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International Criminal Law Developments in the Case Law of the ICTY

Edited by
Gideon Boas & William A. Schabas

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INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY

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Gideon Boas & William A. Schabas, editors

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Foreword

When the history of the ICTY comes to be written, its contribution to the jurisprudence of international criminal law will be seen as among its significant achievements. Like the builders of old, the pioneers of the Tribunal found a quarry and turned it into the makings of a temple. However, at the time of writing, the foundations are just being built. There has been important work in many disparate fields. Much has been done to define the substantive law, for instance, the elements of the crimes and the types of responsibility. A code of procedure and evidence has been established and there have been important decisions on such matters as hearsay and written evidence. The notion of fair trial rights has been developed with decisions such as those on the right of the accused to examine witnesses and equality of arms. A system for the protection of victims and witnesses has been set up, a development which may be said to be unique and from which it is to be hoped others can learn.

But, there is no point in building a temple if nobody sees it or uses it. While sterling work has been done in some quarters to collect, publish and publicise the decisions of the Tribunal, and a certain amount of academic commentary has been engendered, the fact remains that too many decisions go unheeded. If they are given by Trial Chambers, and in some cases by the Appeals Chamber, they may go into the files and not be properly reported. The fate of oral decisions is even more summary. There is thus, as yet, no comprehensive collection of these decisions and no easily accessible way to get at them.

It is, therefore, particularly welcome that this analysis of developments in the case law of the Tribunal is being published now. It is written by authors with much experience of the work of the Tribunal and can, therefore, be relied upon to shed light on its practice. Analysis of the decisions will help to publicise them. Discussion and criticism of the case law will contribute to its development. In the end, those who worked in the Tribunal will be able to say, as the great architect said of his masterpiece: '*si monumentum requiris, circumspice*' – if you want a monument, look around.

Richard May
Judge of the International Criminal Tribunal for the former Yugoslavia

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Preface

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a profoundly important institution in the development of international humanitarian law and criminal law in general. Its arrival heralded a newfound willingness of the international community to bring to book perpetrators of war crimes and gross or systematic violations of human rights.

There have been precursors – the International Military Tribunal at Nuremberg is the most celebrated – but the General Assembly's call for the creation of a permanent court in article VI of the 1948 Genocide Convention stalled during the Cold War. The idea of an international criminal court was only revived in late-1989. Then, as work on the project moved forward, the world was plunged into a brutal conflict that focussed attention on issues of impunity and accountability, and on the contribution that justice might be able to make to peace. In May 1993, the United Nations Security Council established the ICTY.

During the course of its relatively brief existence, the ICTY has developed many areas of law, and defined and explained legal norms, sometimes for the first time. Even if the legal issues with which it was confronted had already been addressed judicially, the precedents were nearly half a century old. While still relevant in many respects, these ancient authorities had to be read in light of evolving international, human rights and criminal law. By 1993, due process standards were more rigorous, and States were finally willing to punish a broad range of war crimes and crimes against humanity committed in internal conflicts, and even in peacetime.

After nearly a decade of operation, the Tribunal is a vigorous and dynamic institution, but nevertheless a temporary one. It is in "middle age". Measures are being taken to expedite proceedings, all of this with an eye on retirement. And in parallel, the International Criminal Court is finally being established. The new Court will owe a great debt to the ICTY, which has pioneered the prosecution of international crimes in so many ways.

As the title suggests, the aim of this book is to discuss some of the international criminal law developments that have taken place in the practice and procedure of the Tribunal. It makes no claim to an exhaustive treatment of

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the issues. Rather, it is a contribution to a modest but increasingly substantial body of literature.

The book contains eight chapters dealing with a range of issues. Chapter 1, by Gideon Boas, discusses whether the Rules of Procedure and Evidence of the Tribunal represent a credible code of evidence and procedure for international criminal law. In doing so, the unique rule-making powers of the Tribunal are analysed, together with the substance of some of its rules of evidence. It considers the dialectic between the common law and Romano-Germanic systems of criminal law which is reflected in the Tribunal's Rules of Procedure and Evidence, and contemplates the draft Rules of Procedure and Evidence of the International Criminal Court.

In Chapter 2, Michael Bohlander reviews the law and jurisprudence of the Tribunal concerning the position of the defence (the accused and counsel). He considers recent efforts to regulate, and to self-regulate, the profession.

Pascale Chifflet, in Chapter 3, focuses on the status, role and rights of victims before the Tribunal, and analyses issues relating to victim protection, participation and reparation. Chapter 4, by Thomas Henquet, concerns the question of illegal arrest raised by some accused before the Tribunal, and considers the agency principle applied in international and national laws and the obligations of States under Article 29 of the Tribunal's Statute. Chapter 5, by Michelle Jarvis, analyses the recent emergence of gender perspectives in international criminal law and the development and treatment of these issues in the case law of the Tribunal.

Gabrielle McIntyre, in Chapter 6, examines the role of human rights case law, beginning with the much-celebrated dismissal of precedents of the European Court of Human Rights in one of the earliest decisions of the ICTY. Daryl Mundis, in Chapter 7, examines issues of criminal responsibility under the Tribunal's Statute. He analyses the jurisprudence of the Tribunal relating to the responsibility of superiors as well as the development and expansive use of the criminal law doctrine of joint criminal enterprise in the Tribunal's jurisprudence.

In Chapter 8, Professor André Nollkaemper looks at the development of general principles of law by the Tribunal and, more particularly, the question of whether the Tribunal can or should borrow such principles from national legal systems and how it has done so.

Throughout the book are threads concerning the development and application of international criminal law not only by the ICTY, but also by the *ad hoc* International Criminal Tribunal for Rwanda and the new International Criminal Court. Liberal reference is made to the Statute and Rules of Procedure and Evidence of the International Criminal Court. Prospective issues and difficulties likely to confront that Court when it commences operation in 2003 are also considered.

The book is written by academics and practitioners. With one exception, all of the contributors are current or former employees of the ICTY. Each article begins with the customary disclaimer, of course, although it goes without

saying that these are personal views and they do not necessarily reflect those of the Tribunal or the United Nations. But clearly, the authors bring a unique expertise and a certain amount of information and perspective that few who have not had this experience will share. Those familiar with the literature will know that a considerable amount of commentary on the Tribunal has indeed been penned by insiders. This is both a strength and a weakness. Sometimes the insiders are a bit too defensive, and have difficulty standing back and testing the material with a sufficiently critical and independent eye. Sometimes, though, we are also left with the distinct impression that the Tribunal is a hotbed of legal debate. By and large, the public is usually exposed to this in the judgments and decisions of Trial Chambers and the Appeals Chamber. It is only when lawyers who work or have worked within the Tribunal change hats, so to speak, and write as academics, that we can glimpse the unpublished dissents and, perhaps, the precedents of tomorrow. But we will leave this assessment to the readers.

Gideon Boas, The Hague
William A. Schabas, Oughterard

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Abbreviations

CSCE	Conference on Security and Cooperation in Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECMM	European Community Monitoring Mission
FRY	Federal Republic of Yugoslavia
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IFOR	Implementation Force
IHL	international humanitarian law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
LRTWC	Law Reports of the Trials of the War Criminals

NAC	North Atlantic Council
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
OLAD	Office of Legal Aid and Defence Matters
OSCE	Organisation for Co-operation and Security in Europe
OTP	Office of the Prosecutor
PCIJ	Permanent Court of International Justice
POW	prisoner of war
SACEUR	Supreme Allied Commander Europe
SFOR	Stabilisation Force
SHAPE	Supreme Headquarters Allied Powers Europe
TWC	Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10
UK	United Kingdom
UN	United Nations
UNCC	United Nations Compensation Commission
UNHCR	United Nations High Commissioner for Refugees
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
US	United States
USA	United States of America

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GIDEON BOAS*

A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY

The judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) created their own binding rules of procedure and evidence shortly after the Tribunal was set up. They have subsequently amended the Rules of Procedure and Evidence some twenty-two times. During the same period, the judges have interpreted the Rules numerous times and in a myriad of different ways. The ICTY Rules represent the first attempt to create a coherent and credible code of procedure and evidence for the prosecution of international criminal conduct and, particularly, the prosecution of violations of international humanitarian law.[1] This body of norms has been virtually replicated in the Rules of the International Criminal Tribunal for Rwanda. It has also contributed substantially to the drafting of the Statute and the Rules of Procedure and Evidence of the International Criminal Court. How the ICTY Rules have been created, interpreted and amended are important considerations in assessing their fairness and credibility.

