

2006

Strategy or Process - Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Laura Bingham

Recommended Citation

Laura Bingham, *Strategy or Process - Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 24 BERKELEY J. INT'L LAW. 687 (2006).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol24/iss2/12>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda

By
Laura Bingham

Nothing is final until it's right.
- Abraham Lincoln

I. INTRODUCTION

The other articles in this volume explore various important aspects of international courts and tribunals in operation, as well as the decision to invoke international judicial process by creating a court or tribunal.¹ However, in an age of unprecedented activity within and among international courts and tribunals,² the twin *Ad Hoc* Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR)³ must confront the prospect of permanent closure.⁴ To this

1. For illuminating discussions on the creation of international courts and tribunal, see Mani Sheik, *The Establishment of Special Criminal Courts* (manuscript on file with author); Mike Burstein, *The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights*, 24 BERKELEY J. INT'L L. 423 (2006); Rebecca Wright, *African Court of Human Rights*, 24 BERKELEY J. INT'L L. 463 (2006); and Charles Seavey, *The Lack of an International Bankruptcy Court*, 24 BERKELEY J. INT'L L. 499 (2006). For analyses of international criminal courts in operation, see Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today*, 24 BERKELEY J. INT'L L. 554 (2006); Jennifer Landside, *International Jurisdiction Over the Rwandan Conflict: the Costs and Benefits of Primacy* (manuscript on file with author); and Anne-Sophie Massa, *ICTY's Response to NATO's Intervention in Kosovo*, 24 BERKELEY J. INT'L L. 610 (2006).

2. See Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 437 (2003). Martinez notes that a "flurry of judicialization" began in the 1970s and 1980s, accelerated in the 1990s, but has somewhat plateaued in the new millennium. *Id.* at 437. However, she emphasizes that "the institutions created in that burst of premillennial enthusiasm now have a life of their own; how effective they will be is still open to question, but their existence (at least for now) is not." *Id.*

3. Hereinafter they are referred to individually as the "ICTY" and the "ICTR" and collectively as the "International Criminal Tribunals" or the "Tribunals."

4. The current projections of closing dates for the ICTR and ICTY, respectively, are 2008 and 2009 for completion of all trials in the first instance. The role of deadlines in the Completion Strategies is discussed at length in Part IV.

end, an ongoing dialogue between the Security Council and high-ranking administrative officials within the Tribunals has resulted in the articulation of official Completion Strategies to be implemented by the Tribunals.⁵ While Part IV further outlines the substance of the Completion Strategies, it is important to note at the outset their composite and fluid form. In reality, the Completion Strategies are a combination of Security Council Resolutions, Annual Report projections, internal policy initiatives, formal amendments to the Rule of Procedure and Evidence, and informal dialogue between countless political actors associated with each of these bodies.⁶ The actors involved have consistently referred to the means of closure as a strategy, and discourse on the subject understandably turns on logistics, efficiency and deadlines.

This article addresses the question of how the Completion Strategies, as one particular means of closure, might impact the remaining work and eventual legacy of the Tribunals, beyond the scope of their administrative role as fora for trying war criminals. It proceeds from the premise that the creation of the Tribunals triggered an organic judicial process, and that closure is logically opposed to that process. This premise borrows heavily from two theoretical schools of thought. First, the concept of "norm internalization," espoused by Harold Koh as an integral part of transnational legal process theory, posits an ongoing "complex process . . . whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes."⁷ Second, while Koh's transnational legal process theory is largely an effort to explain compliance by states, Alec Stone Sweet and Martin Shapiro use the concept of internalization as a means of explaining a wider range of behavior by individual actors in the expanding process of "judicialization." In particular, Stone Sweet argues that these processes, once begun, are "irreversible."⁸ The

5. For the most comprehensive enumeration of the Completion Strategies for closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda (hereinafter Completion Strategies), see President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *Assessments and Report of Judge Theodor Meron provided to the President of the Security Council Pursuant to Paragraph 6 of Security Council Resolution 1534 (2004)*, Annex I to U.N. Doc. S/2005/343 (May 25, 2005) [hereinafter Meron]; and *Completion Strategy of the International Criminal Tribunal for Rwanda* (Nov. 2005 version), <http://65.18.216.88/ENGLISH/completionstrat/301105.pdf> (last visited Dec. 22, 2005).

6. The literature summarizing the development and implementation of the Completion Strategies is still limited, and most commentators focus on the immediate concerns of avoiding impunity and ensuring that the Tribunals continue to meet international due process standards. See, e.g., Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT'L L. 158 (2005); Daryl A. Mundis, *Completing the Mandates of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?* 28 FORDHAM INT'L L. J. 591 (2005) [hereinafter Mundis, *Lessons from Nuremberg*]; Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142 (2005) [hereinafter Mundis, *Judicial Effects*]; Dominic Raab, *Evaluating the ICTY and Its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82 (2005).

7. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996) [hereinafter Koh, *Transnational Legal Process*].

8. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 1

prospect of closure is inherently inimical to the idea that judicialization is ever-expanding and irreversible.

At the time of the Tribunals' creation, the Security Council and other actors in the international community extolled and seized on the potential symbolic force that an international judicial process could exert in the face of unimaginable displays of inhumanity. However, practical concerns and the desire to see an end to disputes, have led to the imposition of target dates for completion and procedures through which the Tribunals might meet these deadlines. The Completion Strategies, as a product of political dialogue between the Tribunal leadership and the Security Council, are external to the judicial process carried out by the Tribunals. Perhaps because they have taken shape through external political channels, the Completion Strategies tend to disregard both the dynamic nature of legal process, and the eventual legacy of the Tribunals, when they are no longer seats of judicial reckoning and only exist in archives and collective memory. This article argues that the Completion Strategies formulated for the ICTY and ICTR suffer from a potentially damaging omission: they reflect a lack of value for the host of implicit social and political functions not enumerated in the Statutes that created the institutions over a decade ago. By setting these functions aside in favor of a strategic model that invites equating closure with docket clearing, the various authors of the Completion Strategies risk wagering the legacy of the Tribunals on the ability to meet deadlines.

Part II begins by surveying the creation of the Tribunals, in order to understand the purposes and original functions conceived of at the moment they came into existence. This important exercise, to the extent it may have taken place, was not adequately performed in the public eye as the Completion Strategies developed in press releases, Security Council resolutions and Annual Reports. Through an exploration of the moment that generated the Tribunals, Part II stresses the importance of their function as a powerful symbol in the international sphere. Part III discusses how the functions of the Tribunals—judicial, political and social—have changed over time. This Part, in particular, notes the “dissipation” of the symbolic function in Security Council rhetoric,⁹ while other actors have continued to seize upon the Tribunals as symbolic of various trends and phenomena in the international sphere. Part IV takes up the Completion Strategies proper, setting out the development, methods and problematic aspects at play as the Tribunals wrestle with implementation. Part V undertakes a theoretical analysis of the role that the Completion Strategies play in light of the functions identified in Parts II and III. The article concludes that, because the Completion Strategies tend to neglect, rather than vindicate the non-judicial functions embraced by the Security Council at the outset of the process, the Tribunals face the risk of losing legitimacy and positive symbolic value in the tran-

(2000); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE POLITICAL ANALYSIS* 17-28; 36-7 (1981).

9. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401, 411 (2006) [hereinafter Caron, *International Courts and Tribunals*].

sition from reality to legacy.

II.

ICTY AND ICTR CREATION: INVOKING INTERNATIONAL PROCESS

A. ICTY: Symbolic Function at Creation and the Translation into Reality

The catalogue of atrocities visited upon the civilian populations of Rwanda and the republics of the Former Yugoslavia is too long and appalling to render adequately here the horror that those responsible for the conflicts brought into the world. However, the gravity of the outrages upon humanity committed in these regions did not inevitably dictate the creation of international war crimes tribunals, particularly after decades of the Cold War had all but erased the legacy of Nuremberg from political and cultural memory. It is proper, therefore, when considering the impact of closing the Tribunals, to endeavor to understand the purposes for which they were created, and why the international community chose to respond to the unimaginable havoc of war and genocide with international judicial institutions.

During the deliberations leading to the establishment of the ICTY, the permanent members of the Security Council voiced several justifications for bringing about such an institution.¹⁰ In their statements, the representatives focused considerably on the ability of a tribunal to send messages to victims, to future would-be perpetrators, and to the “international community.”¹¹ As Michael P. Scharf writes, “[t]he punishment of crimes committed in the Balkans would send the message, both to potential aggressors and vulnerable minorities, that the international community will not allow atrocities to be committed with impunity.” Scharf quotes Richard Goldstone, the first Prosecutor for the ICTY:

[I]f people in leadership positions know there's an international court out there, that there's an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren't going to think twice as to the consequences. Until now, they haven't had to. There's been no enforcement mechanism at all.¹²

Thus one aim of the Tribunals at the time of creation involved not the reality but the *image* of a tribunal—the semaphoric weight of the institution in the abstract. Thomas Franck cites “symbolic validation” as a key indicator of the legitimacy of rules, because symbolic “cues” signify the link between an abstract rule and “the overall system of social order.”¹³ While Franck identifies “ritual and pedi-

10. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Resolution 808 Report].

11. 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 298-310 (1995).

12. Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons From the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 932 (2000) (quoting Richard Goldstone).

13. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 34 (1995).

gree”¹⁴ as examples of symbolic validation, the Tribunals themselves, at the time of creation, validated international rules proscribing genocide with a seat of judicial process. In this way, because the rules preceded the Tribunals, creating fora for judicial reckoning had the important effect of stamping international rules with authority.¹⁵ It is this symbolic function of the Tribunals, so apparent in the rhetoric of their creation, that is most threatened by the prospect of their permanent closure. In other words, not only will the Tribunals no longer be “out there,” they also face the difficult task of closing without unraveling or distorting their role as a “symbolic validation”¹⁶ of the international community’s commitment to bringing war criminals to justice.

Translated into the legal language of UN Security Council Resolutions, the purpose of the Tribunals became a determination “to put an end to . . . [the threat to peace and security posed by the atrocities] and to take effective measures to bring to justice the persons who are responsible for them.”¹⁷ In his Report advocating the creation of the ICTY, the Secretary-General presciently articulated the paradoxes that have complicated the process of establishing, operating and closing an “independent” tribunal under the auspices of the United Nations:

[The Tribunal] would, of course, have to perform its functions independently of political considerations; it would not be subject to the authority or control of the Security Council with regard to the performance of its judicial functions. As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security . . . and Security Council decisions related thereto.¹⁸

Thus, under its Chapter VII authority to maintain international peace and security,¹⁹ the Security Council proposed an independent, terminable tribunal—and therein lies the paradox. For written into the constitutive process that brought about the ICTY (and by extension the ICTR, see below) was the caveat that work would end when the Security Council decides. It is difficult to stake a claim to judicial or prosecutorial independence²⁰ without acknowledging this

14. *Id.*

15. *Id.* at 35.

