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Completing the ICTY-Project without Sacrificing its Main Goals

Security Council Resolution 1966 – A Good Decision?

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Abstract

Almost two decades after having established the ad-hoc criminal tribunal for the former Yugoslavia, this institution is about to fulfill its mandate and will close its doors in the near future. Looking back on 20 years of legal and political struggle, the overall result of this institutional project is positive. This article analyses the way the Security Council and the ICTY have chosen to bring the tribunal to an end by implementing the Completion. The problematic aspect, the Security Council was faced with before its final Resolution 1966, adopted on 22 December 2010, has been outlined together with the chosen path to avoid commitments, especially with regard to its major goal to end impunity for serious breaches of international law, and to bring justice and peace to the people living on the territory of the former Yugoslavia. This (so far) last resolution, which implemented the International Residual Mechanism for Criminal Tribunals (IRMCT), was adopted at a time, when the last two remaining fugitives, Ratko Mladic and Goran Hadzic were still at large. Only a few months ago, the two were caught and transferred to the tribunal. The author argues that not shutting the institutional doors entirely until all remaining fugitives are arrested, was a complex situation in a legal and practical sense. Facing and solving this problem through Resolution 1966 was the best choice at that time. This article will give a brief description about the practical impact of the IRMCT on the ICTY´s further work, and the relation between these two judicial institutions during their coexistence.

A. Establishing the ICTY & Shaping its Main Goals

During the armed conflict on the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) the Security Council of the United Nations decided, in May 1993, to establish an International Tribunal designated to prosecute persons who were responsible for grave breaches of international humanitarian law on this territory from 1 January 1991.[1]

[1] SC Res. 827, 23 May 1993 established the International Criminal Tribunal for the former Yugoslavia (ICTY) as a non-military measure under Article 41 UN-Charta. The precondition to execute the Chapter VII powers of the Security Council pursuant to Article 39 UN-Charta already have been ascertained by SC Res. 713, 25 September 1991. On the legality of the ICTY see *Prosecutor v. Dusko Tadic,* Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-

The main goal of this experimental Chapter VII measure was to put an end to impunity and to bring all persons to trial, who were responsible for serious breaches of international law. Furthermore, there was hope that, by establishing a tribunal designed to prosecute alleged war criminals, the deterrence-effect (as an extended goal) would minimize further serious breaches during the conflict. Unfortunately, the deterrence-effect could not prevent outrageous atrocities committed even after the establishment of the tribunal, which ended in the massacre of Srebrenica in June 1995. There, more than 8,000 civilians, mainly male Bosniaks (Bosnian Muslims) between 12 and 77 years of age lost their lives.[2] Other crucial aims have been to bring justice to the victims and to the people of a country that was strongly battered by the war and to build up a historical record of the atrocities by holding proper criminal trials, also to help prevent the glorification of war criminals as heroes. Both objectives serve the major goal, in the long run, of bringing lasting peace and reconciliation to the societies of the collapsed former SFRJ. However, it is impossible to accomplish all the described goals, if the starting point, that of ending impunity, has not yet been reached.

Let us first take a look at the early days of the ICTY and its working progress since its establishment in 1993, to capture the circumstances which, in the end, led to the implementation of the Completion Strategy. After an initial period of almost one and a half years, the tribunal issued its first indictment on 4 November 1994 against Dragan Nikolic.[3] Only four days later, the first public hearing was held before the Trial Chamber in a deferral application, which was filed by the Prosecutor on 12 October 1994.[4]

94-1, 05 October 1995, paras 26-48; Richard Goldstone, 'International Criminal Courts and Ad hoc Tribunals', in T. G. Weiss & S. Daws (eds), *The Oxford Handbook on the United Nations* (2007), 465; William A. Schabas, *The UN International Criminal Tribunals* (2006), 53; For the opposite view see B. Graefrath, 'Jugoslawientribunal – Präzedenzfall trotz fragwürdiger Rechtsgrundlage', 47 *Neue Justiz* (1993), 433.

2 See Preliminary List of Missing Persons from Srebrenica 1995 at the Website of the Potocari Memorial Center, available at www.potocarimc.ba/_ba/liste/nestali_a.php (last visited 3 January 2012). For a detailed analysis of the events see the Report of the Secretary-General pursuant to General Assembly resolution 53/35 – The fall of Srebrenica from 15 November 1999 (UN Doc. A/54/549).

3 *Prosecutor v. Dragan Nikolic*, Initial Indictment, IT-94-2-I, 4 November 1994.

4 Second annual report of the ICTY President A. Cassese, UN Doc. A/50/365, S/1995/728, 23 August 1995, para. 8; *Prosecutor v. Dusko Tadic,* Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for the Former Yugoslavia

The granting of the deferral by the presiding judge, Adolphus Karibi-Whyte, led to the first war crimes trial since Nuremberg and Tokyo against Dusko Tadic and, eventually, delivered the ICTY´s first trial judgment on 7 May 1997, exactly one year after the commencement of that trial.[5] By that time, the sentencing judgment in the Erdemovic case[6] had already been rendered after a guilty plea by the accused. The Celibici Camp trial against the four accused named Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo commenced in March the same year. [7] At the end of June 1997 the Trial against Tihomir Blaskic started.[8] By August 1998 there had already been 13 cases in the trial or pre-trial stage with a total of 26 accused individuals (the Tadic case was on appeal, the final Erdemovic judgment was rendered in March 1998 and the Dokmanovic case was discontinued, due to the death of the defendant).[9] The institutional international criminal law machinery started to ignite quite fast from its establishment based on Resolution 827 from 23 May 1993, until the first judgment, less than four years later, especially, if one considers it being the first of its kind for almost fifty years.

After this rapid take off the ICTY soon had to realize that its capacity was limited. While most of the trials, which started in the early days of the

in the Matter of Dusko Tadic, IT-94-1-D, 12 October 1994, reprinted in: 6 *European Journal of International Law* (1995) 1, 144.

5 *Prosecutor v. Dusko Tadic*, IT-94-1-T, 07 May 1997; in his first opening paragraph the Trial Chamber stated: "It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations. The international military tribunals at Nuremberg and Tokyo, its predecessors, were multinational in nature, representing only part of the world community".

6 *Prosecutor v. Drazen Erdemovic*, Sentencing Judgment, IT-96-22-T, 29 November 1996.

7 *Prosecutor v. Zejnil Delaic et al.*, Initial Indictment, IT-96-21, 19 March 1996; for the starting date see "Decision on the Applications for Adjournment of the Trial Date" from 03 February 1997, which adjourned the trial until 10 March 1997, available at http://www.icty.org/x/cases/mucic/tdec/en/70203PT2.htm (last visited 3 January 2012).

8 *Prosecutor v. Tihomir Blaskic*, Second Ammended Indictment, IT-95-14, 25 April 1997; for the starting date see "Order for the holding of a hearing and the setting of a date for the start of the trial" from 17 June 1997 which scheduled the beginning of the trial on 24 June 1997, available at http://www.icty.org/x/cases/blaskic/tord/en/70617RM113305.htm (last visited 31 December 2011).

9 Fifth annual report of the ICTY President G. K. McDonald, UN Doc. A/53/219, S/1998/737, 10 August 1998, paras 11-88.

Tribunal had not been entirely completed for a long time, the increased pendency of new cases brought to court,[10] let the tribunal struggle. From the above described so-called first cases, the Tadic case came to a final end in February 2001,[11] the Celibici Camp Trial in April 2003[12] and the Trial against Tihomir Blaskic [13] lasted until July 2004. The accumulation of old and new cases led to the conclusion that, despite the fact that time was constantly running, progress in terminating cases could not be mirrored numerically. Therefore, the ICTY itself introduced a number of reforms between 1997 and 2003 with the aim to shorten pre-trial and trial proceedings[14] and, eventually argued that a new approach would be needed and proposed the implementation of a completion strategy to conclude their mandate.[15]

10 Namely the huge number of first instance cases running in the period between August 2001 and August 2002 against more than 40 accused persons, 10 persons on appeal on the merits, several interlocutory appeals and requests for review. At that time 46 persons have been at the United Nations detention unit in Scheveningen (The Hague), see ninth annual report of the ICTY President C. Jorda, UN Doc. A/57/379, S/2002/985, 04 September 2002, paras 60-206 and Annex II.

11 *Prosecutor v. Dusko Tadic*, Appeals Chamber Judgment, IT-94-1-A-AR77, 27 February 2001.

12 *Prosecutor v. Zdravko Mucic et al.*, Appeals Chamber Sentencing Judgment, IT-96-21-A*bis*, 08 April 2003; One of the initially four accused was acquitted in the Trial Chamber Judgment in 1998 and the acquittal was upheld on appeal in 2001, *Prosecutor v. Zejnil Delaic et al.*, Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, paras 331-360.

13 *Prosecutor v. Tihomir Blaskic*, Appeals Chamber Judgment, IT-95-14-A, 29 July 2004.

14 For a detailed analysis about the ICTY reforms see M. Langert & J. W. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms', 36 *The Yale Journal of International Law* (2011) 2, 241, 247-253.

15 Ninth annual report of the ICTY President C. Jorda, UN Doc. A/57/379, S/2002/985, 04 September 2002, para. 37; Tenth annual report of the ICTY President T. Meron UN Doc. A/58/297, S/2003/829, 20 August 2003, paras 13-16; see also on that point F. Pocar, 'Completion or Continuation Strategy? – Appraising Problems and Possible Developments in Building the Legacy of the ICTY', 6 *Journal of International Criminal Justice* (2008) 4, 655, 657; D. Raab, 'Evaluating the ICTY and its Completion Strategy – Efforts to Achieve Accountability for War Crimes and their Tribunals', 3 *Journal of International Criminal Justice* (2005) 1, 82, 84.

B. Shutting down the ICTY by its Completion Strategy

Security Council Resolution 1503 from 28 August 2003 endorsed the ICTY´s Completion Strategy and envisaged the Tribunal's termination by the end of 2010.[16] The Completion Strategy provided two major approaches to bring the tribunal to an end. Firstly, one of the Tribunal's main goals, to prosecute persons, who were responsible for grave breaches of international humanitarian law was narrowed down to the prosecution of the major alleged war criminals, suspected of being most responsible for crimes within the tribunal´s jurisdiction. Secondly, cases involving intermediate- and lower-rank accused should be transferred to competent national authorities to reduce overall workload of the Tribunal.[17] This resulted in two major amendments to the ICTY Rules of Procedure and Evidence. Articles 11 *bis* and 28 of these rules provided the transfer of cases and the necessity of determination on the question, if an accused is "senior" enough to be tried by the ICTY itself.[18] Eventually, the termination of investigations by the Office of the Prosecutor by the end of 2004, as set out in the Completion Strategy,[19] began to pave the way for a conceivable ending.[20]

16 With the same Security Council Resolution the Completion Strategy was simultaneously endorsed for the International Criminal Tribunal for Rwanda (ICTR) which was established by SC Res 955, 08 November 1994; For a summary of the Completion Strategy of the ICTR see Completion Strategy of the International Criminal Tribunal for Rwanda, enclosure, in Letter Dated 29 September 2003 from the President of the ICTR E. Møse addressed to the Secretary-General, UN Doc. S/2003/946, 3 October 2003. For a detailed analysis about the steps that in the end led to SC Res 1503, see T. Wayde Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals – From Completion to Continuation', 9 *Journal of International Criminal Justice* (2011) 4, 797, 799.

17 In the first years the ICTY Prosecutor investigated a huge number of lower or intermediate level perpetrators as part of a so-called "pyramid indictment strategy", on that point see the analysis of N. Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004) 3, 446.

18 For a further analysis on the impact of the Completion Strategy see D. A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals', 99 *American Journal of International Law* (2005) 1, 142; L. D. Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', 99 *American Journal of International Law* (2005) 1, 158.

19 SC Res. 1503, 28 August 2003.

20 For an analysis about the impunity gap as a result of the termination of investigations on the ICTR see L. Haskell & L. Waldorf, 'The Impunity Gap of the International

I. Implementing the Completion Strategy and its Progress

As time has proved, the work of the tribunal could not be finished by the end of 2010. Through several Security Council Resolutions[21] the initial deadline was postponed year after year. The last of its kind was Resolution 1993 from 29 June 2011, which extended the term of the office of the permanent and the ad litem judges until the end of 2012. An additional reason for this delay can be found in the fact that besides the Completion Strategy, all the additional measures the ICTY had implemented to speed up proceedings did not have the expected effect of reducing the length of the trials.[22]

Following the guidelines set out in the Completion Strategy, the ICTY referred 8 cases involving 13 persons to national courts in the former Yugoslavia between September 2005 and June 2007.[23] A precondition for transferring cases to the national courts was however the strengthening of the capacity of national jurisdictions. Especially in Bosnia and Herzegovina, where the war had its most severe impact, the judiciary structure was in a miserable condition and therefore not able to hold unbiased trials against alleged war criminals. During the same time frame the Completion Strategy was introduced, the Office of the High Representative in Bosnia and Herzegovina launched a restructuring process and conducted vetting within the judiciary. In 2003, new substantive and procedural Criminal Codes were adopted to gain a legal foundation to start proceedings, which would meet acceptable international standards. Furthermore, a new Court of Bosnia and Herzegovina was established and its first section became responsible for war crime cases.[24] This special War Crimes Chamber would act as a link between the ICTY and the national courts and would be able to handle and

Criminal Tribunal for Rwanda: Causes and Consequences', 34 *Hastings International and Comparative Law Review* (2011) 1, 49.

21 SC Res. 1837, 29 September 2008; SC Res. 1877, 07 July 2009; SC Res. 1931, 29 June 2010.

22 For an empirical assessment on the effects of the implemented measures by the ICTY on the length of the proceedings see Langert & Doherty, *supra* note 14, 252-278, who argue that the implanted measures prolonged the overall time of proceedings instead of reducing them.

23 One case was referred to Serbian courts. Another case involving two persons was referred to Croatian courts and the remaining six cases were referred to the courts of Bosnia and Herzegovina.

24 For further details of the establishment of the new court and the special war crimes section see Mundis, *supra* note 18, 152-155.

deliver the transferred cases to local courts.[25] After having made this substantive progress in the national judicial system of Bosnia and Herzegovina, the ICTY transferred 6 cases involving 10 persons, to the special War Crimes Chamber in Sarajevo to relieve their own caseload.[26]

II. Two Remaining Fugitives – An Obstacle for the Completion Strategy?

In 2010, after the completion of the Tribunal´s main work was within reach,[27] the Security Council had to determine the closing of the ICTY and to decide about the scope of the body, which would take over the ICTY´s tasks after its closure. At that point the Security Council was faced with the crucial question of how to deal with the case of the remaining fugitives.

On the one hand we had the need for justice and the goal of the ICTY to achieve its mandate: ending impunity for the most serious breaches of international law.

On the other hand the ICTY faces a huge financial burden. From an initial, rather manageable budget during the first years, it had increased rapidly to almost 100 Million US$ per year at the turn of the millennium and amounted to 170 Million US$ per year in 2008 and 2009.[28] The costs

25 For further details about the relationship between the new established court of Bosnia and Herzegovina and the cantonal and district courts see A. Chehtman, 'Developing Bosnia and Herzegovina´s Capacity to Process War Crimes Cases – Critical Notes on a 'Success Story'', 9 *Journal of International Criminal Justice* (2011) 3, 547, 562-569.

26 Beyond these transferred cases there are further cases that were picked up by the Special War Crimes Chamber. Firstly, the cases which were investigated but not prosecuted by the Office of the Prosecutor of the ICTY. Secondly, new investigations commenced by the Bosnian Special Department for War Crimes and thirdly those cases which were not processed by local authorities to the point of indictment, see E. Kirs, 'Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina', 3 *Goettingen Journal of International Law* (2011) 1, 397, 403-404.

27 By the end of July 2010 the ICTY concluded proceedings against 126 of the 161 persons indicted, see seventeenth annual report of the ICTY President P. Robinson, UN Doc. A/65/205, S/2010/413, 30 July 2010, para. 2.

28 The budget is listed at the ICTY's Homepage, available at www.icty.org/sid/325 (last visited 31 December 2011); see also the fifteenth annual report of the ICTY President F. Pocar, UN Doc. A/63/210, S/2008/515, 4 August 2008, para. 111.

totaled to approx. 7.5 % of the overall UN budget.[29] This money was spent to achieve the ICTY´s goals. But seen from a practical point of view, one is tempted to question the rationale behind allocating such a huge amount of money from the UN budget, towards one single conflict, that too, one which ended in June 1999 in the Kosovo region, and in December 1995 in the rest of the disintegrated SFRJ. This might be a pragmatic argument, but nevertheless one with substantial practice-relevant weight.

Even if the tribunal would not be able to get an accused to stand trial at The Hague, there is at least some positive effect which already can be seen as a contribution to peace and justice through the back-door. All of the indicted persons lost their social position and political power after a while.[30] This is especially true in the case of the remaining fugitives in 2010, Ratko Mladic[31] and Goran Hadzic[32]. But even taking this positive effect into account, which resulted solely from the indictments, it would have been too bitter a pill for this institution to close without the trial of these two missing persons, bearing in mind that Mladic is one of the most prominent alleged war criminals of the whole conflict.

C. SC Resolution 1966 – A Successful Approach?

With its Resolution 1966 of 22 December 2010, the Security Council established the International Residual Mechanism for Criminal Tribunals (IRMCT) to take over and continue the ICTY's and ICTR's tasks after the

29 Art 32 ICTY-Statute in accordance with Article 17 UN-Charta; Find the UN budget for the years 2009/2010 in GA Res. 62/237 A-C, 01 February 2008. In the following two years the budget decreased for the first time and amounted to approx. 5,5% of the overall UN budget, see Robinson, *supra* note 27, para. 94 and GA Res. 64/244 A-C, 04 March 2010.

30 See also O. Triffterer, 'Irrelevance of Official Capacity – Article 27 Rome Statute Undermined by Obligations under International Law or by Agreement (Article 98)?', in I. Buffard *et al.* (eds), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner*, 2008, 571-602, 602: "While in the short run such endeavours are not successful because the absent suspect cannot be tried, the development since the establishment of the ICTY and the ICTR has shown that a tremendous increase of successful investigation has attributed certain crimes to certain persons who consequently lost their political power and social position".

31 *Prosecutor v. Karadzic und Mladic „Bosnien und Herzegowina"*, Initial Indictment, IT-95–5-I, 24 July 1995 and *„Srebrenica"*, Initial Indictment, IT-95-18-I, 14 November 1995.

32 *Prosecutor v. Goran Hadzic "Krajina,* Initial Indictment, IT-04-75-I, 4 June 2004.

tribunals are closed.[33] The Security Council requested both Tribunals to expeditiously complete their work by 31 December 2014. The commencement dates for the ICTR and ICTY are 1 July 2012 and 1 July 2013. Its purpose is to bring the tribunals to a smooth end and install a mechanism, which is able to maintain their legacy[34] and carry on the remaining responsibilities in the aftermath of their work.

I. Basic Features of the Residual Mechanism

The basic functions of a residual mechanism can easily be identified.[35] Certainly a decision-making body will be needed to decide on matters like discharge of convicted persons. Adjudication on retrials, if new facts come to light after final judgments, rulings on penal matters connected to prior trials, like prosecuting witnesses who gave false testimony and so on. In addition, the mechanism was not only needed for judicial, but also for administrative tasks, like maintaining the archives of the Tribunal to keep a thorough record that acknowledges the pain and suffering of all victims to protect against later revisionism and denial of atrocities. Furthermore the residual mechanism can keep up prolonged support for the outreach program in the former Yugoslavia. Capacity building of national jurisdictions will constitute the tribunal's general legacy.[36]

33 For an overview about the historical precedents see Guido Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?', 9 *Journal of International Criminal Justice* (2011) 4, 789, 791; For a detailed analysis about the steps that in the end led to Security Council Resolution 1966 see Thomas Wayde Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals – From Completion to Continuation', 9 *Journal of International Criminal Justice* (2011) 4, 797, 805.

34 For a detailed analysis about the legacy of the ICTY and all his numerous and multifaceted aspects see B. Swart *et al.* (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011) and R. H. Steinberg, *Assessing the Legacy of the ICTY* (2011).

35 For a critical analysis about the eight residual functions of the IRMCT see C. Denis, 'Critical Overview of the 'Residual Functions' of the Mechanism and its Date of Commencement (including Transitional Arrangements)', 9 *Journal of International Criminal Justice* (2011) 4, 819.

36 About the efforts the ICTY is undertaking to reach this goal see P. Robinson, *supra* note 27, para. 8: "The President continued to advance the capacity-building of national jurisdictions, as a priority of the Tribunal's legacy strategy. In February 2010, the Tribunal organized a donor-funded conference that gathered more than 350 participants from the international community and the countries of the former Yugoslavia to discuss aspects of the Tribunal's legacy, particularly in the region. On

II. Additional Features of the Residual Mechanism

The more difficult part was, whether or not and how the matter of the two remaining fugitives would be dealt with. Three major solutions were regarded as feasible. The first one was to shut down the ICTY and to install a residual mechanism, which serves the above mentioned goals, keeping up the necessary judicial functions, capacity building and legacy. That would have meant giving the two remaining fugitives the possibility of getting away without a proper criminal trial, if the Republic of Serbia is unwilling and unable to bring them to trial in accordance with the rule of law.[37] Not being able to try all major accused war criminals during the life of the ICTY, (which would be more than twenty years by the end of 2013) would remain as a lasting stain on the ICTY´s legacy. At the end of the day, one could say that the ICTY failed to achieve its most important goal of ending impunity for grave breaches of international humanitarian law at least in two cases.

The second major possibility would be exactly the opposite approach, namely to keep the ICTY open as long as the last remaining alleged war criminal is brought to trial and to install a residual mechanism after that. This would mean to keep the institutional framework of the Tribunal, including its staff, on hold, until such persons were captured and transferred to the ICTY. When this would happen remained uncertain during the year 2010, before SC Res. 1966 was adopted in December of that year. The possibility could not be ruled out that the ICTY would have to wait for an unpredictable amount of time for the capture of all criminals at large. Even the feasibility that the two accused would die without their death becoming public had to be taken into consideration. Keeping up the tribunal until the day of truth would become an extremely expensive solution. Nevertheless, it

1 May, the Tribunal and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe launched a joint 18-month project funded by the European Union aimed at assisting the national judiciaries of the region in securing their capacity to investigate, prosecute and adjudicate war crimes cases, including a project to translate trial transcripts and research tools into the languages of the region. The Tribunal is also preparing for the establishment of information centres under local ownership in the former Yugoslavia".

37 For a detailed analysis about the possibilities to try the remaining fugitives after the ICTY has closed its institutional doors see D. Riznik, 'Die voraussichtliche Schließung des ICTY im Jahre 2013: Ein Freibrief für flüchtige Kriegsverbrecher? – Die Bewältigungsstrategie und ihre Folgen', 47 *Archiv des Völkerrechts* (2009) 2, 220.

would be a solution which would give the ICTY the possibility to get its work done properly and to try all indicted major alleged war criminals before its closure.

The third option was a mixture between the mentioned two solutions and the one the Security Council has chosen in Resolution 1966.[38] It seemed that it was the declared intention of the Security Council members[39] that none of the two fugitives would get away without a proper trial, which Japan summarized at the meeting of the Security Council members on 22 December 2010 when Resolution 1966 was adopted as follows:

> "The establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal

[38] A similar conclusion was drawn by G. Acquaviva, 'Was a Residual Mechanism for International Criminal Tribunals Really Necessary?', 9 *Journal of International Criminal Justice* (2011) 4, 789, 793-795; see also G. Acquaviva, 'Best Before Date Shown': Residual Mechanisms at the ICTY', in Swart *et al.*, *supra* note 34, 507, 523.

[39] See the completion strategy report of the ICTY President P. Robinson, UN Doc. S/2011/316, 18 May 2011, paras 91, where he states: "It again must be reported that Ratko Mladic and Goran Hadzic continue to remain at large. It is noted, however, that there is a general agreement among members of the Security Council that there will be no impunity regardless of when these remaining fugitives are apprehended. All States, especially those of the former Yugoslavia, are asked to intensify their efforts and to deliver these fugitives to the Tribunal as a matter of urgency"; see also SC Res. 1966, 22 December 2010 where it states: "*Reaffirming* its determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice"; see also the statements by two representatives of the Security Council members at the meeting on 22 December 2010 (UN Doc. S/PV.6463); United Kingdom: "The United Kingdom welcomes the adoption of this resolution, which makes arrangements for the continuation of essential legal functions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) following the completion of the Tribunals' trials and appeals, including by making provision for the trials of the remaining fugitives, who must be brought to justice"; Austria: "The establishment of the residual mechanism sends a strong Security Council message against impunity. The high-level fugitives indicted by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda cannot escape justice"; see also the Statement by the President of the Security Council, UN Doc. S/PRST/2008/47, from 19 December 2008 where he already declares: "The Security Council acknowledges the need to establish an ad hoc mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals".

> for Rwanda was the manifestation of the full determination of the international community not to tolerate impunity"[40].

On the other hand, the intention to bring the tribunal to an end seemed to be as equally important as the former one. A solution had to be found, which would cut the costs by reducing the institutional framework including staff members and at the same time keep up the ICTY functionality as long as needed to try the remaining fugitives after their capture. The established IRMCT serves both goals. The ICTY as it is known will definitely come to an end within conceivable time through a Security Council Resolution. The installed Residual Mechanism will take over and keep up the main functions needed after the Tribunals' termination. The ultimate residual functions, legacy building through administrative tasks and the continuation of necessary minor judicial tasks are the core features in the proper sense of a residual mechanism.

The additional function of being able to hold entire trial and appeal proceedings against remaining fugitives had to be integrated into this mechanism. Article 1 Nr. 1 of the IRMCT-Statute postulates the continuation of the material, territorial, temporal and personal jurisdiction as set out in the respective Articles of the ICTY and the ICTR by the Residual Mechanism. Article 1 No. 2 explicitly points out that the Mechanism shall have the power to prosecute the major alleged war criminals indicted by the ICTY or the ICTR.

Therefore, 25 judges will be appointed, to have a roster of experienced jurists in order to hold up the necessary functions of a judicial institution.[41] Their presence at the IRMCT seats is not required,[42] not even for minor judicial decisions and the pool of highly qualified professionals is large enough to fill up a few trial and appeals chambers,[43] if necessary. A similar approach regarding competent staff for the Office of the Prosecutor and the Registry was implemented.[44]

The legal foundation for the prosecution of the remaining fugitives as demonstrated is set up by the Residual Mechanism. Moreover, the practical

40 Statement by the representative of Japan at the Security Council meeting on 22 December 2010 (UN Doc. S/PV.6463).

41 Article 8 No. 1 of the Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT- Statute), SC Res. 1966, 22 December 2010, Annex 1.

42 Art 8 No. 3 IRMCT-Statute.

43 Art 12 IRMCT-Statute.

44 Arts 14 No. 5 and 15 No. 4 IRMCT-Statute.

aspects have been accounted by a system, which allows the tribunal in praxis to convert from a residual mechanism administrating its basic features to a well-equipped international criminal tribunal being able to deliver judgments on major war criminals. And last, but not least, the Residual Mechanism would be able to cut the costs immensely compared to the expenses spent on the ICTY. Therefore, judges appointed to the roster will not receive any remuneration until they do any service for the Mechanism.[45] The same holds true for the rest of the staff being part of the experts roster, even, if the Statute does not mention this explicitly.

III. Transitional Arrangements

The commenced date of the IRMCT of the ICTR branch is 01 July 2012, the one of the ICTY branch is 01 July 2013.[46] By that time both the ICTR and the ICTY will not be finished with their work.[47] Because the three judicial bodies ICTY, the ICTR and the Residual Mechanism coincide with each other in addition a few transitional provisions had to be set up.

In the special scenario regarding the remaining fugitives the areas of responsibility between the ICTY, ICTR and the IRMCT were decided in Article 1 of the Transitional Arrangements (TA).[48] Article 1 No. 2 of the TA prescribes that an arrest of an indicted fugitive 12 months prior to the commenced date of the IRMCT of the respective branch should remain within the competence of the respective tribunal. The commenced date of the ICTY branch of the IRMCT is 01 July 2013. Consequently the fugitives Ratko Mladic on the run since 16 years and Goran Hadzic on the run since 7 years arrested in May and June 2011 will be tried by the ICTY. Hence, there will be no need for the IRMCT to compose a trial chamber for the two former fugitives. Presumably the ICTY will not finish its work and close down until 2016, if both captured do not plead guilty and the length of the trial is comparable with the one against Radovan Karadzic.[49]

45 Art 8 No. 3 IRMCT-Statute.

46 SC Res. 1966, 22 December 2010, No. 1.

47 See the estimated completion dates from both ad hoc in Tribunals in the Completion Strategy Report of the ICTY President P. Robinson, UN Doc. S/2011/316, 18 May 2011, enclosure VII, VIII & IX.

48 SC Res. 1966, 22 December 2010, Annex 2.

49 This assumption is based on an estimation considering that both trials will last as long as the trial dates of Radovan Karadzic estimated by the ICTY accounting the fact that they will start approx. two years later, see P. Robinson *supra* note 47, 11, para. 46 & enclosure VII. Ironically enough the ICTY, in its annual report from 2000, estimated

The situation is different in the case of appeals. Pursuant to Article 2 No. 2 of the TA all appellate proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the IRMCT, which is 1 July 2013, will fall within the competence of the Mechanism. Consequently, expected appeals from the last two captured fugitives as well as an appeal by Radovan Karadzic, which is expected around August 2014[50] will have to be tried before the IRMCT. The expected appeals seem likely to become the first on-road test for the IRMCT of the ICTY´s branch to transform from a genuine residual mechanism to a full-fledged criminal tribunal, able to undertake appellate proceedings.

D. Conclusion

Even if the necessary tools in the IRMCT for trying fugitive suspects proved to be superfluous for the ICTY, from today´s perspective, the opposite conclusion has to be drawn for the ICTR, which still has another nine accused at large.[51] And once again one should keep in mind that the Security Council had to decide on the IRMCT during a period, when the two accused, Ratko Mladic and Goran Hadzic, were still at large. It was, therefore, an appropriate decision at the time it was reached and gave a strong signal, not only to countries where the fugitives were hiding, but also to the entire world community.[52] The symbolic impact of the Security Council's conclusion on the ending of impunity must by no means be underestimated.

But one should not forget that one of the primary goals of the Completion Strategy is cost reduction by reducing the tribunal's life span. The downgrade of staff and premises is an auspicious approach. The constant reduction of ICTY staff has started to downsize the costs of the

its duration until 2016 excluding appeals but only if no changes will be implemented regarding penal policy, rules of procedure, format and organization of the court and other contributing factors, see seventh annual report of the ICTY President C. Jorda, UN Doc. A/55/273, S/2000/777, 07 August 2000, para. 336.

50 See Robinson, *supra* note 47, enclosure VIII.

51 Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR, to the United Nations Security Council on 6 June 2011, UN Doc. S/PV.6545), 10, 12; Sixteenth annual report of the ICTR President K. R. Khan, UN Doc. A/66/209, S/2011/472, 29 July 2011, 12, para. 46.

52 The Security Council´s decision reflects the suggestion the author already made in June 2009, see Riznik, *supra* note 37, 220.

tribunal since its all-time high in the years 2008-2009[53] and will probably continue to drop.[54] In the end, time will show if cost reduction measures were duly implemented into the Mechanism and, compared to the budget of the reduced ICTY, the overall budget will decrease once the IRMCT takes over.

The will to finally accomplish trials for good on the international level after 20 years can be identified in Article 1 No. 5 of the IRMCT-Statute.[55] There, it states that the Mechanism lacks the power to issue new indictments except the ones against already indicted persons[56] and those who interfered with the administration of justice or gave false testimony.[57] It is a necessary provision to make sure that the chapter of the ad hoc criminal tribunals will be definitely closed one day.

The framework for a smooth transition from both ad hoc Tribunals to the Residual Mechanism was established by Security Council Resolution 1966. It will be interesting to see how the Mechanism will develop and perform; how parts of the staff will shift from the tribunals to the IRMCT;[58] and, in the long run, how the Mechanism will minimize its workload and functions[59] until its final transformation to an administrative body securing the archives of the ICTY and ICTR.

53 See already the difference of 40 Million US$ of the biennium budget 2010-2011 compared to the previous biennium at the ICTY´s budget listing at the Homepage of the Tribunal under the section "about the ICTY/the cost of justice", available at www.icty.org/sid/325 (last visited 17 October 2011).

54 By the end of September the ICTY had abolished approx. 170 posts, see Robinson, *supra* note 47, 22, para. 96.

55 See also Art 16 No. 1 IRMCT-Statute.

56 Art 1 No. 2 and 3 IRMCT-Statute.

57 Art 1 No. 4 IRMCT-Statute.

58 Art 7 of the Transitional Arrangements supports a smooth exchange of staff between the two ad hoc Tribunals and the IRMCT.

59 See the Statement by the President of the Security Council, UN Doc. S/PRST/2008/47, from 19 December 2008 about the future ad hoc mechanism: "In view of the substantially reduced nature of these residual functions, this mechanism should be a small, temporary, and efficient structure. Its functions and size will diminish over time".