It is important that the method by which the judges of the ICTY have created the Rules of Procedure and Evidence, and the way in which they amend and interpret them, is consistent with international and criminal law norms. It will be noted that the judges, acting in a quasi-legislative capacity, amend the Rules whilst also interpreting them and developing their meaning and comprehension in a judicial capacity. This tension will be analysed.

The Rules of the ICTY constitute a melange of legal systems. The predominant structure gives deference to the adversarial common law system of criminal justice, although they depart from it in many ways. Laced from the start with concepts from the civil law or Romano-Germanic system of criminal

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1. See Richard May & Marieka Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha", (1999) 37 *Colum. J. Transnat'l L.* 745.

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *1-33.*

procedure, the Rules have evolved through their numerous amendments to reflect more and more of an inquisitorial approach. If the Rules of the ICTY represent a sound code for international criminal law, then do they properly reflect the best that the common law and civil law systems of criminal justice have to offer? And are they adequately balanced to address the needs of an international criminal law jurisdiction? This chapter will reflect upon relevant differences in the two systems from a comparative law perspective, and show how the Tribunal has utilised different aspects of these systems of law.

In dealing with the process of the creation, interpretation and amendment of the Rules of the ICTY, this chapter will also consider how the International Criminal Court (ICC) has grappled with these issues in the development of its Statute and Rules. The purpose of this comparative analysis is to show strengths and weaknesses in the ICTY process and further the inquiry as to whether or not the ICTY model constitutes a coherent code of evidence and procedure for international criminal law such that it merits copying by other developing international criminal tribunals.

Finally, it must be asked whether the ICTY Rules appropriately reflect the balance between ensuring the proper and expeditious administration of justice and strict respect for the rights of accused persons. Whilst human rights aspects of the treatment of defendants before the ICTY are discussed in another chapter in this book, it is apposite to reflect upon Rules which have been interpreted to limit or vary certain "minimum guarantees" attaching to the accused under the ICTY Statute. This is really an acid test of whether or not the ICTY Rules can be properly described as a code of evidence and procedure for international criminal law.

Creation, Amendment and Interpretation of the ICTY Rules

The ICTY Statute empowered the judges to create and adopt Rules of Procedure and Evidence. In Resolution 827, the Security Council "[r]equest[ed] the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal".[2] Article 15 of the ICTY Statute states: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate measures." The Secretary-General made it clear in his Report that

2. UN Doc. S/RES/827 (1993), para. 3.

"the judges of the International Tribunal as a whole should draft and adopt the rules of procedure and evidence".[3]

Numerous proposals were received before the draft statute set out in the Secretary-General's Report was adopted by the Security Council. With respect to the manner in which rules of procedure and evidence were to be created, a number of States and organisations made proposals. The Organisation for Security and Cooperation in Europe suggested that a plenary of the court should draw up the rules, with non-voting participation of the Prosecutor.[4] Italy proposed the same procedure, adding that rules should be included which ensure the rights of the accused and provide adequate protection for victims and witnesses.[5] France proposed that the judges and prosecutor should adopt detailed rules for the proceedings of the tribunal based on respect for human rights, general principles of criminal procedure recognised by all nations and the provisions of its own Statute.[6] Russia[7] and Canada[8] both supported the creation of the rules by the Tribunal, whilst Brazil and Mexico emphasised that the tribunal's rules should strictly adhere to general principles of law, such as due process, and the protection of the rights of the accused.[9] Interestingly, the United States proposed that the tribunal adopt its rules of procedure and evidence only with the Security Council's approval.[10]

3. "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 83.
4. Article 49 of Hans Corell, Helmut Türk & Gro Hillestad Thune, "Proposal for an International War Crimes Tribunal for the Former Yugoslavia", cited in Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, 1995, pp. 211-310.
5. "Letter from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General", UN Doc. S/25300, Article 11.
6. 'Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General", UN Doc. S/25266, Article XV.
7. "Letter from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General (April 5, 1993)", UN Doc. S/25537, Article 11.
8. 'Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations Addressed to the Secretary-General', UN Doc. A/25594.
9. Virginia Morris & Michael P. Scharf, *supra* note 4, p. 414.
10. "Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General (April 5, 1993)", UN Doc. A/25575, Article 6.

The Process of Amending the Rules

Implicit in the power given to the ICTY judges to create the Tribunal's Rules is the power to amend them.[11] Rule 6 of the ICTY Rules ("Amendments to the Rules") sets out the procedures which are to be followed in this respect:

> (A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all judges.
>
> (B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the judges.
>
> (C) Proposals for amendment of the Rules may otherwise be made in accordance with the Practice Direction issued by the President.
>
> (D) An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

On 18 December 1998, the President of the Tribunal issued a Practice Direction setting out the procedure for the proposal, consideration of and publication of amendments to the ICTY Rules.[12] On 4 May 2001, this Direction was amended to provide for input into the process by *ad litem* judges.[13] Practice directions may be issued pursuant to Rule 19(B) according to which the

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11. For an analysis of this process, see Gideon Boas, "Comparing the ICTY and the ICC: Some Procedural and Substantive Issues", (2000) 47 *Netherlands Int'l L. Rev.* 267.

12. "Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal", IT/143, 18 December 1998.

13. "Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal", IT/143/Rev.1, 4 May 2001. The Practice Direction was further amended to incorporate changes to the composition and structure of the Rules Committee, IT/143/Rev.2, 26 February 2002. The Statute of the ICTY was amended on 30 November 2000 by Security Council Resolution 1329 to provide for the election of judges on short-term appointment for the limited purpose of hearing specific trials. The purpose of these changes is to allow the ICTY to expedite the trying of cases on its docket by allowing a greater number of cases to be heard simultaneously. As of April 2002, the ICTY was for the first time conducting six trials in its three courtrooms. For a critical analysis of the role of the *ad litem* judges, see generally Daryl Mundis, "The Election of *Ad Litem* Judges and Other Recent Developments at the International Criminal Tribunals", (2001) 14 *Leiden J. Int'l L.* (2001), and Gideon Boas, "Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia", (2001) 12 *Crim. L. Forum* 167.

President of the Tribunal, in consultation with the Bureau, the Registrar and the Prosecutor, may issue such Directions to address detailed aspects of the conduct of proceedings before the Tribunal, so long as they are consistent with the Statute and the Rules. Whilst not strictly dealing with the conduct of proceedings before the Tribunal, this Practice Direction usefully seeks to regulate the manner in which amendments are to be made to the Rules of the ICTY. This is a valuable function, given the volume and frequency with which the ICTY Rules have been amended since their creation.

To give some idea of the quantity of amendments to the Rules, they were adopted on 11 February 1994 and modified twice in that year. In 1995 and 1996 they were amended four times each year. From then on, the Rules have been amended an average of twice per year. In itself this fact is not particularly shocking. The ICTY Rules are, as has been stated, the first substantive and coherent body of norms governing international criminal proceedings. Given the complexity and breadth of the jurisdiction, it is understandable that the regulatory provisions require persistent attention and fine-tuning. However, there is understandable concern about the volume of amendments, and in particular the number of recent ones. In 2000 and 2001 alone, ninety-one rules were amended, seven new rules were adopted and one rule was deleted. By any regulatory standards, this is an enormous number of amendments to a set of 153 provisions. Imagine, for example, amending half or more of a criminal law code or statute in the space of two years, notwithstanding constant and sometimes dramatic amendments preceding such an overhaul. Of course, there are reasons for this. Recent amendments to the ICTY Statute to accommodate the addition of *ad litem* judges have required considerable changes to the Rules, often of a minor nature. However, it is worth noting the uncertainty this process must create for all parties to the proceedings, but most importantly for accused persons.