16. *Id.* at 35-36.

17. S.C. Res. 827, Preambular ¶ 5, U.N. Doc. S/Res/827 (May 25, 1993) (establishing the ICTY under Chapter VII powers).

18. Resolution 808 Report, *supra* note 10, ¶ 28.

19. S.C. Res. 25704, Annex, U.N. Doc. S/RES/25704/Annex (May 3, 1993) (Statute of the Tribunal).

20. For a detailed account of the Security Council’s decision to split the Office of the Prosecutor for the Tribunals, ending Prosecutor Carla del Ponte’s mandate in Arusha, see Eric Husketh, *Pole Pole: Hastening Justice at UNICTR*, 3 NW. U. J. INT’L HUM. RTS. 8 ¶ 66 (2005). Husketh explores the “expediency” of the Security Council’s decision, given the fact that Del Ponte intended to investigate war crimes allegations against members of the RPF, the predominately Tutsi group responsible for overthrowing the genocidal Interim Government in 1994. Many former RPF members hold positions in the current Rwandan administration, which strenuously resisted the investigation and prosecution of RPF acts committed within the ICTR’s temporal jurisdiction. Del Ponte’s persistence sparked tension between the ICTR and the Rwandan government, and the Security Council decision has been criticized as a thinly veiled attempt to derail further investigation into RPF activities during the genocide. *Id.* ¶¶ 72, 80.

reality.²¹

The Secretary-General noted two possible methods under international law for bringing about the Tribunal. Because of the “urgency”²² of the situation, the Secretary-General advised the Security Council to bypass a more traditional treaty process and instead create the Tribunal as an enforcement measure under Chapter VII.²³ To sum up, “[t]he treaty process would probably have taken years, if not decades, and might have been derailed through the opposition of a number of governments On the other hand, Article 25 of the Charter binds all UN Members to accept and carry out the decisions of the Security Council.”²⁴ Again, in the interest of “effective and expeditious implementation,” the Tribunal’s “life span” was bound to the UN organs in a novel way. Under the Statute, annexed to Security Council Resolution 827 establishing the Tribunal,²⁵ the Secretary-General himself appoints the Prosecutor,²⁶ the General Assembly appoints judges nominated by the Secretary-General,²⁷ and, perhaps the most direct form of political control, the General Assembly approves the budget of the Tribunal.²⁸

The validity of establishing the Tribunal as an enforcement measure under Chapter VII was judicially challenged in the first case brought to trial in The Hague.²⁹ The defense in *Prosecutor v. Tadic* argued, *inter alia*, that the Tribunal was not “established by law” in accordance with Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) because, essentially, the Security Council is an executive and not a legislative body.³⁰ The Appeals

21. “While the Yugoslavia Tribunal is designed to be independent from the Security Council, one cannot ignore the fact that the statute provides that the Tribunal’s prosecutor is selected by the Security Council and its judges are selected by the General Assembly from a short list proposed by the Security Council.” MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIBUNAL SINCE NUREMBERG 72* (1997) [hereinafter *BALKAN JUSTICE*].

22. See YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 151 (1999).

23. S.C. Res. 25704, *supra* note 19, ¶ 22.

24. BEIGBEDER, *supra* note 22.

25. S.C. Res. 827, *supra* note 17, Annex.

26. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 72.

27. See *id.*

28. See *id.* at 79. Article 32 of the Tribunal’s Statute provides: “The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.” S.C. Res. 827, *supra* note 17, Annex; see also BEIGBEDER, *supra* note 22, at 151.

29. *Prosecutor v. Tadic*, Case No. IT-94-I-T, Trial Chamber Judgment, (May 7, 1997), reprinted in I.H.R.R., Vol. 4, No. 3 (1997); *Prosecutor v. Tadic*, Case No. IT-94-I-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), 35 I.L.M. 32 (1996) [hereinafter *Tadic*]. “Tadic was arrested in Germany in February 1994 on a genocide charge, after witnesses asserted that he had killed and maimed Muslim prisoners while serving as a guard at concentration camps run by the Bosnian Serbs and was later extradited to The Hague.” BEIGBEDER, *supra* note 22, at 156. Tadic was eventually convicted and sentenced to 20 years of imprisonment. *Id.*

30. *Tadic*, *supra* note 29, at 22, 31-32. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 105. Article 14(1) states: “[i]n the determination of any criminal charge against him or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and

Chamber rejected the defense argument in part by observing that “since there was no legislature, in the technical sense of the term, in the United Nations system, the argument was inapplicable to a Security Council-created judicial institution.”³¹

While the *Tadic* decision on jurisdiction is now firmly entrenched in the legal framework developed through the Tribunals, the strength of the defense argument concerning political entanglements written into the Statutes should not be forgotten in light of the evolution of the Completion Strategies. Indeed, in the transition from image to reality, the Security Council left the Tribunals vulnerable to allegations of illegitimacy³² such as that formulated in the *Tadic* argument. The logic of the Appeals Chamber’s decision on the proper establishment of an international tribunal “by law” was far from airtight. The Chamber basically conceded that the Tribunal could not be “established by law” according to case law treating national systems,³³ but found the Chapter VII route acceptable in light of the procedural fairness of the process *ex post*.³⁴ With the *Tadic* challenge as the “root”³⁵ of illegitimacy arguments, the degree to which these allegations resonate is amplified by further “mere executive orders”³⁶ that interfere with the judicial work of the Tribunals.

The Completion Strategies, to the extent they are perceived as executive orders emanating from the Security Council, pose just such a challenge to the legitimacy of the Tribunals. As David Caron writes, allegations of illegitimacy “appear to manifest a sense of betrayal of what is believed to be the promise and spirit of the organization.”³⁷ Caron points to the “space between the promises of the preamble” and the “realities of the compromises in the text that follows, a space in which there is discretion regarding the use of authority.”³⁸ In the case of the Tribunals, the symbolic function touted at creation outstrips even the

Political Rights, Dec. 16, 1966, art. 14(1), 999 U.N.T.S. 171.

31. SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 105.

32. For a valuable discussion of the role of legitimacy and allegations of illegitimacy in the international legal community, see David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 552-62 (1993) [hereinafter *Legitimacy*]. See also THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) (significantly contributing to thought on the subject of legitimacy). On “judicial legitimacy” see, for example, Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1357, 1390-409 (1991).

33. The Chamber held that “it is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be ‘established by law’ finds no application in an international law setting.” *Tadic*, *supra* note 29, ¶ 43.

34. “The important consideration in determining whether a tribunal has been ‘established by law’ is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and that it observes the requirements of procedural fairness.” *Id.* ¶ 45.

35. Caron, *Legitimacy*, *supra* note 32, at 559.

36. *Tadic*, *supra* note 29, ¶ 43.

37. Caron, *Legitimacy*, *supra* note 32, at 559.

38. *Id.* at 560.

weighty promises of the preamble, further widening the contested space between promise and reality.

B. ICTR: The Symbol as Precedent

Regarding the creation of the ICTR, one commentator surmises that, "having recently created an international criminal tribunal for humanitarian law violators in the European States of the former Yugoslavia, [the Security Council] decided it could do no less for African Rwanda."³⁹ Though this brief observation glosses over significant differences in the applicable substantive law owing to the internal nature of the conflict in Rwanda,⁴⁰ the statement also illustrates something of the political tenor surrounding the creation of the ICTR.⁴¹ Because the ICTY existed as a very recent precedent, the ICTR as a concept was easy to appropriate and, in fact, Rwanda itself requested the "international community" to "[set] up as soon as possible an international tribunal to try the criminals."⁴² The ICTR Statute and Rules of Procedure and Evidence substantially mirror the ICTY template.⁴³ In the words of Alison des Forges, who has served as an expert witness on the genocide in Rwanda in many of the trials before the Tribunal, "[t]he fact that there was already in existence the ICTY made a very easy route for [the Security Council], and they adopted exactly the same procedures as the ICTY."⁴⁴ Indeed, Des Forges further notes:

With the existence of the ICTY as precedent, it would have been almost impossible for them [the Security Council] not to have created a tribunal because the crimes in Rwanda were so much more blatant and grievous and large in scale that

39. Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421, 421 (1994).

40. Both Tribunals have contributed immensely to the extension of humanitarian law into the realm of internal conflicts. The *Tadić* Appeals Chamber Decision on Defense Motion for Interlocutory Appeal on Jurisdiction demonstrates the progressive development in this area, where the Tribunal found that "the distinction between interstate and civil wars is losing its value as far as human beings are concerned." SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 107 (quoting Geoffrey R. Watson).

41. See, e.g., U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/PV.3453 (Nov. 8, 1994), *reprinted in* 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 298-310 (1998). For an account by the Commander of the U.N. Mission to Rwanda, presenting the Security Council's reluctance to provide needed assistance during the genocide, see LT. GEN. ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003); Alison des Forges, Remarks at the Berkeley Human Rights Center Conference Justice in the Balance: Military Commissions and International Criminal Tribunals (Mar. 16, 2002), http://www.hrcberkeley.org/download/justice_alisondesforges.pdf (last visited Dec. 21, 2005).

42. Letter from the Permanent Representative of Rwanda to the United Nations to the President of the Security Council (September 28, 1994), U.N. Doc. S/1994/1115 (Sept. 29, 1994), *reprinted in* 2 MORRIS & SCHARF, *supra* note 41, at 359, 361.

43. The ICTR was formally created by Resolution 955, S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994), with the Statute attached at the Annex. Because the genocide was the result of an internal conflict, the Tribunal is limited in the substantive criminal law available for the prosecution of genocidaires and other international war criminals who would otherwise fall within its within its personal, temporal and territorial jurisdiction. The symmetry between the two Tribunals is also reflected in the Completion Strategies, discussed further in Part IV.

44. Des Forges, *supra* note 41, at 6-7.

it certainly seemed to them that they had no choice if they were not to risk accusations of racism.⁴⁵

A prevalent motivation for establishing the ICTR, according to the Russian Representative, was the perception that the Tribunal would “give yet another clear and unequivocal signal to the effect that the international community will not tolerate serious violations of norms of international humanitarian law and disregard for the rights of the individual.”⁴⁶ Thus, in the same vein as the discourse that led to the creation of a tribunal to address the atrocities in the Former Yugoslavia, the “international community” (filtered through the prism of the Security Council) envisioned a tribunal for Rwanda as a powerful expressive mechanism to invoke in response to the inhumanity of the situation. The functions envisioned for the Tribunal were not limited to prosecuting war criminals, but also included the symbolic, non-judicial purpose of “promot[ing] the process of national reconciliation, the return of refugees, and the restoration and maintenance of peace in Rwanda.”⁴⁷ The delegate from Argentina also described the establishment of the Tribunal as a symbol for the world and “a clear message that the international community is not prepared to leave unpunished the grave crimes committed in Rwanda.”⁴⁸ Finally, the Tribunal would “signify a breakthrough in creating mechanisms that would impose international criminal law.”⁴⁹

However, unlike the vote to establish the ICTY, the Security Council was not unanimous in upholding the draft resolution creating the ICTR. In fact, the only “no” vote came from the Rwandan delegate. Among the litany of shortcomings identified by Delegate Bakuramutsa was the allegation that “so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of the genocide in particular.”⁵⁰ In his examination of “collective guilt,” George P. Fletcher suggests that turning to the law of individual responsibility “repress[es] the dimension of collective action.”⁵¹ A frequent criticism of the ICTR is the fact that it was created as a token gesture to assuage the guilty conscience of an international community that knowingly failed to intervene and prevent the genocide in Rwanda.⁵² Again, upon closing the ICTR,

45. *Id.*; see also 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* xv-xvi (1998) (quoting Nelson Graves’s succinct accusation of discrimination on the part of the Security Council: “[I]s it because we’re Africans that a court has not been set up?”).

46. 2 MORRIS & SCHARF, *supra* note 42, at 299.

47. *Id.*

48. *Id.* at 303.

49. *Id.* at 302 (delegate from the Czech Republic).

50. *Id.* at 308.

51. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1522 (2002). For a more sustained discussion of the relationship between collective guilt and war crimes tribunals, see Mani Sheik, *supra* note 1.

52. “When the genocide finished, actually some weeks before it finished, there was a considerable amount of guilt on the part of various international actors, which led them to begin championing the cause of justice.” Des Forges, *supra* note 41; see also DALLAIRE, *supra* note 41.

the international community runs the risk of amplifying the resonance of such allegations.

The ICTR complement to the *Tadic* decision on jurisdiction came in 1997, when the former burgomaster of Ngoma commune Joseph Kanyabashi challenged the jurisdiction of the ICTR to consider charges against him.⁵³ The defense argued that the ICTR was “just another appendage of an international organ of policing and coercion, devoid of independence.”⁵⁴ According to Kanyabashi, due to the Tribunal’s political rather than judicial character, it did not retain the power to render a legal judgment.⁵⁵ The Trial Chamber rejected Kanyabashi’s challenge, pointing to the procedural protections in place to ensure fair, legal process.⁵⁶ However, Kanyabashi’s assertions have returned to haunt the judges of the Tribunals as political pressure to successfully implement the Completion Strategies has seeped into the daily workings of the institutions. In the particular case of the ICTR, which was viewed not only as an appendage of the Security Council, but also as an annex to the ICTY,⁵⁷ Security Council involvement in implementation of the Closing Strategies could lend credence to assertions of dependency and illegitimacy.⁵⁸

While the Trial Chamber in *Kanyabashi* and the Appeals Chamber in *Tadic* argued that the structural protections in place fostered judicial independence in the Tribunals, it can hardly be denied that a unique political dimension to the creation, operation and closure of these institutions exists. Both the political circumstances that led to their creation and the political nature of the United Nations system itself lend the Tribunals a peculiar quality of cabined dependency.⁵⁹ As noted above, the General Assembly is responsible for the budgets of both Tribunals. According to Cesare P. R. Romano, “[t]he single most persistent criticism that has been leveled against the ‘twin criminal tribunals’ throughout their life is that they are far too expensive.”⁶⁰ Romano estimates that the total cost of the Tribunals upon closure could exceed \$2.5 billion.⁶¹ Because the Tribunals exist at the will of the donor community, structural protections can only partially eliminate political pressures from influencing the judicial work of the Tribunals.

Furthermore, because of the lack of structural protections softening the di-

53. Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on Jurisdiction, ([Month Day], 1997).

54. *Id.* ¶ 37.

55. *Id.* ¶¶ 37-50.

56. See Vircinia [sic] Morris, Prosecutor v. Kanyabashi, *Decision on Jurisdiction*, 92 AM. J. INT’L L. 66, 69 (1998) (summarizing the response by the Trial Chamber).

57. 2 MORRIS & SCHARF, *supra* note 10, at 298-310; see also *Tadic*, *supra* note 29, ¶ 42.

58. Caron, *Legitimacy*, *supra* note 32, at 556-62.

59. See, e.g., Des Forges, *supra* note 41, at 7 (asking Goldstone what door he would knock on at the UN to seek provisions for “the simplest logistical materials,” like pencils and paper. His response: “That’s the problem. There’s no door.”).

60. Cesare P. R. Romano, *The Price of International Justice*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 281, 295 (2005).

61. *Id.* at 296.

rect link between the General Assembly and the Tribunals on budgetary matters, the Tribunals are vulnerable to the prevailing will of the international community in arguably the most political way: funding. As the deadlines established in the Completion Strategies approach (see Part IV, *infra*), the financial vulnerability of the Tribunals could lead to an unfettered political solution, putting an inappropriate, administrative end to a complex judicial process.⁶²

As noted above, the more political the effort to close the Tribunals becomes, the stronger the *Tadic* and *Kanyabashi* argument resonates. This is better understood through Martin Shapiro's argument, which posits that courts of all kinds rest on an "essential social logic" that is, in turn, based on consent by parties to have a third party decide the outcome of a dispute.⁶³ Shapiro identifies a "permanent crisis" faced by contemporary courts because they have become dislodged from the clearly established consent in the original "social logic" of dispute resolution.⁶⁴ By challenging the legality of the Tribunals as judicial bodies, *Tadic* and *Kanyabashi* cut directly to the social fabric of the ICTY: they rejected the consent of the entire international community because of the political, rather than legislative, function of the United Nations. Although they upheld the legality of the Tribunals, the *Tadic* and *Kanyabashi* decisions on jurisdiction do not place the legitimacy of the Tribunals beyond question, particularly if the United Nations system imposes a premature end to work. Such a move would vindicate to some extent the charge that the Tribunals were created merely to serve as "appendages" of a political behemoth.

III.

CHANGING FUNCTION: THE PROCESS OF A WAR CRIMES TRIBUNAL

As Professor David Caron emphasizes in his Introduction to this volume, the sparse literature advancing general theories of international courts and tribunals often overlooks the fact that institutions, even judicial institutions, may change dramatically over time.⁶⁵ Caron also notes that the political functions of international courts and tribunals will often go unstated in the relevant constitutive instruments.⁶⁶

Part II identified the "non-related function" of imagery or symbolic valida-

62. This possibility is not without precedent, even in the context of the Tribunals themselves. See SCHARF, *BALKAN JUSTICE*, *supra* note 21, at 48 (discussing the premature termination of the investigative Commission established for the former Yugoslavia under Security Council Resolution 780). According to Scharf, the unexpected termination forced "an early end to Commissioner Cleiren's rape investigation, with two hundred victims from Croatia and Bosnia still scheduled to be interviewed. It also prevented the commission from finishing the exhumation of the Vukovar mass gravesite which had been suspended during the cold Croatian winter." *Id.* at 48. Scharf goes on to cite Chairman Bassiouni's response questioning the reason for premature termination: "[P]erhaps it is the nature of the U.N. beast—part political, part bureaucratic—that accounts for what I believe to be an unconscionable outcome, no matter what reason." *Id.* at 48-49.

63. SHAPIRO, *supra* note 8, at 8.

64. *Id.*

65. Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

66. *Id.* at 411.

tion of the Tribunals and its presence at the time the Tribunals were created. The Security Council appropriated the symbolic validation embodied in the Tribunals in order to signify its commitment to rendering justice and to lend authority to the rules of humanitarian law. The decision to invoke international legal process⁶⁷ tapped into the enduring legacy of the Nuremberg trials—where the victorious nations opted for public trials of Nazi perpetrators over summary executions.⁶⁸ Laura Dickerson terms the decision to invoke legal process, including the complex web of historical circumstances and political dialogue leading up to that decision, a “Nuremberg moment,”⁶⁹ which, consequently, is the point at which the symbolic weight of the resulting tribunal is at its zenith. Non-related functions, however, because they are not cast in legal language and incorporated into the operative structure of the institution, can “dissipate over time.”⁷⁰

As the Tribunals have gone about the judicial work of investigating and trying war criminals, other functions, related and non-related, have emerged and faded in the process. A host of actors has shaped the international legal process, initiated in the “Nuremberg moments” that brought about the creation of the Tribunals, by working “with and against” the “bounded strategic space” carved out in the constituent documents discussed above.⁷¹ However, it is important to note that throughout this ongoing process, the Tribunals have continued to be seized upon as symbols, most significantly for the purposes of this article by commentators asserting the progressive development of an international system of courts and tribunals. In this regard, the twin Tribunals have become “the darling of international human rights lawyers.”⁷²

Many commentators debate the existence of an international legal system.⁷³ While the scope of this article does not permit a sustained exploration of this subject, the striking evolution of international criminal law during the lifetimes of the Tribunals, and particularly the interrelationship between the relevant international bodies, bears considerably on the question of how to close the

67. For an informative account of the development of the International Legal Process school of international law, as well as previous and subsequent scholarly thought related to the school, see Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L. J. 2599 (1997) [hereinafter Koh, *Nations Obey*].

68. Laura A. Dickerson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1442 (2002).

69. *Id.* at 1438.

70. Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

71. *See id.* at 412.

72. Martinez, *supra* note 2, at 479.

73. *See, e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); FRANCK, *supra* note 13; THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997); LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1968); Koh, *Transnational Legal Process*, *supra* note 7; Martinez, *supra* note 2; HANS J. MORGANTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2d ed. 1954); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005) [hereinafter Posner & Yoo, *Judicial Independence*].

Tribunals. Before the Tribunals existed, international criminal law had not yet awakened from “the long sleep into which it had fallen after the Nuremberg and Tokyo trials.”⁷⁴ Today, landmark precedents exist in numerous areas of substantive international criminal law, a working set of Rules of Procedure and Evidence has been developed and applied for over a decade, and the day-to-day operation of the Tribunals animates the once dormant corpus of legal tools for prosecuting international war criminals.⁷⁵

Over the course of their operation, the Tribunals have also served as a dynamic mechanism for bringing about both legal and cultural changes in the war-torn regions to which they are devoted.⁷⁶ Moreover, and perhaps more emphatically than non-criminal international courts and tribunals, the Tribunals have been incorporated into the trajectory of an evolving “global community of law,”⁷⁷ capable of apprehending and prosecuting individual war criminals.

Repeated interaction with dispute resolution mechanisms over time “will construct . . . causal linkages between the strategic behaviour of individuals and the development of rule systems.”⁷⁸ In other words, with the Tribunals open and operating, individuals and groups negotiate their behavior according to the “bounded space” of the institutions within which they must act. But, according to Stone Sweet, and David Caron in this volume, the space carved out is *reactive*, meaning that the strategic behavior also changes the character of the institution in a mutual, symbiotic relationship.⁷⁹ One important effect of this process is the gradual acclamation of the community to conceiving their actions in relation to the judicial process, or the judicialization of behavior.⁸⁰ Moreover, “the community” should not be narrowly defined for a proper understanding of the political and social functions of international courts and tribunals. Rather, and particularly in the case of the Tribunals, the community that has engaged in strategic behavior associated with the Tribunal includes actors such as the international human rights practitioners who have made these institutions their “darlings.”

74. Romano, *supra* note 60, at 297.

75. See, e.g., INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY (Gideon Boas & William Schabas eds., 2003); HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2004), <http://hrw.org/reports/2004/ij/> (last visited Dec. 22, 2005).

76. Both Tribunals have spawned extensive outreach programs, within the institutions themselves and in their namesake countries. Much information about these programs can be found at the respective Tribunal websites: www.ict.org and www.icty.org. Additionally, both Tribunals, in preparation to transfer cases to national jurisdictions, have engaged in ongoing dialogues with officials in the national governments in order to ensure due process standards can be met in future trials. While the scope of this article does not permit a full discussion of the trials of national jurisdiction, it is important to note the extensive interaction between governments and Tribunal leadership. For a more thorough exploration of this topic, see Jennifer Landside, *supra* note 1.

77. Helfer & Slaughter, *supra* note 73, at 281.

78. STONE SWEET, *supra* note 8, at 3.

79. *Id.*; Caron, *International Courts and Tribunals*, *supra* note 9, at 412.

80. STONE SWEET, *supra* note 8, at 1.

It was the process of judicialization upon which the Security Council rested its hope to restore peace, stability and the rule of law to the former Yugoslavia and Rwanda. More precisely, the Council hoped to use the organs as a means of "social control" through which the rules of humanitarian law would operate.⁸¹ This method of dispute resolution already "undercuts" independence, because the Tribunals "operate to impose outside interests on the parties."⁸² Indeed, according to Shapiro, the Tribunals were vulnerable at the outset, because their function placed them at the lowest ebb of social legitimacy as conflict resolvers—"deeply embedded in the general political machinery" of the United Nations.⁸³ Nevertheless, the Tribunals have exerted a tremendous influence on international criminal law, substantially delivering on the promise of judicialization. But the process is also a seductive and expansive affair; and though it began on paper, it cannot now be reduced to the constitutive documents that brought it about. As Stone Sweet contends, once the process of judicialization has begun, it is irreversible.⁸⁴

The problem presented here is how to account for the vacuum left when the Tribunals close, leaving the community without a reference point for modeling their behavior. How will members of the community interact with the legacy of the Tribunals once they are closed? Does closure entirely efface the "bounded space" carved out by the Statutes? Thus, in moving to a discussion of the Completion Strategies, it is important to reiterate that, to the extent that the Completion Strategies take on the form of "mere executive orders," they suggest a lack of integration into the organic process that the Tribunals triggered. The lack of integration, in turn, conjures up the illegitimacy arguments brought by Tadic and Kanyabashi. If the wide community, to which the Tribunals were originally presented as symbols, perceives the Completion Strategies as a top-down executive edict, allegations of illegitimacy are far more likely to resonate with significant and influential figures in the international legal community and beyond. Part IV will present the Completion Strategies in their current form,⁸⁵ while Part V returns to the central question of this article: do the Completion Strategies properly adjust for the judicialization that has taken place, or do they leave the Tribunals poised to be seized upon as symbols of illegitimacy?

IV. THE COMPLETION STRATEGIES

A. Beginnings: A Quest for Efficiency

It is beyond question that the International Criminal Tribunals must, one day, reach a definitive end. While the language of the Security Council resolu-

81. SHAPIRO, *supra* note 8, at 37.

82. *Id.*

83. *Id.*

84. STONE SWEET, *supra* note 8, at 1.

85. Current through Nov. 2005.

tions establishing both Tribunals is markedly open-ended, the nature of the work undertaken, the *travaux préparatoires*, and implicit assumptions in the operative language of their Statutes all dictate the finite nature of the Tribunals.⁸⁶ However, the Completion Strategies emerged later, after the Tribunals had achieved remarkable milestones in the development of international criminal law,⁸⁷ and after time had obscured the horror of the events that spawned their creation.

While sources trace the origin of the Completion Strategies to different moments in the political dialogue between the Security Council and the ICTY President,⁸⁸ one significant aspect of the Completion Strategies is the very fact that they arose as a result of a politically charged dialogue among states and various U.N. institutions.⁸⁹ The public character of the Completion Strategies, like the Completion Strategies themselves, is without precedent.⁹⁰ In his first address to the press in January of 1999, for example, then-President of the ICTY Claude Jorda observed that “[t]he Tribunal [was] at a turning point in its history,” and the time had come to “question the productivity and efficiency of the Tribunal,” and to identify a “time-frame . . . for fulfilling its mission.”⁹¹ President Jorda’s speech was self-consciously addressed to “the international community,”⁹² and his remarks are representative of subsequent reports and press releases denoting the progress of the Tribunals in fulfilling the Completion Strategies.⁹³ An obvious and reasonable motivating concern behind the devel-

86. See Raab, *supra* note 6, at 84. While Raab cites the drafting history of Resolution 808 as evidence of the Security Council’s intent to create a finite Tribunal for the Former Yugoslavia, *id.* at n.7, the language of both Statutes also implies the assumption that the Tribunals would hold finite mandates. For example, Resolution 827 created the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law.” S.C. Res. 827, *supra* note 17 (emphasis added). The ICTR Statute contains identical language, and both Tribunals exert bounded temporal and territorial jurisdiction under their Statutes. See *id.*; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

87. See, e.g., HUMAN RIGHTS WATCH, *supra* note 75.

88. The earliest such moment is Kofi Annan’s appointment of a group of experts in the late 1990s to study the efficiency of the Tribunals. Mundis, *Lessons from Nuremberg*, *supra* note 6, at 600. See also G.A. Res. 634, U.N. Doc. A/54/634 (Nov 22, 1999) (the resulting report on financing of the International Criminal Tribunals).

89. The political nature of international war crimes tribunals is undeniable. The fact that the Closing Strategies may arguably be traced to a budgetary study only emphasizes the respective bargaining positions of the Security Council and the Tribunals created by it. The International Criminal Tribunals are unique among international courts and tribunals in this sense because it is impossible to divorce their temporary existence from the political mechanisms that brought them into being. In short, there are no private parties with controlling interests to buffer the political element.

90. See Mundis, *Lessons from Nuremberg*, *supra* note 6, Part IV. “One of the big advantages of the Control Council Law No. 10 prosecutions stemmed from the availability of the IMT infrastructure, which facilitated the success of the follow-on trials. Similarly, [Telford] Taylor was successful in encouraging some of the IMT staff to remain in Nuremberg for the subsequent trials.” Mundis, *Lessons from Nuremberg*, *supra* note 6, at 614.

91. Press Release, <http://www.un.org/icty/pressreal/p466-e.htm> [hereinafter Jorda]. See also Press Release, H.E. Judge Claude Jorda, President, Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty/pressreal/RAP000620e.htm> (last visited Nov. 2005).

92. *Id.*

93. An extensive compilation of annual reports and press releases can be found on both Tribunals’ web sites.

opment of the Completion Strategies, then, was the “price of international justice.”⁹⁴

It is important to recognize that the public iterations of the Completion Strategies are substantially aimed at donor states, and that they express, at least in part, the promise of efficiency in return for continued financial support.⁹⁵ The potential deficit in judicial process that could result from placing political demands on the judicial systems in place has not gone unrecognized.⁹⁶ However, it is equally important to note that the Tribunals are creatures of international politics, and that their completion will be no less political than their creation. Any discussion of the Completion Strategies would be incomplete without acknowledging the extent to which judicial process and political influence shade together, and the beginnings of the strategies illustrate this point with considerable force.

B. Principle Components Framing the Completion Strategies

1. Security Council Resolutions 1503 and 1534

The first definitive enumeration of the Completion Strategies appears in Security Council Resolution 1503 of August 28, 2003, ten years after the ICTY came into existence.⁹⁷ The preambular paragraphs affirm “in the strongest terms” the President of the Council’s endorsement of the ICTY’s Completion Strategy.⁹⁸ The Resolution goes on to set out the two most basic prongs of the Completion Strategies: (1) concentration on prosecuting and trying the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction, and (2) transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions.⁹⁹ Resolution 1503 goes on to urge the ICTR to “formalize a detailed strategy, modeled on the ICTY Completion Strategy.”¹⁰⁰ The Security Council also incorporated the formal deadlines proposed by the ICTY in its own Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts (ICTY Completion Strategy).¹⁰¹ At the time, the ICTY “target dates”¹⁰² pro-

94. Jorda, *supra* note 91; see also Romano, *supra* note 60.

95. This is particularly true in light of the 2004 hiring freeze placed on the Tribunals by the Secretary-General.

96. See, e.g., Prosecutor v. Milosevic, Case No. IT-02-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, ¶¶ 20-22 (Oct. 21, 2003), available at <http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm>; Mundis, *Judicial Effects*, *supra* note 6, at 147-59; Mundis, *Lessons from Nuremberg*, *supra* note 6 at 606 (discussing the amendments to ICTR and ICTY Rules of Procedure and Evidence made to facilitate the Completion Strategies); Johnson, *supra* note 6, at 158.

97. S.C. Res. 1503, Annex I, U.N. Doc. S/RES/1503/Annex I (Aug. 28, 2003).

98. *Id.*

99. *Id.*

100. *Id.*

101. The ICTY proposal was jointly prepared by the President, the Prosecutor and the Registrar of the ICTY and approved by the judges. S.C. Res. 678, U.N. Doc. S/2002/678 (June 17, 2002) (Letter from the Secretary-General to the President of the Security Council (June 17, 2002)).

jected that investigations would end by the end of 2004; first instance trial activity would cease by the end of 2008; and all work would conclude by 2010.¹⁰³

The second major Security Council action in developing the Completion Strategies followed Resolution 1503 in close succession. In part as a response to the ICTY Prosecutor's October 2003 report on her intention to indict approximately 30 new defendants, the Security Council issued Resolution 1534 in March of 2004.¹⁰⁴ The principle operative clauses call for increased attention to the Completion Strategies by the Tribunal bodies, and closer monitoring by the Security Council of the progress.¹⁰⁵ First, Paragraph 5 emphasizes the substantive focus on high-ranking officials.¹⁰⁶ Here the Council formally called for a judicial check on the Prosecutor's power, a highly controversial demand that is further discussed in the next two sections. Second, Resolution 1534 calls for bi-annual reports from the President and Prosecutor of each Tribunal, "setting out in detail the progress made toward implementation of the Completion Strategy of the Tribunal."¹⁰⁷ Daryl A. Mundis, a prosecutor at the ICTY, posits that a report by the UN Office of Internal Oversight Services on the Office of the Prosecutors of the ICTY and ICTR may have spurred the Security Council to enact Paragraph 6 reporting requirements. The oversight report noted, *inter alia*, "that there was insufficient evidence to support the contentions that the completion strategy was on track to meet its target dates."¹⁰⁸ The reporting requirement thus implicitly confirms the end of an era: with a new report due every six months, the completion of work now commands the daily attention of the President and the Prosecutor of each Tribunal. A considerable portion of the administrative function of these leadership positions would now be devoted to the inexorable progression toward completion of work.

2. Amendment of Tribunal Rules

The latest Annual Report to the Security Council submitted by the ICTY references the amendment of Rule 98 *bis* of the Rules of Evidence and Procedure (RPE). The amendment, in an effort to increase the efficiency of the Tribunal at the trial level, permits oral arguments instead of written briefs in a mo-

102. "[T]he dates are 'target dates' or goals, not definitive decisions on when certain activities of the ICTY must cease." Johnson, *supra* note 6, at 160 (disputing David A. Mundis's assertion that the Security Council had "compell[ed]" the Tribunal to adhere to the deadlines); see Mundis, *Lessons from Nuremberg*, *supra* note 6.

103. S.C. Res. 1503, *supra* note 97; see also Raab, *supra* note 6, at 87.

104. See S.C. Res. 1534, U.N. Doc. S/Res/1534 (Mar. 26, 2004).

105. *Id.* §§ 5-6.

106. The paragraph "[c]alls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in Resolution 1503 (2003)." *Id.* § 5.

107. *Id.* § 6.

108. Mundis, *Judicial Effects*, *supra* note 6, at 145. See Review of the Office of the Prosecutor at the International Criminal Tribunal for Rwanda and for the Former Yugoslavia, G.A. Res. 677, Summary, ¶¶ 8-13, U.N. Doc. A/58/677 (Jan. 7, 2004).

tion for acquittal at the close of the Prosecutor's case.¹⁰⁹ The so-called "internal reforms"¹¹⁰ to the ICTY trial process stemming from the Completion Strategies also include amendments to RPE 11 *bis* (permitting the transfer of cases to national jurisdiction) and RPE 28¹¹¹ (vetting of indictments to ensure only the most senior officials are charged in the Hague).¹¹² As of the August 2005 Annual Report, four Rule 11 *bis* motions, involving eight accused, were pending appeal,¹¹³ and on September 29, 2005, Radovan Stankovic became the first ICTY indictee to be transferred to Sarajevo for trial by the War Crimes Chamber¹¹⁴ of the Court of Bosnia and Herzegovina.¹¹⁵ Therefore, the global Completion Strategies outlined in Resolutions 1503 and 1534 have already resulted in considerable secondary structural changes within the ICTY.

The ICTR judges also amended RPE 11 *bis* to permit the transfer of cases to national jurisdiction in accordance with the requirements of Resolution 1534.¹¹⁶ However, the judges collectively declined to amend the Rules to allow the ICTY RPE 28 vetting procedure for authorizing indictments. The decision highlights the fact that amendments to the Rules of Procedure and Evidence of both Tribunals are promulgated by the judges themselves, although ostensibly the Security Council could amend both the Rules of Procedure and Evidence and the Statutes of the Tribunals.¹¹⁷ Therefore a considerable margin of discretion

109. Rule 98 *bis*, G.A. Res. 267, at 3, U.N. Doc. A/60/267 (Aug. 17, 2004) (now reading "[a]t the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction").

110. *Id.* at Summary, 3.

111. The vetting procedure was hotly contested by Prosecutor Del Ponte as yet another check on prosecutorial independence, this time placing her decisions under direct scrutiny by the judges who would decide the cases. See, e.g., RACHEL S. TAYLOR, INSTITUTE FOR WAR AND PEACE REPORTING, JUDGES CHANGE THE RULES (Apr. 16, 2004), <http://www.globalpolicy.org/intljustice/tribunals/yugo/2004/0416rules.htm> (last visited Dec. 22, 2005).

112. Rule 28(A), ICTY Rules of Evidence and Procedure (as amended July 2005), <http://www.un.org/icty/legaldoc-e/index.htm> (last visited Nov. 2005) (now providing that "[o]n receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor.").

113. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S CONCERNS ON THE IMPLEMENTATION OF THE "COMPLETION STRATEGY" OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1, <http://web.amnesty.org/library/print/ENGEUR050012005> (confirming that 10 cases, totaling 18 accused, had moved into the 11 *bis* pipeline).

114. For more in-depth analysis on the creation of the War Crimes Chamber in Sarajevo, see Mundis, *Lessons from Nuremberg*, *supra* note 6, at 607 *et seq.*

115. See Press Release, ICTY, Radovan Stankovic Transferred to Bosnia and Herzegovina (Sept. 29, 2005), <http://www.un.org/icty/pressreal/2005/p1008-e.htm> (last visited Nov. 2005).

116. ICTR Rules of Evidence and Procedure, *supra* note 112. Rule 11 *bis* was amended in the Twelfth Plenary Session of the Judges (July 5-6, 2002). *Id.*

117. "Asked whether the Prosecutor [Del Ponte], as announced earlier, had asked the President for clarification regarding the amendment to Rule 28 of the Rules of Procedure and Evidence,

exists in how the Completion Strategies will go forward at the Tribunal level, and how the Rules should or should not bend to increase the pace at which the Tribunals eliminate their dockets.

C. Conflation

Commentators consistently overlook one striking feature of the Completion Strategies: they are remarkably similar in spite of substantial differences in the substantive international criminal law applied, the status of relations with relevant national governments, and the underlying conflicts.¹¹⁸ The similarity was perhaps heralded by Resolution 1503 itself, which called upon the ICTR to model its strategy after the ICTY Completion Strategy as set forth in the 2002 ICTY Report on Judicial Status.¹¹⁹ However, although practical concerns and force of habit undoubtedly bore on the adoption of a single template for closing both tribunals, the pattern suggests that the solutions adopted were inevitable, which is far from the case.

The fungible, transsubstantive character of the Completion Strategies also obscures the fact that actors within the institutions hold very different views on the advisability of some of the measures adopted, as well as the efficacy of the methods of implementation.¹²⁰ First, as noted above, the judges at the ICTR refused to establish the same vetting procedure in Rule 28(A) of the ICTY Rules of Procedure and Evidence.¹²¹ Amending the ICTR Rules would have resulted in a significant judicial check on the Prosecutor's independence in the interest of ensuring that indictments comport with Resolutions 1503 and 1534. However, the ICTR judges felt "the amendments [to be] a violation of the Statute since they limit the independence of the prosecutor."¹²² Given the concerns voiced by Judge Hunt in his dissents to Appeals Chamber decisions,¹²³ the fact that the ICTR judges declined to amend the RPE further demonstrates a lack of accord among judges as to the means of complying with the Completion Strategies.

Ruch replied that the Prosecutor had indeed asked for a clarification and that she had received yesterday a personal letter from the President. Ruch said that the view of the Prosecutor and the view of the President were different. Her view was much closer to the view of the Judges of the ICTR, who had not amended Rule 28. The Prosecutor's feeling was that at the end of the day this would be an issue which had to be solved at the level of the Security Council. There was no other mechanism or procedure to deal with this matter." Press Release, ICTY Weekly Press Briefing Summary (Apr. 28, 2004), <http://www.un.org/icty/briefing/2004/PB040428.htm> (last visited Dec. 22, 2005).

118. To begin with, the genocide in Rwanda was a purely internal conflict, which limits substantively the international criminal law applicable. For a comprehensive account of the war crimes prosecuted by each Tribunal, including in-depth case law analysis, see HUMAN RIGHTS WATCH, *supra* note 75.

119. See S.C. Res. 1503, *supra* note 97; S.C. Res. 678, *supra* note 101.

120. The debate between Mundis and Johnson is representative. Mundis, *Judicial Effects*, *supra* note 6, at 147; Johnson, *supra* note 6, at 148; see also Milosevic, *supra* note 96, ¶¶ 20-22.

121. See Mundis, *Judicial Effects*, *supra* note 6, at 148; Mundis, *Lessons from Nuremberg*, *supra* note 6, at 612.

122. S.E. NEWS SERVICE EUROPE, *Good Enough for the Hague, not Good Enough for Arusha*, May 12, 2004, <http://www.sense-agency.com/portal/english/index.php?sta=3&pid=5201>.

123. Milosevic, *supra* note 96.

Second, the two Prosecutors have adopted opposite mechanisms for streamlining the trial process through new indictment policies, with ICTY Prosecutor Carla Del Ponte advocating multi-defendant cases and ICTR Prosecutor Hassan Jallow calling for severance and “trial readiness.”¹²⁴ On September 21, 2005, for example, Trial Chamber III of the ICTY granted the Prosecution’s motion to join six cases, including nine accused, under a single indictment.¹²⁵ The six cases all relate to atrocities inflicted upon Bosnian Muslims during their forced removal from the Srebrenica and Zepa enclaves in Eastern Bosnia in July 1995.¹²⁶ The Trial Chamber reasoned that the “megatrial”¹²⁷ would promote judicial economy by avoiding the need to revisit a common set of underlying facts.¹²⁸

In stark contrast, it is the express policy of the ICTR Prosecutor’s office to abandon multi-accused trials, an approach that has led to lengthy delays in the past.¹²⁹ Prosecutor Jallow’s policy has already been reflected in the severance of André Rwamakuba¹³⁰ from the joint indictment of four accused in the Prosecution’s “Government I” case.¹³¹ Instead of joining cases with similar factual underpinnings or common enterprises, Prosecutor Jallow intends to focus on honing indictment language to be as specific as possible to the alleged crimes of the accused, and on making sure that cases are discrete and “trial-ready” before indictments are signed.¹³²

It is worthwhile to note that Resolution 1503, which first enunciated the Completion Strategy for the ICTY, also formally split the Office of the Prosecutor (OTP) of the two Tribunals, leading to the installation of Jallow as Prosecutor in Arusha.¹³³ Therefore, the occasionally lockstep attitude adopted by numerous actors and commentators is misleading, since the two Tribunals became more independent from each other even as the Security Council endorsed the joint Completion Strategies. Of course, as discussed above in Part II, the decision to end Carla del Ponte’s mandate in Arusha provoked a flurry of criticism that the Security Council had encroached upon her prosecutorial discretion to

124. Author’s notes from ICTR Office of the Prosecutor intern meeting with Chief Prosecutor Jallow, July 21, 2005 (on file with author) [hereinafter Author’s notes].

125. See Press Release, ICTY, Nine Accused Charged Jointly for Crimes Committed in Srebrenica and Zepa, <http://www.un.org/icty/pressreal/2005/p1005-e.htm> (last visited Nov. 2005).

126. *Id.*

127. See COALITION FOR INT’L JUSTICE, REPORT ON PROSECUTOR CARLA DEL PONTE’S “MEGA TRIAL STRATEGY”: ICTY PRESIDENT TO UN SECURITY COUNCIL—TRIALS SHOULD FINISH BY 2009 IF ALL RULE 11 BIS MOTIONS GRANTED, ALL JOINDERS ALLOWED AND NO NEW ARRIVALS; PROSECUTOR: FUGITIVES—“MOST SERIOUS OBSTACLE,” <http://www.cij.org/index.cfm?fuseaction=viewReport&reportID=690&tribunalID=1> (last visited Nov. 2005).

128. *Id.*

129. See *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T (Mar., 2, 2001) (the largest trial with six accused) [hereinafter *Nyiramasuhuko*].

130. See *Prosecutor v. Karamera et al.*, Case No. 98-44-TS, Decision On Severance of André Rwamakuba and for Leave to File Amended Indictment, (Feb. 14, 2005), available at <http://www.ictcr.org/ENGLISH/cases/Rwamakuba/index.htm>.

131. *Id.*

132. Author’s notes, *supra* note 124.

133. S.C. Res. 1503, *supra* note 97.

investigate the activities of the RPF during the genocide in Rwanda.¹³⁴ Thus, Resolution 1503 stands as an especially bold interference by the Security Council, not only for its imposition of the Completion Strategies as such, but also for the politically charged decision to remove Del Ponte from her position in Arusha.

In sum, the Completion Strategies hold three general elements in common. First, the OTP and the Chambers must work in concert to limit indictments to the highest-ranking officials with the most responsibility. Second, the ground-work must be laid so that cases involving lower-ranked officials are successfully transferred to national jurisdictions capable of trying these accused in accordance with principles of international criminal law. Third, the Tribunals must make every effort to complete their work by the slated deadlines. However, further conflation of the two strategies runs the risk of overlooking key differences in how the actors within these institutions seek to preserve prosecutorial independence and judicial deference, and uphold the rights of the accused, all in the face of (actual or perceived) political pressure to end their mandate.

D. The Role of Deadlines

Unlike the Nuremberg process,¹³⁵ the International Criminal Tribunals are subject to express, highly publicized¹³⁶ deadlines for the completion of all work, whereupon the Tribunals will cease to exist, leaving the remainder of prosecutable war crimes in the hands of national judicial systems. The unprecedented use of deadlines for closing a war crimes tribunal has gone largely unacknowledged by commentators. Authors do, however, consider the meaning of the deadlines from a practitioner's point of view. Larry D. Johnson, Chef de Cabinet of the Office of the President of the ICTY, argues that "from the legal point of view, the [Security] Council did not decide that the Tribunal must complete all activities in 2010, but that it should do so."¹³⁷ But commentators and judges alike dispute this distinction between "must" and "should" as nothing more than semantics in practical application.¹³⁸ Moreover, whether target dates or deadlines, the numbers are easily appropriated by the press and have come to embody a significant component in the collective international understanding of

134. Husketh, *supra* note 20,, ¶¶ 76 *et seq.*

135. See Mundis, *Lessons from Nuremberg*, *supra* note 6, at 614.

136. See, e.g., Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations General Assembly, Address (Oct. 10, 2005), <http://www.un.org/icty/pressreal/2005/Meron-ga-10-10-2005.htm> (last visited Dec. 22, 2005); Carla del Ponte, Address (June 30, 2004), <http://www.npwj.org/?q=node/1754> (last visited Dec. 22, 2005). A complete compendium of Annual Reports and Press Releases is also available on both Tribunal web sites.

137. Johnson, *supra* note 6, at 160.

138. Johnson, *supra* note 6, at 174. Johnson is directly addressing Daryl Mundis's position with respect to the judicial effects of the deadlines established in Resolution 1503. See Mundis, *Judicial Effects*, *supra* note 6, at 158. Johnson also dismisses as "groundless" Appeals Judge Hunt's concerns regarding diminished procedural fairness for the accused. Johnson, *supra* note 6, at 174. See also Milosevic, *supra* note 96.

the Tribunals as *temporary*. For instance, Richard Prosper, the U.S. ambassador-at-large for war crimes issues, openly deemed the completion of work at the International Criminal Tribunals a challenge to “reach the finish line.”¹³⁹

Statements such as Prosper’s suggest that the deadlines in Resolution 1503 will comprise a significant factor in assessing the overall effectiveness of the Tribunals over the long term. According to Prosper’s logic, the Tribunals should be commended if (and maybe only if) they “finish” on time. This is precisely what Appeals Judge Hunt warns in his *Milosevic* and *Nyiramasuhuko* dissents.¹⁴⁰ Judge Hunt’s dissents, interestingly, dispute propositions not entirely present in the language of the relevant majority opinion.¹⁴¹ This may indicate that his concerns voice a more generalized opposition to the deadline-intensive approach underlying the Completion Strategies as a whole.¹⁴²

Finally, neither the Security Council nor the Tribunal leadership clearly relates the “judicial economy” concerns to the substantive mandates set out in the Tribunal Statutes. In fact, the legal character of the Completion Strategies, or any one component thereof, is ambiguous at best, and is rendered more so by the different implementation mechanisms adopted by the two Tribunals. If the Tribunals “reach the finish line” behind schedule, how does this failure relate to the substance of the work mandated in the respective Statutes?¹⁴³ Without an un-

139. Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at OSCE Conference in Belgrade, War Crimes and State Responsibility for Justice (June 15, 2002), <http://belgrade.usembassy.gov/press/2002/020615.html>.

140. *Milosevic*, *supra* note 96, ¶¶ 20-22; Prosecutor v. *Nyiramasuhuko et al.* Decision re Proceedings Under Rule 15 *bis*(D), No. ICTR-98-42-A15bis (Sept. 30, 2003), Dissenting Opinion of Judge David Hunt, ¶¶ 17, 36 [hereinafter *Nyiramasuhuko 15 bis*].

141. Mundis points out that “[w]hile the term ‘completion strategy’ is not employed in the appeals chamber’s decision, the majority does discuss policy considerations, including the ‘economic management of criminal trials before the Tribunal.’” Mundis, *Judicial Effects*, *supra* note 6, at 156. See also Prosecutor v. *Milosevic*, Case No. IT-02-54-AR73.4, Appeal Decision on Admissibility of Written Statements ¶ 21 (Sept. 30, 2003).

142. See, e.g., AMNESTY INTERNATIONAL, *supra* note 113; HUMAN RIGHTS WATCH, A LETTER TO THE U.N. SECURITY COUNCIL: “DEADLINES FOR THE TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA MUST BE FLEXIBLE” (June 24, 2004), <http://hrw.org/english/docs/2004/06/28/rwanda8970.htm> (last visited Dec. 22, 2005).

143. Two further important points regarding deadlines should be included here. First, both Tribunals faced an additional challenge in the May 2004 hiring freeze, imposed by the Secretary-General. In the words of President Meron (ICTY) before the Security Council: “[t]he freeze is beginning to have a devastating effect on the Tribunal . . . [T]he perceived lack of support from the international community cannot help but influence staff morale and motivation. We are striving hard to do more with less, but we can only redistribute workloads for so long. Inevitably the hiring freeze will cripple our ability to operate efficiently and to fulfill the goals of the completion strategy. As an institution with only a limited mandate and an impermanent duration, we already face difficulties in recruiting and retaining talented staff members who are attracted, naturally, to more permanent employment, with greater opportunities for advancement, at other institutions. This intrinsic disadvantage, coupled with the hiring freeze, poses a serious threat to our completion goals.” Address of Judge Theodor Meron, President of the International Criminal Tribunal For the Former Yugoslavia to the United Nations General Assembly (Nov. 15, 2004), <http://www.un.org/icty/pressreal/2004/p912-e.htm> (last visited Dec. 22, 2005). Second, and related, is the fact that the ICTY has already pushed back the projected deadline of 2008 to 2009. In its Resolution 1534 Report to the Security Council for May 2005, the ICTY leadership listed several factors bearing on the “recapitulation” of the deadline, as well as pausing to point out the “uncertain and tentative nature of

derstanding of the legal weight of the deadlines in relation to the Statutes, allegations of illegitimacy lodged against the Tribunals might acquire further resonance as the deadlines of the Completion Strategies approach. This is particularly true where the Completion Strategies appear to downplay the “promises”¹⁴⁴ extended not only in the lofty mandates set out for the Tribunals, but also in the rhetoric that the Council itself espoused at the moment of creation.

Whether or not the deadlines are distinguishable from “target dates,” the impact of the dates will be felt after, as much as during, the proceedings in The Hague and Arusha. Both Johnson and Mundis agree, after all, that “treating the target dates mechanistically” could warp the process envisioned in the Tribunal Statutes, resulting in a failure of due process and prosecutorial independence, or, worse still, outright impunity.¹⁴⁵ However, this article is concerned with the consequences of identifying a “finish line” from a different perspective. Part V will explore the impact of the Completion Strategies on the work of the Tribunals, where that work is conceived of as a process rather than a terminable docket.

V.

CLOSING THE TRIBUNALS: STRATEGY OR PROCESS?

A. *In Search of an Adequate Analytical Framework*

Now that the Tribunal leadership has responded to the Security Council’s calls for formal strategies, the question remains: do the Completion Strategies, in form and in substance, appropriately adjust for the vacuum that will be left when the bounded space carved out by the Tribunals no longer exists?

In an effort to identify an analytical framework for understanding the potential effects of the Completion Strategies, Part V begins by surveying several theories addressing international courts and tribunals generally. This exercise is meant to demonstrate the difficulty of separating the “strategy” involved in closing the Tribunals from the “process” described in Parts II and III. The first section of Part V is also intended to stimulate further integration of the *Ad Hoc* Criminal Tribunals into generalized theories about the existence and character of an international judicial system, and the role of independence and effectiveness as tools for understanding courts and tribunals as a social phenomenon.

One reality that cannot go unrecognized is certainly cost. Cesare Romano’s discussion of the price of international justice brings home the drain that the Tribunals have exerted on UN coffers.¹⁴⁶ In this sense, part of the life span of a

any estimated final date.” *Meron*, *supra* note 5, ¶ 29.

144. Caron, *Legitimacy*, *supra* note 32, at 560.

145. Johnson, *supra* note 6, at 174; *see also* Mundis, *Judicial Effects*, *supra* note 6, at 157-58.

146. Romano, *supra* note 60; *see also* Husketh, *supra* note 20, ¶¶ 4-6 (citing, *inter alia*, the fact that as of 2003, the ICTR on average resolved two cases per year). Husketh goes on to point out

temporary tribunal is devoted not to the resolution of the disputes or atrocities that gave rise to its mandate, but rather to the cost-effective resolution of its need to exist. Therefore, an important distinction must be drawn between permanent international tribunals and *ad hoc* tribunals with a very limited mandate, both temporally and substantively. These temporary institutions require resources comparable to a permanent institution, both financial and personnel, but their longevity is inescapably bound to the narrow focus of their jurisdiction.

At a certain point, the supranational interests bearing down on the Tribunals shifted from the creation of a mandate to the push for a closing strategy. The dialogue among actors has notably shifted as well. The “closing phase,” as Prosecutor Jallow has called it,¹⁴⁷ cannot help but distract high-ranking administrative and judicial actors from the substance of the Tribunal Statute.¹⁴⁸ The Completion Strategies have worked themselves into the daily judicial proceedings of the Tribunals,¹⁴⁹ and though they grew out of a separate process of “rulemaking,”¹⁵⁰ the Completion Strategies operate alongside the body of substantive law applied in the cases. Similarly, the Tribunals themselves are not divorced from the culture of judicial dialogue¹⁵¹ simply because they have entered the “closing phase.” Rather, the strategies adopted by the OTP in Arusha (narrowing of targeted accused, creating an *ad litem* judge pool and streamlining the indictment process),¹⁵² may now be dislodged from the ICTR context and put into place in future *ad hoc* tribunals for their entire life span.¹⁵³ As a result, untangling the strategy for completion from the judicial function of the Tribunals becomes increasingly difficult in the “closing phase.”

As stated above in Part IV, scholars fervently debate what actually constitutes a judicial system, particularly in relation to the potential effectiveness of international justice.¹⁵⁴ The debate over the need for an international judicial system between Eric Posner and John Yoo (largely rejecting the premise that an international system exists),¹⁵⁵ and Anne-Marie Slaughter and Laurence Helfer

“that the legal work of the tribunal carries a massive burden of human suffering. The resulting emotional charge should not be overlooked because . . . the Tribunal cannot and does not operate in a vacuum.” *Id.* ¶ 4.

147. Author’s notes, *supra* note 124.

148. See, e.g., Nyiramasuhuko 15 *bis*, *supra* note 140, ¶¶ 17, 36; Milosevic, *supra* note 96, ¶¶ 20-22.

149. This is particularly true now that the Chambers are hearing 11 *bis* motions to transfer cases to national courts. See, e.g., Prosecutor v. Mejkacic et al., Case No. 9 IT-02-65-PT, Transcript of Motions Hearing (Mar. 3, 2005), available at <http://www.un.org/icty/transe65/050303MH.htm> (discussing the role that the Completion Strategies should play in the Chamber’s decisionmaking process) (last visited Dec. 22, 2005).

150. See description of the composite framework of the Completion Strategies, *supra* Part III.B.

151. See generally Martinez, *supra* note 2 at 429, 437; see also Helfer & Slaughter, *supra* note 73, at 277.

152. See Author’s Notes, *supra* note 124, describing Prosecutor Jallow’s remarks on the OTP strategy.

153. *Id.*

154. See Posner & Yoo, *Judicial Independence*, *supra* note 73, at 5-6.

155. *Id.*

(heralding the rise of “supranational adjudication”),¹⁵⁶ bears relevance in assessing the wisdom of the Completion Strategies, as well as the implications they might have when viewed as precedent. The Tribunals stand at an uncertain crossroads between the two sides of the debate. They have often been touted as a stepping stone along the way to a system of individual responsibility for international crimes, and yet they suffer from a debilitating dependency on the Security Council and have weathered staggering bouts of inefficiency throughout their lifetimes. In short, the literature in this area does not define effectiveness¹⁵⁷ in a way that is helpful for understanding the possible ramifications of the Completion Strategies. It is submitted here that placing an emphasis on effectiveness in the context of temporary tribunals invites too much focus on deadlines, which is the most obvious way to test whether or not the Tribunals are “on track.” In other words, with the Completion Strategy implementation in full swing, the question of effectiveness may boil down to one of sheer efficiency: whether or not the Tribunals can complete their mandates within an arbitrarily selected time frame. Considering the substance of the task at hand, this hardly seems like an adequate criterion for determining effectiveness.

Moreover, while the relationship between effectiveness and legitimacy is far from clear,¹⁵⁸ assessing the work of the Tribunals from the limited perspective of effectiveness could amplify the resonance of illegitimacy allegations if the Tribunals operate past the deadlines.¹⁵⁹ This potentially problematic relationship between effectiveness and legitimacy holds regardless of the function of the Tribunals. That is, allegations of illegitimacy will resonate more strongly whether the functions are tied to the fate of Rwanda and the former Yugoslavia, the development of a system of supranational criminal justice, or the ability of the United Nations to address threats to international peace and security.

The same authors also debate the role of judicial independence with respect to the effectiveness of international dispute resolution.¹⁶⁰ The Tribunals do not fit neatly into this discussion when one considers the criteria for independence asserted on both sides.¹⁶¹ Certainly the Chambers operate independ-

156. Helfer & Slaughter, *supra* note 73, at 276.

157. See Posner & Yoo, *Judicial Independence*, *supra* note 73, at 28-29 (defining effectiveness as measured by compliance with decisions and frequency of use); Helfer & Slaughter, *supra* note 73, at 283 (defining effectiveness as “the power of a court to compel parties to appear before it and to comply with its judgment”). The coercive powers of the Security Council render this discussion somewhat moot when read too narrowly. This stems from the limited exploration by both sets of authors into the structural distinctions within different international courts and tribunals, especially the differences between civil and criminal adjudication. See also Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

158. See Caron, *Legitimacy*, *supra* note 32, at 558.

159. *Id.*

160. *Id.*; Posner & Yoo, *Judicial Independence*, *supra* note 73, at 3, 12. See also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 901 (2005); Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 958 (2005) [hereinafter Posner & Yoo, *Reply*].

161. Both sets of authors focus their analysis on either permanent courts and tribunals or private arbitration, neither of which clearly captures the unique set of actors and roles involved in

ent of the OTP and the Registry in both the ICTR and ICTY: all judges, including *ad litem* judges,¹⁶² are appointed by the General Assembly, for example. However, as a component of a temporary tribunal, the judicial role also bears some of the characteristics common to dependent arbitrators. A prime example is the sometimes tortured relationship between the General Assembly Advisory Committee on Administrative and Budgetary Questions (ACABQ), the Security Council and the Tribunal organs (see discussion *supra* in Part II regarding the creation and structure of the Tribunals). Furthermore, Rwanda itself requested (and then voted against) the creation of an international tribunal in order to aid in its recovery from the genocide.¹⁶³ Political motives for making this request, as well as the political decisions that honored it, whether base or high-minded, helped to bring about the very existence of the ICTR. Viewed in this sense, the ICTR is more like a “problem-solving device” at the disposal of the state.¹⁶⁴

Finally, the special case of the Tribunals reveals another weakness in the literature with respect to effectiveness and independence in an international judicial system (regardless of whether that system is coherent or interstitial). The Prosecutors play a vital role in determining and implementing the mechanism for bringing the Tribunals to a close.¹⁶⁵ No counterpart to the criminal prosecutor exists in the commercial arbitration setting, or even in the field of international human rights litigation. However, commentators do not always account for the vast distinctions in the roles played by actors in a given system, distinctions that are based purely on the substance of the dispute.

The effectiveness debate also overlooks the need to “complete” non-related functions—functions that attach themselves to the Tribunal as a seat of international judicial process. Non-related functions of international courts and tribunals,¹⁶⁶ as this article has argued, can be pivotal in their creation and daily operation.¹⁶⁷ Posner and Yoo do acknowledge that a “possible answer” to the question of why states comply with decisions of international tribunals is that “states think there are valuable symbolic reasons for setting up tribunals that look like independent courts, and that by doing so they increase their prestige.”¹⁶⁸ This glance at the possible symbolic function of international courts and tribunals glosses over the dynamic process of reckoning with the unspeakable horrors of genocide and ethnic cleansing. In sum, because the literature

international criminal legal practice. Furthermore, as David Caron points out, both sides of the debate envision static institutions with clear, identifiable and constant functions with respect to the parties that turn to them. Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

162. See S.C. Res. 1329, U.N. Doc. S/RES/1329 (Nov. 30, 2000) (establishing an *ad litem* judge pool and amending statutes).

163. See Letter dated 94/09/28 from the Permanent Representative of Rwanda to the United Nations addressed to the President of the Security Council, U.N. Doc. S/1994/1115 (Sept. 29, 1994),

164. *Id.* at 6.

165. See *supra* Part II, especially note 20 (discussing the problematic bundle of relations between the Prosecutor, the Security Council, the judges and the namesake states).

166. See Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

167. See *supra* Part II.

168. Posner & Yoo, *Reply*, *supra* note 159, at 970.

tends to homogenize tribunals in search of a general theory of “effective” international adjudication, the functions of tribunals are limited to their narrow, scripted renditions on paper, rather than their organic, process-driven manifestations in practice.

B. The Closing Process and Legacy: Non-Related Functions Revisited

This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials.¹⁶⁹ - Judge David Hunt

Today, “Nuremberg” is both what actually happened there and what people think happened, and the second is more important than the first . . . it is not the bare record but the ethos of Nuremberg that we must reckon with today.¹⁷⁰ - Telford Taylor

Understood as part of a process, rather than as a separate “strategy” (as the rhetoric of Security Council Resolutions conceptualizes them), the Completion Strategies actually articulate what might otherwise happen through the judicial workings of the Tribunals alone. The Completion Strategies understood as policy directives emanating from the Security Council and the General Assembly, on the other hand, threaten to accelerate the judicial work of the Tribunals to such an extent that the process becomes unrecognizable, and the *function* of the Tribunals becomes *to close down*. This risk is only apparent when the Tribunals are understood as organic “bounded strategic spaces,”¹⁷¹ sites where a wide variety of actors participate in an international legal process.¹⁷²

This participation is linked to the symbolic, “non-related functions” of the Tribunals identified in Parts II and III. To summarize, Shapiro stresses that courts can behave in significantly uncourtlike ways, particularly in the performance of various “social control functions.”¹⁷³ These, non-related, not strictly judicial functions allow organs like the Security Council or, more traditionally, domestic executive and legislative bodies, to “rule *through* law.”¹⁷⁴ Norms become entrenched, and actors come instinctively to obey them, through repeated participation, or “cycle[s] of interaction, interpretation, and internalization” fostered by international institutions like the Tribunals.¹⁷⁵ The internalization of norms, in turn, can be traced to a community-wide process of judicialization.¹⁷⁶ The Security Council seized upon this non-related function at the moment of creation.¹⁷⁷ The very existence of an international criminal tribunal was in-

169. Milosevic, *supra* note 96, ¶ 22.

170. TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 13-14 (1970).

171. Caron, *International Courts and Tribunals*, *supra* note 9, at 402.

172. See generally Koh, *Transnational Legal Process*, *supra* note 7, at 183-94 (presenting a cogent overview of the evolution of legal process scholarship).

173. SHAPIRO, *supra* note 8, at 17.

174. Caron, *International Courts and Tribunals*, *supra* note 9, at 411-12.

175. Koh, *Transnational Legal Process*, *supra* note 7, at 2655.

176. STONE SWEET, *supra* note 8, at 19.

177. See *supra* Part II.

tended as a signal for would-be transgressors to abandon their illegal methods.¹⁷⁸

Yet the Completion Strategies could easily be perceived by these same actors as the product of the Security Council clamoring to abandon its own attempts to rule through law. Indeed, the Completion Strategies could be perceived as cashing out on the social control function of courts and tribunals altogether—particularly considering the extent to which they emphasize the practicalities of budgetary constraints, the jurisdictional limitations, and lack of independence written into the structure of the Tribunals. As one critic puts it: “It was not supposed to be this way. In 1993 the UN created [the Tribunals] . . . to revive the Nuremberg process, and once again world leaders promised the start of a new age of accountability.”¹⁷⁹ Amnesty International charges that the Completion Strategies appear to be “mostly dictated by financial constraint influenced by a changing geopolitical setting, where countries of the former Yugoslavia have become less of a priority in the international scene.”¹⁸⁰

It can hardly be asserted, however, that the Security Council has entirely abandoned its interest in providing the international community with a symbol to ward off future manifestations of the inhumanity inflicted in Rwanda and the former Yugoslavia. On the other hand, now that over a decade has passed since the Tribunals were created, the non-related function of symbolic imagery has, to some degree, “dissipated,”¹⁸¹ and the Completion Strategies reflect a shift in the political conception of the Tribunals. The direct link between the General Assembly and the Tribunal budgets (coupled with waning political will to fund the Tribunals), the need for restorative justice in other regions of the world, and the development of a permanent International Criminal Court (ICC) are among the many factors that have placed increased emphasis on closing the Tribunals. This emphasis, in turn, necessarily overshadows the image of international support and justice so universally valued in the decision to invoke international process.

The problem, however, is not the simple fact that such allegations are lodged against the Tribunals generally, or the Completion Strategies as a particular method of closure. Instead, the problem is more cogently conceived as a question of the degree to which criticisms will resonate with those to whom promises were made.¹⁸² The striking discrepancy between the early promises in Security Council rhetoric, described in Part II, and the detached tenor of Resolutions 1503 and 1534 leaves ample room for perceptions of betrayal to multiply.

Moreover, closing the Tribunals will freeze the image they are capable of providing. While the Tribunals were always temporary, only upon closing will

178. See 2 MORRIS & SCHARF, *supra* note 11, at 298-310; see also Scharf, *supra* note 12, at 928.

179. *Pressures on Hague court undermining its work*, THE IRISH TIMES, Nov. 21, 2005, at 13.

180. AMNESTY INTERNATIONAL, *supra* note 113.

181. See Caron, *International Courts and Tribunals*, *supra* note 9, at 411.

182. See Caron, *Legitimacy*, *supra* note 32, at 560.

they become finite as operating seats of international justice. The Completion Strategies inevitably form an intricate part of that finite symbol. It is this role of the Completion Strategies that has not received great attention from political actors and commentators alike. Because they have taken shape as “mere executive orders,”¹⁸³ the Completion Strategies exist as a thing apart from the judicial work of the Tribunals.¹⁸⁴ The lack of integration between the social control or judicialization function of the Tribunals and the Completion Strategies may prove problematic in establishing a positive symbolic “ethos,” to borrow Telford Taylor’s term, that will be true to the loftier purposes for which they were created.

Irrespective of the role that the Completion Strategies will play in the ultimate legacy of the Tribunals, the very prospect of closing down means an end to the participatory utility of the Tribunals as a mechanism for encouraging the internalization of international norms.¹⁸⁵ Put another way, the “social control function” of the Tribunals terminates with the judicial function.¹⁸⁶ Viewing the Tribunals as webs of interaction rather than static institutions brings home the myriad effects of extricating these living, functioning institutions from the political and social networks into which they have become embedded.

The spokesman and Legal Advisor to the ICTR has expressed some of the concerns explored in this article in the context of a plea for continued media support for the Tribunals:

In a world in which imagery is having an increasingly important influence in international relations, perceptions—whether created by the media or other actors—determine to a large extent the importance or relevance of global issues and activities. New dimensions of international relations such as international criminal justice are no exception to the reality of the power and influence of imagery. . . . The impact of the tribunals beyond the forensic combat of the courtroom . . . is just as important as what happens in their courtrooms.¹⁸⁷

The leadership of the Tribunals and the Security Council have developed and elaborated the Completion Strategies in a transparent, public manner, and this method is to be commended to the extent that it prepares the relevant communities in Rwanda and the former Yugoslavia for the next phase in their quest for transition and reconciliation. However, the cognizance of perception stops there. Because the Security Council has chosen to adopt official Completion Strategies insensitive to the non-related functions that the Tribunals have performed throughout their existence, closure will especially threaten the legacy or

183. Tadic, *supra* note 29, ¶ 43.

184. Of course, to the extent that certain structural changes have been incorporated into the Rules of Procedure and Evidence and the Statutes themselves, the legal character of the Completion Strategies has gelled, but these are only piecemeal amendments meant to facilitate some aspects of the strategies, rather than systematic implementation measures.

185. See Koh, *Nations Obey*, *supra* note 67, at 2656.

186. See SHAPIRO, *supra* note 8, at 17.

187. Kingsley Chiedu Moghalu, *The Evolving Architecture of International Law: Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 22 (2002).

ethos of the Tribunals. As Parts II and III emphasized, the *Tadic* and *Kanyabashi* challenges to the legitimacy of the Tribunals could find new and amplified resonance if the Security Council inserts itself too far into the closure process. This risk can only be fully understood when the current formulation of the strategies is projected forward to 2010, or 2009, when the deadlines take on a reality that has not quite set in, perhaps, in the public mind. Imagery is a delicate and fickle thing, and symbols can rapidly take on new meaning in the eyes of the perceiver. There is room in the process of closing a tribunal to venerate the ethos crystallized through its operation. The Completion Strategies, to the extent they have taken shape in response to politically charged directives from the Security Council, have failed to seize on this moment.

VI.

CONCLUSION: TOO MUCH FINALITY, TOO SOON?

Interesse rei publicae ut sit finis litium.

The public interest requires that there be an end to disputes. This adage cuts both ways in the world of transitional justice—because the dispute itself, inevitably, shoulders the weighty burden of reconciliation. In other words, the trials in The Hague and Arusha are meant to symbolize an end to disputes in and of themselves. Still, the Tribunals must eventually close their doors even to those who have shaped the bounded space they carved out in operation. The views expressed in this article are presented with the understanding that closure is not only necessary but also at least several years away. The Tribunals are now operating in their third mandate,¹⁸⁸ with a great deal of experience and valuable precedent—and many early stumbling blocks—behind them. Nor are the authors of the Completion Strategies blind to the legacy that the Tribunals will leave behind them. ICTR President Erik Møse recently announced that “the Registrar has set up a Legacy Committee, composed of representatives of all three branches of the Tribunal. In its report, the Committee will consider issues arising in connection with the completion of the ICTR’s work as well as the situation thereafter.”¹⁸⁹ Indeed, cause for optimism about the intentions and facility of Tribunal leadership is most certainly in order.

Nevertheless, this article has identified a potentially damaging weakness in the form and substance of the Completion Strategies as they exist today. The discrepancy between the promise of the Tribunals as powerful symbolic validations of international rules against war crimes and the current rhetoric of judicial efficiency under close Security Council scrutiny leaves too much space for a sense of betrayal to seep into the closure process. From their very creation as

188. The third mandate will last from 2005-2008. For a breakdown of the achievements of the ICTR according to its four-year mandates, see Erik Møse, *Main Achievements of the ICTR*, 4 J. INT’L CRIM. JUST. 920, 920 (2005).

189. Interview with Judge Erik Møse, ICTR President, by the Hirondelle News Agency (Oct. 29, 2005), <http://www.globalpolicy.org/intljustice/tribunals/rwanda/2005/1029interview.htm> (last visited Dec. 22, 2005).

quasi-independent creatures under the Security Council's Chapter VII auspices, the Tribunals have faced an uphill battle against allegations of illegitimacy, and even illegality. Despite momentous progress, nothing has come to pass that sets the Tribunals above reproach for rendering too much finality, too soon. The price of international justice being what it is, the authors of the Completion Strategies would be wise to embrace, once again, the value of what the international community has purchased.