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Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?

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Abstract

On September 2, 2004, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) filed a formal request for the transfer of the Ademi & Norac case to Croatia, pursuant to Rule 11 bis of the ICTY Rules of Procedure and Evidence (“ICTY RPE”). With this filing, the Prosecutor took an important and positive step towards giving effect to the completion strategy of the ICTY. This Article will discuss the steps taken by the ICTY and its sister institution, the International Criminal Tribunal for Rwanda (“ICTR”), to fulfill their mandates by focusing only on the most senior perpetrators while ensuring that minor perpetrators do not escape liability by transferring the cases involving such individuals to national jurisdictions for trial. Because few States have ever undergone a process of closing their criminal justice systems, there are few precedents to guide the ICTY and ICTR leadership in the challenges that they will face in this endeavor. The Nuremberg process, however, as the sole example of closing an international criminal justice “system,” provides a unique spectrum through which to observe and compare the approaches taken in the completion strategies of the ICTY and ICTR [hereinafter ad hoc International Criminal Tribunals], and should also inform the Tribunal leaders with respect to problems that may arise in their implementation. Among the subjects at issue are the persons to be prosecuted, the courts or tribunals before which persons will appear, and the degree of cooperation between these institutions.

COMPLETING THE MANDATES OF THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS: LESSONS FROM THE NUREMBERG PROCESS?

*Daryl A. Mundis**

On September 2, 2004, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia ("ICTY") filed a formal request for the transfer of the *Ademi & Norac* case to Croatia, pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence ("ICTY RPE").¹ With this filing, the Prosecutor took an important and positive step towards giving effect to the completion strategy of the ICTY. This Article will discuss the steps taken by the ICTY and its sister institution, the International Criminal Tribunal for Rwanda ("ICTR"), to fulfill their mandates by focusing only on the most senior perpetrators while ensuring that minor perpetrators do not escape liability by transferring the cases involving such individuals to national jurisdictions for trial.²

Because few States have ever undergone a process of closing their criminal justice systems, there are few precedents to guide the ICTY and ICTR leadership in the challenges that they will face in this endeavor. The Nuremberg process,³ however, as the

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1. See Request by the Prosecutor under Rule 11 *bis*, Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT (Sept. 2, 2004), available at <http://www.un.org/icty>. See generally International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia Since 1991, Rules of Procedure and Evidence ("ICTY RPE"), U.N. Doc. IT/32/Rev.34 (2005), ICTY Statute, Trial and Appeals Chambers Decisions and Judgments, and ICTY Press Releases, available at <http://www.un.org/icty>.

2. For a crucial assessment of the ICTY and International Criminal Tribunal for Rwanda ("ICTR") completion strategies and a rebuttal from the *Chef de Cabinet* to the ICTY President, see Daryl A. Mundis, *Judicial Effects of "Completion Strategies" for the Ad Hoc International Criminal Tribunals*, 98 AM. J. INT'L L. (forthcoming 2005); see also Larry D. Johnson, *Another Perspective: Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 98 AM. J. INT'L L. (forthcoming 2005).

3. This term is used to describe the International Military Tribunal ("IMT"), the

sole example of closing an international criminal justice "system," provides a unique spectrum through which to observe and compare the approaches taken in the completion strategies of the ICTY and ICTR⁴ [hereinafter *ad hoc* International Criminal Tribunals], and should also inform the Tribunal leaders with respect to problems that may arise in their implementation. Among the subjects at issue are the persons to be prosecuted, the courts or tribunals before which persons will appear, and the degree of cooperation between these institutions.

There are, of course, substantial differences between the *ad hoc* International Criminal Tribunals and the legal institutions that comprised the Nuremberg process, the most obvious being the historical conditions prevailing at the time these institutions were created and the resulting legal instruments that led to their formation.⁵ Due process considerations have also evolved in the nearly six decades since the Nuremberg process was completed. One must therefore be cautious in applying conclusions drawn from Nuremberg to the *ad hoc* International Criminal Tribunals. Nevertheless, many of the core issues remain, and the lessons of history should be ignored only at our peril.⁶

trials conducted pursuant to Control Council Law No. 10, and the trials of World War II war criminals conducted by national authorities, whether before civilian courts, military courts-martial or tribunals. *See infra* Pt. I.

4. *See generally* 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 Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994, Rules of Procedure and Evidence ("ICTR RPE"), U.N. Doc. ITR/3/Rev.1 (1995), ICTR Statute, Trial and Appeals Chambers Decisions and Judgments, and ICTR Press Releases, *available at* <http://www.ictor.org>.

5. The history of the Nuremberg process is set forth briefly in the following section. For a description of the establishment of the *ad hoc* International Criminal Tribunals, see VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS (1995); see also M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996); VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). The Security Council established the ICTY in 1993, pursuant to Security Council Resolution 827 of May 25, 1993. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993). The ICTY Statute has been amended several times to provide for, *inter alia*, *ad litem* judges in order to expedite trials. The ICTR was created by Security Council Resolution 955 of November 8, 1994. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994). In order to maintain harmony between the two institutions, the ICTR Statute has generally been amended to track similar changes in the ICTY Statute.

6. It is interesting to note that other internationalized or hybrid courts, such as the

I. THE NUREMBERG PROCESS

The Nuremberg process had its genesis during a series of conferences among the Allies held during the Second World War.⁷ The first important step occurred in London with the articulation of the "St. James Declaration" of January 13, 1942, in which nine States occupied by Nazi Germany⁸ resolved, *inter alia*, to work together to bring to justice the perpetrators of crimes committed in Europe.⁹ The establishment of the United Nations War Crimes Commission ("UNWCC") in October 1943 was the second major step, though it has since been described as "a weak evidence-collecting body that left investigations to its member [S]tates, many of whom were under German occupation."¹⁰

Special Court for Sierra Leone, do not have some of the same problems as the *ad hoc* International Criminal Tribunals, largely because they were established with a more limited life-span and because they involved international and local staff from the outset. Consequently, whether by design or coincidence, the most important lessons learned from the Nuremberg process seem to have been taken into account in designing these hybrid courts.

7. The literature on these efforts is rather extensive. See, e.g., Robert H. Jackson, Report of Robert H. Jackson: United States Representative to the International Conference on Military Trials (1945) (Dep't. of State Publication No. 3080, 1949) [hereinafter Jackson Report]; Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10 (1949) [hereinafter Taylor Report]; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 3-77 (1992); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147-205 (2000); BRADLEY F. SMITH, THE ROAD TO NUREMBERG (1981) [hereinafter SMITH, ROAD TO NUREMBERG]; BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945 (1982); JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL (1994).

8. These States include Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland, and Yugoslavia.

9. Collectively declaring that "international solidarity is necessary in order to avoid the regression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilized world," these States pledged to: (1) "place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them;" and (2) "see to it in a spirit of international solidarity, that those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, and that the sentences pronounced are carried out." The Inter-Allied Declaration, Jan. 13, 1942, reprinted in Punishment for War Crimes: The Inter-Allied Declaration signed at St. James's Palace, London, on 13 January 1942, and Relative Documents (U.N. Office, New York, undated).

10. BASS, *supra* note 7, at 149 nn.8, 10. But see Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 27(450) INT'L CONCILIATION 241, 246 (1949) [hereinafter Taylor, *Nuremberg Trials*] (pointing out that although the United Nations War Crimes Commission ("UNWCC") was a "clearinghouse" rather than an "operating agency," it was "an important center for war crimes activities" in that it received and indexed

In any case, by the time Nuremberg was in the works, the UNWCC was “unceremoniously killed off.”¹¹

The third important development came during the Moscow Conference on November 1, 1943, when Britain, the Soviet Union, and the United States issued what later came to be known as the “Moscow Declaration.”¹² The Declaration put forth a two-fold objective. First, the three signatories stated:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the . . . atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those liberated countries and of the Free Governments which will be erected therein. Lists will be compiled in all possible detail from these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.¹³

Thus, it was clearly envisaged that trials would be held on the territory of the States where the crimes had been committed. The reference to lists referred to those processes already established by the UNWCC.¹⁴

Second, the Moscow Declaration indicated that the national trials would be “without prejudice” to the case of the German criminals whose crimes have “no particular geographical localization and who [would] be punished by joint decision of the government of the Allies.”¹⁵ The concept of a trial of the “major criminals” would subsequently result in the establishment of the

charges filed by member Nations and published lists of war crimes suspects and other valuable information). Comprised of 17 States, the UNWCC was never joined by the Soviet Union due to the Soviet demand that each of its 16 constituent republics be represented on the commission. *See id.*

11. *See* BASS, *supra* note 7, at 149.

