CRIMINAL LAW BULLETIN

Volume 45, Number 2

Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy
Anna Petrig

Case Referral to National Jurisdictions: A Key Component of the ICTY Completion Strategy

With a Special Focus on Serbia and the Kovačevič Case

Anna Petrig*

"It is these courts that have begun the next chapter of the Tribunal's work by domestic prosecution of war crime cases, and it is these courts that will carry on the legacy of this Tribunal by continuing prosecutions long after the Tribunal has completed its mission."

Fausto Pocar, President ICTY, 2006[1]

---

* Anna Petrig is admitted to the Swiss Bar and holds an LL.M. from Harvard Law School. She is also the vice-president of the Swiss non-governmental organization TRIAL (Swiss Association for International Criminal Law).

[1] ICTY, Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), Annex I to the Letter dated 15 November 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/898 (Nov. 16, 2006), at ¶ 23.

TABLE OF CONTENT

I. The Context: ICTY Completion Strategy

A. From a Mandate Unlimited in Time to a Fixed Schedule

B. Measures to Achieve the Work in the Time Frame Set by the Security Council

1. Measures *Intra Muros*

2. Measures *Extra Muros*

II. Case Referral by the ICTY

A. The Way Towards the Nationalization of the Accountability Process

B. Rule 11*bis* ICTY-RPE

1. Formal Aspects

2. Material Aspects

a) Gravity of the Crimes and Level of Responsibility of the Accused

b) Prospects of a Fair Trial and Prohibition of Death Penalty

c) Implicit Referral Criteria: Willingness and Ability to Prosecute

C. Choice of the State of Referral

1. Which Jurisdiction Shall Have Priority?

2. Cases Referred: BiH in the Fore – Serbia the Taillight

III. Prosecutor v. Kovačevič: The Only Case Referred to Serbia

A. Facts and Procedural History

B. Jurisdiction: Why Serbia?

C. Assessment of the Referral Conditions

1. Gravity of Crimes Charged and Level of Responsibility of the Accused

2. Fair Trial Assessment

a) Overly Positivistic and Formalistic Assessment

b) Monitoring and Deferral: Confidence in the Emergency Brake

IV. Critique and Conclusion

Annex: Rule 11*bis* ICTY-RPE

I. The Context: ICTY Completion Strategy

A. From a Mandate Unlimited in Time to a Fixed Schedule

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993[2] its mandate was not limited to a specific period of time — even though there was clearly an underlying assumption to create a temporary tribunal with a finite mission. Nor was the end of the *ad hoc* institution discussed in the first years of its existence while serious violations of International Humanitarian Law on the territory of former Yugoslavia were still occurring. At the turn of the century, however, several events — some of which could be summarized under the slogan "time is money,"[3] coupled with a certain "tribunal fatigue," fading memories of Srebrenica, as well as new issues facing the international community in the aftermath of 9/11 — led to an intensification of the debate about the establishment of a time frame for the completion of the Tribunal's mandate and about measures improving its efficiency.[4]

In 2002 the ICTY adopted its first Completion Strategy, the so-called "Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts."[5] Endorsed by the Security Council (S.C.), it discussed not only prospective case referrals to national jurisdictions but also completion dates

---

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

[3] The longer the ICTY was in existence the more important the amounts spent on the ordinary budget of the UN became. For the development of the regular budget of the ICTY, see http://www.icty.org/sid/325.

[4] Dominic Raab, *Evaluating the ICTY and its Completion Strategy*, 3 J. Int'l Crim. Just. 82, 84 (2005).

[5] ICTY, Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, Enclosure to the Letter dated 10 June 2002 from the President of the International Criminal Tribunal for the former Yugoslavia addressed to the Secretary General, U.N. Doc. S/2002/678 (June 19, 2002) [hereinafter ICTY, Report on the Judicial Status of the International Criminal Tribunal].

of the investigations and Trial Chamber procedures.[6] A year later, the S.C., through Resolution 1503, aligned the schedules of the ICTY and ICTR by calling on them "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."[7] Hence, the shift from a mandate unlimited in time to a fixed schedule, within which the remaining work had to be finished, came to pass.

B. Measures to Achieve the Work in the Time Frame Set by the Security Council

The ICTY was repeatedly criticized for the length of its proceedings: According to the Institute for War and Peace Reporting (IWPR), an average trial lasted a total of five-and-a-half years from the accused's initial appearance in court to the judgment of the Appeals Chambers.[8] This time span not only raised concerns about whether the human rights guarantees concerning an expedient trial and the length of pre-trial detention[9] were respected but also about the efficiency of the tribunal and, hence, its ability to achieve the mandate in the time frame set by the S.C. The ICTY thus adopted different internal and external measures in order to improve efficiency without diminishing procedural rights. These measures are discussed below.

1. Measures *Intra Muros*

While some causes for the protraction of the procedures were beyond the control of the ICTY, such as for example the arrest of indicted persons, it took various measures *intra muros* in order to improve its efficiency. One such measure consisted of the creation of a pool of *ad litem* judges and the enlargement of the membership in the Appeals Chamber.[10] The increased use of "sentence bargaining" and "charge bargaining" also helped to man-

---

[6] S.C. Presidential Statement, Transfer of former Yugoslavia Tribunal Cases to National Courts, U.N. Doc. S/PRST/2002/21 (July 23, 2002).

[7] S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003).

[8] IWPR, Carla Sapsford & Ana Uzelac, *Lengthy Hague Trials Under Scrutiny*, Jan. 7, 2005, *available at* www.iwpr.net.

[9] *See, e.g.*, Article 9 (3) International Covenant on Civil and Political Rights (ICCPR) adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

[10] S.C. Res. S/RES/1329 (Nov. 30, 2000). The institution of *ad litem* judges is foreseen in Articles 12, 13, 13*ter*, 13*quater*, and 14 ICTY-Statute.

age the expanding caseload,[11] but was initially rejected by the judges for being incompatible with the goals of the ICTY.[12]

A shift in the prosecutorial strategy also became part of the completion strategy. While at the inception of the Tribunal's work the Prosecutor focused on low and mid-level leaders,[13] the Tribunal affirmed in its 2002 Annual Report that it "intends to concentrate its activity on trying the *major* political and military leaders."[14] The amended Article 28(A) ICTY-RPE reflects this change by providing that indictments must be submitted to the Tribunal's Bureau, which determines whether the Prosecutor accuses "the most senior leaders."[15] At the same time a change towards less comprehensive and more focused indictments has been observed.[16] These two changes have a considerable impact on the workload of the ICTY and hence its ability to complete the work in the deadlines set by the S.C.