The Practice Direction dealing with the procedure for amendment to the Rules of the ICTY requires that (save in urgent or exceptional cases) all amendments to the Rules shall take place only once during the year, at the final Plenary Session of judges.[14] It has already been noted that since December 1998, the Rules have been amended at least twice each year.

Rule 6(D), requiring that any amendment to the Rules "shall not operate to prejudice the rights of the accused in any pending case", has been argued several times before the Tribunal. The Rule was considered in relation to the introduction of a new Rule 108*bis* in two decisions of the Appeals Chamber.[15] It was also considered by Trial Chamber I in the *Blaškić* case in relation to an

14. IT/143/Rev.2, para. 3.

15. *Prosecutor* v. *Blaškić*, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of Subpoenae Duces Tecum) and Scheduling Order, Case No. IT-95-14-AR108*bis*, 29 July 1997, paras. 10-11, and *Prosecutor* v. *Blaškić*, Decision on Prosecution Motion to Set Aside the Decision of the Appeals Chamber of 29 July 1997, Case No. IT-95-14-AR108*bis*, 12 August 1997, paras. 11-13.

amendment to Rule 66(A), dealing with disclosure by the Prosecutor. The Chamber held that the amendment in question did not change the sense of Rule 66(A), but merely clarified its spirit and meaning, and that there was therefore no violation of Rule 6 in applying the new Rule immediately.[16] More recently, Trial Chamber III ruled that the application of a new Rule 75(D), which concerns applications for access to confidential material produced in another trial before the Tribunal, did not prejudice the accused under Sub-rule 6(D).[17] In that case, the accused applied for transcripts protected by confidentiality orders and documentary material relating to post-traumatic stress disorder produced in the *Furundžija* case. The Trial Chamber held that "Rule 75(D) is a procedural provision and that its operation in the current matter would not operate to prejudice the rights of the accused".[18]

Interestingly enough, Rule 6 itself has itself been amended on several occasions. In December 1998, the reference in Rule 6(A) to "seven judges" was changed to "nine judges", so as to reflect the fact that a new Trial Chamber of three judges had since been added to the Tribunal, bringing the number of judges from eleven to fourteen.[19] At the same time, a new paragraph was added to Rule 6 (which is now paragraph (D)) providing that "an amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment". Prior to this amendment, the Rule provided that amendments should enter into force immediately.

Three Rules have been amended by unanimous vote outside of Plenary Sessions, pursuant to Rule 6(B). Rule 70(B) was amended in October 1994 under Rule 6(B) in order to remedy an urgent problem encountered by the Prosecutor in obtaining information from non-governmental organisations and other bodies. Rule 15 was amended in July 1996 to address the contingency of the sudden resignation due to ill health of Judge Sidhwa. In March 1999, Rule 23 was amended in the same way to allow the Bureau to be constituted in the absence or unavailability of judges ordinarily members of the Bureau by calling upon the next senior available judge, apparently so that the Bureau could continue to function.[20]

16. *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Compel the Disclosure of Rule 66 and 68 material relating to Statements made by a Person known as X, Case No. IT-95-14, 15 July 1998.
17. *Prosecutor* v. *Došen & Kolundžija*, Order on Motion of Accused Kolundžija for Access to Certain Confidential Materials, Case No. IT-95-8-PT, 3 February 2000. The procedural framework of Rule 75(D) was subsequently amended at the twenty-fifth session of the Plenary, IT/199, 21 December 2001.
18. *Ibid*., para. 3.
19. This Rule has subsequently been amended to refer to ten judges, due to the addition of two permanent judges of the Appeals Chamber effected by Security Council Resolution 1329.
20. The Bureau is set up under Rule 23. It is comprised of the President, Vice-President and presiding judges of the Trial Chambers for the purpose of discussing "all major questions relating to the functioning of the Tribunal".

Before moving on to consider the appropriateness of the ICTY's power to and methodology of amending its Rules, it is worth looking at how the International Criminal Court has been empowered to create and amend its Rules of Procedure and Evidence.[21] Article 51 of the Rome Statute of the International Criminal Court governs the creation and amendment of Rules of Procedure and Evidence. Under this provision, the Rules are to enter into force once a two-thirds majority of members of the Assembly of States Parties has adopted them.[22] Rules may be proposed by any State party, the Prosecutor or the judges acting by absolute majority. However these proposed amendments will only enter into force upon adoption by a two-thirds majority of States parties.[23] Article 51(3) is an important provision: "After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties."[24] The International Law Commission (ILC), which in 1994 submitted the draft statute to the General Assembly which formed the basis of the negotiations, was of the view that the judges of the court should draft the rules, like the judges of the ICTY, subject to the approval of States parties. Article 19(3) of the ILC draft provided that once the initial rules were passed by active agreement of the States parties, amendments to the Rules would be subject only to their passive approval. Amendments would be transmitted and confirmed by the Presidency six months thereafter, unless a majority of States parties objected.[25]

21. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9; "Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalised draft text of the Rules of Procedure and Evidence", UN Doc. PCNICC/2000/INF/3/Add.3.

22. Rome Statute, *ibid.*, Article 51(1).

23. *Ibid.*, Article 51(2).

24. Rule 3 of the ICC Rules, *supra* note 21, sets out the procedure for amendment:

> 1. Amendments to the rules that are proposed in accordance with article 51, paragraph 2, shall be forwarded to the President of the Bureau of the Assembly of States Parties.
>
> 2. The President of the Bureau of the Assembly of States Parties shall ensure that all proposed amendments are translated into the official languages of the Court and are transmitted to the States parties.
>
> 3. The procedure described in sub-rules 1 and 2 shall also apply to the provisional rules referred to in article 51, paragraph 3.

25. "Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May-22 July 1994", UN Doc. A/49/10 (1994), para. 2, p. 65. See also Timothy L.H. McCormack & Gerry Simpson, "Achieving the Promise of Nuremberg: A New International Criminal Law Regime", in Timothy L.H. McCormack & Gerry Simpson, eds., *The Law of War Crimes, National and International Approaches*, 1997, pp. 229, 248-49.

Compared with Article 15 of the ICTY Statute and Rule 6 of the ICTY Rules, it is apparent that the procedures in place for the adoption and amendment of the ICC Rules are far more cumbersome. First, the implementation and amendment of the ICC Rules are dictated by the Assembly of States Parties. Judges of the ICC may, under Article 51(2), move amendments to the Rules. However, a proposal must first achieve an absolute majority of the members of the Court. Perhaps the most useful provision available under Article 51 is paragraph 3, allowing for the urgent adoption of provisional rules. If this provision is utilised effectively, the Court may have greater control in the process of amending and applying its rules than would otherwise be possible on the face of the Statute. However, there are two problems with such a methodology. First, it is clearly contrary to the spirit of the provision concerned. Second, a serious question arises with respect to the status of an order made under a Rule implemented pursuant to article 51(3). What is to happen in circumstances in which such a Rule is created, and then an order or orders are made pursuant to the Rule, if the Assembly of States Parties subsequently rejects that Rule? Neither the Statute nor the Rules as they are drafted answer this question.

The examples given above of urgent amendments made under Rule 6(B) of the ICTY Rules are probably the sort of "urgent cases" contemplated by Article 51 of the ICC Statute. It would be unwise to extend its use to substantive changes to the evidentiary or procedural functioning of the Court. It would seem probable that the urgent amendment provision will be used sparingly.

Antonio Cassese has referred to the procedure for the adoption and amendment of rules under Article 51 of the ICC Statute:

> It appears likely that this was a reaction against the ICTY and ICTR precedents, where the judges were, in a sense, both rule-makers and decision-makers. There were good reasons, however, for allocating this role to the judges of the *ad hoc* tribunals and for the extensive amendments they made in discharging this role. The ICTY's and ICTR's Rules of Procedure and Evidence constituted the first international criminal procedural and evidentiary codes ever adopted and they had to be amended gradually to deal with a panoply of contingencies which were not anticipated by the framers of their Statutes.[26]

The saviour of the ICC in this respect may be the doctrine of *stare decisis*. As Professor Cassese points out, "what the Statute does not rule out – and indeed cannot rule out – is the emergence of a doctrine of precedent".[27] This evolution in the interpretation of rules has occurred in the ICTY, as it must in any ostensibly adversarial criminal jurisdiction. Article 21(2) of the ICC Statute

26. Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", (1999) 10 *Eur. J. Int'l L.* 163.

27. *Ibid.*, p. 164.

provides that "the Court may apply principles and rules of law as interpreted in its previous decisions". This process clearly favours the development of precedent as part of the interpretation and application of its Rules of Procedure and Evidence. Given the burdensome process of amending the Rules, the judges of the ICC might opt for a more jurisprudentially oriented approach, instead of re-codifying and clarifying their development, as has taken place in the ICTY.

What is interesting is that the ICTY has a structure which in fact lends itself more to the process of re-codification of changes in legal practice and in interpretation of changing legal standards. This characteristically civilian approach to the legal process has evolved at the ICTY which has often amended rules whose meaning has been clarified in decisions of the Tribunal, even by the Appeals Chamber.[28] It has also been used to alter or overrule decisions of Trial Chambers and the Appeals Chamber. Such quasi-judicial legislating and its potential pitfalls are discussed in detail below.

ICTY Judges as Quasi-legislators

The ICTY has been accused of being "a rogue court with rigged rules".[29] The Tribunal's handling of the Rules has also been the subject of more measured academic criticism.[30] It is appropriate to consider whether the rule-making and amending authority can be legitimately utilised as a quasi-legislative power to overrule decisions made at a trial or even at the appellate level. Applying an identical Rule, the ICTR Trial Chamber, in the *Bagosora* case, stated:

> Apart from case law that emerges in judicial proceedings as a result of judicial interpretation of the law, judges do not make Rules. As a general principle of law, this Trial Chamber, therefore, does not have the mandate to make Rules in the manner requested by the Defence because according to Article 14 of the Statute [equivalent to Article 15 of the ICTY Statute] and Rule 6 of the Rules, this is a function of the Plenary of the Tribunal.[31]

It is true that the judges acting in their judicial capacity do not have the power to make and amend the Rules. However, as noted by one commentator, "it is

28. For example, Rule 62 *bis*(ii) requiring that a guilty plea be "informed", a matter clarified by the Appeals Chamber in *Prosecutor* v. *Erdemović*, Judgment, Case No. IT-96-22-A, 7 October 1999, para. 20.

29. "The anomalies of the International Criminal Tribunal are legion" (letter), *The Times*, 17 June 1999.

30. See Davor Krapac, "Medunarodni Kazneni Sud Za Bivsu Jugoslavija I Neki Prigovori 'Globalizaciji' Njegovoga Postupka", paper delivered at a seminar organised by the Croatian Association of Criminal Sciences and Practices entitled "Serious Violations of IHL and Criminal Responsibility at the ICTY", Zagreb, March 2002.

31. *Prosecutor* v. *Bagosora*, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, Case No. ICTR-96-7-T, 8 July 1998.

precisely the judges, sitting collectively in Plenary and acting in their capacity of quasi-legislators, who do make the Rules".[32] This is an extraordinary power, unavailable to judges in domestic criminal law jurisdictions or indeed in any other international jurisdiction, excepting the ICTR and, to a very limited extent, the ICC. The doctrine of the separation of powers prevents judges in national jurisdictions from legislating and requires that they apply existing law. Even though there are clearly times when the interpretative role of a judge exceeds the simple application of the law and may be perceived as a form of judicial legislating, generally the doctrine prevents any substantial interference of the judiciary in this task.

The judges acting in plenary have amended the Rules of the ICTY with the effect of overruling or varying decisions of the Appeals Chamber on several occasions. Before inquiring as to whether such quasi-legislative activity by judges in interpreting and amending their own Rules is an appropriate exercise of their functions, it is worth looking closely at these instances of legislative overruling. One such instance occurred in the *Kupreškić* case. The Trial Chamber had utilised Rule 71 to sit in deposition with two judges in the absence of their colleague, who was ill. At the time, Rule 71(A) provided: "At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer." Rule 15(E) stated that "[i]n case of illness or an unfilled vacancy or in any other circumstances, the President may authorise a Chamber to conduct routine matters, such as the holding of an initial appearance under Rule 62 or the delivery of decisions, in the absence of one or more of its members".

The Trial Chamber encouraged an application by one of the parties to proceed by way of deposition before two members of the three-member Trial Chamber, one of its members serving as the "Presiding Officer" for the purposes of Rule 71(A). After this request was made orally by the prosecution, counsel for one of the accused challenged the proposal, arguing that the witnesses were going to give evidence on specific facts relating to the actual charges.[33] Over these objections , the Presiding Judge declared: "We rule that in spite of the opposition of the Defence counsel and the accused, Rule 71 is fully applicable because according to this Rule the request of one party is sufficient, and we feel that we are confronted with exceptional circumstances and that the interests of justice command that a fair and expeditious trial be held."[34]

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32. See Daryl Mundis, "The Legal Character and Status of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunals", (2001) 1 *Int'l Crim. L. Rev*. 191, p. 198.

33. *Prosecutor* v. *Kupreškić* et al., Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, Case No. IT-95-16-AR73.3, 15 July 1999, para. 5.

34. *Ibid*., para. 6.

The Appeals Chamber did not agree. Article 12 of the Statute requires Trial Chambers to be composed of three judges. The two judges in the *Kupreškić* case acted in the absence of the third judge, without having previously consulted that judge. The only way the two judges could legally have proceeded, according to the Appeals Chamber, was to obtain an order from the President under Rule 15(E).[35] However, Rule 15(E), as it then appeared in the Rules, only allowed the Trial Chamber to proceed in the absence of one of its members on "routine matters". The Appeals Chamber found as follows:

> In the present case, no such authorisation had been given by the President, and, in any event, the making of a decision to proceed by way of deposition with regard to the examination of witnesses giving evidence on facts relating to the specific charges made against an accused, thereby having a direct bearing on the determination of the guilt or innocence of the accused, does not, in the view of the Appeals Chamber, constitute "routine matters" within the meaning of Sub-rule 15(E)… The Appeals Chamber, therefore, finds that the ruling was null and void since it was rendered without jurisdiction.[36]

Prior to the *Kupreškić* Appeals Chamber decision, trials had been routinely continued in the absence of one judge pursuant to Rule 71 by all three Trial Chambers of the ICTY. It was, presumably, considered appropriate because the absent judge could subsequently read the transcript or view the video of the proceedings if he or she desired. As the Presiding Judge of the Trial Chamber in this case stated, the decision was considered necessary in the interests of justice for the pursuance of a fair and expeditious trial (although the emphasis was clearly on the expeditiousness of trial, given that the decision was made over the objection of the accused).

Four months later, the judges acting in plenary amended Rules 15 and 71 and created a new Rule 15*bis*.[37] Rule 15(E) was deleted. The newly created Rule 15*bis* (A) provided that

> If
>
> (i) a judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
>
> (ii) the remaining judges of the Chamber are satisfied that it is in the interests of justice to do so,

35. *Ibid*., para. 14.

36. *Ibid*.

37. This amendment was adopted at the twenty-first session of the Plenary held on 15-17 November 1999. The new and amended Rules entered into force on 6 December 2000 by authority of IT/161, 30 November 1999.

> those remaining judges of the Chamber may order that the hearing of the case continue in the absence of that judge for a period of not more than three days.