12. *See* Declaration of Four Nations on General Security, 9 DEP'T ST. BULL. 308 (1943), reprinted in 38 AM. J. INT'L L. 5 (1944) [hereinafter Moscow Declaration], available at <http://www.yale.edu/lawweb/avalon/wwii/moscow.htm>; *see also* SMITH, ROAD TO NUREMBERG, *supra* note 7, at 10.

13. Statement on Atrocities, Moscow Declaration, *supra* note 12.

14. *See* Taylor, *Nuremberg Trials*, *supra* note 10, at 247.

15. Statement of Atrocities, Moscow Declaration, *supra* note 12.

International Military Tribunal (“IMT”), discussed below. Interestingly, even before the IMT was created, thought had already been given to the domestic trials of low-level perpetrators.¹⁶

Following the Moscow Declaration, the Nuremberg process became “largely an American creation,”¹⁷ and the topic of procedure was hotly debated both within and between the governments of Great Britain, France, the Soviet Union, and the United States.¹⁸ On May 2, 1945, President Truman designated U.S. Supreme Court Associate Justice Robert H. Jackson to serve as both the U.S. Representative to negotiate with these States the establishment of the IMT and as Chief of Counsel for the U.S. prosecution team.¹⁹ A few days later, on May 7, 1945, Germany surrendered. Due to the groundwork laid by the UNWCC, a system had already been put in place whereby theater U.S. military commanders were in a position to apprehend and detain alleged war criminals.²⁰ Upon his appointment, Justice Jackson immediately assembled a staff and, by June 6, 1945, had delivered an

16. While the Statutes and RPE of the *ad hoc* International Criminal Tribunals refer to the prosecution of “serious” violations of international humanitarian law, these constituent documents as originally drafted were silent as to trials of some perpetrators by national courts (though they do have provisions governing complementarity and primacy). See Mohamed M. El Zeidy, *The Principle Of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 877 (2002). Given the large numbers of perpetrators, however, it would seem that the *ad hoc* International Criminal Tribunals — as with the IMT five decades earlier — would have been incapable of trying all of the alleged perpetrators, and that national courts would therefore have to complete the task of ensuring accountability.

17. BASS, *supra* note 7, at 150 n.15 (citing HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 140 (1961)).

18. See Taylor, *Nuremberg Trials*, *supra* note 10, at 248; see also BASS, *supra* note 7, at 150-203.

19. See Exec. Order No. 9547, 10 Fed. Reg. 4961 (May 2, 1945), available at <http://www.yale.edu/lawweb/avalon/imt/imt9547.htm> (last visited Feb. 12, 2005).

20. Taylor quotes from an order of the Combined Chiefs of Staff to the effect that they were authorized to “apprehend and detain” war crimes suspects listed as such by the United Nations War Crimes Commission “without requiring further proof of their having committed war crimes,” but the commanders were not as yet authorized to conduct any such trials.” Taylor Report, *supra* note 7, at 3. An earlier order dated December 25, 1944, had instructed theater commanders not to try any war criminals before military tribunals except in cases involving military security or occupation. See *id.* n.15. On June 19, 1945, the theater commanders were authorized to proceed with trials (by military tribunal) of war criminals within their custody, with the exception of those individuals holding high political, civil or military positions. Trials of such persons were to be deferred pending determinations as to who was an appropriate target of prosecution by the IMT or for possible transfer to another allied State for prosecution in accordance with the Moscow Declaration. See *id.* at 3-4, nn.17-18.

interim report to President Truman.²¹ Three weeks later, representatives of the United States (led by Jackson), Great Britain, France, and the Soviet Union, met in London to begin final discussions for the trial of major war criminals. Justice Jackson's interim report served as the blueprint for the IMT "with remarkable prevision and clarity."²²

On August 8, 1945, three months after Germany surrendered, the document variously referred to as the "London Charter" or "London Agreement,"²³ to which was annexed the "IMT Charter,"²⁴ was signed, and the institution which came to be known as the "Nuremberg Tribunal" was established.²⁵ On November 20, 1945, the trial began, with the prosecution seeking "declarations of criminality" for twenty-one individuals and six "groups or organizations."²⁶ The trial concluded nine months later on October 1, 1946.²⁷

21. See Report to the President by Mr. Justice Jackson (June 6, 1945), in Jackson Report, *supra* note 7, at 42.

22. See Taylor, *Nuremberg Trials*, *supra* note 10, at 249. Although concluding that the IMT generally "embodied the recommendations of the Jackson [interim] report," Taylor does acknowledge that during the course of the negotiations concerning its establishment, "divergences of viewpoint were numerous, and several serious disagreements prolonged the discussion." *Id.* at 135.

23. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280, 59 Stat. 1544 [hereinafter London Agreement], available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>.

24. See Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280, 59 Stat. 1544 [hereinafter IMT Charter], available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>; see also DIETRICH SCHINDLER & JIŘÍ TOMAN, *LAW OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 911-19 (1988).

25. Pursuant to Article 5 of the London Agreement, other member States of the United Nations (as that term was used at the time) were invited to "adhere" to the Agreement, of which 19 States opted to do so. See London Agreement, *supra* note 23, art. 5; see also Taylor, *Nuremberg Trials*, *supra* note 10, at 257 n.18. Aside from some general comments relevant to the present topic, the proceedings before the IMT are beyond the scope of this Article.

26. Unlike the Statutes of the *ad hoc* International Criminal Tribunals, the IMT was empowered to declare that a "group or organization" to which one or more defendants belonged was a "criminal organization" whose affiliates could subsequently be prosecuted on the sole basis of their membership. See IMT Charter, *supra* note 24, arts. 9-11. Among those groups listed in the IMT Indictment were the "Leadership Corps" of the Nazi Party, the Secret Service ("SS"), the General Staff and High Command of the German Army, and the Storm Troopers ("SA"). See *id.*

27. The full proceedings of the IMT, including indictment, trial transcripts, judgment, and exhibits, have been published in a 42-volume set. See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEM-

Although Article 22 of the IMT Charter clearly envisaged a series of trials before the IMT, Justice Jackson made it clear that the United States did not consider itself bound to participate in more than one trial.²⁸ Based on Jackson's interim report, work had begun, even before the IMT was constituted, on a basic war crimes policy directive for the Allied occupational administration in Germany.²⁹ Culminating in the issuance of a U.S. Joint Chiefs of Staff directive,³⁰ which formed the basis for Control Council Law No. 10,³¹ a law that allowed additional individuals to be prosecuted for war crimes.³²

The importance of Control Council Law No. 10 cannot be overstated, since it served as the basis for all the Nuremberg trials except for the IMT. The preamble of Control Council Law No. 10 set forth three goals: (1) to give effect to the Moscow Declaration; (2) to give effect to the London Agreement and IMT Charter; and (3) to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar of-

BER 1945 — 1 OCTOBER 1946 (1947-1949). For a transcript of the proceedings, as well as additional materials, see <http://www.yale.edu/lawweb/avalon/imt/imt.htm> (last visited Feb. 12, 2005).

28. See Taylor, *Nuremberg Trials*, *supra* note 10, at 253-54. While maintaining that a second IMT trial would involve certain disadvantages, Jackson nonetheless recommended as late as April 1946 that preparations should be made so that if another trial were to commence, it could be completed promptly. See Taylor Report, *supra* note 7, at 24. For discussions surrounding the idea of a second IMT trial, see *id.* at 22-27. Additional documents concerning American participation in a second international trial of Nazi war criminals, including Taylor's memorandum on the subject to the Secretary of War, a reproduction of the minutes of the Chief Prosecutors on April 5, 1946 concerning this topic, and a note of the United States to the Allies informing them that the United States would not participate in a second international trial, are also available. See *id.* apps. I, J, K.

29. See Taylor Report, *supra* note 7, at 4.

30. See Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, July 8, 1945, in Taylor Report, *supra* note 7, app. C, available at <http://www.yale.edu/lawweb/avalon/imt/imtjcs.htm> [hereinafter Directive on the Apprehension of War Criminals].

31. See Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, in Taylor Report, *supra* note 7, app. D, available at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> [hereinafter Control Council Law No. 10]. Germany was divided into four "zones of occupation" with supreme authority vested in the military commander of each respective zone. Central authority for all of Germany was vested in the Allied Control Council, which was comprised of the four zone commanders. Any actions taken by the Allied Control Council required unanimity. See *id.*

32. See Taylor Report, *supra* note 7, at 6.

fenders other than those dealt with by the IMT.³³

Nor should it go unobserved for present purposes that this law took effect on December 20, 1945 — one month to the day after the IMT trial began.³⁴ Thus, months before the IMT had even rendered its judgment, the legal framework was already in place for trials of serious offenders who were not prosecuted before the IMT.³⁵ Moreover, in light of the first prong of the Moscow Declaration, Control Council Law No. 10 set forth standards governing the transfer, for trial, of individuals held by an Allied government to the territorial State where the crimes had been committed.³⁶ As for the second prong, relating to “major criminals whose offenses have no particular geographic location” and who were to be prosecuted by “joint decision” of the Allies, Control Council Law No. 10 complemented the proceedings held before the IMT.³⁷

Telford Taylor, the Chief of Council for War Crimes for the trials conducted by the United States pursuant to Control Council Law No. 10, has acknowledged that the results were “imperfectly achieved,” at least with respect to the third goal of trials under this law.³⁸ Taylor cites to the fact that it was only in the U.S. and French zones that there were “systematic and mutual[ly] harmonious programs” for implementing Control Council Law No. 10.³⁹ In the British zone, military courts conducted

33. See Control Council Law No. 10, *supra* note 31, pmbl.

34. See *id.*

35. Article 10 of Control Council Law No. 10 also provided for trials of the members of organizations declared criminal by the IMT. In such cases “the criminal nature of the group or organization is considered proved and shall not be questioned.” *Id.* art. 10. See Taylor Report, *supra* note 7, at 7 n.34.

36. See Control Council Law No. 10, *supra* note 31, arts. III-V.

37. See *supra* note 15 and accompanying text.

38. See Taylor Report, *supra* note 7, at 7-8.

39. See *id.* at 7. Ordinance No. 7, issued by the Military Government of Germany for the United States zone on October 18, 1946, proffered the actual authority under which the United States implemented Control Council Law No. 10. See Ordinance No. 7: Organization and Power of Certain Military Tribunals, Oct. 18, 1946, in Taylor Report, *supra* note 7, app. L, available at <http://www.yale.edu/lawweb/avalon/imt/imt07.htm> [hereinafter U.S. Ordinance No. 7]. Pursuant to Article II of U.S. Ordinance No. 7, the trials were officially declared to be “Military Tribunals,” and were presented before panels of three civilian judges made up of lawyers who had been admitted to practice, for at least five years, before the highest courts of any of the U.S. States, the District of Columbia, or the U.S. Supreme Court. See *id.* art. II(a)-(b). For a more detailed discussion of Ordinance No. 7, see Taylor Report, *supra* note 7, at 28-32. Note that U.S. Ordinance No. 7 was subsequently amended on February 17, 1947 by U.S. Ordinance No. 11. See Ordinance No. 11: Amending Military Government Ordinance

the trials under the auspices of a Royal Warrant⁴⁰ rather than Control Council Law No. 10, with all such cases limited only to war crimes.⁴¹ It appears that the Soviet Union did not conduct any trials pursuant to Control Council Law No. 10.⁴²

As for France and the United States, however, the picture is more optimistic. Under Control Council Law No. 10, the United States conducted 12 Nuremberg trials, involving 185 individuals.⁴³ France conducted one major trial and several minor trials in accordance with Control Council Law No. 10.⁴⁴ The success of the U.S. efforts rests, in part, on the decision to establish the machinery to prosecute the second round of trials pursuant to Control Council Law No. 10 even before the IMT had rendered its judgment.⁴⁵ Nevertheless, Taylor has written that “at

No. 7 of 18 October 1946, Entitled “Organization and Power of Certain Military Tribunals,” Feb. 17, 1947, in Taylor Report, *supra* note 7, app. M, available at <http://www.yale.edu/lawweb/avalon/imt/imtor11.htm>.

40. See Royal Warrant — Regulation for the Trial of War Criminals, June 18, 1945, in Taylor Report, *supra* note 7, app. E, available at <http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm>. For more on the use of the Royal Warrant to prosecute war criminals following the Second World War, see A. P. V. Rogers, *War Crimes Trials Under the Royal Warrant: British Practice 1945-1949*, 39 INT’L & COMP. L.Q. 780 (1990).

41. Under Control Council Law No. 10, the signatory States could prosecute offenders for war crimes, crimes against peace, crimes against humanity, and membership in one of the organizations declared to be criminal by the IMT. See Control Council Law No. 10, *supra* note 31, art. II(1).

42. See Taylor, *Nuremberg Trials*, *supra* note 10, at 254.

43. See *id.* at 255. Out of a total of 185 individuals who were indicted, eight either committed suicide or were severed from indictments due to illnesses that precluded them from being tried. For a summary of the Nuremberg trials, see *id.* at 277-335, 371 (containing a statistical chart summarizing both the IMT and Control Council Law No. 10 proceedings); see also Taylor Report, *supra* note 7, app. A (containing a table summarizing the results of the trials and providing other basic details of the cases); GOVERNMENT PRINTING OFFICE, TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949-53) (containing a complete record of the trials). Most of these cases are best known by their short names, reflecting either the category of defendants (i.e., the “High Command,” “Einsatzgruppen” or “Ministries” cases) or the subject matter of the trial (i.e., the “Hostages,” “Justice” or “Farben” cases). Additional material is available at <http://nuremberg.law.harvard.edu> (last visited Feb. 12, 2005).

44. See Taylor, *Nuremberg Trials*, *supra* note 10, at 254. These trials were held in the French zone at Rastatt, near Baden-Baden. See *id.* Taylor notes that the principal defendant in the major trial was Hermann Roechling, a Saar Valley industrialist who “interestingly enough, had been sought and tried *in absentia* as a war criminal by the French after the First World War.” *Id.* at 254-55. Roechling had also been identified as a defendant in the event of a second IMT trial. See Taylor Report, *supra* note 7, at 25.

45. See Taylor Report, *supra* note 7, at 13-21 (discussing these efforts, which were undertaken by the “Subsequent Proceedings Division” of the Office of the Chief of Counsel for the Prosecution of Axis Criminality (“OCCPAC”)); see also OCCPAC Gen-

the outset it would have been wise to establish at the very outset a single organization for the purpose of planning and carrying out the war crimes trials."⁴⁶

U.S. proceedings conducted in Nuremberg under Control Council Law No. 10 were completed on April 14, 1949, and the U.S. Office of Chief Counsel for War Crimes was deactivated on June 20, 1949.⁴⁷ This did not signal the end of the war crimes trials, however. A large number of other cases were prosecuted before military tribunals of various Allied States, including the United States, which held trials at both Nuremberg and Dachau.⁴⁸ Although a large number of other cases were handled before German courts, the commencement of the Cold War focused attention elsewhere. Many of the individuals tried by these courts received relatively light sentences. Individuals who received longer sentences were often released from confinement after serving only a small part of their sentences.⁴⁹

II. COMPLETION STRATEGIES FOR THE AD HOC INTERNATIONAL CRIMINAL TRIBUNALS

U.N. Secretary-General Kofi Annan's appointment of a group of experts in the late 1990s to study ways in which to improve the efficiency of the *ad hoc* International Criminal Tribunals⁵⁰ set in motion a series of measures leading to the articulation of what have come to be known as the "Completion Strategies" for the ICTY and ICTR.⁵¹ Pursuant to these strategies, the

eral Memorandum No. 15, Mar. 29, 1946, in Taylor Report, *supra* note 7, app. H, available at <http://www.yale.edu/lawweb/avalon/imt/imtmem15.htm>.

46. Taylor Report, *supra* note 7, at 105-06.

47. *See id.* at 94. The Central Secretariat for the U.S. trials pursuant to Control Council Law No. 10 remained open slightly longer in order to finalize clemency and other issues relating to the final case prosecuted, known as the *Ministries* case.

48. These cases are reported in a 15-volume set published by the UNWCC. *See UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS* (1992).

49. *See* Amit Agarwal, *The Crimes of War . . . ; and How They Should and Should Not be Judged*, WKLY. STANDARD, Aug. 6, 2001, at 35 (book review).

50. *See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda*, U.N. GAOR, 54th Sess., Agenda Items 142 and 143, at 64, U.N. Doc. A/54/634 (1999); *see also* Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM J. INT'L L. 759 (2000) [hereinafter Mundis, *Improving the International Criminal Tribunals*]; Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM J. INT'L L. 934, 949-51 (2001).

51. These efforts, undertaken between 1999 and 2004, included amendments to

ad hoc International Criminal Tribunals will undertake a three-stage approach to completing their mandates.⁵² First, their Prosecutors will not issue newly investigated indictments after December 31, 2004, with the goal of completing all trials by December 31, 2008 and all appeals by December 31, 2010. Second, they will focus their attention and resources on trying the most senior-level military and political leaders for serious violations of international humanitarian law committed within their temporal and territorial jurisdictions. Third, cases involving mid- and low-level perpetrators are to be transferred to national courts for prosecution, so as to avoid allowing the guilty to escape criminal accountability.⁵³

The development of the completion strategies has been a linear process which may be traced to the "Rules of the Road" program established by the Rome Agreement of February 18, 1996.⁵⁴ Pursuant to this agreement, between Croatia, The Federal Republic of Yugoslavia and Bosnia and Herzegovina, war crimes investigations pursued by the authorities in Bosnia and Herzegovina were to be submitted to the ICTY Prosecutor for review prior to an arrest warrant, indictment and proceeding to trial before domestic courts. The ICTY Prosecutor has reviewed and classified several thousand dossiers for further action by lo-

the RPE of the *ad hoc* International Criminal Tribunals, with particular emphasis on: (1) improvements to the efficiency of pre-trial management to expedite cases; (2) the creation of *ad litem* judicial positions to increase the capacity to adjudicate cases; (3) amendments to the ICTY RPE allowing cases to be transferred to national courts for prosecution; and (4) the amendment of ICTY Rule 28(A) which provides that when the Prosecutor files an indictment for confirmation, the ICTY Bureau (consisting of the ICTY President, Vice-President and Presiding Judges of the three Trial Chambers) shall have the power to "determine whether the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal." Concerning points (1) and (2), see Mundis, *Improving the International Criminal Tribunals*, *supra* note 50; see also Daryl A. Mundis, *The Election of ad litem Judges and Other Developments at the International Criminal Tribunals*, 14 LEIDEN J. INT'L. L. 851 (2001). Points (3) and (4) are discussed in greater detail below.

52. See Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council 1 (July 26, 2002) [hereinafter July 2002 Security Council Comments].

53. See *id.*

54. See ICTY Yearbook 1998, at 255. Notwithstanding the "Rules of the Road" program, little international support was devoted to restoring the infrastructure required for the States of the former Yugoslavia to actually prosecute the cases approved under the Rome Agreement. The "Rules of the Road" program came to an end in late 2004.

cal prosecutors. The Rules of the Road function was transferred to the Prosecutor at the Bosnia and Herzegovina State Court on October 1, 2004. More recently, on June 10, 2002, the ICTY President submitted to the U.N. Security Council a report outlining the steps to complete the mandate of the ICTY.⁵⁵ The President of the Security Council endorsed the plan shortly after it was presented,⁵⁶ and the ICTY President and Prosecutor further articulated these policies in speeches to the Security Council in 2002⁵⁷ and 2003.⁵⁸ The ICTR initially submitted a document in July 2003 setting forth its completion strategy.⁵⁹ It then forwarded a revised plan in September 2003.⁶⁰ Security Council Resolutions 1503 and 1534 strongly endorsed the completion strategies of both *ad hoc* International Criminal Tribunals.⁶¹

55. See *Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, U.N. SCOR, 57th Sess., Enclosure, U.N. Doc. S/2002/678 (2002) [hereinafter *ICTY Completion Strategy*].

56. See *Statement by the President of the Security Council*, U.N. SCOR, 57th Sess., U.N. Doc. S/PRST/2002/21 (2002).

57. See July 2002 Security Council Comments, *supra* note 52; see also Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 30, 2002) [hereinafter October 2002 Security Council Comments]; Press Release, ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 30, 2002) [hereinafter ICTY Prosecutor October 2002 Security Council Comments].

58. See Press Release, ICTY, Statement of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 9, 2003) [hereinafter October 2003 Security Council Comments]; see also Press Release, ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Oct. 10, 2003). These remarks were also set forth in a Security Council Meeting. See U.N. SCOR, 58th Sess., 4838th mtg. at 3-7, 9-13, U.N. Doc S/PV.4838 (2003).

59. See *Completion Strategy of the International Criminal Tribunal for Rwanda*, U.N. GAOR, 58th Sess., Annex, Agenda Item 133, at 34, U.N. Doc. A/58/269 (2003); see also *Seventh Annual Report of the ICTR*, U.N. GAOR, 57th Sess., ¶¶ 21-23, U.N. Doc. A/57/163-S/2002/733 (2002).

60. See *Completion Strategy of the International Criminal Tribunal for Rwanda*, U.N. SCOR, 58th Sess., Enclosure, at 5, U.N. Doc. S/2003/946 (2003) [hereinafter *ICTR Completion Strategy*]. The ICTR President and Prosecutor also addressed the Security Council on October 9, 2003 with respect to their efforts in developing a comprehensive Completion Strategy for the ICTR. See October 2003 Security Council Comments, *supra* note 58, at 7-9, 13-16. Shortly thereafter, ICTR Prosecutor Jallow conducted a review of all cases and on-going investigations undertaken by his office and, on February 28, 2004, compiled a document entitled, "Completion Strategy of the Office of the Prosecutor." See U.N. Doc. S/2004/341, n.2 (2004) (unpublished document).

61. See S.C. Res. 1503, U.N. SCOR, 58th Sess., 4817th mtg., ¶ 7, U.N. Doc. S/RES/1503 (2003); see also S.C. Res. 1534, U.N. SCOR, 58th Sess., 4935th mtg., ¶ 3, U.N. Doc.

The ICTY President and Prosecutor have consistently indicated that the completion strategy is predicated in part on the timely arrest of indicted individuals and on timely access to evidence.⁶² Security Council Resolution 1503 emphasized the duty of States to ensure that the completion strategies succeed by assisting in the process, noting that an “essential prerequisite to achieving the objectives of the ICTY and ICTR completion strategies is full cooperation by all States, especially in apprehending all remaining at-large persons indicted by the ICTY and ICTR.”⁶³ The United States, an early advocate of the completion strategies,⁶⁴ supports this position, as do other permanent members of the Security Council.⁶⁵

S/RES/1534 (2004). Citing to the need to ensure adherence to the completion strategies, Resolution 1503 split the prosecutorial functions of the ICTY and ICTR. See S.C. Res. 1503, *supra*, ¶ 8. Prior to this resolution, the *ad hoc* International Criminal Tribunals shared a common Chief Prosecutor, which contributed to, among other things, uniform policies with respect to prosecuting offenders before the ICTY and ICTR.

62. The ICTY leadership has been consistent in stating that the completion strategy target dates are conditioned on the apprehension and trial by the ICTY of Radovan Karadžić, Ratko Mladić, and Ante Gotovina. See, e.g., *ICTY Completion Strategy*, *supra* note 55, ¶ 15; October 2003 Security Council Comments, *supra* note 58, at 5-6; ICTY Prosecutor October 2002 Security Council Comments, *supra* note 57, at 3-4; October 2002 Security Council Comments, *supra* note 57, at 1; July 2002 Security Council Comments, *supra* note 52, at 2; Press Release, ICTY, Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Nov. 27, 2001) [hereinafter ICTY Prosecutor November 2001 Security Council Comments]. Moreover, in early May of 2004, the ICTY president, acting in furtherance to ICTY Rule 7 *bis*, forwarded to the Security Council a report of the Prosecutor setting forth a pattern of “consistent failure on the part of Serbia and Montenegro to comply with its obligations” under the ICTY Statute and RPE. See Press Release, ICTY, Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, Reports Serbia and Montenegro’s Non-cooperation, to the Security Council (May 4, 2004). The President noted that these failures “are detrimental to the expectations placed upon the Tribunal by its completion strategy and could seriously impinge on the Tribunal’s ability to meet those expectations.” *Id.*

63. S.C. Res. 1503, *supra* note 61. The resolution also referred to the need to arrest Karadžić, Mladić, and Gotovina, as well as Felicien Kabuga, an ICTR indictee. See *id.* ¶¶ 2-3. Of course, for the tribunals constituting the Nuremberg process, arrest of those most responsible for the crimes committed by Nazi Germany was not a major impediment since most of them (with the exception of Hitler, Göbbels and Eichmann) were already in custody. See Taylor Report, *supra* note 7, at 5, 51-52 (discussing the efforts to determine who should be arrested for trial before the Nuremberg tribunals); see also Directive on the Apprehension of War Criminals, *supra* note 30.

64. See, e.g., Amb. Pierre-Richard Prosper, War Crimes and State Responsibility for Justice, Remarks at OSCE Conference in Belgrade (June 15, 2002), available at <http://belgrade.usembassy.gov/press/2002/020615.html>; see also *War Crimes: United States “Forced to Practice What it Preaches”*, INT’L JUSTICE TRIB., May 24, 2004, at 5.

65. At the time Security Council Resolution 1534 passed, both the United States

In adopting Resolution 1534, the Security Council ordered the Prosecutors of the *ad hoc* International Criminal Tribunals to review their respective caseloads with a view to determining which cases should be transferred to “competent national jurisdictions.”⁶⁶ All new indictments must also be based on charges relating to only “the most senior leaders” suspected of being “most responsible” for crimes within the relevant tribunal’s jurisdiction.⁶⁷

Resolution 1534 also require the leaders of the *ad hoc* International Criminal Tribunals to present biannual reports to the Security Council concerning progress made towards reaching the goals of the completion strategies.⁶⁸ In May and November 2004, the Presidents and Prosecutors of the *ad hoc* International Criminal Tribunals articulated their progress in complying with the completion strategies, while also pointing out remaining dif-

and France reiterated their strong support for the *ad hoc* International Criminal Tribunals in their efforts to bring those most responsible for crimes in the former Yugoslavia and Rwanda to justice. *See U.S. Favors Trial of War Crime Fugitives*, UNITED PRESS INT’L, Mar. 26, 2004.

66. *See* S.C. Res. 1534, *supra* note 61, ¶ 4.

67. *See id.* ¶ 5. This has been the official policy of the ICTY Prosecutor since as early as October 2002. *See* October 2002 Security Council Comments, *supra* note 57, at 4. *But see* ICTY Prosecutor November 2001 Security Council Comments, *supra* note 62, at 1.

68. *See* S.C. Res. 1534, *supra* note 61, ¶¶ 6-7. As of late November 2004, both *ad hoc* International Criminal Tribunals had filed reports. For the ICTY reports, see U.N. Doc. S/2004/420 (2004) [hereinafter *ICTY May 2004 Report*]; *see also* Press Release, ICTY, Address of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Nov. 23, 2004) [hereinafter *Meron Press Release*]; Press Release, ICTY, Comments by Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Nov. 29, 2004); Press Release, ICTY, Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (Nov. 23, 2004) [hereinafter *Del Ponte Press Release*]. For the ICTR reports, see U.N. SCOR, 59th Sess., Annex, U.N. Doc. S/2004/341 [hereinafter *ICTR May 2004 Report*]; *see also* Press Release, ICTR, ICTR President and Prosecutor Update Security Council on Completion Strategy (Nov. 24, 2004) [hereinafter *ICTR Completion Strategy Press Release*]. On June 29, 2004, the ICTR President and Prosecutor reported to the Security Council that the ICTR was “on schedule” to complete its trials by 2008, as required by Security Council Resolution 1503. *See* Press Release, ICTR, President and Prosecutor Update Security Council on Completion Strategy (July 6, 2004). At that time, ICTR Prosecutor Jallow indicated that he intends to transfer five of the currently detained accused to national courts for trial, while anticipating that at least four indictees who are at large, as well as some other individuals to be indicted, will probably be transferred as well, in accordance with ICTR Rule 11 *bis*. *See id.*

facilities.⁶⁹ The Security Council was presented with basic statistics concerning the accomplishments of the *ad hoc* International Criminal Tribunals thus far.⁷⁰ The ICTY Prosecutor informed the Council that six investigations remained open and were

69. The ICTY Prosecutor identified three primary obstacles: (1) the reluctance of certain States to arrest and transfer individuals indicted by the ICTY; (2) the ability and willingness of the States of the former Yugoslavia "to proceed with trials, while ensuring that those trials will be led in accordance with the highest judicial standards"; and (3) the lack of resources to maintain steady progress in fulfilling the ICTY's mandate. See Del Ponte Press Release, *supra* note 68. With respect to the second potential obstacle, the leaders of the ICTY have noted this problem before. See *ICTY May 2004 Report*, *supra* note 68, ¶¶ 27-28; see also U.N. SCOR, 58th Sess., 4837th mtg., U.N. Doc S/PV.4837 (Oct. 8, 2003); Press Release, Security Council, Security Council Briefed on Establishment of War Crimes Chamber Within State Court of Bosnia And Herzegovina, U.N. Doc. SC/7888 (Oct. 8, 2003). Several organizations have also been critical of the progress made to date of the courts of the former Yugoslavia in prosecuting war crimes cases, while commenting on the potential for the situation to improve in the near future. See, e.g., Press Release, Amnesty International, Bosnia-Herzegovina: Justice Cannot be Achieved on the Cheap (Nov. 12, 2003); Amnesty International, Bosnia-Herzegovina Shelving Justice: War Crimes Prosecutions in Paralysis (Nov. 12, 2003), available at <http://www.amnestyusa.org> [hereinafter Amnesty International Bosnia Report]; Organization for Security and Co-Operation in Europe ("OSCE"), Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring (Jun. 22, 2004), available at <http://www.osce.org/documents>; Press Release, OSCE, OSCE Mission to Croatia Report Finds Ethnic Serbs "Disadvantaged" in War Crimes Trials (Mar. 1, 2004). Based on the monitoring of 75 trials, one OSCE report noted, *inter alia*, that *in absentia* proceedings were almost exclusively utilized in cases involving Serb perpetrators; that significant differences existed between rates of convictions and acquittals between Serbs and Croats; and that the length of proceedings "on both ends of the spectrum" as well as delays in the proceedings were major causes for concern. See OSCE, Mission to Croatia, Background Report: Domestic War Crimes Trials 2002 (Mar. 1, 2004), available at <http://www.osce.org/documents>; see also Council of Europe, Serbia and Montenegro: Compliance with Obligations and Commitments and Implementation of the Post-Accession Co-Operation Programme, Apr. 30, 2004, ¶¶ 28-34. The European Commission, in considering Croatia's application for EU membership, has also raised concerns about Croatia's progress towards prosecuting war crimes cases. See Commission of the European Communities, Commission Opinion on Croatia's Application for Membership in the European Union, COM (2004) 257 Final 31.

70. As of November 23, 2004, the ICTY had completed trials in 18 cases; of the 36 accused, 17 pleaded guilty, three of whom entered pleas mid-trial. Also as of that date, five trials were underway (*Krajišnik*, *Milošević*, *Limaj*, *Hadžhasanović & Kubura*, and *Orić*), while two other cases (*Strugar* and *Jokić*) had been completed with Trial Chambers yet to render their judgments. See *Prosecutor v. Strugar*, Case IT-01-42-T, [2004] Int'l Crim. Trib. Fmr. Yugoslavia 9; *Prosecutor v. Jokić*, Case IT-02-60-T, [2004] Int'l Crim. Trib. Fmr. Yugoslavia 6. Thus, as of November 23, 2004, the ICTY had completed or was conducting proceedings involving 60 accused in 24 trials and 15 separate guilty plea proceedings. See Meron Press Release, *supra* note 68. As of the same date, the ICTR had rendered judgments with respect to a total of 23 persons and was in the process of trying 25 persons, bringing to 48 the number of persons whose trials were either completed or underway. See ICTR Completion Strategy Press Release, *supra* note 68. The ICTR President has estimated that the total number of persons to be tried

likely to result in additional indictments by December 31, 2004.⁷¹ The investigative target of the ICTY was in fact met prior to the deadline. The ICTR Prosecutor informed the Security Council in May 2004 that he had reduced the number of suspects facing indictment from twenty-six to sixteen and that he was planning on transferring certain cases to national courts for trial.⁷² The ICTR has already completed its investigative work and will produce its final indictments in 2005.

The ICTY RPE have been amended twice to facilitate the completion strategy. First, Rule 11 *bis* was amended to provide for the transfer of ICTY cases to domestic courts.⁷³ The ICTR RPE were also amended to incorporate this provision. Second, ICTY RPE Rule 28 was amended to provide a role for the ICTY judges in determining whether a potential indictee is "senior" enough to merit indictment by the ICTY.⁷⁴ The ICTR judges declined to adopt a similar rule for the Arusha-based Tribunal.

ICTY RPE Rule 11 *bis* was amended in June 2004 so as to permit the Trial Chambers to refer cases to any State: (1) where the crime was committed; (2) where the accused was arrested; or (3) having jurisdiction and being willing and prepared to accept the case for trial.⁷⁵ Regardless of where the case is referred, the Trial Chamber must be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.⁷⁶ The Trial Chamber may refer cases either *proprio motu* or upon the request of the Prosecutor, and permits the par-

before that tribunal could be in the range of 65-70 by the time its mandate is complete. See *ICTR May 2004 Report*, *supra* note 68, ¶ 62.

71. The ICTY Prosecutor reported that two of these indictments could be joined with two existing cases, with the result that the open investigations are likely to add a maximum of four additional trials to be carried out in The Hague. See Del Ponte Press Release, *supra* note 68. In May 2004, the ICTY Prosecutor informed the Security Council that, between October 2003 and May 2004, she had issued five new indictments and unsealed an additional indictment. See *ICTY May 2004 Report*, *supra* note 68, ¶¶ 7-13.

72. See *ICTR May 2004 Report*, *supra* note 68, ¶¶ 4-7, 36-39.

73. See *infra* notes 75-78 and accompanying text.

74. See ICTY RPE Rule 28 (1994) (amended 1996).

75. The third prong was added at a plenary in June 2004, while the first two prongs were the product of amendments to the ICTY RPE in September 2002. The notion of referring cases to States for trial was discussed by the ICTY Judges as early as September 2000, but rejected. See *Report on the Operation of the International Criminal Tribunal for the former Yugoslavia, Submitted by Judge Claude Jorda, President, on Behalf of the Judges of the Tribunal*, U.N. Doc. A/55/382-S/2000/865, ¶¶ 47-52 (2000).

76. See ICTY RPE Rule 11 *bis*(B) (1997) (amended 2002). The ICTY President may assign cases following indictment to a Trial Chamber for the specific purpose of

ties to be heard on the issues.⁷⁷ The ICTY Prosecutor anticipates that, by the end of 2004, eleven indicted cases concerning twenty accused will have been proposed to the Chambers for transfer to domestic jurisdictions in accordance with Rule 11 bis of the ICTY Rules of Procedure and Evidence.⁷⁸

An essential component of this portion of the completion strategy rests with the State Court of Bosnia and Herzegovina (“BH State Court”),⁷⁹ which was established on November 12, 2000, by Wolfgang Petritsch, the then High Representative for Bosnia and Herzegovina, acting pursuant to his authority under Article V of Annex 10 of the Dayton Agreement.⁸⁰ In May 2002, an expert group (appointed by the Office of the High Representative (“OHR”)), recommended the creation, within the BH State Court, of a special International Humanitarian Law Division (later referred to as the “War Crimes Chamber”) with specific jurisdiction to prosecute serious violations of international humanitarian law.⁸¹ In June 2002, then-ICTY President Jorda submitted the ICTY Completion Strategy Document to the Se-

invoking Rule 11 bis, even in situations where the accused is not in custody. See ICTY RPE Rule 11 bis(A).

77. See ICTY RPE Rule 11 bis(B). The rule is silent as to whether the accused may seek the transfer of his case to a State that meets the conditions set forth in Rule 11 bis. See *id.*

78. See Del Ponte Press Release, *supra* note 68. For progress made by the ICTR in laying the foundation for transferring cases, see ICTR Completion Strategy Press Release, *supra* note 68; see also ICTR May 2004 Report, *supra* note 68, ¶¶ 36-39; ICTR Completion Strategy, *supra* note 60, ¶¶ 36-39.

79. For press reports on war crimes trials conducted in Bosnia and Herzegovina, see Ana Uzelac, *Can Balkan Courts Be Trusted With Tribunal Cases?*, Institute for War and Peace Reporting (“IWPR”) Tribunal Update No. 358 (May 15, 2004), available at <http://www.iwpr.net>; see also Merdijana Sadović, *Teething Problems for Bosnian Courts*, IWPR Tribunal Update No. 358 (May 15, 2004); *First War Crimes Trial of Serb Starts in Republika Srpska*, SOUTHEAST EUR. TIMES, May 17, 2004; *Mostar: Investigation Against 900 Persons Suspected of War Crimes*, FED’N NEWS AGENCY, June 8, 2004, available at <http://www.fena.ba/uk>; *Dnevne Nezavisne Novine, Fifty Indictments for War Crimes Before BiH Court?*, DAILY INDEP. NEWSP., June 9, 2004, available at http://www.tfeagle.army.mil/tfeno/Feature_Story.asp?Article=85514.

80. See Office of the High Representative and EU Special Representative, High Representative for Bosnia and Herzegovina Wolfgang Petritsch, Decision Imposing the Law on the State Court of BiH (Nov. 12, 2000), available at <http://www.ohr.int/decisions>; see also Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, 35 I.L.M. 170.

81. See Consultants’ Report to OHR, *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina* 2, 10-14 (on file with author); see also Press Office, OHR, BiH Media Round-up (May 9, 2002), available at <http://www.ohr.int/ohr-dept/press>; July 2002 Security Council Comments, *supra* note 52, at 3.

curity Council. A key component of that strategy was the transfer of cases involving “lower-level and intermediate accused” to regional courts so that the ICTY could complete all trials by 2008.⁸² President Jorda subsequently recommended the establishment of the War Crimes Chamber as proposed by OHR.⁸³ The War Crimes Chamber, which came into existence in January 2005,⁸⁴ was never envisioned as a “mini-international Tribunal” in Sarajevo, but rather a national court with temporary international support for the purpose of guarantying its impartiality and independence.⁸⁵ The Security Council warmly received this general approach.⁸⁶

82. See *ICTY Completion Strategy*, *supra* note 55, ¶¶ 59-69. The ICTY President originally envisioned a three-tiered approach, with the ICTY trying the most serious cases, the State Court of Bosnia and Herzegovina (“BH State Court”) prosecuting intermediary-level accused, and the lower level domestic courts handling low-ranking accused pursuant to the Rome Agreement. See *id.* ¶ 69; see also July 2002 Security Council Comments, *supra* note 52, at 4.

83. See July 2002 Security Council Comments, *supra* note 52, at 4. As noted above, Amnesty International has criticized the plan to transfer cases to the BH State Court on the grounds that the Bosnian authorities are not yet in a position to satisfy international standards in conducting such trials. See Amnesty International Bosnia Report, *supra* note 69. Amnesty International contends that the War Crimes Chamber of the State Court “could be a first step in tackling the challenging task, but only if part of a wider strategy which embraces the entire Bosnian criminal justice system dealing with cases of genocide, crimes against humanity and war crimes.” *Id.* at 1-2. Concluding that this is *not* the case, Amnesty International disagrees with this aspect of the ICTY Completion Strategy, arguing that its purpose is to “affect the quickest and cheapest possible withdrawal of the international community and the acceleration of the exit strategy of the Tribunal.” *Id.* at 2. Amnesty International has thus concluded that the completion strategy process is being rushed and that the plan is “unrealistic and insufficiently detailed” and will “significantly undermine the battle against impunity” since only a relatively few individuals will be prosecuted before the State Court. *Id.* In the same report, it also criticized the trials being conducted by entity and cantonal courts as well as the role provided for such courts in the ICTY Completion Strategy. See *id.* at 3-5; see also *ICTY May 2004 Report*, *supra* note 68, ¶¶ 24, 29.

84. Although no specialized War Crimes Chamber had been established prior to January 2005, the BH State Court has jurisdiction to prosecute such cases; it is anticipated that it will begin receiving cases from the ICTY in January 2005. See Preliminary Order in Response to the Prosecutor’s Request under Rule 11 *bis*, Prosecutor v. Mejkajić et al., Case No. IT-02-65-PT (Sept. 22, 2004), ¶ 8, available at <http://www.un.org/icty> [hereinafter Mejkajić Preliminary Order]. War crimes cases will be prosecuted by the BH State Prosecutor’s Special Department for Organized Crime, Economic Crimes and Corruption.

85. See July 2002 Security Council Comments, *supra* note 52, at 3 (“In practical terms, a limited number of key posts would be set aside for international judges for a restricted time”).

86. See *Statement by the President of the Security Council*, *supra* note 56; see also S.C. Res. 1503, *supra* note 61, *pmbi*.

Although the elaborate steps taken to establish and properly fund the BH State Court are beyond the scope of this Article,⁸⁷ a rudimentary understanding of this court is necessary in order to appreciate how it fits into the ICTY completion strategy. The BH State Court is authorized to apply the law of Bosnia and Herzegovina and has jurisdiction over three types of war crimes cases: those referred from the ICTY pursuant to Rule 11 *bis*,⁸⁸ investigations dossiers deferred by the ICTY Prosecutor for which no indictment has been issued,⁸⁹ and “Rules of the Road” cases pending before domestic courts but which, due to their sensitivity, should be tried at the State Court level.⁹⁰ The Criminal Code of Bosnia and Herzegovina was amended to give the BH State Court jurisdiction over all serious criminal cases, including war crimes.⁹¹ The procedural rules for the BH State Court as well as the Criminal Procedure Code of Bosnia and Herzegovina were also amended so as to render evidence gathered by ICTY investigators admissible before the BH State Court.⁹² For an initial period, there will be an international component of the BH State Court, to include international

87. For a discussion on these developments, see Press Release, ICTY, Statement by President Meron on Establishment of Special War Crimes Chamber in Bosnian State Court (June 13, 2003); see also Press Release, ICTY, Statement of Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, Before the Commission on Security and Cooperation in Europe “U.S. Helsinki Commission” (Oct. 8, 2003); U.N. SCOR, 58th Sess., 4837th mtg., U.N. Doc S/PV.4837 (2003) (Meeting Record); Press Release, United Nations, Security Council Briefed on Establishment of War Crimes Chamber Within State Court of Bosnia and Herzegovina (Oct. 8, 2003), U.N. SCOR, 58th Sess., 4837th mtg., U.N. Doc SC/7888 (2003); *Twenty-fifth Report of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General*, U.N. Doc. S/2004/126, Enclosure (2004); Press Release, OHR, First Meeting of the Joint Executive Board of the BiH Special War Crimes Chamber Implementation Project (Dec. 5, 2003), available at <http://www.ohr.int/ohr-dept/presso>; ICTY Weekly Press Briefing (Apr. 28, 2004), available at www.un.org/icty/briefing/2004/PB040414.htm.

88. See Press Release, ICTY, OHR-ICTY Working Group on Development of BiH Capacity for War-Crimes Trial Successfully Completed (Feb. 21, 2003) [hereinafter Working Group Press Release].

89. These cases involve approximately 45 suspects. See *id.*

90. See *id.*

91. See Press Release, ICTY, Donors Raise 15.7 Million Euros for War Crimes Chamber of BiH Court (Oct. 30, 2003) [hereinafter Donors Press Release].

92. See *id.*

judges, prosecutors and court management personnel, for a “transitional period of up to five years.”⁹³

As noted above, the ICTY Prosecutor first invoked Rule 11 *bis* in September 2004, seeking to transfer three cases involving seven accused to national courts in Croatia and Bosnia and Herzegovina. On September 2, 2004, she filed a request to transfer the *Ademi & Norac* case (involving two accused) to Croatia,⁹⁴ prompting ICTY President Theodor Meron to appoint a Trial Chamber to consider this request.⁹⁵ Similar requests were subsequently filed on September 2 and September 21, 2004, seeking to transfer the *Mejakić* and the *Stanković* cases, respectively, (involving four accused and one accused, respectively) to the BH State Court.⁹⁶ Upon receipt of the *Mejakić* Request, the ICTY President wrote a letter to the Senior Deputy High Representative in Bosnia and Herzegovina, seeking his advice as to whether there was any court in Bosnia “presently capable of trying persons accused of war crimes in a manner which meets international human rights and due process standards.”⁹⁷ In his response, the Senior Deputy High Representative wrote, *inter alia*,

93. *See id.*; *see also* Working Group Press Release, *supra* note 88.

94. *See* Request by the Prosecutor under Rule 11 *bis*, Prosecutor v. Ademi & Norac, Case No. IT-04-78-PT (Sept. 2, 2004), available at <http://www.un.org/icty>. The ICTY Prosecutor noted that no other State had indicated that it had jurisdiction or was willing and adequately prepared to accept the case; that Croatia has territorial jurisdiction over the case; and that the Croatian authorities had indicated that they were willing and prepared to accept the case for prosecution. *See id.* ¶¶ 20, 21. She also pointed out that recent OSCE Reports support her position that progress has been made with respect to the integrity of the Croatian judiciary as that system relates to the prosecution of war crimes cases. *See id.* ¶ 23.

95. *See* Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court Under Rule 11 *bis*, *Ademi & Norac*, Case No. IT-04-78-PT (Sept. 7, 2004). As of late November 2004, this Trial Chamber had not yet rendered a decision on whether to transfer the case.

96. The Prosecutor’s requests concerning these cases are not available on the ICTY web-site. As discussed *infra*, the ICTY President took steps following the filing of the *Mejakić* Request to determine whether the courts in Bosnia and Herzegovina were prepared to begin receiving cases from the ICTY. This issue had not yet been resolved at the time that the request was filed in the *Stanković* case, and the ICTY President deferred consideration of the *Stanković* Request pending the filing of the *Mejakić* Prosecutor’s Supplementary Motion on September 29, 2004. *See* Preliminary Order in Response to the Prosecutor’s Motion Under Rule 11 *bis*, Prosecutor v. Stanković, Case No. IT-96-23/2-PT (Sept. 27, 2004).

97. *Mejakić* Preliminary Order, *supra* note 84, ¶ 8. The President wrote this letter after concluding that, based upon information contained in the Prosecutor’s Request, it would be possible for the State Court of Bosnia and Herzegovina to begin prosecuting war crimes cases transferred from the ICTY in January 2005. *See id.* ¶ 7.

that from the perspective of OHR, it would not be possible for the BH State Court to meet international due process standards prior to January 2005, and that it was consequently premature to transfer any cases.⁹⁸ In addition, he wrote that “Any premature referral to [Bosnia and Herzegovina] before January could even undermine the current efforts to establish that capacity.”⁹⁹ The ICTY President then concluded:

This is an unusual case. It involves some tension among the need for efficient judicial management of Trial Chamber resources, the need to safeguard Defendants’ procedural rights, and the need to effectuate the basic judicial function of the Tribunal.¹⁰⁰

Consequently, after discussing the matter with the Bureau, the ICTY President offered the Prosecutor the opportunity to file a supplemental brief on the extent to which Bosnia and Herzegovina was capable of referring Defendants’ case to a competent court “forthwith,”¹⁰¹ and addressing her view that Bosnia and Herzegovina would “provide all necessary legal and technical conditions for fair trials.”¹⁰² On September 29, 2004, the Prosecutor filed her Supplementary Motion,¹⁰³ arguing that since it is anticipated that the BH State Court will be operational in January 2005, her requests were not premature, and that there were good reasons for assigning the matter to a Trial Chamber for its consideration.¹⁰⁴ The ICTY President agreed, and assigned the cases to a Trial Chamber for its consideration as to whether the transfer of these cases was appropriate.¹⁰⁵

98. *See id.* ¶¶ 8-9.

99. *Id.* ¶ 8.

100. *Id.* ¶ 10.

101. *Id.*

102. *Id.* (quoting from ¶ 29 of the Prosecutor’s Request).

103. As with the original request, this document is not available on the ICTY website.

104. The ICTY Prosecutor argued that “coherent planning and efficient judicial management, both at the Tribunal and in [Bosnia and Herzegovina]” supported her argument that it was not premature to transfer the cases. Order Transferring a Motion Pursuant to Rule 11 *bis*, *Mejakić et al.*, Case No. IT-02-65-PT (Oct. 4, 2004), ¶ 3 (citing Prosecutor’s Supplementary Brief, ¶¶ 8, 10). *See* Order Transferring a Motion Pursuant to Rule 11 *bis*, *Stanković*, Case No. IT-96-23/2 (Oct. 4, 2004), ¶ 3 (citing Prosecutor’s Supplementary Brief, ¶¶ 8, 10).

105. *See* Order Appointing a Trial Chamber for the Purposes of Determining Whether the Indictment Should be Referred to Another Court Under Rule 11 *bis*, *Mejakić et al.*; *see also* Order Appointing a Trial Chamber for the Purposes of Determining

The second amendment to the ICTY RPE to have an impact upon the completion strategy was adopted at a plenary in April 2004. This was a few days after the Security Council adopted Resolution 1534, in which ICTY Judges amended ICTY RPE Rule 28(A) giving the Bureau¹⁰⁶ a role in determining whether or not an indictment involved “the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal.”¹⁰⁷ Notably, the ICTR Judges declined to adopt a similar rule for the ICTR, regarding the amendment as a statutory violation limiting prosecutorial independence.¹⁰⁸ Nonetheless, given the ICTY Prosecutor’s stated intention to focus her remaining investigations only on senior military and political leaders, the amendment is likely to have little impact.¹⁰⁹

The net result of these developments and efforts may be summarized as follows: First, the *ad hoc* International Criminal Tribunals are on schedule. The ICTY has met the December 31, 2004 deadline for completing investigations and is on track to complete all trials by December 31, 2008 and all appeals by December 31, 2010. Second, efforts will be made to focus the limited resources devoted to the ICTY and ICTR on prosecuting those individuals accused of being most responsible for the crimes committed in Rwanda and the former Yugoslavia. In this connection, the dates for the completion of trials and appeals seem to be contingent on the arrest, transfer and trial by the ICTY and ICTR of those accused bearing significant responsibility for crimes committed in Rwanda and the former Yugoslavia, specifically including Radovan Karadžić, Ratko Mladić, Ante Gotovina, and Felicien Kabuga. Third, the *ad hoc* International

ing Whether the Indictment Should be Referred to Another Court Under Rule 11 *bis*, *Stanković*.

106. The bureau consists of the ICTY President, Vice-President, and the Presiding Judges of the three Trial Chambers. See ICTY RPE Rule 23 (1994).

107. ICTY RPE Rule 28(A) (1994) (amended 1996).

108. See *Good Enough for The Hague, Not Good Enough for Arusha*, SE. NEWS SERVICE EUR., Apr. 27, 2004, available at <http://www.sense-agency.com>.

109. This has been the official policy of the Office of the Prosecutor at the ICTY since as early as October 2002: “I have dramatically prioritized our investigative objectives, for both Tribunals, and further focused our efforts on ‘the main civilian, military and paramilitary leaders’ so that we can now reasonably expect to fulfill the essence of our prosecution missions for both Tribunals by the end of 2004.” ICTY Prosecutor October 2002 Security Council Comments, *supra* note 57, at 4 (emphasis in original). Note that these comments were made when the ICTY Prosecutor was also the Chief Prosecutor for the ICTR.

Criminal Tribunals will soon begin transferring cases involving mid- and lower-level perpetrators to domestic courts for trial.

III. CONCLUSIONS AND APPLICABLE LESSONS

The biggest hurdles to be overcome in completing the mandates of the *ad hoc* International Criminal Tribunals clearly relate to the willingness of States, particularly those in the former Yugoslavia, to live up to their obligations to arrest and transfer all outstanding indictees into the custody of the ICTY, and to ensure that their national judiciaries can be entrusted to provide trials that meet international due process standards so that cases can be transferred for prosecution. In these two respects, the Nuremberg process offers few lessons, since the arrest of major war criminals was not a significant problem, with the major exception of those leaders who escaped liability by committing suicide. Similarly, since the majority of the major offenders were tried by the IMT, under Control Council Law No. 10 or by other Allied military tribunals, German courts, under the watchful eyes of military occupation authorities, were left to deal only with minor perpetrators.

Nevertheless, in many respects, the completion strategies for the *ad hoc* International Tribunals resemble the Nuremberg process. In both instances, the international community focused its resources on major offenders, while national courts (or military tribunals conducted by Allied States in the case of the post-World War II cases) were given primary responsibility for mid- and lower-level perpetrators. In both instances, the United States was a major proponent in initiating the use of courts to prosecute offenders, before seemingly losing patience with the process and encouraging the development of alternative methods to expedite the process.

One of the big advantages of the Control Council Law No. 10 prosecutions stemmed from the availability of the IMT infrastructure, which facilitated the success of the follow-on trials. Similarly, Taylor was successful in encouraging some of the IMT staff to remain in Nuremberg for the subsequent trials. Unfortunately, due to limited resources, there is no indication that the ICTY or ICTR will be able to provide staff to assist with the prosecution of cases before national courts. Given that the legal and investigative staffs of the *ad hoc* International Criminal Tribunals

were the ones who developed and prepared these cases, this may make things a bit more difficult. If funding by the international community were to be made available, it would likely prove to be of great assistance in efforts to ensure continuity in the prosecution of such cases.

As noted above, Taylor has described the utility of having an overall plan for conducting the war crimes trials at Nuremberg.¹¹⁰ The completion strategies for the *ad hoc* International Criminal Tribunals present a comprehensive plan for fulfilling the mandates of the ICTY and ICTR, but not all of the pieces are yet to come together. The international community needs to ensure that the national courts to which the ICTY and ICTR seek to transfer cases have the requisite resources to undertake these important trials. International organizations and NGOs will play an important role in ensuring that the rights of the accused are respected while also ensuring that impunity does not result. Trial monitoring will not be the end of the process, though, as it will be necessary to confirm that individuals convicted by national courts actually serve their sentences in conformity with national laws and are not prematurely released from imprisonment — as was the case with many of the Germans prosecuted by German courts following World War II.

If the processes envisioned by the completion strategies for the *ad hoc* International Criminal Tribunals come to pass, the mandates for these judicial institutions should be achieved in fewer than six years. The international community's continuing resolve to overcome the remaining obstacles will be crucial in determining whether the completion strategies succeed. As the final chapters on the *ad hoc* International Criminal Tribunals are being written, it will be extremely important to balance competing values — accountability for the perpetrators, ensuring that perpetrators receive fair and expeditious trials, and ensuring justice for the victims and their families. Whether by design or by coincidence, the completion strategies seem to have generally adhered to the approach taken by the Nuremberg process. One remains hopeful that with the transfer of cases to national jurisdictions, the ICTY and ICTR will take to heart these lessons

110. See *supra* note 46 and accompanying text.

learned and provide whatever institutional support is necessary — within the confines of limited resources — to ensure that these competing values are reconciled to the maximum extent possible.