2. Measures *Extra Muros*

Besides the implementation of different internal measures, the Tribunal also developed an *extra muros* strategy. To prevent growth of the ICTY's docket,[17] the first measure consisted in the transfer of investigation results and evidentiary material collected by the ICTY to national jurisdictions in cases where the indictment was not yet confirmed.[18] The key measure, however, consisted in the referral of cases to national jurisdictions under Rule 11*bis* ICTY-RPE. In these cases an indictment had already been issued and confirmed by the ICTY and was hence already part of the Tribunal's

---

[11] Between 2001 and 2003 the ICTY approved twelve plea-bargains, therewith clearing as much as forty percent of the cases from its docket. *See* Michael P. Scharf, *Trading Justice for Efficiency, Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070, 1074 (2004).

[12] For an overview of the use of plea-bargaining and the goals of international criminal tribunals, see Anna Petrig, *Negotiated Justice and the Goals of International Criminal Tribunals*, 8 CHI.-KENT J. INT'L & COMP. L. 1, 7-31 (2008).

[13] An explanation for this prosecutorial strategy can be found in Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 430 (2004).

[14] ICTY, Annual Report of the ICTY to the General Assembly and the Security Council, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002), at ¶ 326 (emphasis added).

[15] For a description of the disagreement between the Judges and the Prosecutor on the "pyramidal strategy" (first targeting lower-level suspects, and then gradually moving to senior leaders), see Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 586-88 (2004).

[16] Raab, *supra* note 4, at 90.

[17] For a discussion of this *extra muros* measure, see Philip Grant, *Vers la fin des Tribunaux Pénaux Internationaux pour l'ex-Yugoslavie et le Rwanda: consequences juridiques des contraintes temporelles*, 65-68 (2004-2005), *available at* http://www.prix-henry-dunant.org/sites/prixhd/doc/2005_Dissertation_Philip_Grant_fr.pdf.

[18] *Cf., e.g.*, the *Zvornik* case, which was tried in Serbia; indictments in English at http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE_ENG.htm.

docket. This latter form of "nationalization of the accountability process" will be the object of this article.

II. Case Referral by the ICTY

A. The Way Towards the Nationalization of the Accountability Process

The idea of attributing a more important role in the accountability process to domestic jurisdictions in the territory of the former Yugoslavia came up at quite an early stage of the Tribunal's existence. In 1997 Article 11*bis* ICTY-RPE was introduced, which foresaw the possibility of *suspending* an indictment in case of proceedings before national courts.[19] But the concept of referring cases in which the ICTY already issued an indictment was deemed to be premature at that time. The Expert Group recognized in 1999 that case referrals could be a "potentially useful mechanism"[20] but are not possible at the current stage.[21] The President of the ICTY reached a similar conclusion in May 2000, stating "[r]egardless of the undeniable and not inconsiderable advantages of the measure, the judges are of the view that the disadvantages far outweigh them."[22] He confirmed this assessment in November 2001 by explaining that the domestic courts on the territory of the

---

[19] Rule 11*bis* ICTY-RPE as amended 17 November 1999:

> Suspension of Indictment in case of Proceedings before National Courts:
> (A) Where, on application by the Prosecutor or *proprio motu*, it appears to the Trial Chamber that
> (i) the authorities of the State in which an accused was arrested are prepared to prosecute the accused in their own courts; and
> (ii) it is appropriate in the circumstances for the courts of that State to exercise jurisdiction over the accused, the Trial Chamber, after affording the opportunity to an accused already in the custody of the Tribunal to be heard, may order that the indictment against the accused be suspended, pending the proceedings before the national courts.

[20] U.N. Expert Group, 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, annexed to the Letter dated 17 November 1999 from the Secretary-General addressed to the President of the General Assembly, UN Doc. No. A/54/634 (Nov. 22, 1999), at ¶ 101 [hereinafter U.N. Expert Group, Report of the Expert Group].

[21] U.N. Expert Group, Report of the Expert Group, *supra* note 20, ¶ 96.

[22] ICTY, Current state of the International Tribunal for the Former Yugoslavia: future prospects and reform proposals, Report on the operation of the International Tribunal for the Former Yugoslavia, submitted by Judge Claude Jorda, President, on behalf of the judges of the Tribunal, Annex I to the Letter dated 12 May 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, U.N. Doc. A/55/382-S/2000/865, at ¶ 53 (Sept. 14, 2000).

former Yugoslavia were not yet ready to receive transferred cases from the ICTY and that equitable institutions must first be developed.[23]

While in November 2001 ICTY President Jorda for the first time mentioned the notion of case referrals in a positive manner,[24] he referred to it only six months later as a *key measure* in the ICTY's Completion Strategy. Accordingly, the ICTY "Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospects for Referring Certain Cases to National Courts" stated: "Paradoxically, at the moment when the judicial activity of the [ICTY] is at the highest point the need to refer some cases to national courts is most keenly felt" and continued "[The ICTY] is contemplating more than ever having some accused tried by national courts."[25]

This shift in the perception of the importance and feasibility of case referrals arose from the conjunction of two factors: First, the gradual restoration of democratic institutions in the countries of former Yugoslavia; and, second, the increase in the number of arrests of high-ranking political and military figures.[26] The evolution of the idea of a partial nationalization of the accountability process culminated in the adoption of the new Article 11*bis* ICTY-RPE in September 2002, by which the possibility of case referrals was officially added to the Tribunal's toolbox.[27]

Hence, the process of nationalization must be viewed less as an attempt to leverage the benefits of domestic trials and more as a reaction of the ICTY to the limited amount of time left to clear its docket and to the arrest of a number of "big fish." Thus, its mission would focus on the prosecution of the most senior leaders allegedly responsible for most heinous crimes.

B. Rule 11*bis* ICTY-RPE

Rule 11*bis* ICTY-RPE has been modified four times since the inclusion of the "case referral provision" in 1997. The resulting "patchwork" reflects the fact that case referrals of this type are without precedent in the realm of transitional justice and hence without experience to build upon. It is an illustration of the trial-and-error process the ICTY has traversed since it came into existence.

1. Formal Aspects

Rule 11*bis* ICTY-RPE provides for the appointment by the President of

---

[23] ICTY, Address of President Jorda to the Security Council, UN Doc. S/PV.4429, at 5 (Nov. 27, 2001) [hereinafter ICTY, Address of President Jorda to the Security Council].

[24] ICTY, Address of President Jorda to the Security Council, *supra* note 23, at 5.

[25] ICTY, Report on the Judicial Status of the International Criminal Tribunal *supra* note 5, ¶ 1.

[26] ICTY, Report on the Judicial Status of the International Criminal Tribunal *supra* note 5, ¶ 2.

[27] Article 11*bis* ICTY-RPE was amended in June and July 2004 and February 2005. For the wording of Article 11*bis* ICTY-RPE in force, see the Annex of this article.

a so-called "Referral Bench" consisting of three permanent judges of the Trial Chamber. The Referral Bench may only transfer cases in which an indictment was already confirmed by the ICTY and the trial has not yet commenced.[28]

A referral may be ordered by the Referral Bench *proprio motu* ("by its own motion"); or at the request of the Prosecutor.[29] The provision rests silent on the possibility that the accused can request a referral, which could have important implications. Ante Gotovina, for example, who was indicted in connection with "Operation Storm"[30] and has meanwhile been arrested and is now standing trial,[31] offered to surrender if the ICTY would transfer his case to Croatia.[32] While some argue that the Referral Bench could act upon a request from the accused pursuant to its own power to consider a referral,[33] others are of the opinion that it is a *silence qualifié*, i.e., that the rule maker consciously excluded the possibility that the accused may make an application for a referral.[34]

A referral may only be ordered "after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard."[35] In order to respect procedural fairness, the qualification, "where applicable," must be interpreted narrowly and hence relates to limited circumstances, e.g., a situation of a fugitive accused not legally represented.[36] The case referral provision rests silent on the question whether the concerned State should be heard. Even though not explicitly foreseen in Rule 11*bis* ICTY-RPE, the State, however, is to be heard according to the court's practice. Otherwise it

---

[28] Article 11*bis* (A) ICTY-RPE.

[29] Article 11*bis* (B) ICTY-RPE.

[30] "Operation Storm [1995] marked the end of the self-proclaimed Serb Republic of Krajina, where Serb rebels had staked out territory amounting to about a quarter of Croatia at the beginning of the break-up of Yugoslavia. In the days that followed Operation Storm, property was destroyed and atrocities committed against those Serbs who remained." Matt Prodger, *Evicted Serbs Remember Storm*, BBC NEWS, Aug. 5, 2005, *available at* http://news.bbc.co.uk/2/hi/ europe/4747379.stm.

[31] ICTY, Case Information Sheet, *Gotovina et al. — "Operation Storm" (IT-06-90)*, *available at* http://www.icty.org/x/cases/gotovina/cis/en/cis_gotovina_al_en.pdf.

[32] Agence France-Presse, *Croatian general offers to surrender if tried at home*, Jan. 12, 2005, quoted in Grant, *supra* note 17, at 47.

[33] Sarah Williams, *ICTY Referrals to National Jurisdictions: A Fair Trial or A Fair Price?*, 17 CRIM. L.F. 77, 188 (2006).

[34] *Cf., e.g.*, Grant, *supra* note 17, at n.204: "Il s'agit là certainement d'un silence qualifié: on voit mal comment l'accusé — qui peut même ne pas savoir qu'il est poursuivi, en cas d'acte d'accusation non divulgué (art. 53 RPP-TPIY) — pourrait lui-même enclencher une procédure de renvoi, alors qu'une issue positive à pareille requête nécessite à tout le moins des discussions avec les autorités locales quant à leur "volonté" et leur "capacité" à accepter de telles affaires. Seul le Procureur est en état de mener de telles démarches."

[35] Article 11*bis* (B) ICTY-RPE.

[36] Williams, *supra* note 33, at 188.

would be difficult to make a thorough inquiry into the fulfillment of the referral criteria, such as the willingness and ability to prosecute and the prospect of a fair trial.[37]

Both the Prosecutor as well as the accused can appeal against the decision of the Referral Bench.[38] Once an issued order to refer is effective the accused must be handed over to the authorities of the concerned State[39] or if the accused is not in custody of the ICTY, the Tribunal may issue an arrest warrant specifying the State to which the accused is to be transferred to trial.[40] The Prosecutor must provide the concerned State with all of the information relating to the case, which he considers appropriate along the material supporting the indictment.[41] The qualification "which he considers appropriate" does not pose problems concerning incriminating evidentiary material but could raise discussions as to whether the Prosecutor also has to hand over exculpatory evidence to the defense in the national context. An analogous application of Article 68 (i) ICTY-RPE according to which "the Prosecutor shall . . . disclose to the Defence any material which . . . may suggest the innocence or mitigate the guilt of the accused" could be considered.

2. Material Aspects

a) Gravity of the Crimes and Level of Responsibility of the Accused

In determining whether to refer a case, the Referral Bench has to consider the gravity of the crime as well as the level of responsibility of the accused.[42] While the most senior leaders and heinous crimes should be tried by the ICTY, lower-ranking persons charged for less serious crimes can be transferred to national jurisdictions. The determination of the gravity of the crime charged is to walk a tightrope not only for the Referral Bench but also for the Prosecutor and the Defense.

For the Referral Bench it might be difficult to explain the "insignificance" of a certain case given the obvious gravity of *every* charge before the ICTY. The determination can thus only be seen as a relative one — as an attempt to establish an order of the cases pending before the ICTY according to their gravity — and has to be communicated in a way not impinging on the victim's feelings. But also for the Prosecutor it might be an awkward task to defend a referral request: While in his ordinary role the emphasis of his rhetoric lays on the seriousness of the crimes allegedly committed and he has to follow the principle in *dubio pro duriore* for the indictments ("in case of doubt the suspected must be indicted for the more serious offense"), he

---

[37] Grant, *supra* note 17, at 49.

[38] Article 11*bis* (I) ICTY-RPE.

[39] Article 11*bis* (D) i ICTY-RPE.

[40] Article 11*bis* (E) ICTY-RPE.

[41] Article 11*bis* (D) iii ICTY-RPE.

[42] Article 11*bis* (C) ICTY-RPE.

suddenly finds himself in a position arguing that the crimes are not serious enough as to warrant a proceeding before the ICTY.

Finally, in the case of an accused opposing a referral of his case, it may be difficult to uphold a coherent defense strategy for the reason that he has to stress the gravity of the crime and his responsibility therein in order to argue against the fulfillment of the referral criteria. In the decision of the Referral Bench in re *Dragomir Milosevic*, for example:

> The Defence submits that the crimes with which Dragomir Milosevic has been charged are inherently very grave. The Defence also draws attention to the number of incidents in the two Schedules attached to the Indictment. 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 Milosevic, 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.[43]

It is difficult to imagine how the defense will argue during the subsequent proceedings on the merits before the Trial Chamber having made these de facto admissions about the gravity and responsibility of its client.

The criteria used by the Referral Bench in order to determine the gravity of the crimes are the geographic and temporal scope of the crimes and the number and types of victims affected. However, the Referral Bench does not favor the establishment of a fixed hierarchy of gravity among the crimes falling in the jurisdiction of the ICTY.[44]

Given the fact that the Prosecutor pursues a so-called "pyramidal strategy," i.e., first targeting lower-level suspects, and then gradually moving on to military commanders and political and military leaders, there are persons of very different caliber indicted by the ICTY.[45] Under the terms of the S.C. Resolution 1534 only intermediate and lower ranking accused should be transferred to domestic jurisdictions while the most senior leaders should be tried in The Hague.[46] According to the Referral Bench, neither the simple fact that the accused was in command of others nor a charge of command responsibility or joint criminal enterprise does establish a level of responsibility *per se* high enough for barring a referral.[47] Rather, it examines on a

---

[43] ICTY, Prosecutor v. Dragomir Milosevic, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, at ¶ 13-14 (July 8, 2005) [hereinafter Prosecutor v. Milosevic].

[44] Williams, *supra* note 33, at 202.

[45] Cassese, *supra* note 15, at 586-88.

[46] S.C. Res. S/RES/1534 (Mar. 26, 2004), at ¶ 5-6.

[47] Williams, *supra* note 33, at 203.

case-by-case basis the position of the accused in the military-political hierarchy and his or her role with regard to the crimes charged.[48]

b) Prospects of a Fair Trial and Prohibition of Death Penalty

The Referral Bench may only order a referral after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.[49] These two requirements were only introduced in June 2004, but it was assumed that both were implicitly contained in the previous provision.[50]

The death penalty is abolished in all States on the territory of the former Yugoslavia[51] and hence this requirement is not an obstacle for case referrals. The much bigger hurdle consists in the assessment whether the accused would be given a fair trial in the State of referral. This test can only be made individually for each State given the uneven nature of the judicial reforms undertaken in Croatia, Bosnia and Herzegovina and Serbia. Eventually, only a case-by-case determination of the specific circumstances and the complexity of a case allows a more or less reliable evaluation.

The case referral provision does not specify what the yardstick shall be for the determination whether a trial respects due process. The Referral Bench interpreted the fair trial clause in Article 11*bis* ICTY-RPE as including those rights set out in Article 21 ICTY-Statute, which correspond to the guarantees of Article 14 ICCPR and Article 6 ECHR.[52] It is thus a standard at least formally in force in Croatia, Bosnia and Herzegovina, and Serbia given that each country ratified the ECHR.[53]

The rights contained in the ICCPR and the EHCR are circumscribed and defined by the doctrine of the respective judicial bodies. But in the special context of case referrals, where the case begins at an international court in

---

[48] *E.g.*, ICTY, Prosecutor v. Vladimir Kovačevič, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11*bis*, at ¶ 16 (Nov. 17, 2006) [hereinafter Prosecutor v. Kovačevič].

[49] Article 11*bis* (B) ICTY-RPE.

[50] Williams, *supra* note 33, at 189.

[51] Croatia, Bosnia and Herzegovina, and Serbia all ratified Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances. *See* http://www.echr.coe.int/ECHR/ (follow "Basic Texts" hyperlink, then follow "Dates of ratification of the European Convention on Human Rights and Additional Protocols").

[52] *E.g.*, ICTY, Prosecutor v. Mitar Rasevic/Savo Todovic, Case No. IT-97-25/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, at ¶ 72, n.126 (July 8, 2005) [hereinafter Prosecutor v. Rasevic /Todovic].

[53] Croatia, Bosnia and Herzegovina, and Serbia all ratified the Convention for the Protection of Human Rights and Fundamental Freedoms. *See* http://www.echr.coe.int/ECHR/ (follow "Basic Texts" hyperlink, then follow "Dates of ratification of the European Convention on Human Rights and Additional Protocols").

The Hague and continues in a domestic court in the Western Balkans, the content and boundaries of these rights are not always obvious. For example, does the right to a counsel of the defendant's choosing mean that he can take his defense counsel from The Hague to Serbia? In *Rasevic/Todovic*, the Referral Bench rejected submissions by the accused that his right to a counsel would be violated if the case were transferred because the present counsel would not be able to represent his client as he was not admitted to the bar in Bosnia and Herzegovina. The ICTY decided that this would not infringe upon the right of the accused to be represented by a counsel of his own choosing since this right would not be absolute.[54] Given the complexity of the case and the domestic counsel's unfamiliarity with the dossier,[55] this decision is of major importance and will certainly delay the procedures at the domestic court. Even though this decision could potentially cause a violation of the defendant's right to be tried without undue delay, the ICTY did not discuss this *specific issue*. Instead it limited its analysis to a general and abstract reference to the existing right to a trial without undue delay as guaranteed in the State Constitution.[56]

This example shows that at first glance the fair trial issue seems plain, but that specific problems arise out of the "hybrid context." A reading of Referral Bench decisions suggest that the ICTY applies an abstract, global test when determining the prospects of a 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. Furthermore, the ICTY lacks power to dictate national courts how to apply or interpret national provisions. This is especially problematic with regard to fundamental rights given their abstract formulation. The ICTY can hence only guess how a certain guarantee would be understood and applied by domestic judges: from a defendant's perspective this surely represents a walk on the wild side.

c) Implicit Referral Criteria: Willingness and Ability to Prosecute

Besides the explicit conditions of Article 11*bis* ICTY-RPE, there are two implicit criteria that must be fulfilled in order to refer the case to a national jurisdiction. First, the referral State has to be *willing* to accept and prosecute a case. This prerequisite is not explicitly codified in Article 11*bis* ICTY-RPE and is only mentioned in connection with referrals to a State

---

[54] Prosecutor v. Rasevic /Todovic, *supra* note 52, ¶ 64-65, 88-89.

[55] The accused emphasized that the review of the material will be even more time consuming as it is in English language, which is most probably not the ordinary working language of a domestic attorney in Bosnia and Herzegovina. Prosecutor v. Rasevic /Todovic, *supra* note 52, ¶ 69.

[56] Prosecutor v. Rasevic /Todovic, *supra* note 52, ¶ 69-71. The problem of this limited review, which consist in ensuring that a defendant's right is *formally* in force but is neither taking into account the specific circumstances of the case nor how this right is applied and implemented in practice, will be further discussed in Part III of this article.

other than those in whose territory the crime was committed or in which the accused was arrested.[57] Logic, however, dictates that this criterion must be fulfilled in all instances of case referral. This view was confirmed by the President of the ICTY in the referral decision *Mjakic et al.*: "Finally, the logic of the rule appears to suggest that the receiving State must be 'willing and adequately prepared to accept such a case'. This last phrase, which is located in 11*bis* (A)(iii), technically applies to states other than those where the crime was committed or the accused arrested. However, it is not clear how an existing legal case could be referred to a country which is unwilling or unprepared to accept a case for prosecution."[58]

As we will see later this criterion is of special importance in the case of Serbia, where this willingness to accept and prosecute referred cases was or is not always apparent.

Second, a State has to be *able* to prosecute complex war crime cases. In this context, the President of the ICTY, Fausto Pocar, stated in the Completion Strategy Report of May 2006: "It cannot be emphasized enough that, if the referral of cases to the region is going to be successful, it is essential that the international community provide full support to building the capacity of domestic jurisdictions and prisons in the former Yugoslavia."[59] Hence, the requirements of being able to prosecute war criminals and to grant a fair trial are closely tied to capacity building and to strengthening the institutional and legal reforms undertaken in the respective countries. Further, even in a judicial system practicing internationally accepted due process standards, the knowledge and experience necessary to handle complex international criminal law cases might be absent and it therefore is of major importance to provide specific training in these new fields. Finally, only a court equipped with adequate resources is able to conduct efficient and fair trials — the ICTY itself being an example of lengthy procedures due to scarce resources.

C. Choice of the State of Referral

1. Which Jurisdiction Shall Have Priority?

Rule 11*bis* ICTY-RPE provides for the referral either to the State in whose territory the crime was committed, the State in which the accused was arrested, or a State having jurisdiction and being willing and adequately pre-

---

[57] *Cf.* Article 11*bis* (A) iii ICTY-RPE.

[58] ICTY, Prosecutor v. Mejakic/Gruban/Fustar/Knezevic, Case No. IT-02-65-PT, Preliminary Order in Response to the Prosecutor's Request Under Rule 11*bis*, at ¶ 4 (Sept. 22, 2004).

[59] ICTY, Annex I to the Letter dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, addressed to the President of the Security Council, U.N. Doc. S/2006/353, at ¶ 39 (May 31, 2006).

pared to accept such a case.[60] Introduced in 2004, the latter option seeks to "expand the available national jurisdictions to which cases involving intermediate and lower-level accused could be referred."[61] The State envisaged by this option must already have jurisdiction under a recognized principle of international law (e.g., universal jurisdiction); the Referral Bench cannot create or confer such jurisdiction.[62] To date, the Referral Bench has yet to use the third option.[63]

While the Prosecutor has to designate the State to which the case shall be transferred in his request, the final decision is incumbent on the Referral Bench, which considers that its power to refer a case *proprio motu* includes the authority to refer a case to a State other than the one identified by the Prosecutor. The case referral provision does not give the Prosecutor or Referral Bench any guidance as to which State shall have priority in the event of competing claims of jurisdiction. Despite jurisdictional principles well established in international customary law, the priority among them is contested. [64]

An important argument in support of attributing jurisdiction to the territorial State, i.e., where the crimes allegedly occurred, is that the proceedings will be held closer to the victims and thus the chances to engage them in the accountability process are higher. This is not only due to the geographical proximity, but also to the fact that domestic procedures are normally conducted in the language of the victims and in a legal system that is more familiar to them. The victims may also have a deeper sense of "ownership" and "empowerment" if the proceedings are conducted where the crimes occurred. Also, from the viewpoint of prosecution it makes sense to hold proceedings at the *locus delicti* given the fact that physical as well as personal evidence might be better accessible. It is, however, important to note that these benefits will only be realized if the procedures respect certain standards. Where judges are strongly biased, where they lack the capacity to handle complex international criminal law cases, or where basic human rights standards are not respected, the benefits of a case referral to the territorial State might be outweighed by the resulting risks of this choice, and preference might be given to another jurisdiction under these circumstances.

Concerning the competing jurisdictional claims, the Prosecutor has argued in favor of the State where the crimes occurred: "Should more than one State have an interest in the prosecution of a case, the Prosecutor would interpret these provisions as ranking the possible States in descending order

---

[60] Article 11*bis* (A) ICTY-RPE.

[61] ICTY, Annual Report of the ICTY to the General Assembly and the Security Council, U.N. Doc. A/59/215-S/2004/627, at ¶ 10 (Aug. 16, 2004).

[62] This idea is clearly entrenched in Article 11*bis* (A) iii ICTY-RPE, stating that "the case should be referred to the authorities of a State: *having jurisdiction* and being willing and adequately prepared to accept such a case . . .." (emphasis added).

[63] *Cf.* ICTY, Status of Transferred Cases, *available at* http://www.icty.org/sid/8934.

[64] Williams, *supra* note 33, at 196.

of priority [of Article 11*bis* (A) i — iii ICTY-RPE]. In accordance with the principle that justice in criminal matters should be rendered as closely as possible to the victims and to the place where the crimes were committed, the Prosecutor considers that, where possible, a case should be referred to the authorities of the State where the crimes alleged took place.''[65] The Referral Bench does not share the Prosecutor's view about a need to prioritize the territorial State over other jurisdictions; and, as we will see in the discussion of the *Kovačevič* case, it is sometimes even blinding out the victim's perspective while focusing solely on the defendant's perspective. The Referral Bench takes the stance that Article 11*bis* ICTY-RPE only outlines alternatives without indicating a priority, which reflects international law. Instead, it has adopted a so-called ''nexus approach'' by weighing the strength of the links of the crimes to the State to which referral is requested against the links of the crimes to other States with an interest in referral. Thereby factors such as the place of commission of the crimes, the State in which surrender took place, as well as the nationality and residence of the victim and the accused are taken into account.[66] The Appeals Chamber endorsed the approach of the Referral Bench in *Gojko Jankovic* by holding: ''[W]here there are concurrent jurisdictions under Rule 11*bis* (A)(i)-(iii), discretion is vested in the Referral Bench to choose without establishing any hierarchy among these three options . . .. A decision of the Referral Bench on the question as to which State a case should be referred . . . must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11*bis* (A) of the Rules.''[67]

2. Cases Referred: BiH in the Fore — Serbia the Taillight

As of 13 January 2009, the ICTY has referred six cases under Rule 11*bis* ICTY-RPE involving ten accused to Bosnia and Herzegovina, one case involving two accused to Croatia[68] and one case involving one accused to Serbia.[69] Referral was denied in three cases.[70] The first denial was rendered in the case of *Dragomir Milosevic,* where the Referral Bench stated:

> The campaign alleged in the Indictment and the crimes with which Dragomir Milosevic has been charged stand out when compared with other

---

[65] ICTY, Prosecutor v. Rahim Ademi/Mirko Nora, Case No. IT-04-78, Request by the Prosecutor Under Rule 11*bis* for Referral of the Indictment to Another Court, at ¶ 6 (Sept. 2, 2004).

[66] Williams, *supra* note 33, at 198.

[67] ICTY, Prosecutor v. Gojko Jankovic, Case No. IT-96-23/2-AR11*bis*.2, Decision by the Appeals Chamber on 11*bis* Referral, ¶ 33 (Nov. 15, 2005).

[68] ICTY, Status of Transferred Cases, *supra* note 63.

[69] ICTY, Prosecutor v. Vladimir Kovačevič, Case No. IT-01-42/2-AR*bis*.1, Decision by the Appeals Chamber on 11*bis* Referral (Mar. 28, 2007); ICTY, Press Release, Mar. 28, 2007, Appeals Chamber, *Vladimir Kovačevič to Stand Trial in Serbia Following Appeals Chamber Decision, available at* http://www.icty.org/sid/8891.

[70] ICTY, Status of Transferred Cases, *supra* note 63.

> cases before the Tribunal, especially in terms of alleged duration, number of civilians affected, extent of property damage, and number of military personnel involved. It is also evident that the Prosecution's case imputes significant authority to Dragomir Milosevic. The Referral Bench therefore concludes that the gravity of the crimes charged and the level of responsibility of the accused, particularly when they are considered in combination, requires that the present case be tried at the Tribunal.[71]

The motions of referral in the case of "the Vukovar Three,"[72] in the case of *Rajic*, and in the case of *Zelenovic* were withdrawn.[73] Currently, there are no 11*bis* motions under consideration by the Referral Bench, and given that none of the cases pending on the ICTY's docket involves lower or intermediate accused, none can be considered for referral to domestic courts.[74]

One explanation for the small number of cases referred to the Republic of Serbia is its poor cooperation with the ICTY in prosecuting war criminals, an important precondition for referral to a State. Judge Meron, President of the ICTY, stated in 2004: "The likelihood of referring cases to the courts of Serbia and Montenegro is diminished by the poor record of cooperation between that State and the Tribunal in recent months."[75] Subsequently, the situation did not improve considerably, and the Prosecutor spoke in December 2006 of the "willful failure of Serbia to cooperate" which would be a "demonstration of utmost disrespect" towards the victims.[76] Amnesty International also noted in its report of June 2005 that Serbia's policy of "voluntary

---

[71] Prosecutor v. Dragomir Milosevic, *supra* note 43, ¶ 24.

[72] For a discussion of the difficulties associated with the decision of whether or not to transfer this case, see Louis Aucoin & Eileen Babbitt, *Transitional Justice: Assessment Survey of Conditions in the Former Yugoslavia*, United Nations Development Program UNDP, Belgrade, June 2006, 59, *available at* http://www.undp.org/bcpr/documents/jssr/trans_justice/UNDP_2006_Balkans_Transitional_Justice_Assessment.pdf.

[73] ICTY, Status of Transferred Cases, *supra* note 63.

[74] ICTY, Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), Annex I to the Letter dated 21 November 2008 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, U.N. Doc. S/2008/729 (Nov. 24, 2008), at ¶ 32 [hereinafter ICTY, Assessment and report of Judge Patrick Robinson].

[75] ICTY, Press Release, June 29, 2004, containing the full text of the Address of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, *available at* http://www.icty.org/sid/8405 [hereinafter Address Judge Meron, 29 June 2004].

[76] ICTY, Press Release, Dec. 15, 2006, containing the full text of the Address by Carla del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to the Security Council, 15 Dec. 2006, *available at* http://www.icty.org/sid/8665.

surrenders'' would violate the obligation to fully cooperate with the ICTY.[77] Further, Serbia's failure to prioritize the domestic prosecution of high-ranking officials — either due to a lack of political will or to the unclear status of command responsibility in Serbian law[78] — demonstrates an unwillingness to prosecute the persons most responsible for international crimes.

Even though important legal and institutional reforms were undertaken in Serbia since 2001 — such as the adoption of the ''Law on the Organization and Jurisdiction of Government Authorities Prosecuting Perpetrators of War Crimes''[79] — there are still concerns raised from various sides about its ability to conduct war crime trials according to international standards.[80] Specifically, they relate to the reluctance of the Serbian courts to apply the theory of command responsibility,[81] the effective implementation of witness protection,[82] or the lack of cooperation in the field of extradition and mutual legal assistance between the States of the former Yugoslavia.[83]

Despite these concerns the Appeals Chamber of the ICTY decided on 28 March 2007 to transfer a first case to the Republic of Serbia. An examination of this case follows.

III. Prosecutor v. Kovačevič: The Only Case Referred to Serbia

A. Facts and Procedural History

Vladimir Kovačevič, alias ''Rambo,'' was the Commander of the Third Battalion of the Yugoslav Peoples's Army. According to the indictment, the accused participated in a military campaign directed at the municipality of Dubrovnik in Croatia in December 1991. The indictment alleged that on 6

---

[77] Amnesty International, *Amnesty International's concerns on the implementation of the ''completion strategy'' of the International Criminal Tribunal for the former Yugoslavia* (June 2005), *available at* http://web.amnesty.org/library/pdf/EUR050012005ENGLISH/$File/EUR0500105.pd, 5 [hereinafter Amnesty International, Completion Strategy Report].

[78] Aucoin & Babbitt, *supra* note 72, at 81.

[79] It would go beyond the scope of this article to explain the different legal and institutional reforms in detail. For an overview on prosecution of war criminals in the Republic of Serbia, see Aucoin & Babbitt, *supra* note 72, at 78-86.

[80] The condition of not imposing the death penalty does not pose a problem in the Serbian context. The criterion of the ''gravity of the crimes charged'' and the ''level of responsibility of the accused'' can only be assessed on a case-by-case basis, which might — to some extent — also be true for the ''fair trial'' assessment.

[81] *See, e.g.*, Amnesty International, Completion Strategy Report, *supra* note 77, at 11-12; Aucoin & Babbitt, *supra* note 72, at 85, 89-91.

[82] Serbia adopted the ''Law on Protection of Participants in Criminal Proceedings,'' Official Gazette of the Republic of Serbia, no. 85/2005.

[83] Amnesty International, Completion Strategy Report, *supra* note 77, at 9.

December 1991 the accused ordered, committed, or otherwise aided and abetted in the unlawful artillery and mortar shelling of the UNESCO protected old town of Dubrovnik, killing two and wounding three civilians as well as causing damage to cultural property. The accused is charged with six counts of violations of the laws or customs of war on the basis of individual criminal responsibility and command responsibility.[84]

In April 2006 the Trial Chamber decided that Kovačevič is unfit to enter a plea and to stand trial because of his mental illness.[85] Kovačevič, who is a Serb citizen, has been accommodated in a mental health facility in the Republic of Serbia since June 2004.[86]

Earlier, in October 2004, the Prosecutor had filed a Motion for Referral demanding the case to be referred to the Republic of Serbia.[87] On 28 March 2007 the Appeals Chamber affirmed the verdict issued by the Referral Bench on 17 November 2006 to refer the case of Vladimir Kovačevič to Serbia. This was the first time a case referral to Serbia in accordance to Rule 11*bis* ICTY-RPE took place.

B. Jurisdiction: Why Serbia?

In the abstract, the Prosecutor lobbied for giving priority to the territorial State in case of competing jurisdictional claims since justice should be rendered as closely as possible to the victims and the place where the crimes were committed.[88] Even though the crimes were committed in Dubrovnik, Croatia, with the evidence and victims located there, she requested the case to be transferred to the Republic of Serbia.[89]

The victims were not of real concern in the reasoning of the Referral Bench in attributing jurisdiction to the territorial State. The discussion of the determination of the State of referral in the judgment was limited to four lines and read as follows: "The Referral Bench notes that in the instant case, the crimes alleged in the Indictment were committed in the Republic of Croatia against citizens of the Republic of Croatia. The Accused, who is and were citizen of Serbia, has been accommodated in a mental health facility in the Republic of Serbia since 6 June 2004, pursuant to Order for Provisional Release issued by the Trial Chamber I."[90] The Referral Bench concluded that "there are no reasons for considering a State other than the Republic of Serbia for referral of the instant case. In addition, the Referral Bench notes that, as the Accused's current state of health does not favor his transfer to

---

[84] Prosecutor v. Kovačevič, supra note 48, ¶ 11-14.

[85] ICTY, Prosecutor v. Vladimir Kovačevič, Case No. IT-01-42/2-I, Public Version of the Decision on the Accused's Fitness to Enter a Plea and to Stand Trial (Apr. 12, 2006).

[86] Prosecutor v. Kovačevič, *supra* note 48, ¶ 23.

[87] Prosecutor v. Kovačevič, *supra* note 48, ¶ 17, 22.

[88] *See supra* Part II C.1 of this article.

[89] Prosecutor v. Kovačevič, *supra* note 48, ¶ 22.

[90] Prosecutor v. Kovačevič, *supra* note 48, ¶ 23.

another medical facility, referral to a State other than Serbia might be detrimental to his mental health condition."[91]

A critique of the Referral Bench's decisions finds several shortcomings. First, there was no real discussion about the competing jurisdictional claims and no adequate motivation of the reasons why Serbia should have priority over Croatia. The Referral Bench simply enumerated four factors — crimes committed in Croatia, crimes against Croatian citizens, Serbian nationality of the accused, and current residence of the accused in Serbia, concluding that it would therefore be appropriate to transfer the case to Serbia. Secondly, there were reasons for considering a State other than Serbia: not only are the victims in Croatia, but the damage occurred in the old town of Dubrovnik and hence, both witnesses and physical evidence are in Croatia. In the light of the poor cooperation in criminal matters between Croatia, Bosnia and Herzegovina, and Serbia, direct access to evidence could be of major importance for a successful completion of the case. In sum, it is not so much the result of the Kovačevič case that is troubling but rather the *manner* in which it was reached by the Referral Bench.

Arguably, the ICTY gave priority to Serbia over other jurisdictions because it saw the Kovačevič case — in which proceedings most probably will never be opened due to the defendant's unfitness to stand trial[92] — as a suitable means to satisfy the intensive lobbying of Belgrade to try individuals indicted by the Hague court.[93]

C. Assessment of the Referral Conditions

1. Gravity of Crimes Charged and Level of Responsibility of the Accused

Discussing the gravity of the crimes charged, the Referral Bench pointed out their limited geographical and temporal scope: The alleged crimes were limited to the old town of Dubrovnik and were all committed in December 1991. In terms of victims, the indictment embraced two killed and three wounded civilians. The Referral Bench reached the conclusion that the crimes charged — even though serious in themselves — were of limited seriousness compared to the gravity of other cases before the ICTY. Even though Kovačevič was a commander, his level of responsibility was limited in that he only commanded at the battalion level and the military operation in the Dubrovnik area was carried out by a much larger force of the Army. Furthermore, two of his superiors have already been found guilty by the

---

[91] Prosecutor v. Kovačevič, *supra* note 48, ¶ 24.

[92] ICTY, Assessment and report of Judge Patrick Robinson, *supra* note 74, ¶ 33: "In the *Kovačevič* case, the only one referred to Serbia, the Belgrade District Court found on 5 December 2007 that the state of mental health of the Accused temporarily prevented criminal prosecution."

[93] IWPR, Alison Freebairn, *Kovačevič May be Tried in Belgrade*, Nov. 5, 2004, *available at* www.iwpr.net. *See also* Williams, *supra* note 33, at 197-98.

ICTY for their role in the attack of Dubrovnik. Hence, the gravity of crimes charged and the responsibility of the accused would allow a referral to Serbia.[94] This conclusion seems to be justified.

2. Fair Trial Assessment

a) Overly Positivistic and Formalistic Assessment

Much more problematic is the Referral Bench's assessment of the prospect of a fair domestic trial. The Referral Bench began by delineating the requirements for a fair criminal trial per Article 21 ICTY-Statute, Article 6 ECHR, and Article 14 ICCPR.[95] The Referral Bench found that "[t]he new Serbian Constitution, proclaimed on 8 November 2006 ("Serbian Constitution") and the Serbian Criminal Procedure Act ("ACP") mirror each of these requirements."[96] The assessment next listed the relevant provisions of Serbian Law and asserted that Serbia would also be bound by Article 6 ECHR.[97] The Referral Bench concluded by stating that it "was satisfied that the laws applicable to proceedings against the Accused in Serbia would provide an adequate basis to ensure compliance with the requirements of a fair trial."[98]

The argumentation of the Referral Bench is deficient for two reasons. First, the fair trial test seems to be overly positivistic and formalistic. The Referral Bench is only ensuring that the due process guarantees are *formally* in force in Serbian Law. However, it does not assess whether and how these provisions are applied in practice. It is reasoning in a vacuum and ignores the judicial reality and the political context in which war crimes trials take place in the Republic of Serbia.

Second, the ICTY, the European Parliament,[99] various scholars,[100] NGOs and international organizations[101] repeatedly demurred over the prospect of a fair trial in Serbia. Only two years before handing down the Kovačevič refer-

---

[94] Prosecutor v. Kovačevič, *supra* note 48, ¶ 19-21.

[95] Prosecutor v. Kovačevič, *supra* note 48, ¶ 68.

[96] Prosecutor v. Kovačevič, *supra* note 48, ¶ 69.

[97] Prosecutor v. Kovačevič, *supra* note 48, ¶ 70-79.

[98] Prosecutor v. Kovačevič, *supra* note 48, ¶ 81.

[99] European Parliament, *Resolution on the State of Regional Integration in the Western Balkans*, Apr. 14, 2005, P6_TA(2005)0131, *available at* http://www.europa.europa.eu/meetdocs/2004_2009/documents/dv/p6_ta(2005)0131_/p6_ta(2005)0131_en.pdf.

[100] *Cf., e.g.*, Aucoin & Babbitt, *supra* note 72, at 78-86.

[101] *Cf., e.g.*, Amnesty International, Completion Strategy Report, *supra* note 77; Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro* (Oct. 2004), *available at* http://hrw.org/reports/2004/icty1004; International Center for Transitional Justice, *Serbia and Montenegro: Selected Developments in Transitional Justice*, 4-7 (Oct. 2004), *available at* http://www.ictj.org/images/content/1/1/117.pdf.

ral decision, the ICTY President had provided the following unfavorable assessment: "At the moment, there are still doubts that credible war crimes trials can take place in the domestic jurisdictions of Croatia or Serbia and Montenegro."[102] Despite these doubts on whether war crimes trials in Serbia will meet the international fair trial standard required by Article 11*bis* ICTY-RPE, the Referral Bench ignored them in its first case referred to Serbia. Nor does it discuss how these concerns — stemming from various sources — could have been overcome in such a short period. The contrast between the fair trial assessment in the Kovačevič case and the prevailing doubts creates some uneasiness in the reader of the referral decision.

b) Monitoring and Deferral: Confidence in the Emergency Brake

In its conclusion relating to the fair trial assessment the Referral Bench stressed that the Prosecutor may send observers to monitor the proceedings[103] to better ensure that the expectations of a fair trial are met.[104] Furthermore, it emphasized that a referral order may be revoked by the ICTY[105] when the due process guarantees are not met.[106]

The possibility of monitoring and deferral should, however, not substitute for a diligent review of the fulfillment of the different referral criteria. Indeed, close scrutiny becomes all the more important given the various unresolved questions relating to the monitoring and deferral. For example, what if Kovačevič is found fit to stand trial after the closure of the ICTY and the Republic of Serbia fails to adopt procedures that will ensure a fair trial?

First, the referral provision rests silent on what happens to the monitoring system once the ICTY closes its doors. The monitoring could simply cease or the Secretary General or the Security Council could adopt a proposal by the Tribunal for an alternative reporting mechanism, which would

---

[102] Address of Judge Theodor Meron, June 29, 2004, *supra* note 75.

[103] Article 11*bis* (D) iv ICTY-RPE.

[104] The Appeals Chamber was seized of an appeal filed by Council for Kovačevič; under the third ground of appeal the defense submits that the appellant has been diagnosed with paranoid psychosis and that he would see the proceedings in a paranoid light. Accordingly, the monitoring by the Organization for Security and Cooperation in Europe (OSCE) would deepen Kovačevič's belief that "everybody is monitoring him with the intent to harm him" and thus it would aggravate the paranoia of the appellant. The Appeals Chamber dismissed this ground of appeal stating that the defense would merely re-argue an issue earlier put forward before the Referral Bench. *See* ICTY, Prosecutor v. Vladimir Kovačevič, Case No. IT-01-42/2-AR11*bis*.1, Decision on Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 16 (Mar. 28, 2007), at ¶ 23-30.

[105] Article 11*bis* (F) ICTY-RPE.

[106] Prosecutor v. Kovačevič, *supra* note 48, ¶ 81.

ensure that the proceedings referred to domestic jurisdictions comply with the referral criteria.[107]

Second, a request to revoke a referral order can only be made by the Prosecutor, but not by the accused or the Referral Bench.[108] The referral rule is silent on the question which institution or organ could request a deferral once the Office of the Prosecutor in The Hague is dissolved. But even when the Prosecutor is still in tenure it is questionable whether such a request can be brought in line with his interests. Given the restricted resources available and the pressures emanating from the Completion Strategy, he may well decide not to request deferral to the ICTY despite concerns as to the fair trial standard.[109]

Third, it is unclear which court would sit in judgment once the ICTY ended its activity and a case is taken away from a State because it no longer fulfills the referral conditions. One solution would consist in the creation of a *structure judiciaire résiduelle*,[110] i.e., a mini-ICTY competent for deciding deferred cases.[111] Another solution would consist in sending the case to another national jurisdiction.[112]

Given these uncertainties and questions related to monitoring and revoking referral orders, these two possibilities cannot substitute for a diligent fair trial assessment — despite the pressure on the ICTY's shoulders to disencumber its docket and meet the deadlines set forth in the Completion Strategy.

IV. Critique and Conclusion

The driving force behind case referrals was not the benefits of trials before national courts, such as greater sense of ownership, increasing domestic legal and judicial capacity, and reinforcement of the rule of law in post-conflict societies. Case referrals can rather be seen as a reactive measure of the ICTY in order to meet the goals anchored in the Completion

---

[107] Melanie Werrett, *Challenges of Proper Completion and Winding Up of the Ad Hoc Tribunal — ICTR*, paper presented at the Colloquium of Prosecutors of International Criminal Tribunals, Arusha Nov. 25-27, 2004, *available at* http://69.94.11.53/ENGLISH/colloquium04/werrett.htm.

[108] Article 11*bis* (F) ICTY-RPE.

[109] Williams, *supra* note 33, at 219.

[110] During the last three years the ICTY has been focusing its attention on the important question of devising a mechanism that will be left in place to address residual issues after the completion of the cases on its docket; however, a decision has not yet been taken. ICTY, Assessment and report of Judge Patrick Robinson, *supra* note 74, ¶ 40.

[111] For an overview on other residual functions such a mechanism could have, see Gabriel Oosthuizen & Robert Schaeffer, Complete Justice: Residual Functions and Potential Residual Mechanisms of the ICTY, ICTR and SCSL, 3 HJJ 48 (2008).

[112] But this supposes that there is an international authority deciding on which State should receive the case.

Strategy. For many years, restoring confidence in national judicial systems was not a priority on the agenda of the international community, and it only gained in importance with the growing pressure on the ICTY to soon put an end to its judicial activities.[113] One might ask whether capacity building should not be a goal to be pursued by the international community *ab initio*, i.e., that efforts to re-establish domestic judicial systems should not operate concurrently, or even in place of international mechanisms.

In reading Referral Bench decisions, I am left with the nagging thought that the verdicts were influenced by the normative power of the facts, to wit, the pressure on the ICTY to meet the timeline laid down in the Completion Strategy. Its assessment of the referral conditions repeatedly ignores the political and judicial reality in the referral States, which in some instances should have precluded referral to national jurisdiction. Consequently, a difficult trade-off question comes into play: To what extent can internationally accepted standards for criminal proceedings be compromised in order to achieve a higher level of expediency and efficiency?

Last, but not least, the mechanism of case referral — a new instrument in the toolbox of transitional justice — has a highly experimental character. The multiple amendments of Rule 11*bis* ICTY-RPE and the numerous unresolved issues about case referrals demonstrate the highly unsettled character of this instrument. Whether case referrals constitute the best way of winding-up of the ICTY is very much contested. While some argue that case referrals arose as a means for effecting the quickest and cheapest possible withdrawal of the international community from the accountability process,[114] others — such as Fausto Pocar, President of the ICTY- see this mechanism as the next chapter in the work of the ICTY.[115] In my view, it is too early to judge on the success or the failure of case referral and its positive and negative spillovers — but it leads once again to the question of what constitutes the appropriate balance between international and national prosecution mechanisms.

ANNEX

Rule 11 *bis* — Referral of the Indictment to Another Court

(Adopted 12 November 1997, revised 30 September 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

---

[113] Williams, *supra* note 33, at 214-15.

[114] Amnesty International, Bosnia-Herzegovina — Shelving Justice — War Crimes Prosecution in Paralysis (Nov. 12, 2003), *available at* http://web.amnesty.org/library/pdf/EUR630182003ENGLISH/$File/EUR6301803.pd.

[115] *Cf.* Fausto Pocar, President of the ICTY, *supra* note 1.

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. (Revised 30 September 2002, amended 11 February 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. (Revised 30 September 2002, amended 10 June 2004, amended 11 February 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. (Revised 30 September 2002, amended 28 July 2004, amended 11 February 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 February 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. (Revised 30 September 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. (Revised 30 September 2002, amended 11 February 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. (Revised 30 September 2002, amended 11 February 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. (Revised 30 September 2002, amended 11 February 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 February 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 February 2005)