.[299]

Further, following considerations about the implementation of an ICTY Completion Strategy, including a referral of ICTY cases to domestic courts, the Office of the High Representative (OHR), as the *ad hoc* international institution mandated to oversee the implementation of civilian aspects of the Dayton Peace Agreement,[300] assisted with reforms to the legal system of BiH by proposing the adoption

---

296 *Pasic*, Bosnia's Vast Foreign Financial Assistance Re-examined [accessed: 26 March 2013].

297 *Ibid.*

298 UNSC resolution 827, § 6.

299 How much "assistance" the RoR procedure really was for BiH courts has been subject of some criticism, see OSCE, Progress and Obstacles, p. 47.

300 Office of the High Representative, general information available at: http://www.ohr.int/?page_id=1139 [accessed: 17 May 2013].

of a new legal framework, including the new criminal code and the code of criminal procedure.[301]

Together with the ICTY, the OHR was also highly involved in the conception of the War Crimes Chamber (WCC) within the BiH State Court in order to receive referral cases from the ICTY as well as to hear the "most sensitive" cases.[302] The WCC as part of the hybrid BiH State Court (including both international and national components) started its work in 2005 and in its start-up phase enjoyed significant international funding, which allowed it not only to build modern, technologically advanced courtrooms but also to fund well-trained domestic and international staff.[303] In fact, international judges and prosecutors were appointed so as to assist national judges in the implementation of international standards in national war crime proceedings, and were, in the words of former ICTY President *Robinson*, "critical to protecting the integrity of the judiciary".[304]

The President of the BiH State Court attributes the Court's success entirely to the international community's involvement in the work of the Court, *inter alia*, through the employment of international judges and prosecutors, which he deems to be "invaluable" and to contribute to the "building of the modern and efficient Court that respects the highest international standards in its work."[305] As the Court's President goes on to say, the support of the international community has allowed the Court to manage:

> "…within the shortest delays, not only to set up the necessary infrastructure and capacities to handle the most complex cases, but also to show the readiness to try cases involving persons charged with the most serious crimes."[306]

While the international community's efforts, at various stages of the reconstruction of the BiH criminal justice system must be considered positive, the majority of the logistical and financial participation has – at least initially – concentrated on the state-level institution, such that it has been argued that "the capacity of other courts to try war crimes cases has been neglected."[307] Recently, however, the European Union has launched a multi-million euro project, the War Crimes Justice Project, in

---

[301] *DeNicola*, DePaul Rule of L. J. 3 (2010).

[302] Indeed, the OHR and ICTY issued a joint decision about the necessity of establishing a war crimes chamber in the BiH State Court: *Barria/Roper*, 9 Hum. Rights Rev. 7 (2008).

[303] *Barria/Roper*, 9 Hum. Rights Rev 8 (2008), noting that 16.1 million euro were pledged for the first two years of court's functioning.

[304] However, the presence of international judges has met with quite some controversy in certain circles. See in this instance, *Šarić, Velma*, Bosnia: Future of International Judges and Prosecutors in Doubt TRI Issue 613, 16 Sept. 2009, available at: https://www.iwpr.net/global-voices/bosnia-future-international-judges-and-prosecutors-doubt [accessed: 7 Jan. 2013].

[305] *Kreso, Meddida*, 2nd Public Information Brochure, Court of Bosnia and Herzegovina, 2007. Information Brochure. Available at: http://www.sudbih.gov.ba/files/docs/brosura/brosura_eng.pdf [accessed: 10 Feb. 2011], p. 4.

[306] *Ibid.*

[307] *Barria/Roper*, 9 Hum. Rights Rev. 11 (2008).

association with the OSCE Office for Democratic Institutions and Human Rights (ODIHR), and in partnership with the ICTY and the UN Interregional Crime and Justice Research Institute (UNICRI), in order to train legal professionals at all levels.[308]

While the ICTY Completion Strategy is generally held to be responsible to have spurred important legal reform at the BiH state level, whether it will have long-term effects on the prosecution of war crimes at the entity level will depend, in large part, on the developments in the BiH justice sector on the whole. In addition, as mentioned previously, the difficulties faced by the entity courts in the prosecution of war crimes cannot solely be attributed to the lack of resources coupled with the high volume of cases tried at the entity level, but must also be viewed as the consequence of the BiH government structure – with its two entities – arising out of the Dayton Peace Accord,[309] in which decentralized judicial functions complicate the uniform and effective prosecution of war crimes by these courts. The disjointed legal framework – with old and new criminal codes operating at different levels simultaneously – compound these problems. As detailed above, the ECtHR's finding in *Maktouf* has seriously complicated the already difficult implementation of the National War Crimes Strategy at all levels, notably as regards the harmonization of laws and tight deadlines set forth. Particular concerns arise around the backlog of cases as well as the participation of victims in the re-trials, following the Constitutional Court's annulment of BiH State Court's verdicts. The fact that the high number of cases transferred by the BiH State Court to entity-level courts[310] has not led to any concrete results, cannot be attributed solely to a lack of resources, according to ICTY Chief Prosecutor *Brammertz*. According to him, "[t]here is little commitment by the responsible institutions to prioritise war crimes investigations and prosecutions."[311]

As a result of the foregoing, the difficulties in the implementation of the ICTY referral practice (chapter 2) and its ultimate "success" must be evaluated against the background of these various factors (chapter 4).

2. Rwanda

Contrary to the relatively rapid and concrete action taken by the international community during and following the conflict on the territory of the former Yugoslavia, it was considerably more passive in the context of Rwanda, despite sustained and

---

308 http://wcjp.unicri.it/project/ [accessed: 7 July 2014].

309 *Barria/Roper*, 9 Hum. Rights Rev. 12 (2008).

310 See in this context: Data on Transfer Cases, available at: http://www.sudbih.gov.ba/files/docs/Podaci_o_prenosu_predmeta_-8_03_2012_-_eng.pdf [accessed: 30 June 2014].

311 Address of *Brammertz* to the United Nations Security Council, 5 June 2014, available at: http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/140605_proc_brammertz_un_sc_en.pdf [accessed: 30 June 2014], p. 2.

manifest evidence of massive genocide-related crimes, including incitement to genocide long before the actual occurrence of the three-month genocide in 1994.[312] While the amount of foreign financial aid to Rwanda post-genocide in general is considered to be high,[313] according to one report, in Rwanda, at least in the initial years, the pace of national disbursement has been "painfully slow",[314] and in the first years following the genocide, figures show that a disproportionate amount of funding had gone to refugees outside of Rwanda rather than rehabilitation and reconstruction within Rwanda itself.[315]

As regards the involvement of the international community in providing direct logistical assistance in the reconstruction of a nearly shattered national criminal justice system, some rather great discrepancies can be observed between BiH on the one hand, and Rwanda on the other. Although the ICTR was established by the international community in 1995 to try the masterminds of the genocide, and a certain amount of international financial aid was contributed to this end,[316] a direct international assistance within Rwanda's judicial system – akin to a sort of "Rules of the Road" system provided by the ICTY – was not present. This absence must undoubtedly be viewed in light of the fact that there was no national judicial system to speak of in the time period following the genocide. However, even when national courts started the slow and cumbersome process of trying genocide cases, the direct involvement of international justice – for instance, by way of presence of international judges or prosecutors in national trial proceedings – remained limited. One factor contributing to this absence may have been President *Paul Kagame's* "deep contempt for the international community and its claims to moral authority"[317] and clear preference for "home grown solution[s]" (such as the *Gacaca* system).[318] For instance, while the Rwandan High Court is mandated to receive transfer cases from the ICTR and other states, its regular mandate does not allow it to hear genocide cases committed from 1991 to 1994. As a result, in the case of transfers from the ICTR or

---

312 See in this context: *Dallaire*, Shake Hands with the Devil.

313 Hotel Rwanda Rusesabagina Foundation, When foreign aid hurts more than it helps, available at: http://hrrfoundation.org/wp-content/uploads/2012/08/RwandaTodayForeignAid.pdf [accessed: 1 June 2013], p. 2.

314 US Agency for International Development, Rebuilding Postwar Rwanda: The Role of the International Community, Special Study No. 76, 1996, available at: http://www.oecd.org/derec/unitedstates/50189461.pdf [accessed: 15 Jan. 2013], p. 7.

315 *Ibid.*, p. 24.

316 *Ibid.*, 1996, Summary, p. iv.

317 *Grant, Richard*, Paul Kagame: Rwanda's redeemer or ruthless dictator? The Telegraph, 22 July 2010. Available at: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/rwanda/7900680/Paul-Kagame-Rwandas-redeemer-or-ruthless-dictator.html [accessed: 11 April 2013].

318 News of Rwanda, Rwanda: Kagame Proposes Changes to International Legal System, 24 Sept. 2012, available at: http://www.newsofrwanda.com/breaking/13879/rwanda-kagame-proposes-international-legal-system/ [accessed: 11 April 2013].

other states, the High Court does so exceptionally and peripherally, without a specially designed internationalized Chamber, such as the WCC in the BiH, and without the involvement of international judges or prosecutors.

As chapter 2 has discussed in detail, the Transfer Law applicable to cases referred by the ICTR and other states to the Rwandan High Court has in the meantime been amended, in particular as regards its applicability vis-à-vis other (problematic) Rwandan genocide laws. While this is a triumph in that the ICTR has now been able to transfer its first case to the High Court, the potential impact of the ICTR referral practice on the rest of the Rwandan legal framework appears minimal since, as the name suggests, the Transfer Law applies exclusively to cases transferred from the ICTR and other states, not to the majority of the genocide cases prosecuted at various courts at the national level.

3. Comparative analysis

While no hypothesis will be advanced or debated here to help understand this discrepancy in the level of international commitment between the former Yugoslavia and Rwanda, suffice it to say at this point that this factor is not without impact on the ICTY/ICTR referral practice. Indeed, *Schabas* appears to attribute the ability to refer cases directly to the amount of international involvement, stating that: "whereas the justice system in [BiH], with its substantial international involvement, was quickly deemed acceptable by judges of the [ICTY], there was great resistance to transfer [at the ICTR] in Arusha."[319]

When examining the international reaction following the conflict on the territory of the former Yugoslavia, one may say that the ICTY referral practice appears to have been both the pre-condition and the result of potentially wide-scale legal reforms in BiH. As a result of the fact that the War Crimes Chamber of the State Court applied laws that were essentially similar to the ICTY Statute and Rules of Procedure and Evidence, and that international judges oversee the application of international laws at the state level, the transfer of cases to the WCC was deemed by the ICTY Referral Bench to be relatively unproblematic on the whole. While the legal reform that was initiated following plans for an implementation of the ICTY referral practice has to date generally not been applied at the district and cantonal courts, these laws have the potential – at least in theory – to be implemented at all levels. In fact, the National War Crimes Strategy – adopted in 2008 – strongly recommends this implementation to allow for an effective and uniform prosecution of genocide-related crimes.[320] As a result, the true impact of the referral practice in the long term remains to be seen, and much depends on the legal developments following the *Maktouf* case,

---

[319] *Schabas*, 13 Max Planck UNYB 36 (2009) [accessed: 8 July 2014].

[320] National War Crimes Strategy, pp. 15 ff.

which has seriously complicated the question about the applicability of the fundamentally different national codes.

Conversely, in Rwanda, it appears that the international community's involvement has been significantly more limited, at least at first, and the referral practice, despite spurring some legislative changes so as to be able to try cases nationally, is limited only to this practice, and has little if any bearing on the prosecution of the majority of cases tried at the national level. Some legal transplants, like plea-bargaining, have been adopted and remodelled in recent years, but their use in *Gacaca* proceedings is highly troublesome, as was mentioned above, in chapter 3.

III. Concluding remarks

In the foregoing chapter some possible *normative* and *contextual* root causes in positioning the implementation of the ICTY and ICTR referral practice in BiH and Rwanda, and, in some limited form, in France have been identified. It has uncovered possible root causes underlying some of the difficulties faced in chapter 2 regarding this novel practice and to lay the foundation for a more concrete discussion about how to solve them in a tangible way (chapter 4).

Regarding *normative factors*, one of the major problems in both contexts is the discrepancy in the applicable legal norms for the prosecution of these crimes at various court levels and the systemic lack of coordination between such courts within a complex multiple accountability mechanism. In Rwanda, given the reliance on a mixed accountability system through conventional and community-based *Gacaca* courts, this "uniformization" is particularly complex and has not been – at least officially – attempted. Compounding the difficulties in both contexts is the implementation of common-law notions not previously part of the respective civil-law-based legal traditions, such as plea-bargaining. The UN Security Council referral practice in both contexts only serves to highlight these discrepancies.

A number of *contextual factors*, inextricably interconnected, such as the presence of a functioning criminal justice system (including an appropriate penalty structure and fair-trial rights), the political sensitivity of cases, and the impact it can have on judicial independence and impartiality, the scale of crimes and finally, the financial and logistical support from the international community, must also be considered when examining the "success" of the ICTY and ICTR referral practice at national level.

The foregoing chapter has illustrated that in both BiH and Rwanda, there are sufficient shortcomings (both *normative* and *contextual*), which complicate an effective implementation of the UN Security Council referral practice at the national level. As such, as the foregoing discussion has demonstrated, the mechanical transfer of cases

from the international to national forum, without taking into account the whole context in which the referral practice takes place, creates problems that are not easily remedied.

Chapter 4

The ICTY/ICTR referral practice: impact and possible solutions

I. Impact of the ICTY/ICTR referral practice

A. The referral practice's contribution to the ICTY's and ICTR's overall objectives

Chapter 1 has illustrated the problems that arise in attempting to measure the international tribunals' broad spectrum of (sometimes conflicting) objectives. As the following sections will seek to illustrate, difficulties also arise in assessing how the ICTY/ICTR referral practice contributes to any of the tribunals' primary objectives or to the Completion Strategy's more limited objectives, both practical, such as reducing the Tribunals' caseload, and idealistic, such as bestowing a sense of ownership over the prosecution of such crimes at national level.

Chapter 1 set out in some detail the punishment rationales of the ICTY and ICTR, paramount of which appear to be retribution and deterrence. While the practice of referring cases back to BiH or Rwanda may not significantly contribute to either rationale and/or its outcome, notably deterrence, for other (secondary) purposes of punishment promulgated by the ICTY and ICTR, such as giving a voice to the victims, the practice *may* have a greater impact. Regrettably, however, there is insufficient evidence regarding the perception of the ICTY/ICTR referral practice by the affected communities. As such, one can only formulate the working hypothesis that the practice, if supported by strong outreach activities, has the *potential* of assisting victims in the complex healing process. The importance of early outreach as a necessary element to the successful functioning of this practice will be discussed in greater detail below.

B. The referral practice's contribution to the Completion Strategy's objectives

Perhaps the best way to measure the success of this practice is to return to the stated objectives justifying the implementation of the referral practice in the first place (chapter 2).

1. Judicial economy

To briefly summarize, the first formally stated objective of the referral practice as part of the overall Completion Strategy, was to reduce the caseload of the *ad hoc* international criminal tribunals. As demonstrated in chapter 2, the process of referring has been – notably in the ICTR context – so cumbersome, at least initially, that one may question whether there has truly been any visible work-reduction measure at all. Concretely, the *Bagaragaza* case before the ICTR is a pertinent illustration of the start-up difficulties of this practice. After lengthy proceedings, referral of the *Bagaragaza* case to the Netherlands and Norway was refused for different reasons and by different judicial benches.[1] The result was that it was ultimately tried at the ICTR, without a doubt signifying considerably more work than if it had been tried by the ICTR from the outset.

This intransigent conclusion seems to belie the reality of any novel practice, especially in the multifaceted setting of an international criminal tribunal, in which (oftentimes complex) start-up difficulties are simply inevitable. Such difficulties are likely to be multiplied where such a practice's implementation is, by its very conception, partially external to the institution initiating it. In other words, the ICTY and ICTR Referral Benches have had to rely significantly – if not to say almost exclusively – on factors (including extra-legal), which are external to the court; for instance, a state's willingness to try the case, the adequacy of the national legal framework, etc. For the reasons stated above, it is unrealistic to assume that the referral practice could contribute to fulfilling the primary stated objective of markedly reducing the tribunals' caseloads right from the outset. Rather, such an objective must be considered more long-term.

Ten years into the practice's implementation, the overall success is more tangible, notably when the referral practice is viewed in a broader sense, including the referral of investigative files. Following legislative amendments in Rwanda, the ICTR Referral Bench has been able to transfer a total of eight cases to Rwanda,[2] together with

---

[1] *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-20050860-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, 13 April 2007; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006.

[2] *The Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011 and *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi's appeal against the referral of his case to Rwanda and related motions, 16 Dec. 2011. *The Prosecutor v. Bernard Munyagishari*, Case No. ICTR-2005-89-R11*bis*, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012 and *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeal against the Decision on Referral under Rule 11*bis*, 3 May 2013.

the two transferred to France in 2007,[3] representing a little more than ten percent of its total caseload.[4] The ICTY's overall referral rate is similar, that is, of the 136 accused, 13 have been transferred to national jurisdictions,[5] representing almost ten percent of the accused tried.

While these figures are not overwhelmingly high in light of the total caseload of both tribunals, when examining the objective of case-reduction measures, it is imperative to take into account the referral of investigative files ("category II" cases) by the ICTY and ICTR prosecutors to national prosecutors' offices. The ICTY has transferred 13 cases involving 38 suspects between 2005 and 2009,[6,7] and the ICTR has transferred 60 investigative files to date.[8] Viewed in this broader light, it becomes apparent that the referral practice is likely to have had a concrete impact on the reduction of workload of the tribunals on the whole.[9]

Despite a certain leniency, which should accompany an evaluation about the referral practice's success, due to the aforementioned start-up difficulties, coupled with complex factors external to the tribunals, it is argued that certain problems could have been avoided or, at the least, mitigated. The discussion below seeks to illustrate

---

[3] *The Prosecutor v. Laurent Bucyibaruta*, Case No. ICTR-2005-85-I, 20 Nov. 2007; *The Prosecutor v. Wenceslas Munyeshyaka*, Case No. ICTR-2005-87-I, 20 Nov. 2007.

[4] 75 cases in total were completed at the ICTR. See ICTR website: http://www.unictr.org/Cases/tabid/204/Default.aspx [accessed: 5 July 2014]. See also ICTR Completion Strategy Report, S/2012/349, 23 May 2012.

[5] Key Figures of ICTY cases, available at: http://www.icty.org/x/file/Cases/keyfigures/key_figures_en.pdf [accessed: 23 April 2013]. Of the 13 cases, ten were transferred to BiH, two to Croatia and one to Serbia. The national trials of 12 persons have been concluded, the person having been transferred to Serbia, *Vladimir Kovačević*, was deemed unfit to stand trial. ICTY Completion Strategy Report, S/2012/847, 19 Nov. 2012, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_16november2012_en.pdf [accessed: 17 May 2012], §§ 49–50.

[6] *Ibid*., § 50. See also: ICTY Completion Strategy report, S/2014/351, 16 May 2014, §§ 4 ff.

[7] Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 23 May 2012 to 16 Nov. 2012, S/2012/847, 19 Nov. 2012, Annex I, § 48; Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 5 Nov. 2012), S/2012/836, 14 Nov. 2012, § 6.

[8] Communication with Senior Officer of ICTR-OTP, 30 April 2013. See also: Statement by Justice *Hassan B. Jallow*, Prosecutor of the ICTR, to the United Nations Security Council, 18 June 2010, available at: http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1144 [accessed: 2 May 2013], where it is stated that by June 2010, 55 pre-indictment files had been transferred. In the meantime, this has increased to 60 files. See also the latest ICTR Completion Strategy report, S/2014/343, 15 May 2014.

[9] Assessment and report of Judge *Theodor Meron*, S/2012/847, 19 Nov. 2012, Annex I, § 48; Report on the Completion Strategy of the International Criminal Tribunal for Rwanda, S/2012/836, 14 Nov. 2012, § 6.

some of these problems, and to formulate some valuable lessons learned for future referral practices, notably at the ICC.

2. Nationalization of accountability and the impact of referral on national reconciliation

The second objective that has been voiced – though less formally – is the referral practice's contribution to the "nationalization" of the accountability process, with a view to bestowing ownership over war crimes trials and ultimately to fostering national reconciliation.[10] It is inevitable that the very act of referring cases back to domestic courts contributes – at least to some extent – to the process of nationalizing the accountability process. In the context of the ICTY and ICTR Completion Strategies, one can directly attribute certain concrete positive achievements in national "capacity building" to the ICTY/ICTR referral practice, notably through significant legal reforms at national level, such as the establishment of the War Crimes Chamber within the BiH State Court,[11] or the abolition of the death penalty in Rwanda.[12] Despite these accomplishments, chapters 2 and 3 have also illustrated the incongruent legislative impact that the ICTY and ICTR referral practice has had on the respective national legal landscapes.

While the ICTY Statute does not make explicit reference to "national reconciliation" per se, the Tribunal's objective "to contribute to the restoration and maintenance of peace" must clearly be understood as encompassing such a notion.[13] In addition, Former President *Jorda* alluded to the Tribunal's "mission of reconciliation" in 2001,[14] and the repeated emphasis on this notion over the years by various tribunal

---

[10] Assessment and Report of Judge *Theodor Meron*, U.N. Doc. S/2005/343, 25 May 2005, Annex I, § 12.

[11] UNSC resolution 1503 (2003), which states in its preamble: "Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the 'War Crimes Chamber') and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber".

[12] See in this context: Organic Law No. 05/2009/OL of 21 Dec. 2009 modifying and complementing Organic Law No. 31/2007 of 25 July 2007 relating to the abolition of the death penalty, O.G.R.R. No. 4 of 25 Jan. 2010. See also, Amnesty International News, "Rwanda abolishes death penalty", 2 Aug. 2007, available at: http://www.amnesty.org/en/news-and-updates/good-news/rwanda-abolishes-death-penalty-20070802 [accessed: 17 May 2013].

[13] *Clark, Natalya*, The ICTY and the Challenges of Reconciliation in the Former Yugoslavia. E-International Relations, 23. Jan. 2012. Available at: http://www.e-ir.info/2012/01/23/the-icty-and-the-challenges-of-reconciliation-in-the-former-yugoslavia/ [accessed: 30 April 2014].

[14] ICTY press release, The ICTY and The Truth and Reconciliation Commission in BiH, speech made by former ICTY President *Claude Jorda* on 12 May 2001 in Sarajevo, reprinted 17 May 2001, JL/P.I.S./59/-e, available at: http://www.icty.org/sid/7985 [accessed: 5 July 2014].

officials[15] is an attest to this reading. Resolution 955 (1994), creating the ICTR, is more explicit in recognizing that the objective of "restoration and maintenance of peace" necessarily goes hand in hand with the "process of national reconciliation".[16]

Promoting national reconciliation has also been cited in connection with the objectives underlying the ICTY and ICTR referral practice. Regrettably, any analysis about the *impact* of referring cases to national jurisdictions on such a process has been entirely absent from ICTY and ICTR case law.

While the majority of rule 11*bis* RPE cases have been sent back to national courts of the countries in which the crimes were committed (the so-called *loci delicti commissi*), the ICTR relied on the universal jurisdiction principle to refer its first two cases to France. Any question about whether there is a difference in impact between referring cases to the *loci delicti* or to third countries has remained totally unexplored in the context of the ICTY/ICTR referral practice, including in the ICTR Trial Chamber's deliberations regarding its referral of cases to France. However, one can logically infer that the sense of ownership over these cases would be maximized – with the necessary publicity – where a case is referred back to the *locus delicti* rather than to an unconnected third country for prosecution. Concretely this means that the likelihood of an impact will be greater following an ICTR referral to Rwanda than an ICTR referral to France.

To this date, no concrete evidence exists to suggest that the ICTY/ICTR referral practice to national courts of the *loci delicti* has had any impact on the perception of victim communities regarding national reconciliation. Even less information is available about the possible impact on affected local communities where cases are referred to unconnected third countries for prosecution. This may be attributable to two interrelated factors: firstly, the novelty and experimental character of the referral practice, whose full impact beyond the court room is currently not measurable in any tangible manner; and secondly, the relatively small number of cases transferred in actuality, such that there is no visibility of the practice for the affected populations. Inevitably, with regard to the latter factor, the dissemination of information about the practice through outreach programmes is primordial in reaching local communities. This is arguably all the more so in situations where cases are sent to third countries

---

[15] *Cassese* in ICTY Annual Report, S/1994/1007, 17 Aug. 1994, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1994_en.pdf, § 16; *Gabrielle Kirk McDonald* in ICTY Annual Report, S/1999/846, 2 Aug. 1999 § 146; and more recently, *Serge Brammertz* in ICTY Annual Report, S/2012/592, 1 Aug. 2012, § 76.

[16] UNSC resolution 955 (1994), 8 Nov. 1994, preamble, § 7. In its preamble, the UN Security Council notes that it is convinced that: "in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved *and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.*" Emphasis added.

for trial. The fact that there appears to have been virtually no news coverage in Rwandan mainstream media regarding the two ICTR cases currently being tried by France is an attest to this fact.

Given the scarcity of information available about the impact of this relatively new practice, perhaps a more constructive way to approach this question is to examine more generally the debate about the contribution of international criminal tribunals to the national reconciliation process. Inevitably, this discussion must consider the fact that the ICTY/ICTR referral practice (not just 11*bis* RPE cases but also investigative files) adds a different and novel angle to the debate, namely the *transfer back* of cases from international to national jurisdictions. It is posited that the increased transcendence between national states and international tribunals in both directions – complementarity in its truest sense – when properly understood by all sides – has at least the potential of further spurring national reconciliation efforts. As problematic as the inconsistencies, created by the disjointed application of procedural and substantive laws across national and local courts, may be, the large-scale national capacity building efforts that were undertaken both in BiH and Rwanda to allow for the referral of cases from the ICTY and ICTR, is a tangible attest to this potential.

Since the establishment of the ICTY in 1993 and the ICTR in 1994, both of which are located at a great physical distance from the *loci delicti* and immediate victim communities, much ink has been spilled over the assorted goals of these tribunals. Appraising these goals and assessing the *legacy* of these tribunals is becoming ever more relevant in the wake of their imminent closure.[17] At the time of their creation, there were pertinent arguments in favour of establishing the international tribunals in countries *outside* of the affected societies, notably an ongoing conflict (Bosnia and Herzegovina), devastated judicial systems and infrastructure, and, specifically in the case of Rwanda, the annihilation of a majority of the members of the legal community. Beyond these predominantly logistical justifications, as *Mégret* pertinently notes, there are a number of strong arguments in favour of recourse to international institutions, such as authoritative judgments and a broader reach of the "transitional normative message."[18] However, these arguments have slowly been overshadowed by a growing criticism of excessive universalism, including the physical and legal remoteness of the international tribunals, which is thought to endanger the national reconciliation process.[19]

---

[17] Legacy of the ICTY in the former Yugoslavia, Conference proceedings, Sarajevo, 6 Nov. 2012, Zagreb 8 Nov. 2012, available at: http://www.icty.org/x/file/Outreach/conferences_pub/naslijedje_mksj_sa-zg_en.pdf [accessed: 5 July 2014].

[18] *Mégret*, 38 Cornell Int'l L. J. 728 (2005), citing *Teitel*, 38 Cornell Int'l L. J. 837–862, fn. 3 (2005).

[19] *Ibid.* 730.

The debate regarding national reconciliation – and the respective role of the ICTY and ICTR therein – remains as vivacious as ever. As noted by *Stromseth*, "Notwithstanding the considerable resources and expertise devoted to these courts over the years, we still know surprisingly little about their tangible domestic effects."[20] From an empirical point of view, it is inevitable that the very concept of "measuring" national reconciliation or the ICTY and ICTR's roles therein, is a highly complicated – if not a next to impossible – undertaking. In fact, as noted by *Skaar*, "Reconciliation is one of the most contested concepts in the scholarly debate on transitional justice, and arguably also the most difficult to measure empirically."[21] The arduousness of the debate about whether the ICTY and ICTR have been able to contribute to national reconciliation[22] only serves to highlight the fact that this issue is complex.

In the preamble of UN Security Council resolution 1534 (2004), the Security Council commends "the important work of both Tribunals *in contributing to* lasting peace and security and *national reconciliation and the progress made since their inception*".[23] Similarly, and more recently, former ICTY President *Meron* declared that the ICTY has "*contributed to bringing peace and reconciliation* to the countries of the former Yugoslavia […], forging a new international culture of accountability."[24]

There appears to be general agreement on the fact that the ICTY and ICTR have made significant and lasting contributions to the field of international criminal justice, notably in halting and successfully trying many masterminds of the conflicts in the former Yugoslavia and Rwanda, thereby, to repeat *Meron*'s words, "forging a new international culture of accountability." This statement is particularly true in the case of the former Yugoslavia, where the conflict was still ongoing when the ICTY began its work. Indeed, as noted by one author, "with regard to the first of its goals, delivering justice, *the Tribunal can boast tremendous success.*"[25] ICTY Chief Prosecutor *Brammertz* noted: "We have succeeded – against all the odds – in bringing all of the ICTY's indicted persons to justice."[26] As such, the ICTY must be hailed as "monumentally important for its contribution in establishing the responsibility for and illuminating the circumstances of some of the most serious crimes committed in the

---

[20] *Stromseth*, 1 Hague J. on Rule L. 88 (2009).

[21] *Skaar*, 1 TJR 54 (2013).

[22] ICTJ, Has the ICTY contributed to reconciliation in the former Yugoslavia? Online debate, available at: http://www.balcanicaucaso.org/Racconta-l-Europa-all-Europa/Dibattito-online [in Italian language, accessed: 5 May 2014].

[23] UNSC resolution S/RES/1534 (2004), 26 March 2004, § 5. Emphasis added.

[24] Address of Judge *Theodor Meron*, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations General Assembly, 15 Oct. 2012, available at: http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/121015_pdt_meron_un_ga_en.pdf [accessed: 5 July 2014], p. 2. Emphasis added.

[25] *Kerr*, Lost in Translation? [accessed: 1 Dec. 2013], p. 2. Emphasis added.

[26] ICTY, Outreach Programme Annual Report 2013, available at: http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2013_en.pdf [accessed: 6 July 2014], p. 8.

former Yugoslavia".[27] The ICTR too can boast of considerable achievements through participation in a historic process, which, according to ICTR Prosecutor, "has seen the accountability of the senior perpetrators of the genocide, the expansion of the jurisprudence of international criminal justice and the acceptability of that system as part of the global architecture of accountability."[28]

Despite manifold criticisms about the ICTY and ICTR's work being slow, cumbersome and costly since their creation, the number of convictions, including of high-ranking political and military figures, speaks for the successful fulfillment of one of the primary objectives of these tribunals, namely retribution.

Contention seems to lie in the first part of *Meron*'s statement, that is, the question whether the ICTY has in fact contributed to national reconciliation or not.[29] While some ascertain that the ICTY has been fundamental in contributing to national reconciliation,[30] others believe that the international tribunals may actually be undermining the process by reviving ethnic tensions,[31] due to "competing ethnic 'truths' and colliding meta narratives."[32] In fact, while the UN Security Council resolution establishing the ICTR explicitly established a causal link between accountability and reconciliation, as noted above, some Security Council members espoused the view that "the Tribunal might become a vehicle of justice, but it is hardly designed as a vehicle of reconciliation."[33]

Several observations should be made at this juncture. First of all, and in light of the aforementioned discussion, this debate appears to oversimplify the complexity

---

[27] *Hodžić*, Why the ICTY has contributed to reconciliation in the former Yugoslavia. Online debate, 20 Feb. 2013, available at: http://www.balcanicaucaso.org/eng/Tell-Europe-to-Europe/Dibattito-online/Why-the-ICTY-has-Contributed-to-Reconciliation-in-the-former-Yugoslavia-130374 [accessed: 1 Dec. 2013].

[28] Remarks by Justice *Hassan B. Jallow*, Prosecutor of the ICTR and UNMICT to the ICTR Town Hall Meeting, 18 Feb 2014, available at: http://www.unictr.org/tabid/155/Default.aspx?id=1382 [accessed: 26 May 2014].

[29] See online debate: Has the ICTY contributed to reconciliation in the former Yugoslavia? Available at: https://www.ictj.org/news/join-debate-has-icty-contributed-reconciliation-former-yugoslavia [accessed: 5 July 2014].

[30] *Akhavan*, 20 Hum. Rts. Q. 737 (1998).

[31] See in this context: *McCormack*/*Simpson* (eds.), The Law of War Crimes, p. 8; *Rigby*, Justice and Reconciliation after the Violence, p. 180; *Osiel*, 22 Hum. Rts. Q. 118–147 (2000).

[32] *Clark*, Why the ICTY has not contributed to reconciliation in the former Yugoslavia, 20 Feb. 2013. Online debate, available at: http://www.balcanicaucaso.org/eng/Tell-Europe-to-Europe/Dibattito-online/Why-the-ICTY-has-not-Contributed-to-Reconciliation-in-the-former-Yugoslavia-130370 [accessed: 6 July 2014].

[33] UN Security Council, The Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States, Provisional Verbatim Record, 3453rd meeting, 8 Nov. 1994, S/PV.3453, 7.

of the reconciliation process: it rigidly focuses on "visible" results at a fixed moment in time rather than viewing it as an ongoing and complex multi-dimensional process, in which the ICTY and ICTR play an important but by no means exclusive role.

The very concept of "national reconciliation" appears to be elusive and controversial.[34] While scholars generally seem to agree that reconciliation connotes the repair of social relations following a conflict, there are great variations when it comes to a precise definition. The first notable difference in scholarly literature is in *degree*: while some definitions define reconciliation *narrowly* as "nothing more than 'simple coexistence' between former enemies[35] or the "absence of violence",[36] others cast the notion *broadly*, as "finding a way to balance issues such as truth and justice so that the slow changing of behaviours, attitudes and emotions between former enemies can take place."[37] The second notable difference is in the *level* at which reconciliation can occur (individual, societal or national).[38] Inevitably, as argued by *Skaar*, the type of definition used, in turn, conditions the facility with which one can define and measure this notion: the broader (and hence more complex) the notion, the harder it becomes to quantify.[39]

In addition to its actual meaning, as ICTR Registrar *Dieng* illustrates, "reconciliation", when viewed in isolation, is "a vague, not to say dangerous term".[40] According to *Dieng*, true national reconciliation can only result from other processes, such as truth seeking and accountability.[41]

Furthermore, the debate does not take into account the respective roles of different transitional justice mechanisms on the national reconciliation process, such as alternative dispute resolution mechanisms (i.e. *Gacaca*), although little empirical research exists on the ability of these mechanisms to achieve national reconciliation.[42] Whatever the precise definition, a better starting point for the debate may be to conceive the notion of national reconciliation as a (complex) *process* rather than exclusively an *end goal* in itself.[43]

---

[34] *Skaar*, 1 TJR 65 (2013).

[35] *Crocker*, Reckoning with Past Wrongs, p. 54.

[36] *Skaar*, 1 TJR 65 (2013).

[37] *Brounéus*, Reconciliation and Development, p. 6. *Amstutz*, 48 J. of Church and State 545 (2006).

[38] *Skaar*, 1 TJR, 66 (2013).

[39] *Ibid.*, 65.

[40] *Dieng*, Clarification of Concepts: Justice, Reconciliation and Impunity [accessed: 29 April 2014].

[41] *Ibid.*, p. 2.

[42] *Skaar*, 1 TJR 57 (2013). See also: *Rettig*, 51 Afr. Stud. Rev. 25–50 (2008).

[43] *Skaar*, *ibid.*, 54.

The interdependence of various processes as preconditions to genuine national reconciliation seems to be largely supported.[44] In a recent report to the UN Security Council, the ICTY's Chief Prosecutor, *Brammertz*, stated that: "Effective and efficient national war crimes prosecutions are fundamental for the truth-seeking and reconciliation process in the region of the former Yugoslavia, and will be a critical component of the Tribunal's legacy."[45]

An interrelated observation is that this debate has been framed by the unrealistic expectations that have been placed on the tribunals from the outset of their mandates. This point has been discussed in some detail in chapter 1 and requires no additional elaboration here. Suffice it to say that the assorted and oftentimes highly ambitious objectives of the tribunals may have done their true legacy – which, from a criminal law perspective is undeniable – a great disservice. The result is that one can observe "the manifestation of a considerable gap between the international community's aspirations for justice and the expectations of those in the region."[46]

In light of the number of interacting and complex factors (remoteness from *locus delicti*, complexity and scale of the crimes, existence of other accountability processes at national level, etc.), a more fruitful avenue in this debate may be to rephrase the question as follows: Can these many goals, including national reconciliation, ever be realistically achieved by one institution? The lack of conclusive empirical evidence drawing a strong link between criminal trials and national reconciliation in the former Yugoslavia and Rwanda,[47] or criminal trials following mass atrocities generally for that matter,[48] should not be interpreted to mean that criminal trials do not have the *potential* to initiate the process. As noted by *Fletcher* and *Weinstein*, "[d]espite this lack of data, the purported link between trials and reconciliation has solidified into articles of faith that guide policy decisions in the international arena."[49] Concretely, however, the foregoing does support the hypothesis that such a causal relationship is not systematic, and that the process depends on a number of complex factors external to the work of the tribunals. As a result, the tribunals' "mission of

---

[44] See *Hodžić*, Why the ICTY has Contributed to Reconciliation in the former Yugoslavia. Available at: http://www.balcanicaucaso.org/eng/Tell-Europe-to-Europe/Dibattito-online/Why-the-ICTY-has-Contributed-to-Reconciliation-in-the-former-Yugoslavia-130374 [accessed: 1 Dec. 2013].

[45] Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 24 May to 18 Nov. 2013, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18nov2013_en.pdf, § 75.

[46] *Kerr*, Lost in Translation? [accessed: 1 Dec. 2013].

[47] *Stover*/*Weinstein* (eds.), My Neighbor, My Enemy, p. 323.

[48] *Gallimore*, New Eng. J. of Int'l & Comp. L. Vol. 14:2 (2008), 259. See in this context also generally: *Skaar*, 1 TJR, 54–103 (2013).

[49] *Fletcher*/*Weinstein*, 24 Hum. Rts. Q. (2002), 573–639, 600.

reconciliation" of which Judge *Jorda* spoke, cannot be equated in probability of outcome or measurability with the tribunals' primary goals of retribution and deterrence. Setting a strong focus on an assortment of goals deflects from the tribunals' primary goals, notably retribution, which are based on the tribunals' judicial functions. *Kamatali* argues that "[i]f those courts can sometimes contribute *indirectly* to national reconciliation, strongly linking reconciliation and justice, particularly international justice, risks frustrating the achievement of the principal goals of courts: justice."[50] In this vein, the legacy of the ICTY and ICTR should be measured exclusively by their judicial functions.[51]

The foregoing is not to say, however, that the process of national reconciliation and other objectives cannot be a desired "by-product", which is jumpstarted by the trial process. The referral practice, symbolic of *true* complementarity, if properly understood by the local population, has the potential to assist in that process in some measure.

With respect to the tribunals' judicial functions, one interrelated point must be briefly underscored. Any true judicial legacy of the ICTY and ICTR is contingent upon an understanding of the courts' contribution by the general public in the former Yugoslavia and Rwanda. As one author posited, in order "[t]o assist with reconciliation, justice must not only be done, *but it must also be seen to be done*."[52] There is significant evidence to indicate that in both contexts the work of the tribunals on this front had been lacking for a long time, such that local victim communities were either uninformed or misinformed about the important work of the tribunals, which in turn had the effect of minimizing their visible impact in the region. The importance of outreach is even greater where the courts are located outside the (post-)conflict countries in question. Despite this initial delay, both tribunals have in the meantime placed considerable emphasis on a broad range of local outreach activities both in countries of the former Yugoslavia and Rwanda.[53]

---

[50] *Kamatali*, 16 Leiden J. Int'l L. 133 (2003). Emphasis added.

[51] See, for instance, *Gallimore*, 14:2 New Eng. J. of Int'l & Comp. L. 241 (2008). See *Tolbert*'s contribution in the online debate, available at: http://www.balcanicaucaso.org/Racconta-l-Europa-all-Europa/Dibattito-online [accessed: 5 July 2014]. See more generally, *Damaška*, 83 Chi.-Kent L. Rev. 329 (2008). Emphasis added.

[52] *Gallimore*, 14:2 New Eng. J. of Int'l & Comp. L. 262 (2008). Emphasis added.

[53] See: Outreach Programme Annual Report 2013; and more generally, the many outreach activities of the ICTY, available at: http://www.icty.org/action/outreachnews/7 [accessed: 2 April 2014]. In the ICTR context, an Outreach Programme was launched in 1998 in a number of important areas: http://www.unictr.org/Portals/0/English/News/events/Nov2006/gallimore.pdf [accessed: 10 Feb. 2014].

II. Possible solutions to some legal problems identified

Chapter 2 has sought to highlight many of the legal problems that have arisen in the highly experimental referral practice engaged in by the ICTY and ICTR. Although both tribunals have been able to transfer cases to national courts, notably to the *loci delicti*, which can be regarded as some measure of success in light of its set-out objectives, chapter 2 supports the hypothesis that rule 11*bis* RPE, governing such transfers, is partially inadequate to meet the various challenges that this practice entails. Some problems are common to any context – irrespective of the temporal jurisdiction of the court (*ad hoc* or permanent), the exact circumstances of its establishment (UN Security Council or treaty-based), or the socio-political context of the particular country, etc. – thereby requiring *systematic solutions*. Conversely, as chapter 3 has also sought to illustrate, some solutions will have to be tailored to the unique socio-political contexts in which the referral cases take place, thereby requiring *context-specific* solutions. It is inevitable that any approach will have to factor in a certain measure of both types of solutions, depending on the specific facets of the legal problems concerned.

A. Systematic solutions

While a number of difficult problems were identified with regard to the ICTY/ICTR referral practice in chapter 2, a few major ones could be remedied without any significant amendments to the rule. It is argued that such amendments would not undermine the major objectives underlying the practice.

The first three solutions listed are explicitly related to the *wording* of the rule itself, the fourth solution pertains more generally to the *implementation* of the ICTY and ICTR practice.

1. Explicit clarification regarding the substantive law analysis

As has been previously noted, rule 11*bis* RPE does not explicitly require a substantive law analysis nor does it give any guidance on how to resolve differences between international and national law norms. It merely requires that the national framework provide fair-trial rights. Chapters 2 and 3 as well as the aforementioned section, however, have illustrated potentially significant problems that can arise where the discrepancies between substantive international and national criminal law norms, such as definitions of crimes, are directly juxtaposed. In other words, where there is the possibility that two *different* sets of legal norms could be applied to the *same* case, the risk to universally recognized legal principles, such as the principle of legality and equality before the law, is considerably increased. The lack of any guidance on the part of rule 11*bis* RPE has given rise to different approaches on the

part of the ICTY and ICTR regarding discrepancies between international and national criminal law norms. A pertinent illustration is that while the ICTY Referral Bench considered the "limited" risk of an acquittal for the charge of command responsibility insufficient to bar referral in a number of its cases, the ICTR Trial Chamber conversely considered the *mere* possibility of an acquittal on that charge a sufficient basis to refuse referral.

Given the foregoing, rule 11*bis* RPE – and future types of referral practices that may be based on the ICTY and ICTR experiences – should provide for some explicit guidance about how such discrepancies should consistently be dealt with. It is clear that striking a delicate balance between respecting the diversity of national law norms on the one hand, and imposing some form of coherence between such norms and those that underlie the ICTY and ICTR indictments on the other hand, is no easy task. This is particularly so in a situation where potentially highly divergent sets of laws are already simultaneously at work at the national level, such as in BiH. The BiH National War Crimes Strategy has been conceived on the idea that a certain harmonization of laws at national level is crucial in order to adequately address national war crimes prosecutions. In the case of BiH, the (formerly internationalized) State Court recently started applying both the BiH CC and SFRY CC, depending on the case, such that this discrepancy has concrete bearing on transfer cases. Given that ICTR cases only recently started to be transferred to the Rwandan High Court (the first case, *Uwinkindi*, was transferred in June 2011), little information exists publicly as to what the approach and possible difficulties encountered may be in the application of national laws to these cases. The *Uwinkindi* case has started at the Special Chamber of the Rwandan High Court in January 2014.[54]

If rule 11*bis* RPE were to be used as a basic model for future referral practices, its parameters would be sufficiently strengthened if it were to contain some explicit instruction about the need to evaluate substantive national law norms. In a second step, it would have to contain some sort of general blueprint about what broad standard to impose for margins between international and national legal definitions and systems to be applied to such cases. As was alluded to above, imposing on national systems that their laws directly "mirror" the international standards may be unrealistic. In the ICC context, for instance, many ICC States parties have yet to implement the Rome Statute into their domestic legal systems and thus may encounter a number of legal differences. In any event, there must be some basic expectation underlying the referral practice that serious disparity between courts hearing the *same* cases are resolved – as best as possible – in favour of the initial indictment. It could mean, for instance, that international crimes cannot ever be tried as ordinary crimes, or that the established categories of international crimes are respected (i.e. that genocide-related crimes are not tried as war crimes). Clearly, there will be nuances, which will likely

---

[54] *Musoni, Edwin*, Uwinkindi Trial begins, Rwanda Times, 23 Jan. 2014, available at: http://www.newtimes.co.rw/section/article/2014-01-23/72545/ [accessed: 25 June 2014].

have to be determined on a case-by-case basis. Inevitably, such an expectation cannot be so rigid as to undermine any genuinely necessary discrepancy at the national level. As noted above, regrettably the respective ICTY and ICTR referral benches never engaged in any broader analysis about the precise criteria relied on to make this substantive law determination. Some clearer concrete guidance is thus needed for future referral practices.

2. Explicit consideration of legal tradition employed at national level

In addition to the foregoing, chapter 2 has illustrated the great difficulties that arise in relying on different legal traditions when trying cases at the international level on the one hand, and at the national level on the other hand. The concrete difficulties of these differing approaches will only be fully measurable once the main trial begins in the two ICTR cases before the French courts. What one can already say at this point, however, is that the potential legal problems (and their outcomes for the parties involved) that can arise when a case is initiated in one legal philosophy (adversarial) and carried on in an entirely different legal philosophy (inquisitorial) risk endangering well-accepted principles, such as legal certainty. Indeed, as chapter 2 has briefly illustrated, France has faced great difficulties in investigating these cases.

While there were sound arguments on the part of the ICTR Trial Chamber for allowing a referral of these cases to France, notably French substantive law provisions, it is contended that also the legal tradition underlying the country's trial procedure must imperatively be taken into consideration. Surprisingly, the ICTR Trial Chamber did not even evoke the issue. Indeed, in light of the discussion in chapter 3, and the repercussions this element can have both on the process and the outcome of a case, the trial procedure must be viewed with the same importance as adequate substantive laws. This is not to say that a different legal system should necessarily indicate a bar to referral. It should, however, be examined as one explicitly listed factor among others in making a referral determination. This particular examination could be of importance in situations where there are competing claims for jurisdiction by different countries.

3. Strengthening of the post-referral monitoring mechanism

As chapter 2 has sought to prove in some detail, rule 11*bis* RPE's post-referral monitoring mechanism is partially inadequate. As was pointed out, it is not mandatory – rule 11*bis* stipulates that "the Prosecutor *may* send observers to monitor the proceedings in the national courts on [his or] her behalf"[55] –, which, given the seriousness of the types of crimes contained in the ICTY and ICTR indictments is particularly surprising. This is especially so in light of the fact that the monitoring function allows

[55] Emphasis added.

the ICTY and ICTR to determine whether there are divergences in the way the cases are treated at national level, and allows the Referral Bench, at the request of the Prosecutor and *before* the accused is found guilty or acquitted by the national court, to refer the case back to the ICTY or ICTR. It should be noted, however, that despite the discretionary nature of this procedure, both the ICTY and ICTR have relied on this monitoring mechanism in a very consistent manner throughout the national trials of these referral cases.

Given the foregoing, it is argued that if rule 11*bis* RPE of the ICTY and ICTR is used as a basis for future referral practices, a *mandatory* monitoring mechanism must be employed. It would reflect current practice.

Aggravating the non-mandatory nature of the post-referral mechanism under rule 11*bis* RPE is the fact that the ICTY and ICTR have no recourse following the national court's final decision, notably in the event that punishment is inadequate or where the final verdict is not reflective of the evidence presented at trial (and that would have led to the opposite result at the ICTY or ICTR). Such a practice should allow the referring international court or tribunal to retain a right to contest a final verdict, where, based on the trial proceedings and the evidence adduced throughout, the final verdict rendered or the type or duration of punishment seems unwarranted. Inevitably, this would have to be an exceptional remedy in the event of a clear miscarriage of justice. The exact modalities thereof would have to be clearly defined.

In addition to the foregoing, rule 11*bis* does not address shortcomings in sentencing arrangements following completed judicial proceedings (and final verdicts). Conversely, as elucidated in detail in chapter 2, the enforcement of sentence procedures of the ICTY and ICTR permits some form of post-verdict "supervision" of prison conditions of convicts who are transferred to a third country to carry out their sentences. In the ICTY context, an odd double standard exists between ICTY convicts, who, by virtue of Security Council resolutions, are not allowed to serve their sentences in their countries of origin, and convicts of rule 11*bis* RPE transfer cases, who serve their sentences in BiH, the *locus delicti.* The *Stanković* case, in which the accused did not only serve his sentence in his country of origin, but in the very commune where he committed the majority of his crimes and where a large number of his victims lived (Foča),[56] highlights this oddity in a concrete manner, not least in light of his subsequent escape.

In conclusion, the referral practice should incorporate some form of mandatory post-referral sentence monitoring mechanism.

---

[56] ICTY research visit October 2009 [interview transcript with author].

4. Early establishment of a Transition Team

a) ICTY

In order to help with the tight deadlines set by the Completion Strategy, the Office of the Prosecutor of the ICTY set up the so-called Transition Team in 2004 to oversee any logistical and legal issues arising out of the referral practice (both rule 11*bis* RPE cases and investigative files, the so-called "category II" cases).

Starting in 2009, an EU-funded project implicating "liaison prosecutors" from Croatia, Bosnia and Herzegovina and Serbia was initiated by the ICTY to facilitate the exchange of information between the ICTY and the respective local judiciaries. As part of their duties, the liaison prosecutors serve as contact points for their respective national prosecution services, and assist in national investigations through the provision of evidence out of the OTP's evidentiary records.[57] Their presence has made possible the hand-over of a significant volume of documents that have served in national war crimes investigations and trials "that would otherwise not have been available."[58] To illustrate in figures, in 2013, nearly 4000 documents consisting of 94,471 pages have been transferred to national systems.[59]

While the Transition Team is inevitably necessary for the successful implementation of the Completion Strategy, the fact that it was implemented so late in the Tribunals' lives, namely in 2004, is regrettable. As noted by *Tolbert* and *Kontić*, two ICTY insiders, "[t]he ICTY's relationship with the societies in the former Yugoslavia and particularly their respective legal systems has been late in developing."[60] It is posited that such a unit should have been put in place at the early stages of the Tribunal's existence – long before closure was even concretely envisaged – so as to guarantee a smooth liaison between the ICTY and all national courts from the outset and throughout the ICTY's mandate. Clearly, such a team can tailor its work to the different phases of the tribunal's relationship vis-à-vis the national jurisdictions.

Chapter 1 briefly discussed the important work of the RoR Unit within the ICTY's Office of the Prosecutor in the early days of the Tribunal. The Unit's mandate was eventually terminated and national jurisdictions led their own investigations into war crimes cases. While the ICTY's RoR Unit had an important, albeit limited, function that grew out of the legal and political situation in the former Yugoslavia in the early days of its mandate, and the Transition Team was initiated well into the existence of the ICTY following the UN Security Council's decision to close the tribunal, these measures have been sporadic and (over-)reactive. As *Tolbert* and *Kontić* posit, "the steps taken to transfer cases and knowledge to the region were undertaken principally

---

[57] ICTY Outreach Annual Report 2013, p. 30.

[58] *Ibid*.

[59] *Ibid*.

[60] *Tolbert/Kontić*, in: Stahn/Sluiter (eds.), p. 137.

for the purpose of implementing its Completion Strategy," although they concede that "this process has clearly proven beneficial to the national judicial systems of the region."[61]

Establishing a more permanent section or unit, which would have conglomerated, coordinated and ensured *all* of the OTP's liaison activities (with the help of national prosecutors) throughout the *entire* life of the Tribunal, would likely have helped to mute criticisms regarding the Tribunals' weak outreach activities,[62] at least initially, and may have helped create a greater awareness in countries of the former Yugoslavia about the concrete value of the ICTY to national war crimes prosecutions. This latter statement must be informed, however, by the fact that the outreach attempts by the ICTY in the early days of its life were made difficult by a number of factors, such as hostilities by some states in the region and "informal barriers" to the work of the Office of the Prosecutor, all of which were aggravated by the remote location of the Court.[63]

b) ICTR

The ICTR did not establish a so-called Transition Team but coordinated all of the transitional issues, notably the litigation of referral of cases and the hand-over of investigative files, within the various divisions of the OTP (Appeals and Legal Advisory Division, trial teams, Prosecutor, etc.).[64] In the case of the ICTR, the nature of the "exit strategy" seems even more sporadic and reactive than that of the ICTY.

Other than the ICTY Prosecutor, however, who delegates post-referral monitoring to a different institution, the OSCE, the ICTR Prosecutor has designated monitors from *within* the ICTR itself in order to follow national trials of rule 11*bis* RPE referral cases both in Rwanda and France, a set-up which may guarantee a stronger institutional and transitional continuity.

5. Conclusion

The foregoing brief analysis sought to highlight the importance of a certain institutional continuity in the work of the *ad hoc* tribunals. It has been argued that:

> "One clear lesson for transitional justice processes and mechanisms, especially courts, is that outreach aimed at fostering real critical engagement with the process, as well a sense of ownership of it *[sic]*, must be made a priority *early on and pursued consistently and forcefully throughout.*"[65]

---

[61] *Ibid.*, p. 137.

[62] See, for instance, *Cole*, Shortcomings of ICTY Outreach in Bosnia-Herzegovina [accessed: 5 May 2014].

[63] *Tolbert*/*Kontić*, in: Stahn/Sluiter (eds.), p. 138.

[64] Email communication with ICTR-OTP, May 2014 [transcript with author].

[65] *Kerr*, Lost in Translation? [accessed: 1 Dec. 2013]. Emphasis added.

This statement is particularly true as regards the successful implementation of the Completion Strategy's referral practice. The greater the dissonances (legal, procedural, etc.) between the ICTY and ICTR and the national legal frameworks, the harder the referral practice will be to execute in practice. Such dissonances could be anticipated and mitigated through an early, consistent and coherent cooperation between various mechanisms. This, in turn, could enhance its impact on the region. As *Tolbert* and *Kontić* argue, in the context of the ICTY, "the ICTY's first decade of largely failing to engage with the region and its legal professionals in meaningful ways" caused it to lose "opportunities to make a difference in terms of transitional justice and reconciliation."[66]

Based on the analysis in the first chapters of this research project, if one understands the Tribunals' jurisdiction as being *concurrent* rather than *exclusive* vis-à-vis national jurisdictions, one may come to view the work of the Tribunal as a start-up phase in a comprehensive national strategy to prosecute international crimes, and, as former ICTY President, *Pocar*, argues, understand the "Completion Strategy" as a "Continuation Strategy" instead.[67] Viewing it this way may help put into perspective some of the unrealistic demands that are oftentimes placed on international tribunals, which cannot possibly deal (both from a logistical and financial standpoint) with the sheer volume of potential cases. Inevitably, the referral practice in both contexts has aptly demonstrated that adequate capacity building at the national level must precede such a practice if one is to speak of any "continuation" at all.

The idea of institutional continuity *prior* to completion has also been echoed by the ICC. In its Report on Complementarity, the Court notes that it:

> "is strongly of the view that assistance to the national justice system in a situation country should be made available from as early on as possible to address the cases that will not be subject to ICC proceedings. *Synergies with the ICC's activities should be considered throughout the involvement of the Court in a situation – and not only in connection with the completion of its activities.*"[68]

B. Specific solutions based on context

The foregoing section sets out some solutions that can be generally applicable in all contexts. However, every situation of referral will be different just as every conflict is specific and complex. As a result, some solutions to these context-specific problems will have to be tailor-made.

---

66 *Tolbert*/*Kontić*, in: Stahn/Sluiter (eds.), p. 161.

67 *Pocar*, 6 J. Int'l Criminal Justice 661 (2008).

68 ICC-ASP, Report on Complementarity [accessed: 10 June 2014], § 49.

Chapter 1 has outlined the difficulty of legal problems that have arisen in the referral process to BiH and Rwanda. Many of the significant legal problems are due to incoherent legal frameworks both between the ICTY and ICTR and national courts on the one hand, and between national and local courts themselves.

In BiH, the National War Crimes Strategy was specifically intended, *inter alia*, to harmonize laws, but it does not appear to have affected much to date. In fact, ICTY Chief Prosecutor *Brammertz* has noted that "the picture is bleak" concerning its implementation, and has lamented that there is a considerable delay in prosecuting cases at national level and a large backlog of cases.[69] While the War Crimes Strategy seeks to harmonize laws, *inter alia*, by promoting reliance on the new BiH CC to war crimes cases at all levels, the ECtHR's finding in the *Maktouf and Damjanović* case (July 2013) has further confused matters.

In Rwanda, the situation has also been complicated since the ICTR's Completion Strategy was implemented, and the relationship between various laws governing possible transfer cases from the ICTR and other states remained unclear. The fact that these laws were clarified only in the case of referrals from the ICTR and other states, and not for cases initiated at the national level, highlights serious discrepancies in the prosecution of similar genocide-related cases.

Perhaps the most important lesson to learn in order to adapt to context-specific challenges is to understand them as an inevitable part of the process. Although some standard criteria are undoubtedly necessary to govern the practice, as posited above, chapters 2 and 3 have also illustrated that the referral practice is not a mechanical process that can easily be dissociated from its context. The ICTY and ICTR experience with this practice aptly demonstrates this. What this means concretely, is that any effective referral practice should be *sufficiently flexible* to allow for some form of contextualization, where necessary, while *guarding against the multiplication* of (incoherent) legal responses to the *same* cases. This is a most complex endeavour when one takes into account the national legal framework *as a whole*, including alternative accountability mechanisms (such as the *Gacaca* in Rwanda), which are all working simultaneously to prosecute similar crimes. The inter-transfer between these various mechanisms, notably in the Rwandan context (the referral practice of the highest category of crimes from the formal military courts to the informal *Gacaca* tribunals), is unprecedented and poses a great number of novel challenges, some of which were revealed in chapters 2 and 3.

---

[69] Address of *Serge Brammertz*, Prosecutor, International Criminal Tribunal for the former Yugoslavia to the United Nations Security Council, 5 June 2014, available at: http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/140605_proc_brammertz_un_sc_en.pdf [accessed: 1 July 2014], p. 2.

III. Concluding remarks

The foregoing sections have sought to formulate possible *Lösungsansätze* (solutions) to the legal problems identified in chapter 3. The discussion has intended to underscore the following hypothesis: Irrespective of inevitable discrepancies between norms on the international, national and local level *(basic assumption)* and the fact that some solutions will need to be tailor-made,[70] international law prescribes a basic level of fundamental human rights norms, including fair-trial rights, which pertain to *all* referral cases, regardless of the country of referral. Rule 11*bis* RPE explicitly acknowledges the need for fair-trial rights at national level as a pre-condition to referral, and the referral case law of both the ICTY and ICTR has explained in some details the contours of these rights.

Whether the solutions sought will be more systematic or context-specific, or some measure of both, will largely depend on an examination of the precise legal problems that are exposed by the referral practice in a given setting. The approach to legal problems will invariably be dependent to some degree on the context in which the referral takes place, however systematic structural problems may be. What is readily apparent when examining rule 11*bis* RPE of the ICTY and ICTR respectively, is that some quick-fix solutions exist that could remedy the problems encountered thus far, as discussed above.

Regarding the context-specific solutions, however, they are more complex and require a careful assessment, which is not easily made prior to the implementation of the practice. Nevertheless, some valuable lessons can be gleaned from the ICTY and ICTR experiences, notably that multiple layers of accountability mechanisms require a holistic approach that should consider the entire legal framework in which the referral practice is embedded and not only strictly speaking the formal court with exclusive mandate over transfer cases from international courts and tribunals. The infamous *Maktouf* case, although not an ICTY referral case, has manifestly illustrated the need to consider the greater impact on the work of lower-level courts all over the territory.

---

[70] For instance, in the concrete setting of Rwanda, one solution is to authoritatively clarify the interplay between relevant laws (the *Transfer Law March 2007* on the one hand, and the *Death Penalty Abolition Law July 2007* on the other), so as to indicate which respective penalty structure (imprisonment vs. imprisonment in isolation) is applicable to transfer cases.

Chapter 5

ICTY/ICTR referral practice: What relevance for the ICC?

While the main part of this research project is dedicated to examining the ICTY and ICTR referral practice from various aspects, the analysis of this novel practice and its lessons learned has the potential to prove valuable to the work of other international courts and tribunals, including the ICC. The legal problems associated with the implementation of the ICTY and ICTR practice outlined in chapter 2 and the possible root causes identified in chapter 3 could help in the formulation of solutions so as to better transplant this practice into other contexts, as proposed in chapter 4.

Clearly, the different jurisdictional framework upon which the ICC is built may also give rise to a number of different problems than those experienced by the ICTY and ICTR. For instance, the problem of the discrepancies in legal frameworks would perhaps be less acute in the ICC context because of the treaty-based nature of the Court, in which state parties agree to be bound by the legal norms set forth by the Rome Statute.[1] That is to say, a large number of state parties (albeit not all) have either directly implemented the Rome Statute whole-scale into their national legislations, or have made legislative amendments consistent with the Rome Statute,[2] such that the difficult questions of applicable substantive laws (category of crimes, retroactivity of laws, etc.) may not pose a serious problem.[3] However, as the recent Libya admissibility decision, discussed below, will demonstrate, these issues are nevertheless highly relevant regarding non-state parties.

One important aspect to note is the difference in terminology between the ICTY and ICTR, which uses the word "referral" for the act of referring cases *to* national jurisdictions, whereas in the ICC context, the word "referral" is the act of a state party referring situations *to* the ICC, *not the inverse*.[4] Although, as will be argued in

---

[1] *Tolbert*/*Kontić*, in: Stahn/Sluiter (eds.), p. 161.

[2] Article 12(1), Rome Statute. See in this context: *Däubler-Gmelin, Herta*, Parliamentary Assembly of the Council of Europe, Cooperation with the International Criminal Court (ICC) and its universality, Committee on Legal Affairs and Human Rights, Doc. 11722, 3 Oct. 2008. Available at: http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=12150&lang=en [accessed: 4 April 2013].

[3] *Tolbert*/*Kontić*, in: Stahn/Sluiter (eds.), p. 161.

[4] The term *referral* in the Statutes of the ICTY/ICTR connotes the transfer of a case *from* the international tribunals *to* national states, whereas *deferral* signifies the transfer *from* national courts *to* the tribunals. In the context of the Rome Statute of the ICC, *referrals* and *deferrals* have an altogether different meaning. That is, in the Rome Statute, *referral* connotes the act of a State Party referring a situation in which crimes are allegedly committed *to* the ICC Prosecutor under article 14, whereas *deferral* signifies the act of putting on hold

this chapter, the Rome Statute provides for functional equivalents to the ICTY and ICTR referral mechanism, they are placed under the rubric of challenges to admissibility of the Court (article 19) and requests for cooperation (article 93(10). Despite these terminological differences, and to avoid confusion, *the following sections will employ the term "referral" in the sense used at the ad hoc tribunals*.

Of the eight cases currently before the ICC, five referrals have been brought by state parties (Uganda in 2003, Democratic Republic of Congo (DRC) in 2005, Central African Republic (CAR) in 2007 and 2014, and Mali in 2012), two cases have been referred by the UN Security Council under its chapter VII powers (Darfur, Sudan in 2005 and Libya in 2011) and two have been initiated by the Prosecutor *proprio motu* (Kenya in 2010 and Côte d'Ivoire in 2011).[5]

I. Relevance despite different jurisdictional frameworks

The ICTY and ICTR are created by the UN Security Council, are *ad hoc* in nature, geographically limited, retrospective, and have concurrent but primary jurisdiction over national courts. Conversely, the ICC is treaty-based, permanent, global, prospective, and complementary to national courts. Despite great differences in their respective jurisdictional frameworks, it is posited that the ICTY/ICTR referral practice experience bears relevance for the work of the ICC. Although currently, the Rome Statute does not explicitly foresee a "Completion Strategy" akin to the Strategy implemented by the ICTY and ICTR, the ICC acknowledges the importance of their experiences for its future work in its Report on Complementarity:

> "Completion of the ICC's activities in a situation country is a complex matter. The ICC is a permanent institution with a *sui generis* nature and as such many of the specific issues related to completion strategies of the *ad hoc* tribunals may not apply to the ICC per se. That said, *the experiences of temporary international criminal justice institutions may provide useful considerations if adapted to the ICC context.*"[6]

Given the foregoing, the Assembly of States Parties notes that:

> "The ICC is therefore closely following the discussions about completion strategies, residual functions and legacy in the other tribunals and courts, with a view to building on their experience and knowledge."[7]

---

an investigation or prosecution, following the request by the UN Security Council, under article 16.

[5] ICC website: https://www.icc-cpi.int/# [accessed: 5 July 2014].

[6] International Criminal Court – ASP, Report on Complementarity [accessed: 1 July 2014], § 4. Emphasis added.

[7] International Criminal Court – ASP, Report on the review of field operations, ICC-ASP/9/12, 30 July 2010, available at: https://www.icc-cpi.int/NR/rdonlyres/3358BCD6-6DC3-42D6-91F8-ABC5FFED3CA6/0/ICCASP912ENG.pdf [accessed: 13 June 2014], § 23.

Despite the lack of a specific strategy as such, there is strong basis, both in the explicit terms of the Rome Statute and through the judicial decisions of the ICC, to assume that the question of referral is pertinent to the work of the ICC and will become increasingly so as its work progresses. The primary area in which case referral is envisaged by the Rome Statute and has already been relied upon in the *Al-Senussi* case arising out of the situation in Libya, is following a successful admissibility challenge to the Court's jurisdiction. As noted by one author, this type of referral enables the ICC to "react to a judicial and/or political changes that may occur in the state concerned between the indictment and the actual trial."[8] In addition thereto, the Rome Statute explicitly provides for the transfer of investigative materials and files as part of a national investigation into cases. Both these types of cases have formed the very basis of the ICTY and ICTR referral practice.

As such, currently, there are two principal types of situations where a referral practice is envisaged in the context of the ICC's work. A third type, namely case referral as part of an ICC Exit Strategy, *may* become relevant in the future. These situations will be discussed in turn. How lessons learned from the ICTY and ICTR practice can apply to the ICC will also be contemplated.

II. Referral regulations in the Rome Statute of the ICC

A. Case referrals following a successful challenge to the ICC's admissibility under article 19 of the Rome Statute

Article 19(2), read together with article 17,[9] provides the legal basis for a referral of cases back to national jurisdictions. In this context, cases can be referred back following a successful admissibility challenge to the Court's jurisdiction.[10]

Contrary to rule 11*bis* RPE of the ICTY and ICTR, which was amended into the respective Rules of Procedure and Evidence following the Completion Strategy imposed on the tribunals by the UN Security Council late in their lives, this practice has formed an integral part of the ICC legal system right from the outset. In fact, the ICC itself views the articles on admissibility issues (articles 17 and 19) as the functional

---

[8] *Lindemann*, Referral of Cases from International to National Criminal Jurisdictions, p. 277.

[9] See appendix. As explained in chapter 1, in addition to the threshold criteria of "gravity" of the crimes committed, the category of crimes being listed in articles 5–8 of the Rome Statute, the jurisdiction of the ICC is triggered under article 17 of the Rome Statute where a state party is "unwilling or unable genuinely to carry out the investigation or prosecution". Article 17 also gives further details on the threshold criteria of "unwillingness" and "inability".

[10] See appendix.

equivalent of the ICTY and ICTR referral practice under rule 11*bis* RPE. In its Report on Complementarity, the International Criminal Court notes that:

> "there is no need to devise any special mechanism for the referral of cases to national jurisdictions, which has been an integral element of the completion strategies of the ICTY and the ICTR. In the context of the ICC, such matters are regulated by the existing legal framework of admissibility issues, *a permanent feature of the Rome Statute that is available at all stages of the Court's engagement with a situation and not only in the context of 'completion'*."[11]

In particular, the Rome Statute provides for the possibility to challenge the admissibility of a case or the jurisdiction of the Court under article 19 *once the ICC is seized* of a situation or case. In particular, article 19(1) provides that "the Court may on its own motion, determine the admissibility of a case in accordance with article 17". And Article 19(2) provides that "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction" may be brought by:

> (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
>
> (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
>
> (c) A State from which acceptance of jurisdiction is required under article 12.

In addition thereto, article 19(2) allows for the Prosecutor "to seek a ruling from the Court regarding a question of jurisdiction or admissibility." States who have brought a situation before the Court under article 13, or victims are also permitted to "submit observations to the Court" with respect to the admissibility challenge.

As far as timing of such a challenge is concerned, article 19 stipulates that a State "shall make a challenge at the earliest opportunity", "*prior to* or *at the commencement* of the trial," or exceptionally at a later point with leave of the Court, although the latter two scenarios are applicable only for an admissibility challenge of a case in a *ne-bis-in-idem* claim based on articles 17(1)(c) and 20(3) of the Rome Statute.

How timely the question about an ICC referral practice is can be gleaned from recent developments. In October 2013, the ICC Pre-Trial Chamber I referred the case of *Abdullah Al-Senussi* back to Libya.[12] This marks the very first time a case was referred back to a national court following an admissibility challenge under articles 17(1)(a)[13]

---

[11] International Criminal Court – ASP, Report on Complementarity [accessed: 1 July 2014], § 21. Emphasis added.

[12] Situation in Libya: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11/-01/11, Decision on the admissibility of the case against *Abdulla al-Senussi*, 11 Oct. 2013, § 69 [hereafter *Al-Senussi* admissibility challenge decision]. Emphasis added.

[13] Article 17(1)(a) stipulates: "The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*". Emphasis added.

and 19(2)(b).[14] To come to its decision, Pre-Trial Chamber I used a two-pronged test, which considers:

> (i) whether, at the time of the proceedings in respect of a challenge to the admissibility of a case, *there is an ongoing investigation or prosecution of the case at the national level* (first limb); and, in case the answer to the first question is in the affirmative,
>
> (ii) *whether the State is unwilling or unable genuinely to carry out such investigation or prosecution* (second limb).[15]

After careful analysis of the facts before it, Pre-Trial Chamber I held that both limbs of the test under article 17(1)(a) of the Rome Statute ("willingness" and "ability") were satisfied, thus rendering the case "inadmissible" before the Court. In particular, the Court held that:

> "the same case against Mr Al-Senussi that is before the Court is currently subject to domestic proceedings being conducted by the competent authorities of Libya – which has jurisdiction over the case – and that Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case against Mr Al-Senussi."

While the precise details of the factual evidence relied upon by Pre-Trial Chamber I are beyond the scope of this discussion, one aspect of the *Al-Senussi* admissibility decision is particularly noteworthy.

The situation in Libya was referred to the ICC Prosecutor on 26 February 2011, pursuant to a UN Security Council referral.[16] At the Prosecutor's request, Pre-Trial Chamber I issued an arrest warrant against *Abdullah Al-Senussi*, on the basis of article 25(3)(a) of the Rome Statute, for his alleged role, as indirect perpetrator, in the commission of crimes against humanity (murder and persecution) in Benghazi, Libya, in violation of articles 7(1)(a) and (h) of the Rome Statute.[17] Libya challenged the admissibility of the case in accordance with articles 17(1)(a) and 19(2)(b) of the Rome Statute, claiming that its judicial system was actively investigating *Al-Senussi* for the same crimes as the ICC.[18]

The Pre-Trial Chamber considered that:

> "for the Chamber to be satisfied that the domestic investigation covers the same "case" as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are conducted; and b) *the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court."*[19]

---

[14] Article 19(2)(b) stipulates: "Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted".

[15] *Al-Senussi* admissibility challenge decision, § 26. Emphasis added.

[16] UNSC resolution 1970 (2011), available at: http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf [accessed: 4 Jan. 2013].

[17] *Al-Senussi* admissibility challenge decision, § 69.

[18] *Ibid.*, § 13.

[19] *Ibid.*, § 66 (i).

In examining the latter part of the test, Pre-Trial Chamber I held that "the assessment of the subject matter of the domestic proceedings *must focus on the alleged conduct and not on its legal characterisation*."[20] Interestingly, citing a previous admissibility decision, it held that:

> "[t]he question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge" and "a domestic investigation or prosecution for 'ordinary crimes', to the extent that the case covers the same conduct, shall be considered sufficient".[21]

In comparing the case before the Court and the case subject to Libyan domestic proceedings, Pre-Trial Chamber I observed that:

> "the evidence provided by Libya indicates that the domestic proceedings cover, at a minimum, those events that are described in the Article 58 Decision as particularly violent or that appear to be significantly representative of the conduct attributed to Mr *Al-Senussi*. The fact that such events are referred to in the evidence submitted by Libya confirms that the same conduct alleged against Mr *Al-Senussi* in the proceedings before the Court is subject to Libya's domestic proceedings."[22]

For the purposes of this study it is particularly interesting that the Trial Chamber acknowledged that the crime of persecution – which is set out in article 7(1)(h) of the Rome Statute and with which *Al-Senussi* is charged in the ICC Arrest Warrant – does not seem to have a counterpart in Libyan domestic law.[23] Despite this discrepancy, the Pre-Trial Chamber considered itself satisfied with the fact that targeting a particular group of individuals based on the identity of the group constitutes an aggravating factor for sentencing purposes in the Libyan Criminal Code.[24] As a result, it found that "the evidence placed before it demonstrates that the Libyan competent authorities are taking concrete and progressive steps directed at ascertaining the criminal responsibility of *Al-Senussi* for *substantially the same conduct* as alleged in the proceedings before the Court."[25] It is noteworthy to add that other than the ICTY and ICTR Statutes, article 20(3) of the Rome Statute does not explicitly require "the same legal characterization of the crime in order to satisfy the *ne bis in idem* principle", allowing a challenge for double jeopardy where an individual "has been tried by another court for *conduct* also proscribed by article 6, 7, 8 or 8*bis*".[26]

Although this is the first of a series of admissibility challenges to be successful, the *Al-Senussi* decision – both in its reasoning and in its outcome – has set the tone about the ICC's preference for national prosecution, despite the apparent risk of indirectly endorsing discrepant legal standards between cases tried nationally and those

---

[20] *Ibid.*, § 66 (iv).

[21] *Ibid.*

[22] *Al-Senussi* admissibility challenge decision, § 165.

[23] *Ibid*., § 166.

[24] *Ibid*.

[25] *Ibid.*, § 167. Emphasis added.

[26] Article 20(3), Rome Statute.

tried at the ICC. This risk is especially prominent where the admissibility challenge is brought by a non-state party, such as, in this case, Libya. That is, given the fact that Libya has not ratified the Rome Statute, there is no formal obligation to align its national laws with the legal norms contained in the Rome Statute. Clearly, the "liberal" approach to certain discrepancies or *lacunae* in national laws (i.e. persecution as a crime against humanity) is an attest to the Rome Statute's strong commitment to the complementarity. However, as will be explained below, this commitment *may* – depending on the concrete circumstances of a case – be in direct juxtaposition with a potentially *competing* commitment: accountability.

It is noteworthy – and perplexing – that an earlier admissibility challenge by Libya in the case of *Saif Al-Islam Gaddafi* for the same conduct charged as *Abdullah Al-Senussi* in the ICC indictment,[27] was denied only five months before. Relying on the aforementioned two-prong test for determining admissibility challenges, and finding that the "case" must cover "substantially the same conduct as alleged in the proceedings before the Court", Pre-Trial Chamber I stated that this determination "will vary according to the concrete facts and circumstances of the case and, therefore, requires a case-by-case analysis."[28] Although the specific details of this case are beyond the scope of this section, suffice it to say that Pre-Trial Chamber I denied Libya's request on the basis of both limbs of the test. Specifically, it held that Libya was unable to sufficiently prove that its investigations of *Gaddafi* covered "substantially the same conduct" as that before the ICC, finding instead that the national investigations covered only "certain discrete aspects"[29] that pertained to *Gaddafi*'s conduct alleged in the proceedings before the ICC, but that "the evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against *Gaddafi*."[30] Turning to the second limb of the test, the Pre-Trial Chamber held that Libya's "ability genuinely to carry out the investigation or prosecution against *Gaddafi*" was insufficiently substantiated due, *inter alia*, to its inability to

1) obtain custody of the Accused[31]

2) obtain testimony by "ascertaining control" over certain detention facilities and provide adequate witness protection measures, which directly impacts the investigation against Mr *Gaddafi*,[32] and

3) ensure the appointment of defence counsel for Mr *Gaddafi*, which is a fundamental pre-condition to Libya's ability to hold a trial.[33]

---

[27] Two counts of crimes against humanity of murder as per article 7(1)(a) and persecution as per article 7(1)(h) of the Rome Statute.

[28] Situation in Libya: *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11/-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013 [hereafter *Al-Islam Gaddafi* admissibility challenge decision], § 77.

[29] *Ibid.*, § 134.

[30] *Ibid.*, § 135.

[31] *Ibid.*, §§ 206 ff.

[32] *Ibid.*, §§ 209 ff.

[33] *Ibid.*, § 212.

It is interesting that the third ground was also established in the *Al-Senussi* case[34] but did not lead to a finding of "inability" on the part of Libya to try the case at national level. It is not readily apparent from a close reading of the two cases on what basis these similar cases resulted in diametrically opposing outcomes.

Two comments are necessary at this juncture. First of all, it is not the curious difference in conclusions in the *Al-Islam Gaddafi* and *Al-Senussi* cases that is most noteworthy; rather, what is significant is the Pre-Trial Chamber's reasoning in the *Al-Islam Gaddafi* case as an illustration of the complex balancing act between various (competing) legal principles of the Rome Statute. In this case, the mode by which the ICC admissibility was triggered tests the workability of the complementarity regime *in practice*. The fact that the admissibility challenge in the *Al-Islam Gaddafi* case was based on a UN Security Council referral under chapter VII, may be relevant to the ICC's decision to retain admissibility over the case, given the specific circumstances of the case, although admittedly it does not satisfactorily explain why the ICC decided differently in the *Al-Senussi* case. In any event, the referral of cases by the UN Security Council may, as the *Al-Islam Gaddafi* case demonstrates, severely circumvent the complementarity regime in favour of other competing (and sometimes perhaps mutually exclusive) aims of the Rome Statute, such as *accountability*. While the Pre-Trial Chamber I in the *Al-Islam Gaddafi* decision argued that "[t]he principle of complementarity expresses a preference for national investigations and prosecutions,"[35] the principle of accountability (one of the primary goals of the ICC being "retribution"), prominently set out in the preamble and underlying the entire philosophy of the Rome Statute, counter-balances the oft-emphasized notion of complementarity. Viewed negatively, the Rome Statute thus contains a built-in dilemma, which is not always easily resolved in the concrete context of a specific case. What is noticeable in the examination of the two cases arising from the Libya situation, is that although Libya's willingness is not contested, the *Al-Senussi* referral being proof thereof, the "inability" determination of the admissibility criteria under article 17 of the Rome Statute appears to place greater emphasis on the specific circumstances of the case itself (i.e. control of the accused, control over detention facilities, protection of witnesses, availability of defence counsel) than on the socio-political context (political instability and insecurity, speaking to "ability" in a broader sense) of the country generally. Although this discussion merits its own dissertation, it is beyond the scope of this section. The foregoing section merely sought to briefly illustrate some of the intricacies that have arisen in the concrete setting of an admissibility challenge under the Rome Statute.

The second and interconnected comment relating to an examination of complementarity in practice is the ICC's *own* ability to conduct investigations and prosecu-

---

[34] *Al-Senussi* admissibility challenge decision, §§ 206, 230 ff.

[35] *Al-Islam Gaddafi* admissibility challenge decision, § 52.

tions, which may not differ significantly from the ability of national courts themselves. In the *Gaddafi* case, Pre-Trial Chamber, relying on article 17's admissibility criteria, decided that Libya was unable to try the case itself due to various external factors, such as its inability to gain control over the accused or its detention facilities, to ensure witness protection, etc. In fact, one could make the argument that the ICC would face *even greater difficulties*. Due to the ICC's remote location and lack of police or enforcement powers, it would have to rely substantially on the Libyan government for assistance. In fact, it is precisely on the basis of the fact that national courts are often in a better position – relatively viewed – to obtain control of the accused, evidence, witness testimony, etc. that the presumption of complementarity in favour of the national courts was so prominently enshrined in the Rome Statute in the first place. While there is no easy solution to the aforementioned conundrum, a strong argument can be made towards enhancing the capacity of national institutions and structures such that the ICC's complementarity regime may have a better chance when implemented *in concreto*. This will be discussed in greater detail below.

B. Referral of evidence obtained during an ICC investigation or trial

Contrary to the ICTY's and ICTR's case referral practice under rule 11*bis* RPE, which requires a judicial decision, their referral of investigative files and materials to national prosecutors' offices is based on prosecutorial discretion. As chapter 2 has illustrated, this latter type of referral has been relied on substantially by both the ICTY and ICTR prosecutors. Logically, in both contexts, the number of investigative files transferred to national jurisdictions far outweighed the number of cases referred under rule 11*bis* RPE. It is noteworthy that in the ICTR context, the Prosecutor sent a large number of case files to the Rwandan national prosecutor for further action years *before* formal cases had been approved for referral to Rwanda under rule 11*bis* RPE.

As regards the referral of evidence in the ICC context, it is easily conceivable that a situation could arise where the ICC investigates, but does not issue indictments, or where the trial gives rise to evidence that could help in another case being investigated at national level, and where handing over this evidence to the national judicial jurisdictions would allow for a possible prosecution of these individuals. The Court itself acknowledges this possibility, stating that "[a]ssistance from the ICC to a national jurisdiction, including the sharing of information, subject to necessary legal caveats, is envisaged by the Court's legal framework"[36] since it is understood that "[b]y nature, the ICC will focus its prosecution on few individuals, leaving it to the

[36] *Ibid.*, § 22.

national judicial systems to deal with other perpetrators."[37] From a practical viewpoint, therefore, this provision "will avoid duplication of efforts and resources."[38]

In fact, this type of referral is firmly entrenched in the ICC's legal framework. In particular, article 93(10)(a) of the Rome Statute stipulates that:

> "[t]he Court *may*, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State."

Article 93(10)(b)(i) further stipulates the type of assistance, as including, *inter alia*:

> a) The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
>
> b) The questioning of any person detained by order of the Court.

Rule 194 of the ICC's RPE further supplements this provision.[39] Similar to the ICTY and ICTR practice, this type of referral is discretionary, as the word "may" in article 93(1)(a) suggests.[40] A notable difference is the fact that in the ICTY and ICTR practice, it is the *Prosecutor* who makes this determination, on his or her own motion. Conversely, within the ICC legal framework, the determination is made by the *Court* (the Pre-Trial Chamber or the Prosecutor), following a request from a State Party. Although the wording of article 93(10) of the Rome Statute does not specify the role of the Prosecutor, the Pre-Trial Chamber II stated that such an interpretation "is clear from the usage of the term 'Court' in this provision and in rule 194 RPE, which also makes particular reference to the Prosecutor in its second, third and forth

---

[37] *Ibid.*

[38] *Prost*/*Schlunck*, Other Forms of Cooperation, in: Triffterer (ed.), p. 1117.

[39] Rule 194 of the ICC RPE stipulates:

1. In accordance with article 93, paragraph 10, and consistent with article 96, *mutatis mutandis*, a State may transmit to the Court a request for cooperation or assistance to the Court, either in or accompanied by a translation into one of the working languages of the Court.
2. Requests described in rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, *either to the Prosecutor or to the Chamber concerned*.
3. If protective measures within the meaning of article 68 have been adopted, the Prosecutor or Chamber, as appropriate, shall consider the views of the Chamber which ordered the measures as well as those of the relevant victim or witness, before deciding on the request.
4. If the request relates to documents or evidence as described in article 93, paragraph 10(b)(ii), *the Prosecutor or Chamber*, as appropriate, shall obtain the written consent of the relevant State before proceeding with the request.
5. When the Court decides to grant the request for cooperation or assistance from a State, the request shall be executed, insofar as possible, following any procedure outlined therein by the requesting State and permitting persons specified in the request to be present. [Emphasis added].

[40] Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-97, 12 July 2012, § 17 [hereafter Decision on Kenya's Second Request for Assistance].

subrules."[41] As such, "it follows from this interpretation that the Chamber cannot order the Prosecutor to provide any material or evidence in his "possession" to any State, pursuant to a request under article 93(10) of the Statute, as this is a matter that falls entirely within his power.[42]

Another interesting aspect to note is the type of information that can be referred to the national states by the ICC. Other than the ICTY and ICTR, whose referral practice is limited to investigative materials that have not yet resulted in an indictment, the ICC opens the possibility of the transmission of evidence that has gone far beyond the investigative stage and that has been obtained during an ICC trial.

As a result of the two foregoing differences, and despite the discretionary nature of the request, the ICC referral mechanism of evidence appears to have a considerably more formal character than that of the ICTY and ICTR.

The prospect of this type of referral became concrete in the Kenya situation before the ICC. That is, the government of Kenya filed two requests for receipt of confidential evidence under article 93(10)(a) of the Rome Statute and rule 194 RPE.[43] In particular, Kenya requested "the assistance of and cooperation from the Court and the Prosecutor in respect of its national investigations into allegations of Post-Election Violence in Kenya",[44] namely the "transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC."[45]

The First Request for Assistance was denied on the basis that the government of Kenya was unable to sufficiently establish that its request arose from "conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State" as set out in article 93 (10) of the Rome Statute.[46]

---

[41] Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-63, 29 June 2011, § 30 [hereafter Decision on Kenya's First Request for Assistance].

[42] Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09-63, 29 June 2011, § 31.

[43] Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, ICC-01/09-58, 21 April 2011, available at: http://www.icc-cpi.int/iccdocs/doc/doc1062611.pdf [hereafter Kenya's First Request for Assistance]; Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10), Article 96 and Rule 194, ICC-01/09-79; 16 Sept. 2011 [hereafter Kenya's Second Request for Assistance].

[44] Kenya's First Request for Assistance, § 1.

[45] *Ibid.*, § 2.

[46] Decision on Kenya's First Request for Assistance, §§ 33–34.

In its determination of whether to grant the Second Request for Assistance, the ICC Pre-Trial Chamber II emphasized the discretionary nature of this type of request, finding that the Court had "no obligation to automatically grant a cooperation request submitted by a State."[47] However, it went on to state that "this interpretation should not, in any way, be construed as if the Chamber will likewise automatically reject requests submitted by States."[48] According to the Pre-Trial Chamber, a proper scrutiny of such requests is necessary in accordance with articles 93(10), article 96 and rule 194 RPE.[49] The most decisive factor to the decision whether or not to transmit information under article 93(10) is "to ensure that such an act would not, *inter alia*, put at risk the safety and physical well-being of victims and witnesses."[50] Finding that the disclosure of confidential information requested by Kenya created such a risk, and considering itself "duty bound by law to protect the safety and physical well-being of victims and witnesses,"[51] the Pre-Trial Chamber rejected the Government of Kenya's second request.[52]

Although the aforementioned requests for assistance by the government of Kenya under article 93(10) of the Rome Statute were both rejected for different reasons, the Pre-Trial Chamber II's formulation of a referral standard will be helpful guidance for such requests in the future.

C. Case referrals as part of an ICC completion or exit strategy

This type of referral would most closely resemble the current ICTY and ICTR referral practice in terms of the overall objectives underlying its implementation. Although the ICC underscores that there is no limit on the number of cases that it can hear,[53] or the duration for which it has jurisdiction over them,[54] the ICC itself underlines the importance of some form of phasing out or completion of its work. As *Lindemann* argues, while it seems unlikely, due to its complementarity framework, that the ICC may one day be faced with an overloaded case-docket, the fact that more and more states are becoming party to the Rome Statute coupled with the practice of self-referrals, may make referral as a case-reduction mechanism likely.[55]

---

47 Decision on Kenya's Second Request for Assistance, § 17.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Ibid.*, § 21.

52 *Ibid.*

53 International Criminal Court, Report on Complementarity [accessed: 1 July 2014], § 11.

54 *Ibid.*, §§ 12 ff.

55 *Lindemann*, Referral of Cases from International to National Jurisdictions, p. 276.

Given the different mandate of the ICC on the one hand, and the ICTY and ICTY on the other, "completion" has a significantly different meaning in both contexts.[56] In the ICC context, "a situation before the ICC may not necessarily be closed or completed in the legal sense"; rather, it connotes "the diminishing intensity of the ICC's involvement in a given country."[57] Be that as it may, the ICC underscores that the ICTY and ICTR experience in this area is a "highly useful basis for a structured discussion of completion in the ICC framework".[58]

Despite the fact that the ICC's legal regime does not envisage the formal completion of judicial activities in a situation or case of which it is seized,[59] it is posited that it is precisely its very nature that may make some form of completion an inevitable process. Although the ICC's reach is global and its character permanent, its capacity is limited, in particular logistically. Twelve years into its existence, the ICC has a heavy workload with a total of 21 ongoing cases in eight situations, and preliminary examinations in a number of other situations.[60] The caseload of the ICC continues to increase,[61] accompanied by significant logistical challenges that the work of a remotely placed international court habitually entails (lack of police force, financial limitations, technical and logistical problems obtaining evidence, etc.).[62]As a "court of last resort", the ICC is built on the idea that it plays a subsidiary role vis-à-vis the national courts. The question of some form of "capacity limit" may thus be timely.

Concerning referral of cases as part of a completion or exit strategy, article 19 clearly appears to open the door to such a possibility. In this context, the above stated citation is worth repeating in part. In its Report on Complementarity, the ICC stated that referrals are governed by the admissibility provisions, as being "a permanent feature of the Rome Statute that is available *at all stages of the Court's engagement with a situation and not only in the context of 'completion'*".[63] However, the issue

---

[56] International Criminal Court – ASP, Report on Complementarity [accessed: 1 July 2014], § 15.

[57] *Ibid.*, § 16.

[58] *Ibid.*, § 45.

[59] *Ibid.*, § 15.

[60] Of the currently eight situations before the Court, four situations were referred by State parties themselves (Uganda, Democratic Republic of Congo, Central African Republic and Mali), two situations were referred by the UN Security Council (Darfur and Libya) and two situations were initiated by the Prosecutor *proprio motu* (Kenya and Côte d'Ivoire). http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [accessed: 5 July 2014].

[61] Report of the International Criminal Court for 2012/13, A/68/314, 13 Aug. 2013, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_68_314.pdf [accessed: 1 July 2014].

[62] See in this context: *Mutyaba*, The ICC: Its Impact and the Challenges it Faces in Fulfilling its Mandate [accessed: 1 Feb. 2014].

[63] International Criminal Court – ASP, Report on Complementarity [accessed: 1 July 2014], § 21. Emphasis added.

remains hypothetical to date. Although the topic of completion is being actively pursued at the ICC, until this time, it has not seriously envisaged the phasing-out or completion from any of its situations. However, this issue *may*, at some point in the near future, become relevant.

What exact form an ICC completion or exit strategy could take, and what role article 19 can play as a case-referral mechanism in this particular context, remains to be seen. However, what *is* clear is that the Rome Statute contains a built-in mechanism to engage in this practice at *all* stages of the process, including at the completion level.[64] It is thus not unimaginable that the Court could, *on its own motion*, make a finding of inadmissibility under article 19(1) in the context of a completion strategy. In any event, the Court's first ever referral of a case to a national court in the *Al-Senussi* case sets and important precedent regarding reliance on this mechanism.

D. Conclusion

Referral in the ICC context has thus far been first and foremost contemplated in response to States' admissibility challenges to ICC jurisdiction, or a request for information or evidence. A third possibility has been presented, which would most closely resemble the ICTY and ICTR's referral practices regarding the objectives for its implementation (case-reduction strategy). While the ICTY and ICTR rules are specifically and exclusively tailored to achieve case-referral as part of a general Completion Strategy, whereas the ICC referral mechanism is more generally subsumed under its general legal framework, the foregoing discussion has sought to demonstrate that there is nevertheless a legal basis in the Rome Statute to engage in a referral as part of a Completion/Exit Strategy, which given the potential caseload of the ICC, is perfectly likely to be relied upon in some form in the foreseeable future.

III. Referral as an illustration of complementarity in practice: difficulties and prospects

Former ICC Chief Prosecutor *Moreno Ocampo* has stated that:

"As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court,

---

[64] *Ibid.*

as a consequence of the regular functioning of national institutions, would be a major success."[65]

An ICC referral practice, coming into play *after* the ICC has seized jurisdiction, can be considered a concrete element of the complementarity principle in practice. If we are to take *Moreno Ocampo*'s words literally, one can draw the conclusion that the determination of *in*admissibility of a case before the ICC (leading to a referral to national jurisdictions) can also be a measure of the ICC's success.

However, as the ICTY and ICTR referral practice experience has demonstrated, this process is dependent not just on states' political will to try such cases ("willingness") but on the presence of an adequate legal framework and working and independent judiciary at the national level ("ability") – dual criteria which form the very tenet of the ICC's complementarity regime under article 17 of the Rome Statute.

Concretely speaking, this means that if the success of the ICC depends on the national courts' ability to take on the investigation and prosecution of crimes within the ICC's jurisdiction under the complementarity regime, greater emphasis must be placed on durable national capacity building. In the ICTY and ICTR context, national capacity building was a decisive factor in allowing for the successful implementation of Completion Strategies' referral practice, despite certain complex legal problems both *pre-* and *post*-referral, highlighted by chapters 2 and 3. However, the ICC's *Gaddafi* admissibility challenge decision, while illustrating the priority of the accountability principle, does not provide concrete guidance on how cooperation efforts – at the international and national level – can accomplish accountability by way of national prosecutions.

A cursory view of accountability initiatives in some ICC situation countries illustrates the lack of effective national measures working in a truly complementary relationship with the ICC. Although the initial absence or ineffectiveness of such measures at national level can inevitably be explained by the devastating impact of conflict on these societies, in light of the limited capacity of the ICC, national mechanisms – whether formal or informal – form a crucial part of the fight against impunity on state-wide level. Only where international and national efforts exist in parallel, can there be any chance for true accountability.

To illustrate this point more concretely, national accountability initiatives in three situation countries will be examined briefly below. In particular, the purpose of these brief case studies is to demonstrate that, akin to the criteria laid forth in rule 11*bis* RPE of the ICTY and ICTR, any successful case referral to national systems under the Rome Statute – be it as part of an admissibility challenge, or as part of a possible ICC Completion/Exit Strategy from a country – is directly dependent on the ICC's

---

[65] *Moreno-Ocampo, Luis*, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor, The Hague, 16 June 2003. Available at: http://www.iccnow.org/documents/MorenoOcampo16June03.pdf [accessed: 3 Jan. 2014], p. 2.

dual admissibility criteria, contained in article 17, namely a state's willingness and ability. Much like the ICTR, which was forced to refuse the transfer of cases to Rwanda for many years, due to a number of different legal issues discussed earlier, the ICC's referral practice is directly dependent on the genuine commitment of States parties and the ability of national accountability mechanisms to fight impunity (i.e. a functioning and adequate national accountability mechanism). The following section thereby seeks to show certain difficulties to the very idea of complementarity in practice, which the referral is an important facet of, in light of three ongoing cases before the ICC.

A. Case studies

1. Uganda

Uganda referred the brutal crimes committed over the period of two decades by commanders of the Lords' Resistance Army (LRA) and other rebel groups to the ICC in 2003.[66] The ICC opened an investigation on 29 July 2004 concerning the situation in Northern Uganda, and issued arrest warrants in 8 July 2005 against five LRA leaders.[67] Nine years later, the arrest warrants are still outstanding and the individuals subject thereto are still at large. At the national level, the Ugandan government has launched its own accountability initiative in July 2008 in the form of a War Crimes Division (now the International Crimes Division, ICD) within the Ugandan High Court to prosecute these crimes,[68] as a way of "fulfilling the Government of Uganda's commitment to the actualization of Juba Agreement on Accountability and Reconciliation."[69] In fact, the ICD was established following (failed) negotiations between the government and the LRA, during which its founder *Joseph Kony* and other senior leaders of the LRA indicated their unwillingness to surrender to the

---

[66] ICC press release, President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-CPI-20040129-43, 29 Jan. 2004, available at: https://www.icc-cpi.int/Pages/item.aspx?name=president+of+uganda+refers+situation+concerning+the+lord_s+resistance+army+_lra_+to+the+icc [accessed: 7 July 2014].

[67] The ICC issued arrest warrants against *Joseph Kony*, *Vincent Otti*, *Dominic Ongwen*, *Okot Odhiambo* and *Raska Lukwiya* on 8 July 2005 (source: https://www.icc-cpi.int/uganda). It has been confirmed that *Lukwiya* was killed in combat in Northern Uganda in 2006 and it is believed that *Otti* has died (source: BBC Obituary: LRA deputy Vincent Otti, 23 Jan. 2008, available at: http://news.bbc.co.uk/2/hi/africa/7083311.stm [accessed: 6 July 2014]; warrants for the three men remain outstanding.

[68] International Crimes Division of the Ugandan High Court, official website: http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html [accessed: 5 July 2014].

[69] *Ibid*.

ICC.[70] While a detailed examination of the Ugandan situation, and the role and impact of the ICC therein, is complex and beyond the purview of this section, suffice it to say here that the ICD has faced considerable challenges since its establishment. In particular, it lacked the adequate legal framework to try genocide, crimes against humanity and war crimes in the beginning of its mandate.[71] This was rectified only *two years after* the establishment of the ICD, following the adoption of the International Criminal Court Act on 25 June 2010.[72] Considered as "a court of 'complementarity' with respect to the International Criminal Court, thus fulfilling the principle of complementarity stipulated in the preamble and article 1 of the Rome Statute", the ICD has jurisdiction over "the perpetrators of war crimes and crimes against humanity *including commanders of the LRA and other rebel groups*."[73]

Despite the adoption of the ICC Act, a Human Rights Watch report details the many remaining legal problems, notably the interplay between the ICC Act and amnesty laws, the right to adequate defence, structural issues, etc.[74] Regrettably, so far, these concerns have been confirmed, since the ICD's only trial to date has ended following the successful invocation of amnesty laws by former LRA commander, *Thomas Kwoyelo*.[75] The case is currently pending appeal by the Ugandan government.[76]

2. Democratic Republic of Congo

Similarly to the Uganda situation, the government of the Democratic Republic of Congo (DRC) itself referred horrendous crimes committed on its territory since 1 July 2002 to the ICC on 19 April 2004.[77] An investigation was opened on 23 June

---

[70] Although the *Juba* peace talks (from Aug. 2006) laying the foundation for the establishment of the ICD to try senior members of the LRA failed, the ICD was nevertheless established in 2008. See *Gore, Rachel*, Outreach Strategy for War Crimes Division of High Court of Uganda, Public International Law and Policy Group & Oxford Transitional Justice Research. Available at: https://www.academia.edu/1105201/Outreach_Strategy_for_War_Crimes_Division_of_High_Court_of_Uganda [accessed: 5 May 2014], fn. 46.

[71] *Ibid*, p. 14.

[72] The International Criminal Court Act, 2010, http://www.issafrica.org/anicj/uploads/Uganda_ICC_Act_2010.pdf [accessed: 5 July 2014].

[73] International Crimes Division of the Ugandan High Court, official website: http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html [accessed: 5 July 2014]. Emphasis added.

[74] Human Rights Watch, Justice for Serious Crimes before National Courts [accessed: 7 May 2014].

[75] *Gladys, Oroma*, Could Uganda Prosecute Joseph Kony? Institute for War and Peace Reporting, ACR Issue 377, 23 Jan. 2014, available online at: http://iwpr.net/report-news/could-uganda-prosecute-joseph-kony [accessed: 5 July 14].

[76] *Ibid.*

[77] https://www.icc-cpi.int/drc [accessed: 5 July 2014].

2004.[78] Currently, there are four cases arising out of the DRC situation before the ICC, two of which are awaiting appeal following their convictions *(Thomas Lubanga Dyilo* and *Germain Katanga)*, one is awaiting appeal following an acquittal *(Mathieu Ngudjolo Chui)*, one case is still at the pre-trial stage *(Bosco Ntaganda)* and one case is pending the arrest of the accused *Sylvestre Mudacumura*).[79] At the national level, accountability initiatives have been engaged in, but with varying levels of success. Although the government of the DRC has indicated its commitment to prosecuting heinous crimes committed on its territory, and "there has been some progress with national and international trials, *the vast majority of the perpetrators of these crimes remain unpunished.*"[80]

As stated in the Declaration of 146 Congolese and international human rights organizations, national trials in Congo's military courts have exposed many legal issues, notably as regards the quality of investigations, victim and witness protection mechanisms, rights of the defence, and the courts' jurisdiction over senior-level commanders with the greatest level of responsibility.[81] In October 2013, DRC President *Joseph Kabila*, in a statement before both chambers of Parliament, confirmed his commitment to the establishment of a specialized war crimes tribunal with jurisdiction over war crimes, crimes against humanity and genocide.[82] One of the major concerns in this context, however, is the lack of ICC implementing legislation that would allow for effective national prosecutions of ICC crimes. Draft legislation incorporating ICC's core crimes into Congolese national law was adopted by a specialized commission of the Congolese National Assembly in December 2013.[83] While welcoming this draft legislation, a coalition consisting of 146 human rights organizations opposes the imposition of the death penalty as the only penalty for war crimes, crimes against humanity and genocide, which is foreseen in the current version of the draft law.[84]Although the foregoing initiatives are proof of a growing commitment to entrench the ICC's complementarity regime at national level, the process is slow and cumbersome, and very little has tangibly been achieved *in concreto.*

---

[78] *Ibid.*

[79] *Ibid*.

[80] Joint Declaration by 146 Congolese and international human rights organizations: Democratic Republic of Congo: No More Delays for Justice. Establish Specialized Mixed Chambers and Adopt ICC Implementing Legislation During the Current Parliamentary Session, 1 April 2014, available at: http://www.hrw.org/sites/default/files/related_material/No%20more%20delays%20for%20justice%20-%20DRC%20Specialized%20Mixed%20Chambers_0.pdf [accessed: 5 July 2014]. Emphasis added.

[81] *Ibid.*, 1.

[82] *Ibid.*

[83] *Ibid.*, 2.

[84] *Ibid.*

3. Kenya

In the *Kenya* case before the ICC, the Prosecutor's request to initiate an investigation *proprio motu* into crimes committed following the 2007–2008 election was authorized by Pre-Trial Chamber II on 31 March 2010.[85] Currently, there are four cases before the ICC arising from that situation, against *William Samoei Ruto* and *Joshua Arap Sang*, *Uhuru Muigai Keyatta* and *Walter Osapiri Barasa*.[86] At the national level, while Kenya implemented ICC core crimes into its national legislation through the International Crimes Act in 2009, its accountability initiatives regarding the post-election violence have focused on an alternative form of justice, with mixed reviews on the whole. That is, the establishment of the Truth, Justice and Reconciliation Commission (TJRC) has been strongly criticized for being selective (not exposing certain egregious conduct, such as extrajudicial executions), mismanaged and corrupt, "reflecting the reluctance of the political leadership to account for the country's dark past."[87] On the whole, its legacy for exposing the truth, advancing justice and promoting reconciliation in the country has been considered, even by a former commissioner, as rather "mixed". It is at this point not yet clear how the recommendations following the highly contested final report will be implemented at national level.

Although a detailed *exposé* of national accountability initiatives of all the ICC situation countries is vast and beyond the purview of this section, the foregoing merely sought to illustrate certain complexities (both as regards technical capacity and as regards political will) surrounding national prosecutions of ICC core crimes in *parallel* to ICC cases. In order for complementarity to work effectively, and in light of the ICC's limited capacity, the role of national courts is crucial. This is not least so when one considers the ICC referral practice – notably as part of an exit strategy from a situation – as a potentially important facet of complementarity in practice.

In the ICTY context, financial and logistical support from the European Union, states, international and national governmental and non-governmental institutions, etc. have been crucial in supporting the capacity building of BiH institutions, including the BiH judiciary. This in turn has made it possible for the referral practice to be a feasible option, despite certain legal start-up difficulties.

Regrettably, a strong commitment to fighting impunity for grave international crimes appears to undergo a constant balancing act on the agenda of the African

---

[85] Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation in the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, available at: http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf [accessed: 5 July 2014].

[86] Source: https://www.icc-cpi.int/kenya [accessed: 5 July 2014].

[87] *Gitari Ndungú, Christopher*, Lessons to be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation, ICTJ Briefing, May 2014, available at: http://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf [accessed: 5 July 2014], p. 10.

Union (AU). On the one hand, the AU is pushing for the establishment of the African Court of Justice and Human Rights (to replace the African Court on Human and Peoples' Rights and the African Court of Justice)[88] as the main judicial instance for grave human rights violations at the pan-African level, and seeks to bestow on it – for the first time – a broad mandate to prosecute individual criminal responsibility for war crimes, crimes against humanity and genocide.[89] On the other hand, in June 2014, the future Court's mandate was seriously compromised when the AU approved a controversial amendment to provide immunity from criminal prosecution of sitting heads of states and senior government officials,[90] essentially legitimizing the commission of such crimes during their term of office. Aside from seriously curtailing the jurisdiction of the African Court, this amendment represents a regression in the development of international criminal law norms, and is in direct contravention to the philosophy underlying the Rome Statute and thus to the legal obligations of those African states having ratified it. Amnesty International therefore argues that this amendment calls "into question the African Union's commitment to its declared goal of ensuring justice for victims of serious crimes under international law."[91]

What is apparent from the foregoing is that the Rome Statute's complementarity principle applied in practice gives rise to a myriad of legal problems regarding both the dual criteria of inability and unwillingness, for which there are no easy solutions. Various areas and means of national capacity building and outreach programmes can assist the accountability process in countries which are genuinely committed to fighting impunity. Where insufficient political will exists in the top ranks of a country's government structure, the most effective national capacity building efforts in

---

[88] Protocol on the Statute of the African Court of Justice and Human Rights, available at: http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf [accessed: 5 July 2014].

[89] Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights – Introducing the Draft Protocol, available at: http://www.africalegalaid.com/news/draft-protocol-afchpr [accessed: 10 July 2014].

[90] See, for instance, *Pflanz, Mike*, African leaders vote to give themselves immunity from war crimes prosecutions, The Telegraph, 2 July 2014, available at: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10940047/African-leaders-vote-to-give-themselves-immunity-from-war-crimes-prosecutions.html [accessed: 6 July 2014]. The reactions by civil society have been strong. See, for instance, Amnesty International news release, African Union Summit: Government leaders must not grant themselves immunity for genocide, war crimes and crimes against humanity, 19 June 2014, available at: http://www.amnesty.ca/news/news-releases/african-union-summit-government-leaders-must-not-grant-themselves-immunity-for [accessed: 6 July 2014]; Coalition for the ICC, A step towards impunity for grave crimes: AU approves immunity for those in power, available at: http://ciccglobaljustice.wordpress.com/2014/07/03/a-step-towards-impunity-for-grave-crimes-au-approves-immunity-for-those-in-power/ [accessed: 6 July 2014].

[91] Amnesty International news release, African Union Summit: Government leaders must not grant themselves immunity for genocide, war crimes and crimes against humanity, available at: http://www.amnesty.ca/news/news-releases/african-union-summit-government-leaders-must-not-grant-themselves-immunity-for [accessed: 6. July 2014].

the world will be ineffective. Like in the ICTY and ICTR contexts, the ICC referral practice – as one tangible facet of the complementarity relationship with national courts – concretely highlights certain limits of international criminal justice.

IV. Some possible lessons learned from the ICTY and ICTR referral practice for the ICC

Having established the relevance of the referral practice to the work of the ICC, an obvious question that follows is: *which lessons learned from the ICTY and ICTR experience can be transposed to the ICC context?* Despite the existing legal basis in the Rome Statute (discussed above), the provisions are *ad hoc* and scarce, such that some sort of "streamlining" of the ICC referral scenarios into a specific referral mechanism would undoubtedly be beneficial to allow for a clear and coherent approach in the future.[92] Despite inevitable differences in jurisdictional frameworks, some lessons can be drawn from the experience of the ICTY and ICTR referral practice. Based on chapters 1 to 3, section II of chapter 4 has sought to carve out a number of solutions, both systematic and context-specific, to remedy some of the problems encountered by the ICTY and ICTR. While the context-specific solutions or particular propositions for textual modifications to rule 11*bis* RPE are not pertinent for the ICC for obvious reasons, some of the systematic solutions contemplated are likely to be useful in the ICC context.

A. Clarification of applicable substantive laws

The lack of clarification and dogmatic reasoning about the need for a substantive law analysis proved to be one of the most pertinent problems with regard to the implementation of rule 11*bis* RPE of the ICTY and ICTR. Contrary to rule 11*bis* RPE, the need for a substantive law analysis is inherent in the ICC's admissibility provisions. In addition, chapter 2 has elucidated different viewpoints on the part of the

---

[92] *Lindemann*, Referral of Cases from International to National Criminal Jurisdictions, p. 281. *Lindemann* makes a plea for the implementation of a detailed and specific referral mechanism akin to that of the ICTY and ICTR rule 11*bis* RPE. It is clear, however, that the specific modalities of any such approach will necessarily have to take into account the very different jurisdictional frameworks at play between the ICC and its *ad hoc* precedessors, as well as certain shortcomings of the ICTY and ICTR rule 11*bis* RPE (highlighted in chapters 2–4 of this study) that should be expressly remedied for future referral practices. In addition, the fact that the ICTY and ICTR applied the nearly identical rule in quite a different manner gives impetus to an argument to revisit it thouroughly before transposing it into the ICC context, an argument that *Lindemann* herself makes by pleading for an "intermediate yet uniform" approach to the rule by the two *ad hoc* tribunals, p. 283.

ICTY and ICTR regarding the extent to which the legal characterization of a crime contained in the ICTY and ICTR indictments for possible transfer must be "mirrored" by national law. While the ICTY took a seemingly liberal view, the ICTR's position appears to be more stringent, having impeded transfer to Rwanda and other national jurisdictions for a significant amount of time. As one will recall, the ICC Pre-Trial Chamber's position in both the *Al-Senussi* and *Gaddafi* admissibility decisions is more in line with the ICTY approach and focused not on the actual legal characterization as such but rather on whether the conduct charged at national level reflected the crimes contained in the ICC indictments. However, the different outcomes in the Pre-Trial Chamber's admissibility decisions regarding the same conduct in these cases, discussed in chapter 2, does give rise to some confusion about the stance of the Pre-Trial Chamber regarding the substantive law analysis, and the determination of the "substantially the same conduct" part of the two-prong test, employed in both cases.[93] While this section does not intend to revisit the incongruence between these two decisions, it merely intends to illustrate that significant legal challenges (notably those faced by the ICTY and ICTR in their respective referral practices) should be examined more closely by the ICC so as to allow for the formulation of a more coherent approach from the outset.

B. Strong post-referral monitoring mechanism

It is posited that the post-referral monitoring mechanism is crucial to the referral practice of *any* court, but especially the ICC, whose global reach and, at the same time, remoteness from the *loci delicti*, amplifies the need for an effective monitoring mechanism of national criminal procedures. Given the complementarity framework of the ICC, in which a number of situations are continually monitored across the continents and over the years, a monitoring mechanism in the context of a case referral practice is clearly in line with current practice. However, the Rome Statute does not provide for a monitoring mechanism as such. Regrettably, the ICC Trial Chamber in the *Al-Senussi* case did not insist on some form of monitoring when referring the case back to Libya. On the contrary, the fact that it actually invalidated the arrest warrant against *Al-Senussi* and declared the case as closed at the ICC following the referral,[94] appears questionable in light of the fact that it is as of yet unclear whether Libya will actually try *Al-Senussi* as promised. Nevertheless, article 19(1) of the Rome Statute provides the Prosecutor the right to request "review"

---

[93] *Al-Senussi* admissibility challenge decision, § 69; *Gaddafi* admissibility challenge decision, § 77.

[94] Pre-Trial Chamber I, Decision following the declaration of inadmissibility of the case against Abdullah Al-Senussi before the Court, 7 Aug. 2014, ICC-01/11-01/11-567, available at: http://www.icc-cpi.int/iccdocs/doc/doc1802149.pdf [accessed: 1 July 2014], § 6.

of a case under article 19(10)[95] if new facts arise regarding the initial admissibility decision. Perhaps it is, at least in its outcome, a functional equivalent of rule 11*bis* RPE's provision allowing the ICTY and ICTR to request a case back in case it is not properly adjudicated at national level. In addition, the ICC Prosecutor has indicated that "the Office has requested Libya to make information available on its national proceedings against Mr. Al-Senussi" and that "[t]he Office has also taken steps to ensure that independent trial monitoring occurs."[96]In light of the foregoing, and given the importance of an effective monitoring in referral cases, it is posited that some form of more established and internally coherent monitoring mechanism should be put in place.

As was discussed earlier, the post-referral monitoring mechanism proved to be an important tool in allowing the ICTY and ICTR to retain some form of control over the cases (the confirmed indictments) transferred under rule 11*bis* RPE. However, given the seriousness of crimes charged in the indictments, section II of chapter 4 has criticized the discretionary nature of the monitoring function and has advocated for a mandatory post-referral monitoring mechanism. In addition, it has seriously questioned the mechanism's lack of recourse following a final decision (whether or not it led to a conviction or an acquittal) or the post-referral sentence monitoring mechanism. Given the relevance of monitoring in the ICC context, any post-referral monitoring mechanism of national trials would seriously benefit from taking into account the shortcomings in the ICTY and ICTR model and the specific remedies for resolving them, as suggested above.

C. Early Establishment of a Transition Team

The ICC's complementarity arrangement relies heavily on strong national accountability mechanisms and the continued cooperation with States. Contrary to the ICTY and ICTR, and perhaps due to its unique jurisdictional set-up, the ICC's external relations, public information and outreach activities have been developed in a comprehensive manner from early on in its life.[97] Although the ICC is a permanent institution, the sheer volume of cases it could potentially hear and the limits on its capacity to do so will likely lead it to start "closing" cases at some point in the future,

---

[95] If the court has decided that a case is inadmissible under article 17, the prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

[96] Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011), available at: http://www.icc-cpi.int/iccdocs/otp/otp-report-UNSCR%201970-11-11-2014-Eng.pdf [accessed: 14 June 2014], § 21.

[97] See the Integrated Strategy for External Relations, Public Information and Outreach, available at: https://www.icc-cpi.int/NR/rdonlyres/425E80BA-1EBC-4423-85C6-D4F2B93C7506/185049/ICCPIDSWBOR0307070402_IS_En.pdf [accessed: 6 Jan. 2015].

with the possibility of some form of referral. Such a completion or exit strategy has been evoked earlier.

The ICTY and ICTR experiences have demonstrated that the lack of an early and effective transition approach had significant repercussions on the knowledge and perceptions of affected communities regarding the tribunals. Despite its integrated strategy, the fact that the ICC is operating in remote areas of the world, including in (possibly hostile) non-State parties, where information about the ICC may be sparse, makes this element crucial. The very fact that the first case referral by the ICC *(Al-Senussi)* was to Libya, a non-State party, is significant. As the ICTY and ICTR experience also illustrated, any impact an international criminal institution may have, from afar, on affected communities, is significantly enhanced through effective national capacity building, which includes external relations, public information and outreach between different accountability mechanisms at the international, national and local levels.

Conclusion and outlook

Chapter 2 has illustrated a large array of complex legal conundrums that have arisen throughout the implementation of the referral practice under rule 11*bis* RPE of the ICTY and ICTR respectively as part of the UN Security Council's Completion Strategy. By its very nature, rule 11*bis* RPE has forced the comparative analysis between norms at the international and national fora, and has exposed significant problems *in concreto*. Problems include in particular the application of divergent norms to the prosecution of similar crimes within the same criminal justice system. This is arguably the inevitable result of any criminal justice response by transitional societies to the prosecution of complex crimes committed on a mass scale. In Bosnia and Herzegovina, it is the multiplicity of conventional courts at various levels and their application of widely different laws, which contributes to legal uncertainty. In Rwanda, the particular complexity is based on the mix of fundamentally different approaches altogether, with the conventional courts on the one hand, and the *Gacaca* courts on the other, as informal dispute resolution mechanisms based on community practice.

Through an analysis of the ICTY and ICTR referral case law, chapter 2 has sought to prove the working hypothesis that rule 11*bis* and its judicial interpretation have been at least partially insufficient in addressing the number of legal issues arising out of this intricate process. This is certainly in some part attributable to the fact that the referral mechanism under rule 11*bis* was conceived significantly *after* the establishment of the respective *ad hoc* tribunals, and can, perhaps in some manner, be considered an "after-thought". The crux therefore is to view the practice of referral from the international tribunals to national courts as a direct implementation of their functional jurisdictional arrangement, based on true complementarity. Understanding it as such may provide added impetus to establish public information and outreach programmes, and to enhance national capacity building efforts, so as to facilitate referral from the international to national levels.

Based on an analysis both of the legal problems (chapter 2) as well as the possible contextual and normative root causes of such problems (chapter 3), concrete proposals for possible amendments to the ICTY and ICTR rule 11*bis* RPE have been proffered in chapter 4. These could, in many parts, be generally applicable in other contexts. The amendments include the improvement of the monitoring mechanism by international courts of national trials (comprising the post-verdict monitoring mechanism), increased public awareness and national capacity building, as well as the early establishment of a transition team. In light of the fact that the referral process is terminated at the ICTY and is nearly completed at the ICTR, this proposal

comes too late for these *ad hoc* international criminal institutions which were the first of their kind, after the Nuremberg trials in the wake of World War II. It is contended, however, that such proposals are valuable for other international courts and tribunals facing similar issues. Indeed, despite the jurisdictional differences between the two tribunals on the one hand, and the ICC on the other (chapter 1), the discussion in chapter 2 has also sought to show that some major legal problems that have been highlighted by the ICTY and ICTR referral practice experience transcend formal barriers, such that lessons learned from the ICTY and ICTR contexts may very well prove useful in the ICC context. The fact that the ICC legal framework already contains functional equivalents to the case referral mechanism under rule 11*bis* RPE of the ICTY and ICTR respectively, and also to the referral procedure of investigative files and evidence, underscores the relevance of the ICTY and ICTR experience to the ICC context.

Chapter 4 has posited that while some solutions must inevitably be tailor-made based on a specific context, the conceptualization of systematic solutions for a certain category of general problems is nevertheless possible. Some solutions are relatively straightforward to implement, e.g. the early establishment of some form of transition team, the implementation of outreach and public information programmes, national capacity building. Other solutions, such as attempts to resolve significant legal discrepancies between courts at various levels due to the application of a number of highly diverse legal standards, may be significantly more ardurous. The complexities of such legal diversity in the context of multiple accountability structures involving the prosecution of highly complex international crimes are readily apparent in both BiH and Rwanda. Inevitably, in every different situation, the legal response will vary. This is no truer than in the ICC context, which, unlike the ICTY and ICTR, works in highly diverse settings and will hear only a small number of cases in each situation of which it is seized. Chapter 4 has also sought to elaborate on the difficult discussion regarding the "margin of appreciation", a margin, which does not appear to be clearly defined in international criminal law today. Nevertheless, chapter 4 has sought to prove that irrespective of disparate norms between international and national criminal law norms *(basic assumption)*, and the inevitable context specificity of some solutions, the *corpus* of international law sets a minimum standard of basic human rights, including fair-trial rights, which are universal, and which should apply to *every* referral case, *regardless* of the country of referral.

Conceived first and foremost as a case-reduction mechanism, the ICTY and ICTR case referral practice – as part of the UN-Security-Council-adopted Completion Strategy – is a novel experiment in the laboratory of international criminal justice. As chapter 4 has posited, one can argue about the success of the referral practice in significantly reducing the Tribunals' caseload, but when viewed broadly (as including "category II" cases, namely investigative materials at a pre-indictment stage), the figures show that the referral practice can be considered to have fulfilled its primary justification, *at least at the level of the international Tribunals*. Clearly the fact that

these "category II" cases have not yet been processed at the national level in BiH, seriously undermines the success of this practice when viewed globally. Other more idealistic and amorphous rationales have been cited in connection with the referral practice, such as national reconciliation. These are significantly more difficult to concretely measure in themselves, certainly in the short-term. It has been posited that the debate about the tribunals' impact has been falsely framed around rigid *end results* rather than viewing reconciliation as a long and complex *process*. Reframing the debate may be a better starting point to understanding the concrete impact international courts and tribunals can have on domestic systems.

What *can* be confirmed with certainty, however, is that the ICTY and ICTR referral practice experience – the first of its kind – has provided a wealth of insight into the various legal problems that have arisen in the process, both prior to and following the referral of cases to national jurisdictions. The lessons learned from these problems can, in turn, assist in some measure to anticipate possible problems in the work of other courts, including the ICC. Although the ICC is only now concretely talking about "completion" scenarios, the Rome Statute already contains a built-in mechanism that appears to adequately cover a form of broad "referral practice" under articles 19 and 93(10). It is hoped that some of the important lessons learned from the ICTY and ICTR referral practice experiences can concretely serve the ICC in the formulation of its own specific "Completion" Strategy.

By way of the ICTY and ICTR referral practice of cases to national criminal jurisdictions, this study has sought to illustrate more generally the increasingly important role of international courts and tribunals in progressively shifting the interface of the world global order.[1] What was previously predominantly a nation-state model has increasingly become a legal system in which there is "neither a hierarchical order nor […] legal unity but rather a situation characterized by conflicts of laws and values".[2] The result being, as *Sieber* pertinently argues, "a very much stronger dissonance between authority and regulation than in the past", showing "clearly that legal order and social control in the modern global society have become very much more complex" than under the previous model.[3] The functional relationship between international courts and tribunals and national jurisdictions (irrespective of whether this relationship is based on primacy or complementarity) tests this new global legal order in pivotal ways and gives rise to important challenges that are not easily resolved. Many of the complex challenges, including those highlighted by the patchwork of legal responses to war crimes cases at national level, will not be amenable to quick-fix solutions. However, it is clear that legal challenges arising from or made evident following the growing proliferation of actors and norms – and their inevitable

---

[1] *Sieber*, Legal Order in a Global World, p. 11.

[2] *Ibid*., p. 22.

[3] *Ibid*., p. 23.

interaction on many levels – within this new global legal order, may be more effectively addressed if they are understood as belonging to a *Gesamtsystem* (system as a whole), however fragmented and haphazard, rather than as unconnected units.

It is hoped that the lessons learned from the specific example of the ICTY and ICTR referral practice can enhance a general understanding about the early challenges of this new global legal order, and can ultimately contribute to helping actors and norms find their rightful place therein.

Appendix

ICTY Rules of Procedure and Evidence

IT/32/Rev. 49, 22 May 2013

Rule 11*bis* Referral of the Indictment to Another Court

(Adopted on 12 Nov. 1997, amended on 30 Sept. 2002)

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or (amended 10 June 2004)

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, (amended 10 June 2004) so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Amended 30 Sept. 2002, amended 11 Feb. 2005)

(B) The Referral Bench may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Amended 30 Sept. 2002, amended 10 June 2004, amended 11 Feb. 2005)

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004) 1, consider the gravity of the crimes charged and the level of responsibility of the accused. (Amended 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005)

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force; (amended 11 Feb. 2005)

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf. (Amended 30 Sept. 2002)

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial. (Amended 30 Sept. 2002, amended 11 Feb. 2005)

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10. (Amended 30 Sept. 2002, amended 11 Feb. 2005)

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused. (Amended 30 Sept. 2002, amended 11 Feb. 2005)

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules. (Amended 11 Feb 2005)

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision. (Amended 11 Feb. 2005)

ICTR Rules of Procedure and Evidence

(Adopted on 29 June 1995; as amended on 10 April 2013)

Rule 11*bis*: Referral of the Indictment to another Court

(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.

(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

(ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.

(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.

Rome Statute of the ICC

Article 17
(Issues of admissibility)

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
   (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
   (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
   (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
   (d) The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
   (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
   (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
   (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 19
(Challenges to the jurisdiction of the Court or the admissibility of a case)

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
   (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
   (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
   (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
   (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
   (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that

new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

ICC Rules of Procedure and Evidence

Rule 194

1. In accordance with article 93, paragraph 10, and consistent with article 96, *mutatis mutandis*, a State may transmit to the Court a request for cooperation or assistance to the Court, either in or accompanied by a translation into one of the working languages of the Court.
2. Requests described in sub-rule 1 are to be sent to the Registrar, which shall transmit them, as appropriate, either to the Prosecutor or to the Chamber concerned.
3. If protective measures within the meaning of article 68 have been adopted, the Prosecutor or Chamber, as appropriate, shall consider the views of the Chamber which ordered the measures as well as those of the relevant victim or witness, before deciding on the request.
4. If the request relates to documents or evidence as described in article 93, paragraph 10 (b) (ii), the Prosecutor or Chamber, as appropriate, shall obtain the written consent of the relevant State before proceeding with the request.
5. When the Court decides to grant the request for cooperation or assistance from a State, the request shall be executed, insofar as possible, following any procedure outlined therein by the requesting State and permitting persons specified in the request to be present.

Bibliography

Afande, Koffi Kumelio A., La légitimité et l'efficacité des sanctions pénales dans les pays de l'Afrique subsaharienne – un cas de pluralisme juridico-socio-culturel [Legitimacy and efficiency of penalties in sub-Saharan Africa – a case of socio-juridical-cultural pluralism]. N° 3, Revue Internationale de Criminologie et de Police Technique et Scientifique 277–294 (2007).

Akhavan, Payam, The Crime of Genocide in the ICTR Jurisprudence. Journal of International Criminal Justice 989–1006 (2005).

– Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal. 20(4) Human Rights Quarterly 737–816 (1998).

– Justice and Reconciliation in the Great Lakes Region of Africa: the Contribution of the International Criminal Tribunal for Rwanda. 7 Duke Journal of Comparative and International Law 325–348 (1996–1997).

Alvarez, *Jose E.*, Rush to Closure. Lessons of the Tadić Judgment. 96 Michigan Law Review 2092 (1998).

Ambos, Kai, Treatise on International Criminal Law: Vol. II. Oxford University Press 2014.

– Internationales Strafrecht, Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht [International penal law, criminal procedure, European penal law]. 1st Ed. Munich 2006, 3rd Ed. Munich 2011.

– The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC. In: Kai Ambos/Judith Large/Marieke Wierda (eds.), Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development. Berlin 2009, pp. 19–103.

– Joint Criminal Enterprise and Command Responsibility. 5 Journal of International Criminal Justice 159–183 (2007).

– Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung [The general part of international criminal law. Approaches towards dogmatisation]. Berlin 2004.

– International Criminal Procedure: "adversarial", "inquisitorial" or mixed? 3 International Criminal Law Review 1–37 (2003).

Amstutz, Marc R., Is Reconciliation Possible after Genocide? The Case of Rwanda. 48 Journal of Church and State 541–565 (2006).

Amnesty International, Unfair trials: Justice denied. 8 April 1997, AI Index: AFR 47/008/97. Available at: https://www.amnesty.org/en/documents/afr47/008/1997/en/ [accessed: 16 May 2013].

– Bosnia and Herzegovina, Submission for the European Commission Progress Report, May 2012. AI Index: EUR 63/007/2012. Available at: http://reliefweb.int/sites/reliefweb.int/files/resources/eur630072012en.pdf [accessed: 18 March 2013].

Amnesty International, The Right to Know: Families still left in the dark in the Balkans, 2012, AI Index: EUR 05/001/2012. Available at: https://www.amnesty.org/en/documents/eur05/001/2012/en/ [accessed: 7 July 2014].

– International Criminal Court: The failure of states to enact effective implementing legislation, September 2004, AI Index: IOR 40/019/2004. Available at: https://www.amnesty.org/en/documents/ior40/019/2004/en/ [accessed: 9 July 2014].

– Rwanda, Gacaca: A Question of Justice. December 2002, AI Index: AFR 47/007/2002. Available at: https://www.amnesty.org/en/documents/afr47/007/2002/en/ [accessed: 16 May 2013].

Askin, Kelly D., Crimes within the Jurisdiction of the International Criminal Court. 10 Criminal Law Forum 33–59 (1999).

Aukerman, Miriam J., Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice. 15 Harvard Human Rights Journal 39–97 (2002).

Austermiller, Steven, Mediation in Bosnia and Herzegovina: A Second Application. 9 Yale Human Rights & Development Law Journal 132–165 (2006).

Avocats Sans Frontières (ASF), Monitoring des juridictions Gacaca: Phase de jugement [Monitoring Gacaca jurisdictions: Judgment phase]. Rapport analytique N° 5, Janvier 2008 – Mars 2010. Available at: http://www.asf.be/wp-content/publications/Rwanda_MonitoringGacaca_RapportAnalytique5_Light.pdf [accessed: 7 July 2014].

– Monitoring des juridictions Gacaca [Monitoring Gacaca jurisdictions]. Kigali 2006.

Badar, Mohamed Elwa, "Just Convict Everyone!" – Joint Perpetration: From Tadić to Strakić and Back Again. 6 International Criminal Law Review 293–302 (2006).

Barria, Lilian A./Roper, Steven D., Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY. 9 Human Rights Review 317–330 (2008). Reprinted in Springer Science + Business Media B.V. 2007. Available at: http://www.stevendroper.com/Bosnia.pdf [accessed: 10 May 2013].

Bassiouni, M. Cherif, A Functional Approach to "General Principles of International Law". 11 Michigan Journal of International Law 768–818 (1990).

Bassiouni, M. Cherif/Manikas, Peter, The Law of the International Criminal Tribunal for the Former Yugoslavia. New York 1996.

Bekou, Olympia, Rule 11bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence. 33 Fordham International Law Journal 723–792 (2010).

Benvenisti, Eyal, Margin of Appreciation, Consensus, and Universal Standards. 31 New York University Journal of International Law and Politics 843–854 (1999).

Bergsmo, Morten/Harlem, Mads/Hayashi, Nobuo (eds.), Importing Core International Crimes into National Criminal Law. Forum for International Criminal Justice and Conflict (FICJC) Publications No. 1 (2007). Available at: http://www.fichl.org/fileadmin/fichl/documents/Pre-TOAEP/Importing_Core_International_Crimes_into_National_Criminal_Law__r2_.pdf [accessed: 9 July 2014].

Bickford, Louis, Transitional Justice. In: Dinah L. Shelton (ed.), The Encyclopedia of Genocide and Crimes Against Humanity. Vol. 3, Detroit 2004, pp. 1045–1046.

Bisset, Alison, Rethinking the Powers of Truth Commissions in Light of the ICC Statute. 7 Journal of International Criminal Justice 963–982 (2009).

Blake-Amarante, Candace H., Peace vs. Justice: The Strategic Use of International Criminal Tribunals. In: Henry F. Carey/Stacey M. Mitchell (eds.), Trials and Tribulations of International Prosecution. New York 2013, pp. 91–105.

Bloomfield, David, Reconciliation: An Introduction. In: David Bloomfield/Teresa Barnes/Luc Huyse (eds.), Reconciliation after Violent Conflict. A Handbook, International Institute for Democracy and Electoral Assistance. Stockholm 2003, pp. 10–18.

Boctor, Audrey, The Abolition of the Death Penalty in Rwanda. 10 Human Rights Review 99–118 (2009).

Bogdan, Attila, Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia. 6 International Criminal Law Review 63–120 (2006).

Bohlander, Michael, Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts. 14 Criminal Law Forum 59–99 (2003).

Bornkamm, Paul Christoph, The Implementation of Modern Gacaca. In: Rwanda's Gacaca Courts: Between Retribution and Reparation. Oxford Scholarship Online, May 2012. Available at: http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199694471.001.0001/acprof-9780199694471-chapter-3 [accessed 9 May 2013].

Bothe, Michael, War Crimes in Non International Armed Conflict. 24 Israel Yearbook on Human Rights 241–251 (1995).

Bourdon, William, Prosecuting the Perpetrators of International Crimes, What Role May Defence Counsel Play? 3 Journal of International Criminal Justice 434–46 (2005).

Braithwaite, John, Reconciliation and Architectures of Commitment. Canberra 2010.

Brounéus, Karen, Reconciliation and Development: Study Prepared for Workshop 8 – "Reconciliation." Building a Future on Peace and Justice. International Conference. Nuremberg, Germany, 25–27 June 2007. Available at: http://library.fes.de/pdf-files/iez/04999.pdf [accessed: 1 July 2014].

Burgers, J. Herman/Danelius, Hans, The United Nations Convention against Torture – A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Hague 1998.

Burke-White, William W./Kaplan, Scott, Shaping the contours of domestic justice: The International Criminal Court and an admissibility challenge in the Uganda situation. In: Carsten Stahn/Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court. The Hague 2009, pp. 79–144.

Cassese, Antonio, Oxford Companion on International Criminal Justice. Oxford/New York 2009.

– International Criminal Law. 2nd Ed. Oxford/New York 2008.

– Reflections on International Criminal Justice. 61 Modern Law Review 1–10 (1998).

Chehtman, Alejandro, Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases, Critical Notes on a "Success Story". 9 Journal of International Criminal Justice 547–570 (2011).

Christie, Nils, Conflict as Property. 17 The British Journal of Criminology 1–15 (1977).

Clark, Phil, Hybridity, Holism, and "Traditional" Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda. 39 The George Washington International Law Review 765–837 (2007).

Clark, Phil/Kaufman, Zachary D. (eds.), After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond. New York/London 2008.

Cole, Elisabeth, Shortcomings of ICTY Outreach in Bosnia-Herzegovina: A Case Study, 29 April 2013. Available at: https://www.academia.edu/3632029/Shortcomings_of_ICTY_Outreach_A_Case_Study_of_Bosnia-Herzegovina [accessed: 5 May 2014].

Crocker, David A., Reckoning with Past Wrongs: A Normative Framework. In: Carol A. L. Prager/Trudy Govier (eds.), Dilemmas of Reconciliation: Cases and Concepts. Waterloo 2003, pp. 39–64.

Dallaire, Roméo, Shake Hands with the Devil: The Failure of Humanity in Rwanda. Toronto 2003.

Damaška, Mirjan, What is the Point of International Criminal Justice? 83 Chicago-Kent Law Review 329–365 (2008).

DeNicola, Christopher P., Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism, DePaul Rule of Law Journal (2010). Available at: http://works.bepress.com/christopher_denicola/1/.

De los Reyes, Charmaine, Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused. Chinese Journal of International Law 1–15 (2005).

Del Ponte, Carla, Im Namen der Anklage: Meine Jagd auf Kriegsverbrecher und die Suche nach Gerechtigkeit [In the name of prosecution: Hunting down war criminals and the quest for justice]. Frankfurt a. M. 2009.

Des Forges, Alison, Leave None to Tell the Story: Genocide in Rwanda. New York 1999. Also available at: http://www.hrw.org/legacy/reports/1999/rwanda/rwanda0399.htm [accessed: 25 June 2013].

Diekmann, Jens/Kerrl, Christina, UN Ad Hoc Tribunals under Time Pressure – Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence. 8 International Criminal Law Review 87–108 (2008).

Dieng, Adama, Clarification of Concepts: Justice, Reconciliation and Impunity, ICTR, 24 May 2002. Available at: http://ictr-archive09.library.cornell.edu/ENGLISH/africandialogue/papers/diengEN.pdf [accessed: 29 April 2014].

Drost, Pieter Nicolaas, The Crime of State, Bd. II: Genocide. Leiden 1959.

Drumbl, Marc A., International Criminal Law: Taking Stock of a Busy Decade. 10 Melbourne Journal of International Law, 38–45 (2009).

– Atrocity, Punishment, and International Law. Cambridge 2007.

– Law and Atrocity: Settling Accounts in Rwanda. 31 Ohio Northern University Law 41–74 (2005).

– Collective Violence and Individual Punishment: The Criminality of Mass Atrocity. 99 Northwestern University Law Review 539–610 (2005). Also available at: http://ssrn.com/abstract=530182 [accessed: 1 June 2013].

– Punishment, Postgenocide: From Guilt to Shame to "Civis" in Rwanda. 75 New York University Law Review 1221–1326 (2000).

Dubois, Olivier, Rwanda's National Criminal Courts and the International Criminal Tribunals. International Review of the Red Cross 717–731 (1997).

Eser, Albin, The "Adversarial" Procedure: A Model Superior to Other Trial Systems in International Criminal Justice? In: Thomas Krüssmann (ed.), ICTY: Towards a Fair Trial. Wien 2008, pp. 206–227.

– The Act Requirement: the Nature and Rationale of Punishment. 28 Cardozo Law Review 2427–2436 (2007).

Fletcher, Laurel E./Weinstein, Harvey, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation. 24 Human Rights Quarterly 573–639 (2002).

Fierens, Jacques, Gacaca Courts: Between Fantasy and Reality. 3 Journal of International Criminal Justice 896–919 (2005).

Foster, Don, Evaluating the Truth and Reconciliation Commission of South Africa. 19 Social Justice Research 527–540 (2006).

Frowein, Jochen A., The Internal and External Effects of Resolutions by International Organizations. 49 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 778–790 (1998).

Frulli, Micaela, Are Crimes against Humanity more Serious than War Crimes? 12 European Journal of International Law 329–350 (2001).

Gallimore, Timothy, The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda. 14 New England Journal of International & Comparative Law 239–266 (2008).

Garland, David, Sociological Perspectives on Punishment. 14 Crime and Justice 115–165 (1991).

Gordon, Gregory S., Toward an International Criminal Procedure: Due Process Aspirations and Limitations. 45 Columbia Journal of Transnational Law 635–710 (2007).

Gourevitch, Philip, We Wish to Inform You That Tomorrow We Will Be Killed with Our Families. New York 1998.

Gradoni, Lorenzo, You will receive a fair trial elsewhere: The ad hoc International Criminal Tribunals acting as Human Rights Institutions. 54 Netherlands International Law Review 1–49 (2007).

Grant, Philip, Vers la fin des Tribunaux Pénaux Internationaux pour l'ex-Yougoslavie et le Rwanda: conséquences juridiques des contraintes temporelles (2004–2005) [Towards the closure of the international criminal tribunals for the former Yugoslavia and Rwanda: legal consequences of temporal constraints]. Available at: http://www.prix-henry-dunant.org/sites/prixhd/doc/2005_Dissertation_Philip_Grant_fr.pdf [accessed: 6 June 2013].

Guichaoua, André, Les crises politiques au Burundi et au Rwanda [Political crises in Burundi and Rwanda]. Paris 1995.

Haan, Verena, The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia. 5 International Criminal Law Review 167–202 (2005).

Haile, Dadimos, Rwanda's Experiment in People's Courts (Gacaca) and the Tragedy of Unexamined Humanitarianism: A Normative/Ethical Perspective, Institute of Development Policy and Management, Discussion Paper 2008/01, January 2008. Available at: http://www.ua.ac.be/objs/00167439.pdf [accessed: 14 May 2013].

Harrell, Peter E., Rwanda's Gamble: Gacaca and a New Model of Transitional Justice. New York 2003.

Hiéramente, Mayeul, Internationale Haftbefehle in noch andauernden Konflikten: Rechtliche Rahmenbedingungen bei strafrechtlicher Intervention externer Akteure [International arrest warrants in ongoing conflicts: Judicial parameters of interventions by external actors]. Berlin 2013.

Hodžić, Refik, Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials. 8 Journal of International Criminal Justice 113–136 (2010).

Human Rights Watch, Justice Compromised: Justice for Serious Crimes before National Courts: Uganda's International Crimes Division. 16 Jan. 2012. Available at: http://www.hrw.org/reports/2012/01/16/justice-serious-crimes-national-courts [accessed: 7 May 2014].

– Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of BiH. March 2012. Available at: http://www.hrw.org/sites/default/files/reports/bosnia0312_0.pdf [accessed: 20 June 2013].

– The Legacy of Rwanda's Community-Based Gacaca Courts. London 2011.

– Law and Reality: Progress in Judicial Reform in Rwanda. July 2008. Available at: http://www.hrw.org/reports/2008/rwanda0708/rwanda0708webwcover.pdf [accessed: 1 July 2013].

– There Will Be No Trial – Attacks on Genocide Survivors and Gacaca Participants. London 2007. Available at: https://www.hrw.org/reports/2007/rwanda0707/3.htm [accessed: 14 May 2013].

– The Rwandan Genocide: How it was prepared. No. 1, April 2006. Available at: http://www.hrw.org/legacy/backgrounder/africa/rwanda0406/rwanda0406.pdf [accessed: 25 June 2013].

– Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda, September 2004, Vol. 16, No. 10(A). Available at: http://www.hrw.org/sites/default/files/reports/rwanda0904.pdf [accessed: 8 July 2014].

– Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute. Vol. 13, No. 4(G), September 2001. Available at: http://www.iccnow.org/documents/HRWhandbook_e.pdf [accessed: 9 July 2014].

– Shattered Lives – Sexual Violence during the Rwandan Genocide and its Aftermath. September 24, 1996. Available at: http://www.hrw.org/legacy/reports/1996/Rwanda.htm [accessed: 20 Sept. 2011].

– Genocide in Rwanda. April – May 1994, Vol. 6, No. 4, May 1994. Available at: http://www.hrw.org/sites/default/files/reports/RWANDA945.PDF [accessed: 25 June 2013].

International Center for Transitional Justice, Planning for Residual Issues and Mechanisms for International and Hybrid Criminal Tribunals, Briefing Paper, 1 Feb. 2010.

International Criminal Court, ASP, Report of the Court on Complementarity: Completion of ICC activities in a situation country, ICC-ASP/12/32, 15 Oct. 2013. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-32-ENG.pdf [accessed: 1 Jan. 2014].

International Criminal Tribunal for the former Yugoslavia, ICTY Outreach Programme Annual Report, 2013. Available at: http://www.icty.org/x/file/Outreach/annual_reports/annual_report_2013_en.pdf [accessed: 6 July 2014].

– Manual on Developed Practices, prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY, 2009. Available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf [accessed: 7 June 2013].

Jallow, Hassan B., Prosecutorial Discretion and International Criminal Justice. 3 Journal of International Criminal Justice 145–161 (2005).

– The OTP-ICTR: Ongoing Challenges of Completion. Guest Lecture Series of the Office of the Prosecutor. Den Haag 1 Nov. 2004, 1–8.

Jansen, Yakaré-Oulé (Nani), Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws. 12 Northwestern Journal of International Human Rights 191–213 (2014). Also available at: http://scholarlycommons.law.northwestern.edu/njihr/vol12/iss2/3 [accessed: 8 July 2014].

Kamatali, Jean-Marie, The Challenge of Linking International Criminal Justice and National Reconciliation: the Case of the ICTR. 16 Leiden Journal of International Law, 115–133 (2003).

Kerr, Rachel, Lost in Translation? The ICTY and the legacy of war crimes in the Western Balkans. CIPS Policy Brief No. 19, July 2012. Available at: http://cips.uottawa.ca/wp-content/uploads/2012/07/CIPS_PolicyBrief_Kerr_July2012.pdf [accessed: 1 Dec. 2013].

Kleffner, Jann K., Auto-referrals and the Complementary Nature of the ICC In: Carsten Stahn/Goran Sluiter (eds.), The Emerging Practice of the International Criminal Court. Leiden 2009, pp. 41–53.

Kirkby, Coel, Rwanda's Gacaca Courts: A Preliminary Critique. 50 Journal of African Law 94–117 (2006).

Kirsch, Philipp, A New and Necessary Institution Meriting Continued Support. 28 Fordham International Law Journal 292–307 (2005).

Knust, Nandor, Strafrecht und Gacaca: Entwicklung eines pluralistischen Rechtsmodells am Beispiel des ruandischen Völkermordes [Penal law and Gacaca: Developing a pluralist legal model – by the example of the Rwandan genocide]. Berlin 2013.

Koller, David, The Faith of the International Criminal Lawyer. 40 New York University Journal of International Law and Politics 1019–1069 (2008), also available at: http://nyujilp.org/wp-content/uploads/2013/02/40.4-Koller.pdf [accessed: 1 June 2013].

Koskenniemi, Martti, Between Impunity and Show Trials. In: J. A. Frowein/R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 6 (2002) pp. 1–35.

Lattanzi, Flavia, The International Criminal Court and National Jurisdictions. In: Roy S. Lee (ed.), The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results. The Hague 1999, pp. 187 ff.

Lemkin, Raphael, Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress. Washington D.C. 1944.

Lindemann, Lena, Referral of Cases from International to National Criminal Jurisdictions: Transferring Cases from the ICTY and the ICTR to National Jurisdictions. Baden Baden/Bern 2013.

Magnarella, Paul J., Justice in Africa. Rwanda's Genocide, Its Courts, and the UN Criminal Tribunal. Aldershot 2000.

Maitra, Neelanjan, A Perpetual Possibility? The International Criminal Tribunal for Rwanda's Recognition of the Genocide of 1994. 5 International Criminal Law Review 573–599 (2005).

Martin-Ortega, Olga/Herman, Johanna, Hybrid Tribunals and the Rule of Law: Notes from Bosnia and Herzegovina & Cambodia, JAD-PbP (Just and durable peace by piece) Working Paper Series No. 7, May 2010. Available at: https://www.ciaonet.org/attachments/16753/uploads [accessed: 7 July 2014].

May, Richard/Wierda, Marieke, International Criminal Evidence. Ardsley 2003.

– Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha. 37 Columbia Journal of Transnational Law 725–765 (1999).

McCormack, Timothy L.H./Simpson, Gerry J. (eds.), The Law of War Crimes: National and International Approaches. The Hague 1997.

Mégret, Frédéric, The Legacy of the ICTY as Seen Through Some of its Actors and Observers. 3 Goettingen Journal of International Law 1011–1052 (2011).

– In Defence of Hybridity: Towards a Representational Theory of International Criminal Justice. 38 Cornell International Law Journal 725–751 (2005).

Méndez, Juan E., Accountability for Past Abuses. 19 Human Rights Quarterly 255–282 (1997).

Mettraux, Guénaël, International Crimes and the ad hoc Tribunals. Oxford 2005.

Mitchell, Stacey M., Restorative Justice, RPF Rule, and the Success of Gacaca. In: Henry F. Carey/Stacey M. Mitchell (eds.), Trials and Tribulations of International Prosecution. New York 2013, pp. 255–268.

Morris, Madeline H., The Trials of Concurrent Jurisdiction: The Case of Rwanda. 7 Duke Journal of Comparative & International Law 349–374 (1997).

Morris, Virginia/Scharf, Michael P., An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary, History and Analysis. Irvington-Hudson 1995.

Møse, Erik, The ICTR's Completion Strategy – Challenges and Possible Solutions. 6 Journal of International Criminal Justice 667–679 (2008).

– Main Achievements of the ICTR. 3 Journal of International Criminal Justice 920–943 (2005).

Mujuzi, Jamil Ddamulira, Issues Surrounding Life Imprisonment after the Abolition of the Death Penalty in Rwanda. 9 Human Rights Law Review 329–338 (2009).

Mundis, Daryl A., The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals. 99 American Journal of International Law 142–158 (2005).

Mutyaba, Rita Elizabeth, The ICC: Its Impact and the Challenges it Faces in Fulfilling its Mandate, 15 July 2013. Available at: http://ssrn.com/abstract=2295911 or http://dx.doi.org/10.2139/ssrn.2295911 [accessed: 1 Feb. 2014].

Naqvi, Yasmin, The Right to the Truth in International Law: Fact or Fiction? 88 International Review of the Red Cross 245–273 (2006).

Newton, Michael A., Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court. 167 Military Law Review 20–73 (2000).

Oosthuizen, *Gabriël*, Notes on Rwanda's Transfer Law, International Criminal Law Services (ICLS), 25 Jan. 2010. Available at: http://www.iclsfoundation.org/wp-content/uploads/2009/12/icls-notesonrwandastransferlaw-25012010-final.pdf [accessed: 9 May 2012].

Orentlicher, Diane F., Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime. 100 The Yale Law Journal 2537–2615 (1991).

Orth, Uli, Punishment Goals of Crime Victims. 27 Law and Human Behaviour 173–186 (2003).

Osiel, Mark J., Why Prosecute? Critics of Punishment for Mass Atrocity. 22 Human Rights Quarterly 118–47 (2000).

OSCE, Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing from 2005 to 2010, May 2011. Available at: http://www.osce.org/bih/108103?download=true [accessed: 10 June 2014].

– The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina: Reflections on Findings from Five Years of OSCE Monitoring, January 2010. Available at: http://wcjp.unicri.it/proceedings/docs/OSCEBiH_Processing%2011bis%20cases%20in%20BiH_2010_eng.pdf [accessed: 8 July 2014].

– Witness Protection and Support in Bosnia and Herzegovina Domestic War Crimes Trials: Obstacles and Recommendations a Year after Adoption of the National Strategy for War Crimes Processing, January 2010. Available at: http://www.osce.org/bih/118893?download=true [accessed: 8 July 2014].

– Independence of the Judiciary – Undue Pressure on BiH Judicial Institutions, December 2009. Available at: http://wcjp.unicri.it/proceedings/docs/OSCE_Independence%20of%20the%20Judiciary:%20Undue%20Pressure%20on%20BiH%20Judicial%20Institutions_2009_ENG.pdf [accessed: 25 March 2013].

– Plea Agreements in Bosnia and Herzegovina: Practice before the Courts and their compliance with international human rights standards, 2nd edition, May 2006. Available at: http://wcjp.unicri.it/proceedings/docs/OSCE_PLea%20Agreements%20in%20Bosnia%20and%20Herzegovina:%20Practices%20before%20the%20Courts%20and%20their%20compliance%20with%20international%20human%20rights%20standards_2006_ENG.pdf [accessed: 9 May 2013].

OSCE, War Crimes Trials Before Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles, March 2005. Available at: http://wcjp.unicri.it/proceedings/docs/OSCE BiH_War%20crimes%20trials%20in%20BiH_2005_eng.pdf [accessed: 10 July 2014].

Pasic, Lana, Bosnia's Vast Foreign Financial Assistance Re-examined: Statistics and Results, 21 June 2011. Available at: http://www.balkanalysis.com/bosnia/2011/06/21/bosnia%E2%80%99s-vast-foreign-financial-assistance-re-examined-statistics-and-results/ [accessed: 26 March 2013].

Penal Reform International (PRI), Eight Years On … A Record of Gacaca Monitoring in Rwanda, 2010. Available at: http://www.penalreform.org/wp-content/uploads/2013/05/WEB-english-gacaca-rwanda-5.pdf [accessed: 9 July 2014].

– The contribution of the Gacaca jurisdictions to resolving cases arising from the genocide: Contributions Limitations and Expectations of the Post-Gacaca Phase, 24 Feb. 2010. Available at: http://www.penalreform.org/wp-content/uploads/2013/06/Gacaca_final_2010_en.pdf [accessed: 8 July 2014].

Perron, Walter, Rechtsvergleichender Querschnitt und rechtspolitische Bewertung [Comparative cross section and evaluation of legal politics]. In: Walter Perron (ed.), Die Beweisaufnahme im Strafverfahrensrecht des Auslands. Rechtsvergleichendes Gutachten im Auftrag des Bundesministeriums der Justiz. Freiburg 1995, pp. 549–608.

Petrig, Anna, Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy. 45 Criminal Law Bulletin 3–27 (2009).

Pocar, Fausto, Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY. 6 Journal of International Criminal Justice 655–665 (2008).

– Sind die nationalen Grenzen des Strafrechts überwindbar? Überlegungen zu den strukturellen Voraussetzungen der Angleichung und Vereinheitlichung unterschiedlicher Strafrechtssysteme. [Are the national borders of criminal law transcendable? Thoughts on structural preconditions for the adaptation and harmonization of different criminal law systems.] 109 Zeitschrift für die gesamte Strafrechtswissenschaft 281–301 (1997).

Powers, Shannon E., Rwanda's Gacaca Courts: Implications for International Criminal Law and Transitional Justice, 15 ASIL Insights (2011). Available at: https://www.asil.org/insights/volume/15/issue/17/rwanda%E2%80%99s-gacaca-courts-implications-international-criminal-law-and [accessed: 26 April 2012].

Prost, Kimberly/Schlunck, Angelika, Other Forms of Cooperation. In: Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article. Baden-Baden 1999, p. 1117.

Raab, Dominic, Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals. 3 Journal of International Criminal Justice 82–102 (2005).

Raub, Lindsay, Positioning Hybrid Tribunals in International Criminal Justice. 41 International Law and Politics 1013–1053 (2009).

Rettig, Max, Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda? 51 African Studies Review 25–50 (2008).

Reydams, Luc, The ICTR Ten Years On, Back to the Nuremberg Paradigm? 3 Journal of International Criminal Justice 977–988 (2005).

Reydams, Luc/Wouters, Jan/Ryngaert, Cedric (eds.), International Prosecutors. Oxford 2012.

Rigby, Andrew, Justice and Reconciliation after the Violence. Boulder 2001.

Roxin, Claus, Sinn und Grenzen staatlicher Strafe [Significance and limits of punishment by states]. JuS 1966, 377–387.

Ryngaert, Cedric, The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands, 14 Oct. 2009, Hague Justice Portal. Available at: http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Ryngaert_Bagaragaza_EN.pdf [accessed: 7 June 2013].

Šarić, *Velma*, Bosnia: Future of International Judges and Prosecutors in Doubt, TRI Issue 613, 12 Sept. 2009. Available at: https://www.iwpr.net/global-voices/bosnia-future-international-judges-and-prosecutors-doubt [accessed: 7 July 2013].

Sarkin, Jeremy, The Tension between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide. 45 Journal of African Law 143–172 (2001).

– Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda's Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal with the Past. 2 International Law Forum 112–121 (2000).

Saxon, Dan, Exporting Justice: Perceptions of the ICTY among Serbian, Croatian, and Muslim Communities in the Former Yugoslavia. 4 Journal of Human Rights, 559–572 (2005).

Schabas, William A., The UN International Criminal Tribunals. The Former Yugoslavia, Rwanda and Sierra Leone. Cambridge 2006.

– Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda. 13 Max Planck United Nations Yearbook 29–60 (2009). Available at: http://www.mpil.de/files/pdf2/mpunyb_02_schabasii.pdf [accessed: 8 July 2014].

– Genocide in International Law. The Crimes of Crimes. Cambridge 2000.

– Common law, "civil law" et droit pénal international: Tango (le dernier?) à La Haye ["Civil law" and international criminal law: (The last) tango at The Hague?]. 13.1 Revue québécoise de droit international 281–307 (2000). Available at: http://rs.sqdi.org/volumes/13.1_-_schabas.pdf [accessed: 9 May 2013].

– Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems. 7 Criminal Law Forum 523–560 (1996).

Scharf, Michael P., The Case for a Permanent International Truth Commission. 7 Duke Journal of Comparative and International Law 375–400 (1997).

Scheerer, Sebastian, Kritik der strafenden Vernunft [Critique of the punitive faculty of reason]. In: Ethik und Sozialwissenschaften, Streitforum für Erwägungskultur, Jg. 12, Heft 1, 69–144 (2001).

Schomburg, Wolfgang, Common Law versus Civil Law. 99 Betrifft Justiz 108–112 (2009).

Schomburg, Wolfgang/Nemitz, Jan Christoph, International Criminal Courts and Tribunals. Procedure, Max Planck Encyclopedia of Public International Law. Heidelberg/Oxford 2009.

Schwarz, Axel/Degen, Sarah, Zwischen angloamerikanischem Sendungsbewusstsein und kontinental-europäischer Tradition: Das neue Strafprozessrecht in Bosnien und Herzegowina [Between the Anglo-American sense of mission and Continental-European tradition: The new law of criminal procedure in Bosnia and Herzegovina]. 117 Zeitschrift für die gesamte Strafrechtswissenschaft 458–474 (2005).

Seils, Paul, Justice should be done, but where? The relationship between national and international courts. 101 Proceedings of the Annual Meeting (American Society of International Law) 289–300 (2007).

Sieber, Ulrich, Zivilrechtliche Beweisinteressen im Strafprozeß [Using evidence gleaned from criminal proceedings in civil proceedings]. In: Manfred Seebode (ed.), Festschrift für Günter Spendel zum 70. Geburtstag. Berlin u.a. 1992, pp. 757–776.

– Grenzen des Strafrechts – Grundlagen und Herausforderungen des strafrechtlichen Forschungsprogramms am Max-Planck-Institut für ausländisches und internationales Strafrecht [The limits of criminal law – foundations and challenges of the criminal law research programme at the Max Planck institute for foreign and international criminal law]. 119 Zeitschrift für die gesamte Strafrechtswissenschaft 1–68 (2007).

– Strafrechtsvergleichung im Wandel [Changes in comparative criminal law]. In: Hans-Jörg Albrecht/Ulrich Sieber (eds.), Strafrecht und Kriminologie unter einem Dach. Kolloquium zum 90. Geburtstag von Professor Dr. Dr. h.c. mult. Hans-Heinrich Jescheck am 10. Januar 2005. Berlin 2006, pp. 78–151.

Sieber, Ulrich (ed.), Legal Order in a Global World – The Development of a Fragmented System of National, International, and Private Norms, 14 Max Planck Yearbook of United Nations Law, 1–49 (2010).

– The Punishment of Serious Crimes: A comparative analysis of sentencing law and practice. Vol. 1: Expert Report, Vol. 2: Country Reports. Freiburg 2004.

– Europäische Einigung und Europäisches Strafrecht [European consensus and European criminal law]: Beiträge zum Gründungssymposium der Vereinigung für Europäisches Strafrecht e.V. Köln 1993.

Sieber, Ulrich/Forster, Susanne/Jarvers, Konstanze (eds.), National Criminal Law in a Comparative Legal Context. Vol. 2.1: General Limitations on the Application of Criminal Law. Australia, Bosnia and Herzegovina, Hungary, India, Iran, Japan, Romania, Russia, Switzerland, Uruguay, USA. Berlin 2011.

Sijerčić-Čolić, Hajrija, Akuzatorske i inkvizitorske forme u kaznenom procesnom pravu u Bosni i Hercegovini [Adversarial and inquisitorial forms in criminal procedural law in Bosnia and Herzegovina], Pravo i Pravda, Vol. IV, No. 1, 181–213 (2005), English draft translation, p. 5.

Simon, Jan-Michael, Criminal Accountability and Reconciliation. In: Hans-Jörg Albrecht/Jan M. Simon/Hassan Rezaei/Holger C. Rohne/Ernesto Kiza (eds.), Conflict and Conflict Resolution in Middle Eastern Societies – Between Tradition and Modernity. Freiburg 2006, 99–116.

Skaar, Elin, Reconciliation in a Transitional Justice Perspective. 1 Transitional Justice Review 54–103 (2013).

Sloane, Robert D., The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law. 43 Stanford Journal of International Law 39 (2007).

Stainier, Carolin/Muhayeyezu, Albert/Badibanga, Jean Jacques/Jombwe, Hugo Moudiki, Vade-mecum, Le crime de génocide et les crimes contre l'humanité devant les juridictions ordinaires du Rwanda [The crime of genocide and crimes against humanity before ordinary juristictions in Rwanda]. Avocats sans Frontières, Bruxelles 2004, 119–139. Available at: http://www.asf.be/blog/publications/vade-mecum-le-crime-de-genocide-et-les-crimes-contre-lhumanite-devant-les-juridictions-ordinaires-du-rwanda/ [accessed: 8 July 2012].

Stover, Eric/Weinstein, Harvey M. (eds.), My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity. Cambridge 2004.

Stromseth, Jane, Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies? 1 Hague Journal on Rule of Law 87–97 (2009).

Tallgren, *Immi*, The Sensibility and Sense of International Criminal Law. 13 European Journal of International Law 561–595 (2002).

Teitel, Ruti G., Contemporary Transitional Justice. 38 Cornell International Law Journal 837–862 (2005).

– Transitional Justice Genealogy. 16 Harvard Human Rights Journal 69–94 (2003).

– Transitional Justice in a New Era. 26 Fordham International Law Journal 893–906 (2002–2003).

– Transitional Justice. Oxford 2000.

– Nuremberg and Its Legacy, Fifty Years Later. In: Belinda Cooper (ed.), War Crimes: The Legacy of Nuremberg. New York 1999, pp. 44–54.

Teubner, Gunther, The Two Faces of Janus: Rethinking Legal Pluralism. 13 Cardozo Law Review 1443–1462 (1991–1992).

Thomson, Susan, Getting Close to Rwandans since the Genocide: Studying Everyday Life in Highly Politicized Settings. 53 African Studies Review 19–34 (2010).

Thomson, Susan/Nagy, Rosemary, Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts. 5 The International Journal of Transitional Justice 11–30 (2011).

Tiemessen, Alana Erin, After Arusha: Gacaca Justice in Post-Genocide Rwanda. 8 African Studies Quarterly 57–76 (2004).

Tochilovsky, Vladimir, Proceedings in the International Criminal Court, Some Lessons to Learn From ICTY Experience. 10 European Journal of Crime, Criminal Law and Criminal Justice 268–275 (2002).

Tolbert, David/Kontic Aleksandar, The ICTY: Transitional Justice, the Transfer of Cases to National Courts, and Lessons for the ICC. In: Carsten Stahn/Göran Sluiter (eds.), The Emerging Practice of the International criminal Court. The Hague 2009, 135–162.

Triffterer, Otto (ed.), Commentary on the Rome Statute of the International Criminal Court, Observers' Notes. Article by Article, Baden-Baden 1999.

Uwigabye, Prisca, Gacaca and the Treatment of Sexual Offences. In: Henry F. Carey/ Stacey M. Mitchell (eds.), Trials and Tribulations of International Prosecution. New York 2013, pp. 269–283.

van den Herik, Larissa/*Stahn, Carsten*, The Diversification and Fragmentation of International Criminal Law. Leiden 2012.

Waldorf, Lars, Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice. 79 Temple Law Review 1–87 (2006).

Williams, Sarah, ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price? 17 Criminal Law Forum 177–222 (2006).

Wren Morris, Jennifer, The Trouble with Transfers: An Analysis of the Referral of Uwinkindi to the Republic of Rwanda for Trial. 90 Washington University Law Review 505–541 (2012).

Zappalà, Salvatore, Accusatorial and Inquisitorial Elements in International Criminal Procedure – to what Extent do they Impinge upon the Rights of Individuals? In: Salvatore Zappalà (ed.), Human Rights in International Criminal Proceedings. 2nd Ed. Oxford 2005, pp. 14–28.

Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht

The main research activities of the Max Planck Institute for Foreign and International Criminal Law are published in the following six subseries of the "Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht" (Research Series of the Max Planck Institute for Foreign and International Criminal Law), which are distributed in cooperation with the publisher Duncker & Humblot:

- "Strafrechtliche Forschungsberichte" (Reports on Research in Criminal Law)
- "Kriminologische Forschungsberichte" (Reports on Research in Criminology)
- "Interdisziplinäre Forschungen aus Strafrecht und Kriminologie" (Reports on Interdisciplinary Research in Criminal Law and Criminology)
- "Publications of the Max Planck Partner Group for Balkan Criminology"
- "Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group"
- "Sammlung ausländischer Strafgesetzbücher in deutscher Übersetzung" (Collection of Foreign Criminal Laws in German Translation)

These publications can be ordered from the Max Planck Institute at <www.mpicc.de> or from Duncker & Humblot at <www.duncker-humblot.de>. Two additional subseries are published: "research in brief" contains short reports on results of research activities, and "Arbeitsberichte" (working materials) present preliminary results of research projects. These publications are available at the Max Planck Institute.

Detailed information on all publications of the Max Planck Institute for Foreign and International Criminal Law can be found at <www.mpicc.de>.

Die zentralen Veröffentlichungen des Max-Planck-Instituts für ausländisches und internationales Strafrecht werden in Zusammenarbeit mit dem Verlag Duncker & Humblot in den folgenden sechs Unterreihen der „Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht" vertrieben:

- „Strafrechtliche Forschungsberichte"
- „Kriminologische Forschungsberichte"
- „Interdisziplinäre Forschungen aus Strafrecht und Kriminologie"
- „Publications of the Max Planck Partner Group for Balkan Criminology"
- „Series of the Max Planck Institute for Foreign and International Criminal Law and Bahçeşehir University Joint Research Group"
- „Sammlung ausländischer Strafgesetzbücher in deutscher Übersetzung"

Diese Publikationen können direkt über das Max-Planck-Institut unter <www.mpicc.de> oder über den Verlag Duncker & Humblot unter <www.duncker-humblot.de> erworben werden. Darüber hinaus erscheinen in der Unterreihe „research in brief" zusammenfassende Kurzbeschreibungen von Forschungsergebnissen und in der Unterreihe „Arbeitsberichte" Veröffentlichungen vorläufiger Forschungsergebnisse. Diese Veröffentlichungen können über das Max-Planck-Institut bezogen werden.

Detaillierte Informationen zu den einzelnen Publikationen des Max-Planck-Instituts für ausländisches und internationales Strafrecht sind unter <www.mpicc.de> abrufbar.

Max-Planck-Institut für ausländisches
und internationales Strafrecht

Selected criminal law publications:

S 154 *Carl-Wendelin Neubert*
Der Einsatz tödlicher Waffengewalt durch die deutsche auswärtige Gewalt
2016 • 391 Seiten • ISBN 978-3-86113-799-3 € 41,00

S 153 *Mehmet Arslan*
Die Aussagefreiheit des Beschuldigten in der polizeilichen Befragung
Ein Vergleich zwischen der EMRK, dem deutschen und dem türkischen Recht
2015 • 670 Seiten • ISBN 978-3-86113-801-3 € 55,00

S 152 *Albin Eser / Walter Perron* (Hrsg.)
Strukturvergleich strafrechtlicher Verantwortlichkeit und Sanktionierung in Europa
Zugleich ein Beitrag zur Theorie der Strafrechtsvergleichung
2015 • 1147 Seiten • ISBN 978-3-86113-802-0 € 66,00

S 151 *Emmanouil Billis*
Die Rolle des Richters im adversatorischen und im inquisitorischen Beweisverfahren
Modelltheoretische Ansätze, englisches und deutsches Beweisführungssystem, internationalrechtliche Dimensionen
2015 • 503 Seiten • ISBN 978-3-86113-804-4 € 44,00

S 150 *Ulrich Sieber / Benjamin Vogel*
Terrorismusfinanzierung
Prävention im Spannungsfeld von internationalen Vorgaben und nationalem Tatstrafrecht
2015 • 237 Seiten • ISBN 978-3-86113-805-1 € 35,00

S 149 *Stefan Drackert*
Die Risiken der Verarbeitung personenbezogener Daten
Eine Untersuchung zu den Grundlagen des Datenschutzrechts
2014 • 338 Seiten • ISBN 978-3-86113-806-8 € 35,00

S 148 *Harald Weiß*
Haft ohne Urteil
Strafprozessuale Freiheitsentziehungen im deutsch-französischen Vergleich
2015 • 891 Seiten • ISBN 978-3-86113-807-5 € 60,00

S 147 *Lennart M. Hügel*
Strafbarkeit der Anschlagsvorbereitung durch terroristische Einzeltäter und deren Unterstützer
Eine rechtsvergleichende Untersuchung anhand der deutschen und amerikanischen Rechtsordnung
2014 • 260 Seiten • ISBN 978-3-86113-808-2 € 35,00

Max-Planck-Institut für ausländisches
und internationales Strafrecht

Selected criminal law publications:

S 146 *Jon Petter Rui / Ulrich Sieber* (eds.)
Non-Conviction-Based Confiscation in Europe
Possibilities and Limitations on Rules Enabling Confiscation without a Criminal Conviction
2015 • 306 Seiten • ISBN 978-3-86113-809-9 € 40,00

S 145 *Xenia Lang*
Geheimdienstinformationen im deutschen und amerikanischen Strafprozess
2014 • 400 Seiten • ISBN 978-3-86113-811-2 € 41,00

S 140 *Ulrich Sieber / Marc Engelhart*
Compliance Programs for the Prevention of Economic Crimes
An Empirical Survey of German Companies
2014 • 312 Seiten • ISBN 978-3-86113-816-7 € 40,00

S 128.1.1 *Ulrich Sieber / Konstanze Jarvers / Emily Silverman* (eds.)
National Criminal Law in a Comparative Legal Context
Volume 1.1: Introduction to National Systems
2013 • 314 Seiten • ISBN 978-3-86113-822-8 € 40,00

S 128.1.2 Volume 1.2: Introduction to National Systems
2013 • 363 Seiten • ISBN 978-3-86113-826-6 € 43,00

S 128.1.3 Volume 1.3: Introduction to National Systems
2014 • 297 Seiten • ISBN 978-3-86113-818-1 € 40,00

S 128.1.4 Volume 1.4: Introduction to National Systems
2014 • 391 Seiten • ISBN 978-3-86113-810-5 € 43,00

S 128.2.1 *Ulrich Sieber / Susanne Forster / Konstanze Jarvers* (eds.)
Volume 2.1: General limitations on the application of criminal law
2011 • 399 Seiten • ISBN 978-3-86113-834-1 € 43,00

S 128.3.1 Volume 3.1: Defining criminal conduct
2011 • 519 Seiten • ISBN 978-3-86113-833-4 € 46,00

S 128.4.1 Volume 4.1: Special forms of criminal liability
2015 • 401 Seiten • ISBN 978-3-86113-803-7 € 43,00

S 128.5.1 Volume 5.1: Special forms of criminal liability
2016 • 410 Seiten • ISBN 978-3-86113-800-6 € 43,00

Max-Planck-Institut für ausländisches
und internationales Strafrecht

Selected criminological publications:

K 172 *Julia Kasselt*
Die Ehre im Spiegel der Justiz
Eine Untersuchung zur Praxis deutscher Schwurgerichte
im Umgang mit dem Phänomen der Ehrenmorde
Berlin 2016 • 495 Seiten • ISBN 978-3-86113-255-4 € 42,00

K 171 *Rita Haverkamp, Harald Arnold* (Hrsg.)
Subjektive und objektivierte Bedingungen von (Un-)Sicherheit
Studien zum Barometer Sicherheit in Deutschland (BaSiD)
Berlin 2015 • 384 Seiten • ISBN 978-3-86113-254-7 € 38,00

K 170 *Moritz Tauschwitz*
Die Dopingverfolgung in Deutschland und Spanien
Eine strafrechtliche und kriminologische Untersuchung
Berlin 2015 • 332 Seiten • ISBN 978-3-86113-253-0 € 37,00

K 169 *Andreas Schwedler, Gunda Wössner*
Elektronische Aufsicht bei vollzugsöffnenden Maßnahmen
Implementation, Akzeptanz und psychosoziale Effekte des baden-
württembergischen Modellprojekts
Berlin 2015 • 126 Seiten • ISBN 978-3-86113-252-3 € 25,00

K 168 *Daniela Hunold*
Polizei im Revier
Polizeiliche Handlungspraxis gegenüber Jugendlichen
in der multiethnischen Stadt
Berlin 2015 • 288 Seiten • ISBN 978-3-86113-251-6 € 35,00

K 167 *Christopher Murphy*
“Come in Spinner” – Money Laundering in the Australian
Casino Industry
Berlin 2014 • 152 Seiten • ISBN 978-3-86113-250-9 € 29,00

K 166 *Ramin Tehrani*
Die „Smart Sanctions“ im Kampf gegen den Terrorismus
und als Vorbild einer präventiven Vermögensabschöpfung
Berlin 2014 • 256 Seiten • ISBN 978-3-86113-247-9 € 35,00

K 165 *Daniela Cernko*
Die Umsetzung der CPT-Empfehlungen im deutschen Strafvollzug
Eine Untersuchung über den Einfluss des Europäischen Komitees
zur Verhütung von Folter und unmenschlicher oder erniedrigender
Behandlung oder Strafe auf die deutsche Strafvollzugsverwaltung
Berlin 2014 • 455 Seiten • ISBN 978-3-86113-246-2 € 39,00

BC 1 *Anna-Maria Getoš Kalac, Hans-Jörg Albrecht, Michael Kilchling* (eds.)
Mapping the Criminological Landscape of the Balkans
A Survey on Criminology and Crime
with an Expedition into the Criminal Landscape of the Balkans
Berlin 2014 • 540 Seiten • ISBN 978-3-86113-248-6 € 44,00