Thus, in the absence of one of the judges of the Trial Chamber, the remaining members of a Trial Chamber are now empowered to continue to hear a case if *they* consider that it is in the interests of justice to do so. The removal of the requirement that the Chamber continue with respect only to "routine matters", the removal of the need to establish "exceptional circumstances" and the authority to decide being placed exclusively in the hands of the remaining judges, constitute a direct overruling of the *Kupreškić* Appeals Chamber decision.[38]

Another example of the overruling of an Appeals Chamber decision by the judges sitting in Plenary is Rule 94*ter*. It provided as follows:

> To prove a fact in dispute, a party may propose to call a witness and to submit in corroboration of his or her testimony on that fact affidavits or formal statements signed by other witnesses in accordance with the law and procedure of the State in which such affidavits or statements are signed. These affidavits or statements are admissible provided they are filed prior to the giving of testimony by the witness to be called and the other party does not object within seven days after completion of the testimony of the witness through whom the affidavits are tendered. If the party objects and the Trial Chamber so rules, or if the Trial Chamber so orders, the witnesses shall be called for cross-examination.

In the *Kordić* case, more than fifty affidavits were admitted in corroboration of live witness testimony, pursuant to Rule 94*ter*. During the course of the trial, the Trial Chamber clarified the elements necessary to effect application of the Rule. First, the affidavit must contain some confirmation or support of evidence only in a very general sense. The Trial Chamber felt that the term "facts in dispute" under Rule 94*ter* should be given a very broad interpretation.[39] The affidavit must corroborate the evidence of a live witness. However, it does not follow that because an affidavit is admitted, the Trial Chamber will accept the evidence contained in it.[40] With respect to the procedures for the admission of affidavits, the Trial Chamber noted that objections to admissibility must be made within seven days of the submission of the completion of the testimony of the live witness.[41] The objecting party must provide reasons

38. Because transcripts of Plenary meetings are not publicly available documents, it is impossible to say on precisely what basis the Rules were amended or which judges agreed with the amendments and which did not (the amendment to the Rules require a two-thirds majority vote).

39. *Prosecutor* v. *Kordić & Čerkez*, Transcript, Case No. IT-95-14/2 T, 10 March 2000, p. 16489.

40. *Ibid*., 19 May 2000, p. 19139.

41. *Ibid*., 18 May 2000, p. 19092 and Rule 94*ter.*

for an objection to the admission of an affidavit.[42] These reasons should deal with why the witness should be brought for cross-examination and not with the admissibility of the evidence contained in the affidavit itself.[43] The ruling on the admissibility of affidavits is made on a case by case basis.[44] Furthermore, when admitting an affidavit, the Chamber stated that it must balance the need for cross-examination of witnesses with the need to expedite the trial and any other relevant factors, such as, for example, the availability of any given witness.[45] If the Chamber decides not to admit an affidavit, the affiant is called as a witness for cross-examination and the affidavit is not admitted until that witness has been subjected to cross-examination.

The Chamber took the view that an affidavit would be ruled admissible if the opposing party did not set out a particular reason for its objection; if the content of the objection was sufficiently covered in the evidence that had been given,[46] or if the only thing the opposing party was seeking to do was to test the credibility of a witness through cross-examination.[47] Affidavits were not admitted and the affiants were called for cross-examination in circumstances in which the affiant was mentioned in the opposing party's case;[48] if the affiant was testifying about events central to the case and contradicted critical parts of the opposing party's evidence;[49] if there were other issues concerning the evidence produced by the affiant, such as the admissibility of such evidence;[50] or if the affidavit was produced just before the live witness was to testify and the opposing party had no time to consider the affidavit and was not, therefore, in a position to cross-examine on its content.[51] Where an affidavit was admitted but cross-examination allowed, it was to be limited to matters in the affidavit and to matters of credibility, unless there was some specific point justifying wider cross-examination. To allow otherwise, the Chamber explained, would defeat the whole purpose of having affidavits, which is to try to achieve an expeditious trial.[52]

With these criteria set out, the Trial Chamber ordered, in an oral hearing on 10 March 2000, the admission of seven affidavits and one formal statement pursuant to Rule 94*ter*. This decision was subsequently appealed by the

42. *Ibid.*, 19 May 2000, p. 19130.
43. *Ibid.*, 18 May 2000, p. 19092.
44. *Ibid.*, p. 19091.
45. *Ibid.*, 19 May 2000, p. 19139.
46. *Ibid.*, p. 19134.
47. *Ibid.*, 9 June 2000, p. 20839.
48. *Ibid.*, 19 May 2000, p. 19140.
49. *Ibid.*, pp. 19140-19141.
50. *Ibid.*, 31 May 2000, pp. 19918-19924.
51. *Ibid.*, 20 July 2000, pp. 22977-22894.
52. *Ibid.*, 31 May 2000, pp. 19893-19894.

Defence. In essence, the appeal concerned the Trial Chamber's breach of procedural requirements under the Rule. The Trial Chamber's position was summarised by the Appeals Chamber in its Decision:

> (2) Rule 94*ter* must be interpreted to give it "useful effect" and that in doing so the fact that the seven affidavits and Formal Statement were not supplied before the principal witness testified, as required on the face of Rule 94*ter*, is a technical breach only, since the timing requirement is a formal, procedural requirement which, if interpreted otherwise, "would certainly lead to or may lead to a defeat to the interests of justice"; (3) no prejudice was caused to either the Appellant or Mario Čerkez by the admission of the Statements at this stage; (4) the procedure of allowing witnesses to validate their original witness statements did not breach the Rule; (5) all the Rule requires is that there should be some confirmation or support of evidence in a very general sense and therefore the term "facts in dispute" should be given a very broad interpretation and; (6) although cross-examination of the witnesses is not necessary or required, as "the matter is covered by the affidavit[s] being on oath," when the Trial Chamber considers the evidence it will "bear in mind that it was not given subject to cross-examination".[53]

The Appellant's argument that the statements did not satisfy the requirements of the Rule, in particular that they be filed prior to the testimony of the principal witness through whom they were to be tendered, was upheld by the Appeals Chamber:

> The affidavits in the instant case were submitted at the end of the Prosecution case, and in some cases months after the live testimony which they were supposed to corroborate had concluded. Contrary to the interpretation by the Trial Chamber of the timing requirement and the finding that it is a "technical procedural requirement", the Appeals Chamber finds that this is an integral and fundamental part of the Rule. It ensures that a party is informed of the facts in question and in doing so enables them to cross-examine the future live witness as to the disputed fact on the basis of the affidavit evidence, challenging both the credibility of the live witness together with the truthfulness and accuracy of the statements contained in the affidavits. If a party fails to comply with this requirement, material prejudice may be caused as the timing requirement is not only a technical requirement but also upholds the rights of the opposing party. As seen above, it is accepted that the Rules must be interpreted with some degree of flexibility, the primary object being "to achieve justice, not to delay it, and not to permit mere technicalities to intrude where there has been no material prejudice caused by a non-compliance". Indeed, the Appeals Chamber has, in some other types of cases, accepted non-compliance with the precise

53. *Prosecutor* v. *Kordić & Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No. IT-95-14/2-AR73.6, 18 September 2000, para. 9 (footnotes omitted).

> terms of a Rule, provided it has no adverse effect upon the integrity of the proceedings or the rights of the accused. But departure from the precise terms of Rule 94*ter* in this case was more than of a technical procedural nature.[54]

Interestingly, the Appeals Chamber in its Decision recalled a statement made in the *Tadić* Judgment that "[i]t is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements".[55]

The rule-makers, that is, the judges themselves sitting in plenary, decided either that the provision as it was drafted was indeed superfluous or pointless or at least that it was profoundly flawed. The same rule-makers who created Rule 94*ter* deleted it at the first opportunity following the *Kordić* Appeals Decision and replaced it with Rule 92*bis*,[56] which expressly provides for the admission of statements in lieu of live testimony, carrying with it a far more flexible procedural structure and guidelines on the kinds of evidence which may be admitted by written statement.[57] Rule 92*bis* overturns the *Kordić* Appeals Decision insofar as that Decision addressed the procedural requirements for the admission of affidavits or statements. The corroboration requirement under Rule 94*ter*, of which the Trial Chamber was found to be in breach, has been relegated to a minor status in the new Rule. It is one of six factors to be considered in favour of admission of a statement. So in material ways, the judges, acting as quasi-legislators pursuant to Article 15 of the Statute, overturned the Appeals Chamber in respect of legal requirements under Rule 94*ter* by deleting that Rule and creating a new Rule 92*bis*.

The judges acting in plenary have also amended the Rules to bring them into line with decisions of Trial Chambers and the Appeals Chamber of the ICTY and ICTR, where those decisions appeared to fall outside of the permissible scope of the Rules. As noted by one writer, Rule 87(C), as it existed prior to its amendment in December 2000, represents an example of a Rule that was ignored or not applied in several Trial Chamber decisions and in one decision of the Appeals Chamber.[58] Rule 87 deals with deliberations of the Trial Chamber. Prior to its amendment in December 2000, Rule 87(C) provided: "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the

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54. *Ibid*., paras. 31-32.
55. *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, para. 284, cited in *Prosecutor* v. *Kordić & Čerkez*, *supra* note 53, para. 29.
56. The deletion of Rule 94*ter* and creation of Rule 92*bis* occurred at the twenty-third Plenary Session held 29 November to 1 December 2000. The changes to the Rules entered into force on 19 January 2001, pursuant to IT/183, 12 January 2001.
57. For an analysis of Rule 92*bis*, see Gideon Boas, *supra* note 13.
58. See also, Daryl Mundis, *supra* note 32, pp. 199-206.

penalty to be imposed in respect of each finding of guilt." At the same time, Rule 101(C) of the Rules provided that the Trial Chamber "shall indicate whether multiple sentences shall be served consecutively or concurrently".

Five cases before the ICTY and ICTR had imposed a single, or global, sentence on a finding of guilt on multiple counts of the indictment.[59] Furthermore, the Appeals Chamber considered an appeal on this issue from the *Kambanda* case.[60] In doing so, the Appeals Chamber stated that "nothing in the Statute or the Rules expressly states that a Chamber must impose a separate sentence for each count on which an accused is convicted".[61] Yet surely that is exactly what Rule 87(C) did, at least until its amendment some two months later by the judges sitting in plenary. Interestingly, the Appeals Chamber made no reference in its judgment to Rule 87(C). Whether one might argue that the Rule, falling as it does under the heading of deliberations, is not intended to bind a Trial Chamber to disclosing what is the individual sentence given in respect of each finding of guilt, the Appeals Chamber might at least have made reference to its existence. However, it remains unclear whether the Chamber considered the Rule. Shortly after the rendering of the Appeals Chamber Decision in the *Kambanda* case, the judges, sitting in plenary, amended Rule 87(C) to read as follows:

> (C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

Furthermore, Rule 101(C) was deleted.[62] These amendments brought the Rule clearly in line with the practice of the ICTY and ICTR, including the practice endorsed by the Appeals Chamber. What is interesting to note is that the amended Rule states explicitly that the imposition of a single sentence is an exercise of an existing authority ("unless it decides to exercise its power…"). Perhaps this indicates that the Plenary considered that the Trial Chambers always had a power to impose single sentences, although this does not change the fact that the amendments remove provisions which appeared to dictate against such a practice.

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59. *Prosecutor* v. *Kambanda*, Sentence and Judgment, Case No. ICTR-97-23-S, 4 September 1998; *Prosecutor* v. *Serushago*, Sentence, Case No. ICTR-98-39-S, 5 February 1999; *Prosecutor* v. *Musema*, Sentence and Judgment, Case No. ICTR-96-13-T, 27 January 2000; *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95-14-T, 3 March 2000; *Prosecutor* v. *Jelisić*, Judgment, Case No. IT-95-10-T, 14 December 1999. For a discussion of these cases, see Daryl Mundis, *supra* note 32..

60. *Prosecutor* v. *Kambanda*, Judgment, Case No. ICTR-97-23-A, 19 October 2000.

61. *Ibid.*, para. 102.

62. These amendments were made at the twenty-third session of the Plenary held on 13 December 2000 and entered into force on 19 January 2001. See IT/183, 12 January 2001.

So it is apparent that the judges of the ICTY have amended the Rules to overrule decisions of Trial Chambers and the Appeals Chamber, as well as to modify and bring the Rules into line with practice which has developed jurisprudentially. A process of codification of case law is not in itself an objectionable process, even where those amending the Rules are the very judges interpreting the provisions in the first place. This is especially so in an institution like the ICTY, which is developing the first comprehensive body of rules of procedure and evidence for the prosecution of international crimes. The need for flexibility in that development process is obvious and efficacious, so long as the rights of the accused are fully respected. Such a codification process can increase clarity and consistency in the application of important procedural and substantive rules, particularly where judges and lawyers come from different jurisdictions with sometimes very different legal systems. Such codification will assist everybody in understanding how to conduct proceedings in an international criminal law jurisdiction.

It is, however, another thing entirely for judges sitting in a quasi-legislative capacity to amend the Rules to overrule decisions made by judges exercising their interpretative judicial functions. The impression this might give is that jurisprudence, even when settled by the Appeals Chamber, is subject to change for reasons which necessarily remain unknown, as the Plenary sessions are not subject to public disclosure. There is very little, if any, explanation of the rationale behind amendments to the Rules. It remains a serious concern that the judges acting in Plenary use their rule-making powers to override and alter certain decisions. This is particularly objectionable where a matter has been settled by the Appeals Chamber. It would lend greater certainty to the development and application of the Rules of Procedure and Evidence for parties to be able to rely upon their interpretation at an appellate level.

It is the author's view that, on balance, the method of creation and amendment of the Rules of the ICTY, placed as it is in the hands of the judges, is appropriate. The ICTY is the first international criminal jurisdiction to prosecute a broad scope of crimes in violation of international humanitarian law. Its ability to develop a coherent and effective body of procedure and evidence that is transferable to other similar jurisdictions (including the International Criminal Court) is, in part, dependant upon the flexibility to test and develop such rules. The lack of considerable procedural or jurisprudential history in this area of law, as well as the importance of removing the political process of international diplomacy from the rule-creating functions of a *criminal* jurisdiction, make a convincing argument for the methodology adopted by the Security Council in Article 15 of the ICTY Statute. Other international criminal courts and tribunals after the ICTY should be able to rely heavily upon its work.

It might be beneficial for the judges of the ICTY to publish detailed reasoning when they amend the Rules, or to publish the debates in Plenary. At present the debates are confidential and only a very brief and general description is published in the Tribunal's annual reports. Improved explanatory

reporting would enhance transparency and treat this ostensibly legislative function in a more traditional and publicly acceptable manner. It would also give an interpretative basis upon which applications under new and amended Rules could be considered, much in the way that second reading speeches are used as a basis for interpreting legislation.

Common Law versus Civil Law?

Is the question of the creation of a suitable code of evidence and procedure for international criminal law as simple as asking whether the common law or civil law systems of criminal justice better achieve the goals of criminal justice? It is clear that there are profound differences in the way these two systems approach the goal of determining truth. This dialectic merits exploration to ascertain what value can be extracted from the practice in the two systems. It is equally important, for the purposes of the analysis in this chapter, to inquire as to which aspects of the two systems are present in the Rules of the ICTY and in which ways interpretation of these Rules have been coloured by the two systems of criminal law.

Representation of the Common and Civil Law Systems in the Statute and Rules of the ICTY

In the First Annual Report of the ICTY, President Cassese stated: "Based on the limited precedent of the Nürnberg and Tokyo Trials, the statute of the Tribunal has adopted a largely adversarial approach to its procedures, rather than the inquisitorial system prevailing in continental Europe and elsewhere."[63] The President made it clear that this analysis was based on the fact that the Prosecutor has the sole task of inquiring into allegations of the commission of offences under the Statute, and obtaining the necessary evidence to secure a conviction.[64] The Prosecutor is the only person authorised to submit an indictment to a judge for confirmation and is required to argue the case before a Trial Chamber.[65]

This is familiar territory for lawyers from an adversarial system of criminal justice, in which it is common for the court not to interfere significantly in the preparation or indeed, to a great degree, in the running of the case. On the other hand, in the civil law criminal system, the court is involved in the

63. "Annual Report of the International Tribunal to the General Assembly of the United Nations, 29 August 1994", UN Doc. A/49/342, para. 71; ICTY Yearbook 1994, p. 99.
64. See Rules 39-43.
65. See Rules 47, 84 and 85.

process from the investigation phase onward. In this sense it is clear that, as President Cassese stated, the ICTY has adopted a largely adversarial approach to its trial procedures. The Statute of the ICTY envisages such a process for the investigation and prosecution of crimes which form the subject matter of its jurisdiction.

On the other hand, President Cassese went on to note three important deviations from some adversarial systems. First, the ICTY is not constrained by restrictive rules with regard to the admissibility of evidence, and consequently all relevant proof may be admitted unless its probative value is substantially outweighed by the need to ensure a fair trial.[66] Second, the Tribunal may at its own instigation order the production of new or additional evidence, not relying upon the evidence placed before it by the parties.[67] Third, there is no provision for the granting of immunity or the practice of plea-bargaining in the Rules. The Prosecutor determines against whom to proceed. Any co-operation from the accused may be taken into account as a mitigating factor in sentencing, as well as by the President when considering pardon or commutation of sentence.[68]

Criminal Procedure in the Common and Civil Law Systems

It has been stated by one commentator that:

> [i]t is hardly surprising that States have a tendency, not only to be chauvinistic about their own criminal justice systems, but also to be suspicious about foreign systems. Efforts towards harmonisation in this field are therefore very often considered as an unacceptable interference in their domestic affairs.
>
> This phenomenon is very clear in the European Community, where criminal procedure has, so far, remained almost completely immune to the general pattern of integration that has affected most other legal disciplines. Within the Community, the most striking difference still is that between civil law countries and common law countries. The (real or perceived) gulf between these countries may be greatest in the field of criminal procedure.[69]

The contrast between the adversarial aspects of the common law system of criminal procedure and the non-adversarial (or inquisitorial) system is relevant in many respects to an analysis of the Rules applied by the ICTY. The differences in these two systems of justice are perhaps greatest in the pre-trial investigation phase, as well as in the manner in which the trial is managed.

66. Rule 89; see also ICTY Yearbook 1994, para. 72.
67. Rule 98; see also ICTY Yearbook 1994, para. 73.
68. Rules 101 and 125 respectively. See also ICTY Yearbook 1994, para. 74.
69. Christine van den Wyngaert, ed., *Criminal Procedure Systems in the European Community*, 1993, p. i.

The perception that the two systems are wholly incompatible is not in fact completely accurate. As long ago as 1976, one writer stated that the perception by American lawyers that the civil law system is wholly "inquisitorial" is 200 years out of date.[70] For a start, most continental legal systems have in place the centrepiece of the common law adversary system: the jury trial in criminal cases.[71] Furthermore, "many of the continental countries, by adhering to the European Convention on Human Rights, have subjected themselves to general standards of procedural fairness quite comparable to our due process notions".[72]

Under civil law systems of criminal justice, legislation is the most significant source of law, with case law and general practice being of more marginal importance, sometimes clarifying or elaborating upon the criminal code. In France, for example, the *Cour de Cassation* (Appeals Court) has made important contributions to the procedures set out in the *Code de procédure pénale*.[73] However, in the common law system legislation is interpreted broadly, which provides for the system of precedent upon which the law is built.

> The law regulating English criminal procedure and evidence, like its substantive criminal law, has never been the subject of systematic legislative attention. Consequently, the relevant law is to be found scattered throughout an enormous range of sources including statutes, the common law (in judicial decisions), administrative guidelines and directions.[74]

The Investigation Phase

There are dramatic differences in the investigation phase of the two systems. In most civil law countries, serious crimes are investigated by the police under the direction of an investigating judge. In France, for example, the *juge d'instruction* (investigating judge) has two types of power at his or her disposal. First is the power of investigation, which the judge either carries out or which is delegated to the *police judiciaire* (judicial police) by formal instruction of the judge. In this respect, the powers of the judge are considerable. Article 81(1) of the French *Code de Procédure Pénale* states that "within the limits laid down by the law, the investigating judge may make whatever enquiries he considers necessary in order to discover the truth".

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70. Rudolf Schlessinger, "Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience", (1976) 26 *Buffalo L. Rev*. 363.
71. *Ibid*.
72. *Ibid*., pp. 363-364. See also, C. Linke, "The Influence of the European Convention of Human Rights on National European Criminal Proceedings", (1989) 21 *De Paul L. Rev*. 397.
73. See Christine van den Wyngaert, *supra* note 69, p. 106.
74. A.T.H. Smith in Christine van den Wyngaert, *supra* note 69.

Second, the investigating judge exercises judicial powers, and may decide to deprive a suspect of his or her liberty, to conduct searches and, at the end of the investigation, decides on whether the matter is to proceed further.[75] However, all the decisions of the investigating judge are reviewable by the *chambre d'accusation* (court of indictment):

> If charges are brought, the accused still does not necessarily have to stand trial. Under the traditional civil law practice, the dossier now goes to a three-judge panel [and] if this panel, having studied the dossier and having given defence counsel an opportunity to submit arguments and to suggest the taking of additional evidence determines [the accused will] have to stand trial.[76]

Under Belgian law, the normal course of pre-trial investigation for complex criminal cases is that conducted under the direction of the investigating judge, especially where coercive measures must be taken.[77] The powers of the investigating judge are substantially similar in practice to those of the investigating judge in the French system:

> The Code does not regulate the powers of the investigating judge in great detail. It is generally accepted that the investigating judge has a general power to carry out whatever investigations he deems necessary to discover the truth. According to the *Cour de Cassation* [Appeal Court], he may perform any act of investigation which is not forbidden by law and which is not incompatible with his professional dignity.[78]

In the Netherlands, the *openbaar ministrie* (Public Prosecution Service) is responsible for the investigation of crimes. However, as in France, a preliminary investigation may be carried out by an *rechter-commissaris* (investigating judge).[79] The investigating judge may also decide on detention on remand.[80] Furthermore, special tasks are assigned to the *raadkamer* (judicial council), a panel of three judges which, like the investigating judge, may have to decide on detention on remand, as well as a number of coercive measures and complaints on summonses.[81]

There are several continental European systems of criminal procedure which do not have the investigating judge as part of their investigation process. In Denmark, for example, criminal investigations are conducted by the police. In

75. *Ibid*., p. 110. Recent changes to the *Code de procédure pénale* have limited the powers of the *juge d'instruction* in this respect. Bail matters must now be considered by a different chamber without ongoing knowledge of the investigation.

76. Rudolf Schlessinger, *supra* note 70, p. 366.

77. *Code d'instruction criminelle* (Code of Criminal Procedure), 6.1.3.

78. Christine van den Wyngaert, *supra* note 69, p. 7. *Cour de Cassation*, 2 May 1960, Paricrisie, 1, 1020.

79. *Wetboek van Strafvordering* 1926 (Code of Criminal Procedure), 6.1.2.

80. *Ibid*., 5.2.1.

81. See generally Christine van den Wyngaert, *supra* note 69, p. 288.

the investigation of a case, police are required to collect evidence regardless of whether it is in favour of the prosecution or defence (*objectivitetsprincipett*).[82] Under the Danish procedures, defence counsel is entitled to full discovery of the results of the investigations as they appear,[83] and it is exceptional for the police to refuse to undertake the steps requested by defence counsel during the investigation.[84] It is, in fact, very rare for the defence to engage in private investigation, and such activity may be rendered illegal.[85]

Under German criminal procedure, the Prosecutor decides what cases are brought to trial. The Prosecutor has also a duty to look for both incriminating and exonerating evidence.[86] Empirical evidence demonstrates, however, that prosecutors generally do not obey this requirement and look predominantly for incriminating evidence.[87]

In common law countries, the process of investigating serious criminal offences is dramatically different, consistent with the adversarial nature of the criminal process. The initial investigation of criminal offences in England, for example, is undertaken by the police, without interference or assistance from the judiciary, except that the detention of a suspect is subject to judicial scrutiny.[88] This is typical of common law systems of criminal procedure, and is a major departure from most of the civil law systems.

One interesting difference in this civil/common law dichotomy is Italy, which amended its *Codice Di Procedura Penale* (Code of Criminal Procedure) in 1988. According to one writer, "[r]ecognising the desirability of separating the trial judge from the act of gathering evidence, the new code creates a distinct investigation phase in the criminal proceeding".[89] Investigations under the new Italian Code are now expressly delegated to the Prosecutor and, under his or her direction, to the judicial police.[90] A newly created *giudice per le indagini preliminari* (preliminary investigation judge)[91] oversees the development of the investigation and has control over the issuance of search warrants and

82. *Ibid*., p. 53.

83. Section 745 of the Criminal Code.

84. Section 746 of the Criminal Code.

85. Christine van den Wyngaert, *supra* note 69, p. 53.

86. *Strafprozeßordnung* (Code of Criminal Practice), § 160 II.

87. F. Blankenburg et al., *Die Staatsanwaltschaft im Prozeß strafrechtlicher Sozialkontrolle*, 1978, p 257 ff. See also Christine van den Wyngaert, *supra* note 69, p. 141.

88. Christine van den Wyngaert, *supra* note 69, p. 75. See generally, Ken Lidstone & Clare Palmer, *Bevan and Lidstone's Investigation of Crime: A Guide to Police Powers*, 1996.

89. L.J. Fassler, "The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe", (1991) 29 *Colum. J. Transnat'l L.* 251.

90. *Ibid*., p. 252.

91. *Codice Di Procedura Penale*, Article 328.

the imposition of pre-trial detention or other coercive measures required to be exercised.[92] Where the need to give pre-trial evidence arises, such evidence may be given to the preliminary investigation judge during a special adversarial hearing called an *incidente probatorio*.[93]

Taking of Evidence and the Trial Process

There are differences and similarities in the way common and civil law jurisdictions treat the taking of evidence and the onus of proof. In France the burden of gathering the evidence to establish guilt falls on the prosecution. In principle, the accused may simply wait until there is sufficient evidence put forward to prove him or her guilty. In this respect the presumption of innocence is a principle which is affirmed by both article 9 of the Declaration of the Rights of Man and Citizen of 1789 and article 6 of the European Convention on Human Rights. As a consequence, the prosecution must adduce evidence of four elements: the legal prerequisites for the existence of an offence, such as the absence of any amnesty or the legal validity of the regulation on which the charges are based; the material element of the offence, particularly the commission of the *actus reus* and the factual responsibility of the accused, *i.e.* his or her participation in the act; the mental element of the offence, *i.e.* the state of mind of the accused (intent or negligence); and that the prosecution is not barred by statutory limitations.[94]

However, the burden of proof on the prosecution is lightened in three ways under the French system. First, there are presumptions as to the mental element of some offences which favour the prosecution.[95] Second, the accused is put to proof with regard to certain facts which give rise to justifications and excuses, such as insanity.[96] Third, the investigating judge looks for both incriminating and exculpatory evidence,[97] the overall purpose being the search for the truth.

It is in the investigation and taking of evidence aspects of the process that the two systems vary the most. As observed by A.T.H. Smith: "The criminal process [in England] is overwhelmingly adversarial in character, so that the trial is not so much a search for the truth as a test of the evidence that is pre-

92. L.J. Fassler, *supra* note 89, p. 252.

93. Piermaria Corso, in Christine van den Wyngaert, *supra* note 69, p. 227.

94. Jean Pradel, in Christine van den Wyngaert, *supra* note 69, p. 119.

95. For example, the offence of *abandon de famille* (failing to pay support); see Article 27-2 of the Code of Criminal Procedure.

96. In the common law system, insanity would be raised as a positive defence by the accused, and would be required to be proved as part of his or her case.

97. Jean Pradel, in Christine van den Wyngaert, *supra* note 69, p. 119.

sented before the court by the parties."[98] Under the civil law system, the search for truth is the paramount philosophy underpinning the criminal investigation and trial process. That is why all evidence is admissible in the civil law system, whereas in common law adversarial systems, admissibility is a crucial part of the pre-trial and trial process, and cases can be won or lost on the basis of success in having evidence ruled admissible or inadmissible.

Furthermore, the involvement of the common law court in the presentation and taking of evidence at trial in the adversarial system is much reduced compared with that of the civil law system. The judge in the common law system rarely interferes in the questioning of witnesses by counsel, and apart from exercising the judge's inherent jurisdiction to ensure fairness to the accused, he or she does little more in this part of the process than to act as "an impartial referee between the parties".[99]

The burden of proof and assessment of the evidence, once admitted, are substantially similar in the two systems. Under English law, as in all common law systems, the burden rests on the prosecution to prove the guilt of the accused "beyond reasonable doubt", a test also applied by the ICTY.[100] French law is governed by the principle that the weighing of evidence by the court is free, the principle of *intime conviction* (profound conviction), whereby the trial judge exercises complete discretion over the weighing of the evidence presented to him or her.[101] The rule is set out in Article 353 of the French Code of Criminal Procedure, providing for the formal warning to be read out to jurors by the presiding judge:

> The law does not ask judges for an explanation of the means by which they are convinced, it does not set out any particular rules by which they must assess the fullness and adequacy of the evidence; it stipulates that they must search their conscience in good faith and silently and thoughtfully ask themselves what impression the evidence given against the accused and defence's arguments have made upon them. The law asks them only one question which sums up all of their duties 'Are you personally convinced' ('Avez-vous une intime conviction?').[102]

98. A.T.H. Smith, in Christine van den Wyngaert, *supra* note 69, p. 82.

99. *Ibid.*, p. 85.

100. See, for example, *Prosecutor* v. *Tadić*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 693. Rule 87(A) states:

> (A) When both parties have completed their presentation of the case, the Presiding judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

101. Jean Pradel in Christine van den Wyngaert, *supra* note 69, p. 129.

102. Translation in *ibid.*, p. 129.

An understanding of the different approaches to the taking of evidence and the weighing of evidence by the different systems to reach the same conclusion – guilt or innocence – is important to an appreciation of both the legal and political background to the ICTY Rules, and how they are evolving from a largely adversarial set of procedures into a "hybrid" system.

The question posed earlier, which of the two systems better achieves the goal of criminal justice, is of course hyperbolic. The two systems have strengths and weaknesses in the protections afforded the rights of accused persons as well as in the process by which the truth is sought. For instance, whilst the author, trained as a common lawyer, cannot resist attraction to the impartiality of judicial control at the investigation and pre-trial phase of proceedings under some of the continental systems of law, as well as the search for the truth being the underpinning philosophy behind the criminal process, it is also apparent that the accused is better served by adversarial representation during the trial process. The importance, for the purpose of this work, in distinguishing between the way the civil and common law systems of criminal procedure operate, is that such a contrast shows that whilst the ICTY Rules and structure are set up in an ostensibly adversarial way, they are also imbued with civil law innovations or characteristics which make them uniquely different to any other criminal jurisdiction.

There are a number of examples of these more civil law procedures. For example, the pre-trial regime is now managed in a far more interventionist manner, with a pre-trial judge being entrusted by the Trial Chamber with all pre-trial functions concerning disclosure, control of the number and nature of witnesses the parties may call in support of their cases and the disposal of pre-trial motions.[103] Another example is the provision for the accused to make an unsworn statement. Rule 84*bis* provides for the accused to speak without taking an oath. However, paragraph (B), which indicates that the Trial Chamber shall consider the probative value, "if any", of the statement indicates that the shadow of the adversarial system of criminal law clearly hangs over the accused's opportunity to speak. Finally, Rule 92*bis* provides for the admission of sworn statements in lieu of live testimony, the admission of testimony from other proceedings and the admission of statements of deceased persons. This Rule tests further the limits of hearsay evidence in a documentary form before the Tribunal and tends towards what the French refer to as *la liberté de la preuve*.[104]

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103. