FROM STATE COURTS TO THE ICTY AND BACK AGAIN

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In 1993, the International tribunal for the Former Yugoslavia (ICTY) was established to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[1] The need for an *ad hoc* tribunal was essential in achieving justice because of the post-conflict instability in the region. National prosecutions for the accused were simply not feasible in the weak domestic judicial systems where the crimes were committed. The need for justice led the United Nations Security Council (UNSC) to establish the ICTY. While the tribunal thrived for a decade, the judicial systems of the Balkans strengthened and slowly gained the capability to handle prosecutions in national courts. With national courts gaining legitimacy and vigour the ICTY began its journey towards its finale.

It was widely accepted that national courts would soon take over the prosecutorial role of the tribunal. With this imminent transition, questions arose as to how best to continue prosecutions and what mechanisms should be employed. Notably, in the adoption of their ultimate strategy everyone failed to ask what are the possible implications and how will this affect other areas of international law, especially those of tribunal authority, transfers of prisoners, and extradition. These lasting ramifications are explored throughout this paper. To understand accurately the possible future problems we must survey the past.

I. SURRENDER OF INDIVIDUALS TO THE ICTY

[1a] Presented in Sarajevo-Herzegovina at the Center for Interdisciplinary Memory Research in 2007.

[1] ICTY Statute at preamble. For a discussion regarding the tribunals establishment *See* M. Cherif Bassiouni, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 426 (Transnational Publishers) (2003).

Once operation of the ICTY began and the first indictment was handed down, it was still unclear what protocol should be followed for the surrender of individuals to the tribunal. The UNSC's establishment of the tribunal under its Chapter VII enforcement power was done through Resolution 808 and 827.[2] Resolution 827 requires that domestic jurisdictions cooperate not only with the UNSC's Resolution but also with Article 29 of the ICTY's Statute.[3] As a result, numerous states were forced to implement domestic legislation to effectuate their cooperation mandate. The legislation occurred almost entirely in the area of surrendering individuals from a state to the ICTY.[4] Additionally, Article 20 of the ICTY Statute provides that an indicted individual shall be transferred to the tribunal. Thus, these statutory articles and UNSC resolution mandate that accused individuals be 'handed over' to the tribunal for proceedings.

The unique structure of the tribunal and the necessity of transferring accused individuals required that the surrender of the accused to the tribunal could not be discretionary.[5] This is a unique breed of transfers similar to a traditional extradition. A traditional extradition is a request from one state to another state whereas the tribunal

[2] S.C. Resolution 808, U.N. SCOR, 48th Sess., Res. & Dec., U.N. Doc. S/INF/49 (1993). S.C. Resolution 827, U.N. SCOR, 48th Sess., Res. & Dec., U.N. Doc. S/INF/49 (1993).

[3] S.C Res. 827, *supra* note 2. Operative paragraph four reads in part "all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and…shall take any measures necessary under their domestic laws to implement the provisions of the present resolution and the Statute, including the obligation…to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute." ICTY Statute Article 29 reads: "1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law. 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal. "

[4] Sheila O'Shea, *Interaction Between International Criminal Tribunals and National Legal Systems,* 28 N.Y.U. J. Int'l L. & Pol. 367 at 375 (1996).

[5] I.A. Shearer, EXTRADITION IN INTERNATIONAL LAW 31-33, 137-141 (1971).

requires forfeiture of an individual to an international tribunal. While Article 20 allows for the surrender of individuals, Article 29 of the Statute makes surrender mandatory.[6]

The implementing legislation adopted by many states was a result of the tribunal asking states not to use existing extradition rules but instead to use this new breed of transfers the tribunal created.[7] To reinforce the ICTY's desire that traditional extradition not be the vehicle used for surrender, the tribunal adopted a rule of procedure wherein a transfer order would supersede any national extradition legislation.[8] This is the first example of the ICTY's artfully avoiding restrictions placed on traditional areas of international law.

Extradition is discretionary in nature to protect individuals from various due process violations.[9] The tribunal is created by an international body, thus the due process violations are non-applicable. Any questions of the legitimacy of charges and receipt of a fair trial and principle against persecution are addressed by the international body rather than the surrendering state. In addition to the non-discretionary nature of surrendering individuals, none of the customary defences to extradition applies.[10] These traditional defences apply to extradition; the rules of procedure stipulate that they may not even be raised in response to a transfer request.[11] A state's obligation to the tribunal arise "not

[6] ICTY Statute at Art. 20 and Art. 29.
[7] Report of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. A/49/342. S/1994/1007, at 49 (1994). (Hereinafter "Report of the Interntaional Tribunal")
[8] ICTY Rule of Evidence and Procedure 58 states "(A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefor. (B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly."
[9] M. Cherif Bassiouni, *Law and Practice of the United States, in* INTERNATIONAL CRIMINAL LAW *at 191* at 198 (M. Cherif Bassiouni ed., 2nd ed., 1999).
[10] Report of the International Tribunal, at 46.
[11] ICTY Rule of Evidence and Procedure 58. Sheila O'Shea, *supra* note 4 at 386.

from a[n extradition] treaty-based obligation, but from the duty of States Members of the United Nations to implement the decisions of the Security Council."[12] However, with regard to the political offence exception most states would recognize the exception to the exception and surrender the accused regardless. The exception to the exception excludes heinous crimes (ie: murder, manslaughter, genocide, etc.).[13] Additionally, the establishment of the tribunal and its mandate of surrendering individuals is contrary to the Yugoslavia constitution.[14] As Resolution 827 required states to "take nay measures necessary" to implement the Resolution and Statute, Yugoslavia was forced to amend its constitution.[15] The Federal Republic of Yugoslavia was not the only country required to amend its constitution to comply with Resolution 827; Croatia, Macedonia and Slovenia all faced a similar fate.[16]

Thus the most common defences to extradition are rendered useless and most states must surrender individuals without judicial review and absent any of the usual extradition procedures. The ICTY established this unique form of surrender to avoid beign restricted by the laborious procedures of traditional extraditions. When first utilized, this practice went relatively unquestioned because of its necessity to the functioning tribunal. With hindsight, however, this hybrid creation laid the foundation the ICTY needed to justify breaking from international norms in otherwise established practices. The next opportunity to deviate from the rule came when the ICTY began its shut down.

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[12] Ibid citing Report of the Committee of French Jurists Set Up by Mr. Roland Dumas, Minister of State and Minister of Foreign Affairs, to Study the Establishment of an International Criminal Tribunal to Judge the Crimes Committed in the Former Yugoslavia, U.N. Doc. S/25266, at 30 (1993).
[13] M. Cherif Bassiouni, *supra* note 9, at 191.
[14] Yugoslavian Constitution Article 17. Additionally, see O Krivicnom Postupku [Yugoslavian Criminal Procedure Act] Article 525 (1976).
[15] O'Shea, *supra* note 4, at 375.

II. REFERRING A CASE FROM THE ICTY TO NATIONAL JURISDICTIONS

The ICTY's creation as an *ad hoc* tribunal evidences the desire that the establishment remain temporary. The ICTY formed under the notion that the tribunal should try high-level perpetrators, and that the accused bee military and political leaders. [17] The tribunal's design was to focus on the 'brains behind the brawn'. The largest problem facing prosecutors was that the war did not end until 1995. This meant that for the first two years of operation the tribunal was trying to prosecute individuals still actively involved in a regional war. This significantly increased the difficulty in physically acquiring the accused, especially if they were influential leaders. This forced the ICTY to begin its prosecutions with low-level perpetrators. As such, the first case was the low-level prosecution of Dusko Tadic.[18] The 1995 *Tadic* indictment showed that the first few years of the tribunal were occupied with indicting and transferring of mid and low level individuals. As a result, the tribunal quickly became clogged with prosecutions that did not involve the top-level perpetrators.[19] As early as 2000 judges and the president of the tribunal began brainstorming possible exit strategies that would end operation of the tribunal[20] This lead to the proposal and adoption of the ICTY's Completion Strategy.[21]

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[16] Ibid.
[17] M. Cherif Bassioni, *supra* note 1, at 427.
[18] *Prosecutor v. Tadic*, "Prijedor" indictment, IT-94-1 (13 February 1995).
[19] Dominic Raab, *Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals.* Journal of International Criminal Justice vol 3 issue 1 pages 82-102 at 85 (2005).
[20] Michael Bohlander, *The Transfer of Cases from International Criminal Tribunals to National Courts,* Criminal Law Forum 14, 59 (2003). Also, see"Report of the Expert Group to Conduct a Review of the Effective Operatoin and Functioning of the International tribunal for the Former Yugoslavia and the International Criminal tribunal for Rwanda", 22 November 1999, UN Doc. A/54/634, p.101.
[21] Judge Clauda Jorda, Address to the United Nations Security Council, ICTY Press Release JDH/PIS/690-e, at 1 (23 July 2002).

The tribunal approached the UNSC with their recommendation on how best to close down. The Council subsequently endorsed the completion strategy through resolutions stating that the ICTY focus on:

1. "completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010…

2. concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction..; [and]

3. transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions."[22]

The UNSC's target date of 2010 would prove difficult without the specific mention of using national courts to aid the ICTY. To utilize the concurrent jurisdiction of national courts the ICTY opted to exploit the little-used Rule 11*bis*.[23]

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[22] S.C. Resolution 1503, U.N. SCOR, U.N. Doc. S/RES/1503 at preamble (2003).

[23] ICTY Rule of Evidence and Procedure Rule 11*bis* reads -

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

(B) The 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.

(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.

(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;(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.

(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.

(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

The original ICTY Rule 11*bis* of November 1997 provided for "the suspension of an indictment." It has been re-drafted with the current title "Referral of the Indictment to Another Court" on 30 September 2002 and has been modified several times since.[24] This rule allows judges to refer or "transfer lower or mid-level accused to national jurisdictions"[25] prior to the commencement of trial. Rule 11*bis* was first invoked 7 September 2004 in the *Ademi* and *Norac* case.[26] After a motion by the Prosecutor, ICTY President Meron established a separate trial chamber to determine the legality of this new use of Rule 11*bis*.[27] Without hesitation, the Rule became a legitimate and widely used tool to achieve the completion strategy goals of transferring cases to national courts.

There are several repercussions resulting from the latest version of Rule 11*bis*. Primarily the authority of the ICTY to create such a referral system is questionable at best. The legitimacy, or illegitimacy, of the system may make it facially illegal. Second, the existence of the referral system is strikingly similar to a transfer of criminal

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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.
(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.
(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.
(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.

[24] Rule 11 *bis*, adopted on 12 November 1997, revised on 30 September 2002, amended on 10 June 2004, 28 July 2004, 11 February 2005. Michael Bohlander, *Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11bis and the Consequences for the Law of Extradition*, 55 Int'l & Comp. L. Q. 219 at 220 (2006).

[25] *Prosecutor v. Radovan Stanković*, Decision on Rule11*bis* Referral, IT-96-23/2-AR11*bis* at para. 16 (1 September 2005).

[26] *Prosecutor v. Ademi and Norac*, Motion by the Prosecutor Under Rule 11 *bis*, No. IT-04-78-PT (Sept. 2, 2004). This case questioned whether the case met the seniority criterion of the Rule and whether States were eligible to receive cases. In this case, both were answered in the affirmative thus granted authority to Rule 11*bis*.

[27] Ibid.

proceedings. Yet, unlike a State-to-State transfer of criminal proceedings, these referrals do not conform to the rules that accompany a transfer and give the referring 'State'--in this case the ICTY--the opportunity to maintain its reach on each individual case. These differences essentially mean that this referral system is illegal as applied. Lastly, use of Rule 11*bis* will significantly influence the extradition law arena. These unexplored areas affected by the recent ICTY procedural change are investigated here at length.

A. AUTHORITY OF THE ICTY TO EXPLOIT RULE 11*BIS*

Before getting into the mechanics of Rule 11*bis*, we must examine the design of the rule itself. We must determine whether the tribunal legally had the authority to amend the rule to allow for referrals to State courts without the explicit approval by amendment of the tribunal's Statute by the UNSC. Second, if that power exists the application and interpretation of the rule must be in accordance with the UNSC's vision. Both of these issues have been raised but have yet to receive a definitive answer from either the ICTY or the UNSC.

Tribunals are the children of the UNSC and therefore derive all power from the States of the Council responsible for their creation. This means that the tribunals are clearly limited in their functions and abilities.[28] The tribunal's Statute explains and limits its prosecutions, jurisdiction, functions, etc. Accordingly, any authority exerted by the tribunal must originate in the Statute. The ICTY couches its ability to create a referral system to State courts in Rule 11*bis* of its Rules of Evidence and Procedure.

Article 15 of the Statute grants judges the power to create "rules of evidence and procedure."[29] Generally, judges have the ability to establish only genuinely judicial

[28] M. Cherif Bassioni, *supra* note 1, at 426-427.
[29] ICTY Statute at Art 15.

decision-making rules while rules, that resemble legislation or law making remain the parent body's prerogative. However, because of the need for expediency and efficiency the ICTY was given considerably greater power in creating rules of procedure and evidence that would otherwise be under the control of the parent body. The ICTY Statute thus grants judges the ability to legislate by making broad rules of evidence and procedure that would otherwise be left up to the UNSC.[30] Therefore, if the UNSC had the power to create rules of evidence and procedure, as done with the International Criminal Court Rules of Evidence and Procedure, then it is not inconceivable that such power may be delegated to the tribunal itself. There is no reason why the Council cannot provide broad policy guidelines for the tribunal and allow the opportunity for the tribunal to operate without amendments to the Statute.[31]

Radovan Stanković became the first accused to substantially question the newly amended rule. Stanković argued that the ICTY judges had exceeded their power in adopting Rule 11*bis* without an explicit UNSC amendment to the Statute.[32] The Appellate Chamber dismissed this argument and held that "the tribunal Judges amended Rule 11*bis* to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council's recognition that the tribunal has implicit authority to do so under the Statute."[33] This statement backs the tribunal's ability to make extensive rules of procedure and thus the legal basis needed to allow the referrals. The Appellate Chamber continued, "the Security Council plainly contemplated the transfer of cases out

[30] Michael Bohlander, *supra* note 24, at 223.
[31] Larry Johnson, *Closing an International Criminal tribunal while Maintaining International Human Rights Standards and Excluding Impunity*. 99 Am. J. Int'l L. 158 at 165 (2005).
[32] *Prosecutor v. Radovan Stanković*, Decision on Rule 11*bis* Referral, IT-96-23/2-AR11*bis* para. 26 (1 September 2005).
[33] Ibid.

of the tribunal's jurisdiction and agreed with the tribunal that referrals would advance its judicial functions. It is true that the Council did not amend the Statute accordingly, but that was not required. The Council accepted that the tribunal was authorized to do so and thus confirmed the legal authority behind the tribunal's referral process, but it left it up to the tribunal to work out the logistics for doing so, such as through amendment of its Rules"[34] Ironically, the court overtly states that it has this authority while the UNSC itself remains silent on the issue.

An amendment to the Statute explicitly granting the ability to refer cases to a national court would have clearly proven the ICTY's ability to do so. However, the wording of the Statute, which confers exceedingly broad power to judges to create their own rules of procedure, surely is enough to justify the adoption of a procedure that would refer cases from the ICTY to State courts. Additionally, although the UNSC has not explicitly endorsed Rule 11*bis*, they have consistently recognized the need for transfer components as part of the completion strategy.[35] As the Statute allows for the adoption of expansive rules of procedure, the UNSC saw no overt need to amend the Statute.

The tribunal has used UNSC Resolutions 1503 and 1534 and consistent recognition as 'proof' that the Council supports Rule 11*bis*. These Resolutions endorse the completion strategy as a whole and call for transfer of mid and low-level cases to competent national jurisdictions while senior leaders remained at the ICTY.[36]

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[34] Ibid.
[35] S.C. Res. 1503, *supra* note 22.
[36] S.C. Res. 1503, *supra* note 22. Resolution 1503 states in part, "...by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions... " Resoluton 1534 states in part, "..review the case load of teh ICTY...in particular with a view to determining which cases should be proceeded with and which should be transferred to competent natonal jurisdictions.. " S.C. Resolution 1534, SC/8040, U.N. Doc S/RES/1534 (2004).

Specifically, Resolution 1503 "endorses the ICTY's strategy for completing investigations" and notes that "strengthening of national judicial systems is crucially important."[37] This general language fails to approve a specific procedure for transferring cases. It is possible that this lack of specificity was a purposeful UN safeguard. If the Completion Strategy were to fail this decisively broad language may be used as evidence that the UNSC never supported the ICTY's procedure but rather only endorsed the need to close the tribunal.

Additionally, Resolution 1534 merely requires that the tribunal inform the UNSC of the status of all transferred cases.[38] This resolution is not a true endorsement of Rule 11*bis*, rather, it is a way for the Council to keep its eye on the tribunal. This monitoring of the referrals may be a way to ensure that the procedure actually works. Once the success or failure of Rule 11*bis* is established, the Council may decide to endorse or reject the ICTY's procedure.

These two resolutions and consistent recognition by the UNSC provide feeble support for a rule that is so generously applied. It remains unclear whether the UNSC, the Secretary General or the UNGA would actually interpret the resolutions and Statute as widely as the ICTY judges did. Rule 11*bis* remains legal until the SC rescinds its creation via a resolution or amendment.

B. TRANSFER V. REFERRAL

The ICTY refers to Rule 11*bis* as a "referral of an indictment to another court."[39] The specific use of the term "referral" rather than "transfer" is a purposeful act on the part of the judges. The judges have literally created a new modality amongst

[37] Ibid.
[38] Ibid.

international procedures with no legal basis. This allows the judges to define whatever requirements and rules they wish to govern the procedure. This new referral process is most similar to a transfer of criminal proceedings, an already and established international modality. The two processes share a lot of common ground. In fact, the only areas where a referral differs from a transfer are those that prove advantageous for the ICTY. The first step in the analysis is an examination of the formal components of each procedure.

1. Transfer of Criminal Proceedings

Transferring proceedings from one jurisdiction to another is an accepted practice in the international criminal world. Transfers of criminal proceedings obtain their legitimacy and are governed by treaties between contracting States. Transfer treaties set forth guidelines, obligations, grounds for refusal of a transfer, status of the accused, requirements, etc. These fundamental rules help ensure that each party knows what is required and expected of it and what it can expect in return. A transfer involves the formal request from one State to another asking for the initiation of legal proceedings for a specific act. Above all a transfer of criminal matters seeks to "contribute to the effective administration of justice and to reducing conflicts of competence."[40]

Transferring criminal proceedings requires that both the requesting and the requested state have competency and generally requires dual criminality. In other words, a transfer requires that the requested State have the capacity to render a judgment in the case. It also requires that the alleged conduct be criminal in both States. Barring any grounds for refusal made by the requested state, once these two prerequisites are met, a

[39] Rule 11*bis*(a)

transfer may occur. Generally, the requested State may refuse acceptance of an accused if (a) the suspected person is not a national of or ordinarily resident in the requested State; (b) the act is an offence under military law, which is not also an offence under ordinary criminal law; (c) the offence is in connection with taxes, duties, customs or exchange; (d) the offence is regarded by the requested State as being of a political nature.[41] Prior to the transfer, the accused is given the opportunity to express his interest in the transfer. While an extremely important procedural guarantee this unique recognition of the rights of the accused is limited. The individual may express to either State his or her interest in the transfer but is only formally given an audience before the court of the requesting State.[42]

Once an accused is transferred the obligations of each State change dramatically. The requesting State promptly discontinues all further prosecutions. The State may continue with investigations but no further formal judicial proceedings may occur. Conversely, the requested State performs the prosecutions with one significant limitation: The final sanction imposed on the accused may not be worse than in the requesting State. This ensures that individuals are not transferred to harsh jurisdictions for political reasons. All final decisions must be reported to the requesting State.

2. Referral of an Indictment

Unlike a transfer, the ICTY's new referral system allows for the removal of a confirmed indictment from the ad hoc tribunal and transferal of the indictment to the authorities of an appropriate State. If an accused remains at large when a Rule 11*bis* referral is ordered, an arrest warrant will be issued. The warrant will specify the State

[40] Model Treaty on the Transfer of Proceedings in Criminal Matters - Adopted by General Assembly resolution 45/118 of 14 December 1990.
[41] Ibid.
[42] Ibid.

that the accused will be transferred to for trial.[43] Referrals may be ordered either by three permanent judges from the Trial Chamber ("Referral Bench") at their discretion or at the request of the Prosecutor.[44]

The referral process is two-fold with independent decisions in each procedure. First, the Referral Bench needs to determine whether a case is[45] suitable for trial in a national court. In the second step, the Referral Bench will scrutinize the receiving State and ensure that it meets all the Rule 11*bis* requirements.

In determining whether a case is suitable for trial in a national court the Referral Bench will evaluate two criteria; 1) the gravity of the crime charged, and 2) the level of responsibility of the accused.[46] Unlike much of the ICTY's procedures, the analysis of these factors is based purely on the allegations contained in the indictment. Information or facts held by either the prosecutor or the accused is inadmissible at this stage. Instead, to determine the gravity of the crime, the court will examine *inter alia* the geographic and temporal scope of the alleged criminal conduct, the number of persons allegedly affected,[47] the extent of property damage[48] and the position of the accused in the joint criminal enterprise.[49] Upon evaluation, should the court determine that the gravity of the crime is excessive it will reserve jurisdiction over the case for the tribunal. The level of responsibility is ascertained in reference to either the "functional responsibility of

[43] Rule 11*bis* (e).
[44] Rule 11*bis* (a).

[46] Rule 11*bis* (c).

[47] *Prosecutor v. Radovan Stanković*, Decision on Referral of a Case under Rule 11*bis*, IT-96-23/2-PT, para 19 (17 May 2005).
[48] *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case pursuant to Rule 11*bis*, IT-98-29/1-PT, para 19 (17 May 2005).
[49] *Prosecutor v. Mitar Rašević and Savo Todović*, Decision on Savo Todović's Appeals against Decision on Referral under Rule 11*bis*, IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis* para. 17 (4 September 2006).

persons" or their "*de facto* responsibility."[50] The political leaders, senior military leaders, and individuals lack high military position play a role in setting an example and are all examples of the 'most senior leaders' whose prosecution will remain at the ICTY.[51] All other mid and low-level individuals are eligible for referral to national courts.

These two criteria do not operate independently of each other. Consider the case of Dragomir Milošević. Milošević was a Corps commander who conducted various campaigns of sniping and shelling attacks in Sarajevo. He was subordinate only to Ratko Mladić and Radovan Karadžić. Dragomir Milošević's case was deemed unsuitable for transfer due to the extreme amount of individuals involved, severity of the crime in addition to his high-ranking position within the Sarajevo -Romanija Corps.[52] Reserving jurisdiction for the ICTY is not the usual course of events for a Rule 11*bis* motion. In fact, overwhelmingly the Referral Bench has found cases suitable for transfer. To date the ICTY has referred a total of 13 cases to various State courts with numerous motions pending before the court.[53]

Once a particular case is considered appropriate for referral, the tribunal must evaluate the receiving State's eligibility to prosecute the case. Referrals from the tribunal

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[50] Ibid.

[51] Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 Journal of Int'L Crim. Justice, 516 at 517 (2004).

[52] *Prosecutor v. Dragomir Milošević*, Decision on Referral of Case pursuant to Rule 11*bis*, IT-98-29/1-PT, para 24 (17 May 2005).

[53] Currently, two cases have been referred to Croatia, 10 to Bosnia-Herzegovina and one accused is currently awaiting an ordered referral to Bosnia-Herzegovina. On 17 November 2006, the ICTY referred the case of Valdimir Kovačević to the authorities of the Republic of Serbia. The Referral Bench concluded today that mechanisms exist in Serbia for the ongoing monitoring of Kovačević 's health and resumption of proceedings against him should he become fit to stand trial. *Prosecutor v. Vladimir* Kovačević, Decision on Referral of Case Pursuant to Rule *11bis*, 17 Nov 2006. IT-01-42/2-1. Additionally, on 14 November 2006 the Court of Bosnia and Herzegovina pronounced its judgment against Radovan Stanković, first accused referred by the ICTY to a national court, guilty on four counts of crimes against humanity and sentenced him to 16 years' imprisonment. Press Release of the Court of BiH 14 November 2006. http://www.sudbih.gov.ba/?id=280&jezik=e

are made to a particular State, and then the State will subsequently refer the indictment to the appropriate state court. [54] Currently the ICTY has three options for referrals: (i) the state in whose territory the crime was committed; (ii) the state in which the accused was arrested; or (iii) the state having jurisdiction and being willing and adequately prepared to accept such a case. Originally, the ICTY only had the ability to refer a case to the state where the accused was arrested (subsection i).[55] The second option was added after President Jorda's report emphasizing the need to refer cases to the territory where the crime was committed.[56] The last option is the most recent addition as well as the most controversial. A State's willingness and ability to accept a referral is implicit in both of the first two options of Rule 11*bis* but remains as a sole option of last resort if referrals are otherwise impossible. If the requested State meets the Referral Bench's standards and the case is suitable for transfer the accused along with the indictment is reassigned to the appropriate State court.

3. Procedural Differences between a Transfer and a Referral

Procedurally, a transfer of a criminal proceedings and a referral from the ICTY to a national court are similar only in that an individual moves from one judicial system to a foreign one. One has its legal basis in a treaty the other in a questionable amendment to a rule of procedure. Transfers are governed by a mutual contract between two states whereas referrals are governed solely by the rules established one-sidedly by the ICTY. Additionally, requesting States in a transfer lose their right of prosecution when the case is transferred whereas the Referral Bench may revoke a referral order so long as the

[54] Rule 11*bis* (a)
[55] Ibid.
[56] Del Ponte, *supra* note 49.

accused has not been found guilty or acquitted by the national court.[57] This unique procedural feature ensures that the ICTY continues to act as the 'Father Figure' of national courts while cases are being prosecuted. The overseeing of national courts while they are prosecuting these new types of cases appears to be a good idea but ultimately presents numerous complications. These complications arise under one of two situations, depending on whether the ICTY is still in operation or has closed down.

As long as the ICTY exists it may exercise its Chapter VII primacy over national courts and, should the need arise, request that an accused be returned to The Hague pursuant to Rule 11*bis* and Article 10 of the Statute.[58] Each State referral carries with it a magical string wherein a case may literally be yanked out of the court and given back to an omnipresent ICTY. Supervision of the national courts and the possibility of revoking a referral has two very important purposes. First, it keeps State courts honest. This, in turn, will legitimize and strengthen these courts. If the ICTY does not revoke any referrals then the assumption is that the national courts are effectively performing their judicial functions. Additionally, revocation acts as a mechanism to literally ensure justice should State courts misuse their power. If the tribunal sees something it does not like it may simply revoke the case to administer justice.

In 2010, the expected closure date of the tribunal, this magical string attachment will be cut and State courts will have exclusive control over the prosecutions. This scenario is much more akin to a traditional transfer of criminal proceedings where the requesting State loses all control over a case. The lack of a Father Figure makes it unclear what will happen within the referral jurisdictions. It is possible that after it has

[57] Rule 11*bis*(g)
[58] Rule 11*bis* (f). ICTY Statute at Art. 10.

shut down, should there be worry that national courts are mishandling these cases, the ICTY may be re-established to try these particular cases. However, due to the immense cost involved, the already questioned jurisdiction of the tribunal and few cases that would be tried, this remains a highly unlikely response without gross negligence by the State courts. Alternatively, it is exceedingly feasible that after its closure a few individuals of the court would remain and act in a supervisory capacity. These individuals might visit various State courts, detention centres, etc. and then report to the UNSC on their progress. If there was exploitation, abuse or mistreatment the UNSC may refer these individual cases to the International Criminal Court (ICC) for prosecution.[59] In the event that the ICC receives a referral, it can easily apply the law of the ICTY statute to a case.[60] This avoids the problems of trying to re-establish the tribunal while preventing impunity. Another possibility is that the ICC may adjudicate a case while applying the law of the national jurisdiction previously prosecuting the case. Each option provides an alternative to keeping the ICTY either in part or in whole in operation until the end of prosecutions.

One interesting thing to note is that there is no mechanism that allows national courts to request that a case be returned to the ICTY once referred to a State. Courts may request the ICTY to investigate a particular incident or case but the revocation decision lies squarely at the discretion of the ICTY. As the tribunal is trying to wind down it is again unlikely that they will revoke a case at the request of a State without egregious conduct. This problem exists once the ICTY has ceased operation as well. The only option once the tribunal closes is a request by the States to the UNSC requesting a

[59] Both Bosnia-Herzegovina and Croatia, the only two national jurisdictions referred to thus far, have ratified the Rome Statute and are current members of the ICC.

referral to the ICC. It is wholly unclear how the international community would react to such requests. In the interest of seeing the ICC succeed hopefully the international legal community would embrace this notion of complementarity. This would be an excellent opportunity for the ICC to illustrate that the Court will only act when countries themselves are unable or unwilling to investigate or prosecute.

The tribunal has embarked on a unique and risky path when it amended the rules to allow for a referral over a transfer. Procedurally, judges amended the rule to conform to traditional procedures for a transfer of criminal proceedings the ICTY's revocation capability would violate the international law that governs a transfer. However, in wording Rule 11*bis* as a 'referral' rather than a 'transfer' the court succeeds in avoiding being bound by established international norms. This linguistic massaging of the law proves beneficial only while the ICTY is in operation. Once the ICTY closes, it will be up to the ICC to take over the role of the Father Figure for state courts that may run amuck.

4. Substantive Differences between a Transfer and a Referral

The substantive differences between a transfer of criminal proceedings and a referral of an indictment are far more injurious than the procedural differences. These disparities are more far-reaching in their effect on international law than the procedural differences. Generally, this is because the procedural differences come from a simple re-categorization of the rule as a referral. The substantive differences of a referral ignore longstanding principles that exist and create a completely new form of law.

a. Competence of Requested States

[60] For the application of another jurisdictions law in a court *See* the *Lockerbie* decision, (*Her Majesty's Advocate v. Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah*, High Court of the Justiciary

Initially, a transfer of criminal proceedings cannot occur unless the requested State has the competence to render a judgment in that case. Rule 11*bis* decreases the traditional requirement of 'competency' standard to mere 'eligibility' by listing three possible jurisdictions for referring a case. This judicially-created diminution of competence has two distinct facets to it. The first is the creation of a hierarchy to state eligibility that is founded on tenuous legal foundations that does not mandate competency. Second, requested states find themselves confronted with standing issues that did not exist under the transfer of proceedings.[61]

The state eligibility hierarchy created by Rule 11*bis* (a) has already been explained. The first two jurisdictions for referrals are based on situations where the crime was committed and where the accused was arrested.[62] States falling under either one of these categories have an obvious interest in prosecuting an individual. The third prong of the jurisdictional options raises cause for concern. States that are facially "willing and adequately prepared" to receive transferrals total over forty-six.[63] Of these more than forty-six states deemed eligible to receive referrals, less than six would have the requisite jurisdiction to adjudicate. These competent states have concurrent jurisdiction over prosecutions with the ICTY but must show deference to the tribunal.[64] The national courts showing deference to the ICTY are those generally located within the Balkans that are investigating cases and begin proceedings - the six previously

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at Camp Zeist 1475/99.) where Scottish law was applied to a case physically situated in The Netherlands.

[61] Daryl Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal tribunals*, 99 Am. J. Int'l L. 142 at 150 (2005).

[62] Rule 11*bis* (a)

[63] Over 45 states have ratified both the ICCPR and the second optional protocol prohibiting the death penalty – GA Res. 2200! (XXI) (Dec. 16, 1966) GA Res. 44/128, annex (Dec. 15, 1968) This number increases beyond forty-six when states that have not ratified the ICCPR Second Optional Protocol give assurances that the death penalty will not be imposed.

[64] ICTY Statute at Art. 9.

mentioned. These national courts have competent jurisdiction over the accused domestically. Prong three resonates not with the jurisdictional principles of territoriality, nationality or the protective principle that create the foundation for the first two subsections.[65] Rather, it is based on the controversial universal jurisdiction theory. Applying these cases to universal jurisdiction by referring them to eligible states will have long-standing effects on an already contentious doctrine. While referring cases beyond the Balkans region may help decrease impunity, more importantly, it ignores the immense value of holding prosecutions where the crimes were committed or within the primarily interested states.[66] Arguably, the tribunal should only be able to refer cases to courts that would have had initial competent jurisdiction to adjudicate a case.

Beyond the questionable legal ground for the third prong, competence in all three possibilities for referrals is not compulsory. Requiring competence prior to a transfer ensures that cases are heard before appropriate courts. By decreasing the standard, the ICTY may actually augment the impunity gap, which is contrary to its goals. If the underlying ground for the transfer is the third prong, then cases will be transferred to states for prosecution based political reasons rather than based on competency. Founded not in a legal framework the third prong exists purely out of utility.

b. The Dual Criminality Requirement

As is the case regarding referrals and the competence of the receiving state, the general dual criminality requirement of transfers is dramatically lowered by the ICTY.

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[65] Ibid.

[66] Daryl Mundis, *Closing an International Criminal tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, Am. J. Int'l L. 142 at 158 (January 2005). President Meron has stated that referring cases to outside the region "is particularly important should some courts in the former Yugoslavia continue to suffer from deficiencies in their ability to conduct trials in accordance with fundamental fairness and due process." UN Doc S/PV.4999, at 5 (2004).

Most transfers of criminal proceedings will only occur if the offence is a crime in both the requested and the receiving state.[67] Rule 11*bis* however, makes no such requirement. Rather, the Referral Bench need only be sufficiently satisfied that the entire criminal conduct as alleged may be addressed under the applicable national law. [68] The ICTY has taken the dual criminality standard and subordinated it to the status of judicial satisfaction.[69]

To reassure the ICTY of its ability to prosecute cases under national law, in 2004, Bosnia and Herzegovina ("BiH") adopted a special law on the transfer of cases.[70] Through this new law, the State Court of BiH created a War Crimes Chamber to deal specifically with the cases transferred from the ICTY and a corresponding special department for war crimes within the Prosecutors Office of BiH.[71] The creation of the War Crimes Chamber lead to significant revisions of the Criminal Code and the Code of Criminal Procedure of BiH.[72] The relevant laws under the jurisdiction of the War Crimes Chamber are those that were in force at the time of the commission of the acts: Criminal Code of BiH, the Criminal Code of the Socialist Republic of Bosnia and Herzegovina,

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[67] European Convtn on the Transfer of Criminal Proceedings in Criminal Matters at Art. 7.

[68] *Prosecutor v. Radovan Stanković*, Decision on Referral of a Case under Rule 11*bis*, IT-96-23/2-PT para 17 (17 May 2005).

[69] *Prosecutor v. Radovan Stanković*, Decision on the Referral of a Case under Rule 11*bis*, IT-96-23/2-PT, para 32 (22 July 2005). The Referral Bench ensured that a if a case were referred, "there would exist an adequate legal framework which criminalises the alleged behavior of the accused so that the allegations can be duly tried and determined and which provides the for punishment. " *See also Prosecutor v. Gojko Janković*, Decision on Referral of Case Under Rule 11*bis*, IT-96-23/2-PT para 27 (22 July 2005). The Bench "must consider whether the laws applicable in proceedings before the State Court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused, for offences of the type currently charged before the tribunal."

[70] Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, Official Gazette of BiH, 37/03, 54/04, 61/04. Law on the Court of BiH and Laws on Amendments,, Official Gazette of BiH, 16/02, 42/03, 42/03, 9/04, 4/04, 35/04, 61/04, Art. 24.

[71] Article 13 of the Law on the Court of BiH and Article 23 of the BiH CPC. For a discussion of war crimes *See* Bassioni, M. Cherif, *supra* note 1 at 141 (2003).

[72] Criminal Code of BiH, 37/03 (22 November 2003). Criminal Procedure Code of BiH, 32/03 (21 November 2003).

and the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") . The latter criminalizes certain forms of war crimes but does not contain a provision regarding crimes against humanity.[73] Moreover, Article 4 of the SFRY Criminal Code requires that the law in power at the time when a criminal act was committed should be applied, thus rendering crimes against humanity inapplicable.[74] While the Criminal Code of BiH contains both war crimes and crimes against humanity, it did not enter into force on 1 March 2003 thus presenting the problem of retroactivity. Article 4a of the Criminal Code of BiH provides that the principle against retroactivity shall not prevent the prosecution of an act or omission, "which at the time when it was committed, was criminal according to the general principles of international law."[75] Additionally, the ICTY is not a position to determine which law will apply once a case is referred to a state.

The State of Bosnia and Herzegovina is not the only state to receive cases thus far. Croatia was the recipient state of the combined case of *Ademi* and *Norac*.[76] The largest obstacle for future transfers is that Croatian substantive criminal law does not recognize command responsibility as set forth by the ICTY statute.[77] The doctrine of command responsibility has since been incorporated into the Croatian criminal code; however, the Croatian constitution bars its application to any acts or omissions prior to its

[73] SFRY Criminal Code, Chapter 10, Article 100 as published in the Official Gazette SFRJ 44/76. For a discussion of crimes against humanity *See* Bassioni, M. Cherif, *supra* note 1, at 139.
[74] Ibid, Art. 4.
[75] Criminal Code of BiH at Art. 4a.
[76] *Prosecutor v. Ademi and Norac,* Motion by the Prosecutor Under Rule 11 *bis*, No. IT-04-78-PT (2 Sept. 2004).
[77] ICTY Statute at Art 7(3).

inclusion in 2004.[78] It is speculated that most cases referred to Croatia will be ones prosecuted based on direct responsibility rather than command responsibility.[79]

This dissection of the criminal law of Croatia and the relevant laws for the War Crimes Chamber illustrates the piecemeal law that comprises the substantive basis for prosecution. In its decision to refer a case, the Referral Bench looks to substantive law full of gaps to determine if dual criminality exists. This weakens the requirement under a transfer of criminal proceedings, mostly because under the more stringent standard states would simply not be able to receive a number of cases. They would be severely limited. Thus, as we have seen before, the ICTY has manipulated the rules to achieve a desirable result but the process will have lasting implications on international law.

c. Referrals to a State Rather Than to a Court

As is the case of a transfer of criminal proceedings, Rule 11*bis* refers a case to a particular state and then they apply their laws.[80] A complex situation arises when the ICTY refers a case to a state that has numerous substantive laws from which to choose. The authorities of the state, not the tribunal, refer cases to the appropriate domestic court. The ICTY will obviously seek assurances that a case be referred to the national court that has is best suited to adjudicate a case.[81] Prior to closure, the ICTY will always have the option of revoking a referral pursuant to Rule 11*bis* (f). However, once a case is referred and the ICTY has shut down, there is the imminent possibility that one court within a state's national system will transfer the case to another court that would have been

[78] Ivo Josipović, *Responsibility for War Crimes before National Courts in Croatia*. Int'l Review of the Red Cross, vol. 88 no. 861 (March 2006)
[79] Ibid.
[80] Rule 11*bis* (a).
[81] In BiH, Croatia, and Serbia and Montenegro, certain courts have had special training for trying war crimes. However, the mere existence of these courts is not indicative of their appropriateness or ability to prosecute a paricular case. UN Doc. S/PV.4999, at 7 (2004).

otherwise prohibited by the ICTY. This conundrum will not be present until closure of the ICTY; at that time, the same concerns arise as outlined earlier: Does the ICTY maintain some staff to allow for revoking a referral? Does the ICC step in and oversee the adjudication of the cases? Leaving the court decision in the hands of the states rather than the tribunal may prove perilous to the prosecution of an individual case and the overall goals of the tribunal.

d. The Political Offence Oddity

Generally, a state may refuse the transfer of a case if the offence is of a political nature.[82] Rule 11*bis* has no such ground for refusal. It is assumed that the ICTY would only refer a case to a State court that is willing. Such willingness, however, is not explicit in the rule. The political offence exception generally relates to one's freedom of expression.[83] A political offense has been defined as an "act committed in the course of and incidental to a violent political disturbance, such as a war, revolution, or rebellion."[84] Additionally, the crime must be in furtherance of one side or another of a struggle for political power.[85] Customarily, war crimes involve violations of the laws of war.[86] These include both the customary regulation of armed conflict as well as the codified laws of war.[87] The ICTY like many other courts defines war crimes as "grave breaches of the Geneva Conventions."[88] War crimes may be rethought to be within the political

[82] European Convention on the Transfer of Criminal Proceedings in Criminal Matters, Article 11 (1972).
[83] For further discussion regarding the political offence exception *See* M. Cherif Bassiouni, *supra* note 9, at 241.
[84] *Omelas v. Ruiz,* 161 U.S. 502, 16 S.Ct. 689, 40 L. Ed. 787 (1896). For a further discussion of the political offence history and application *See* Christine van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order*, Am. J. Comp. L., 30 at 362-371 (Spring, 1982).
[85] Ibid.
[86] M. Cherif Bassiouni, *supra* note 1, at 141.
[87] Ibid.
[88] ICTY Statute at Article 2.

offence framework. Offences such as murder, torture, and kidnappings would be outside the framework, whereas crimes such as compulsory military service, property destruction and the like are more easily seen as falling within the political offence structure.[89] A referral from the ICTY ignores this argument as a basis for non–referral, thus raising questions of standing to contest a referral.

e. Issues of Standing

As in any judicial proceeding, it is imperative that the rights of the accused be respected. These rights deserve protection regardless of the individual's placement in the ICTY or in the national courts. While the Prosecutor, where applicable, must provide the accused the opportunity to be heard, neither the defence nor a state is in a position to request a referral.[90] It is unique that the rule would preserve the rights of the individual while neglecting the rights of the states. In a traditional transfer of proceedings, an individual is allowed to express his interest in the transfer.[91] Even if only informally expressed, the requesting state grants the accused this opportunity. Rule 11*bis* allows an individual to have standing; in reality, however, the only issues raised by the accused relate not to the competency of the receiving state but rather to their receipt of a fair trial and application of the death penalty.[92]

Rule 11bis does not allow the requesting state to contest the referral formally. The situation becomes evermore complicated when a state surrenders an individual to the

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[89] Ibid.
[90] *Prosecutor v. Gojko Janković*, Decision on Referral of Case Under Rule 11*bis*, IT-96-23/2-PT, para 24 (22 July 2005).
[91] Julian Shutte, *The European System, in* INTERNATIONAL CRIMINAL LAW at 191, 643 (M. Cherif Bassiouni ed., 2nd ed., 1999).
[92] Daryl Mundis, *The Judicial Effects of the "Completion Strategies" on the ad hoc International Criminal tribunals.* 99 Am. J. Int'l L. 142 at 150 (January 2005). Objections made by the accused regarding a fair trial have dealt with the appropriateness of referring an individual arrested and surrendered to the ICTY being referred to a jury trial in a common law country.

ICTY, and the ICTY then transfers that individual to another state pursuant to Rule 11bis. If the surrendering state and the Rule 11bis requested state do not have an extradition treaty, the surrendering state has no grounds with which to question the referral.[93] The only way that a state may raise an argument is through the standing of the accused. Should the objectives of the accused and those of the surrendering state differ, however, the state has no vehicle for contestation. It is questionable whether the surrendering state should be entitled to standing to contest a referral. The surrendering state may also use various 'enticements' to try and sway the accused to question the referral for the benefit of the surrendering state. This political manipulation of an already complex judicial system appears to be the only option for a surrendering state.

In creating a referral, system rather than utilizing the already existing procedures of a transfer of criminal proceedings, the tribunal reinvents the substantive basis of these related processes. The ICTY has allowed itself the opportunity to undermine and circumvent various aspects of substantive law that are associated with a transfer of criminal proceedings. Not only does the referral system allow the ICTY to have constant strings attached to a proceeding, but it also allows the tribunal to ignore the legal bases that accompany a traditional transfer. In ignoring these norms, the ICTY creates a system fraught with peculiar results and undesirable scenarios. The ICTY embarks on the perilous slippery slope of transferring individuals between states and tribunals. How future tribunals will maintain this dangerous and legally unsound creation remains to be seen.

C. EXTRADITION

[93] Ibid.

International criminal assistance, regardless of the modality, is largely based on bi-lateral or multi-lateral treaties. Over time, standards have evolved that govern the transfer of individuals to other states and international tribunals. The standards for extradition of individuals include dual criminality, reciprocity, specialty, reservations about extraditing ones own nationals, etc.[94] A number of these have already been surveyed, but how a referral under the ICTY's Rule 11*bis* impact extradition remains to be seen.

There are no questions that extradition is distinctly different from surrendering an individual to an international court.[95] However, three possible scenarios arise under the reverse situation in referring an individual from the tribunal to a national jurisdiction. First, the ICTY may use Rule 11*bis* at its base as a vehicle to relocate a case to a state for local prosecution. Second, the ICTY may direct one state to surrender an individual to a specific state. Lastly, the tribunal may refer an individual to one state and then pursuant to an existing treaty that state extradites the individual to another state.

1. ICTY refers individual to a state

The European Court of Human Rights, in *Naletilic v. Croatia*, found that the transfer of an accused from a state to an international tribunal differs from extradition.[96] The Court cited three main reasons for this distinction: the non-discretionary nature of transfers, the requirement of implementing legislation for extradition treaties, and the fact that extradition criticisms or defences do not apply.[97] Are these reasons applicable in the

[94] M. Cherif Bassiouni, *supra* note 9, at 191.
[95] *Naletilic v. Croatia,* Application no 51891/99, Decision on inadmissibility (4 May 2000).
[96] Ibid.
[97] Ibid.

reverse scenario of a referral from the international body to a state? The answer is not as clear as it may seem.

When the ICTY refers an individual to a state there is no formal treaty between the body and the state. Rather, the tribunal simply orders the referral and does not require any sort of action on the part of the state. States are obligated to comply with the tribunal's order pursuant to the ICTY's statute.[98] The relationship between the ICTY and the member states differs greatly from that of an extradition treaty. A treaty is thoughtfully planned out, negotiated and signed by two consenting parties whereas the referring of individuals by the ICTY is not a mutual agreement but rather a one sided command.

Extradition has been criticised for being a political tool. These same criticisms are applicable when referring a case from an international tribunal to a national jurisdiction. Concerns regarding fair trials and the death penalty have already come to the foreground in the referral arena.[99]

2. ICTY directs one state to surrender (ie: extradite) an individual to another state

In the second scenario, Rule 11*bis* allows the ICTY to direct one state to surrender, or extradite, an accused to another state.[100] This instruction may be accompanied by an arrest warrant, illustrating that the accused need not be in custody yet.[101] The referral practice ignores the extradition norm regarding the exclusion of one's own nationals, leading to add results in Rule 11*bis*'s application.[102] Additionally, Article

[98] ICTY Statute at Art. 29.
[99] M. Cherif Bassiouni, *supra* note 9, at 191.
[100] ICTY Rule *11bis* (e). *See also* Bohlander, Michael. *Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11bis and the consequences for the law of extradition.* 55 Int'l & Comp. L. Q. 219 at 222 (January 2006).
[101] Ibid.
[102] M. Cherif Bassiouni, *supra* note 9, at 191.

29 of the ICTY Statute mandates cooperation by the member states.[103] The ICTY may use Rule 11*bis* in conjunction with the ICTY Statute as a vehicle to force Croatia to surrender an accused Croatian to Serbia or accused Serbian to Croatia.[104] Furthermore, a United States mercenary fighting in Bosnia or a member of NATO who attacked Serbia in 1999 may be ordered under Rule 11*bis* to be surrendered to the War Crimes Chamber.[105]

3. Other Situations

A third situation distinct from the previous two may arise. Imagine that the tribunal refers a case to a specific state for prosecution. That state, then pursuant to an extradition treaty, extradites the accused to a third jurisdiction. The ICTY may always exercise Rule 11*bis* (f) and Article 10 of the Statute and request that a state show deference to the tribunal and surrender to the tribunal regardless of the state's extradition obligations.[106] Once the tribunal ends its operation, however, the same concerns already expressed arise. It is entirely plausible that numerous cases are referred out of the ICTY to various national jurisdictions, and once the tribunal closes, a series of rampant extradition of individuals between states occurs. A more horrific scenario would be if the states 'bargain' with the ICTY prior to a referral any future possibilities for the accused.

III. CONCLUSION

There are obviously clear benefits to using a referral system. Above all Rule 11bis gives the ICTY the ability to meet its Completion Strategy goals and to relieve

[103] ICTY Statute at Art. 29. "States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."
[104] Bohlander, Michael. *Referring an Indictment from the ICTY and ICTR to Another Court – Rule 11bis and the consequences for the law of extradition.* 55 Int'l & Comp. L. Q. 219at 222 (January 2006).
[105] Ibid.

itself of the immense financial burden placed on the UN. The largest impact of the Completion Strategy however, is the decrease in the impunity gap. The ICTY simply does not have the ability to prosecute all the individuals that should be brought to justice. Therefore, so long as it is in existence and maintains control over national prosecutions, it is undisputed that justice will prevail. While local trials increase and become sanctioned by the ICTY, their judicial structures will stabilize and become more competent to further prosecutions. Moreover, these courts will gain legitimacy to courts in areas where the rule of law has suffered greatly.

However, fulfilling the goals of the Completion Strategy presents novel challenges to the international judicial system. The referral system is established on legally shaky ground at best but will have longstanding precedent for tribunal closures. Additionally, the ICTY through a referral, is trying to accomplish the same thing as a transfer of criminal of proceedings but does not want any of the technical attachments (i.e.: restrictions) that accompany it. In practice, the two procedures are viewed by states as synonymous and differ only in nomenclature.[107] The referral system is the way the ICTY avoids being constrained while maintaining its grip over cases. The ICTY abandons the rules in an odd 'ends justify the means' thought process. This sets a dangerous precedent that hopefully will be set aside for practices founded in sound legal doctrine.

Additionally, the courts, including the War Crimes Chamber, are not yet in a position to assume complete responsibility for prosecuting large caseloads. If the ICTY

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[106] ICTY Statute at Art. 10. *See also* Larry Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 Am. J. Int'l L. 158 at 170 (January 2005).

closes down before the national courts have the opportunity to establish themselves, their already weak infrastructure will collapse entirely. This would damage not only the legacy of the ICTY but also lead to a great apprehension for establishing future tribunals.

The closure of the tribunal need not be negative. The ICC remains in an excellent position to carry on the duties of the ICTY. One of the largest criticisms is that if the ICTY closes without prosecuting Radovan Karadžić and Ratko Mladić then the tribunal is an overall failure. However, with the ICC's recent indictments it may prove to be the appropriate arena to try these high-level officials. Moreover, the ICTY overseeing state courts may be a testament to the success of complementarity. Again, when the ICTY closes the ICC may continue to reinforce national authorities in their administration of justice.

[107] "What's in a name? That which we call a rose by any other name would smell as sweet." William Shakespeare, Romeo and Juliet.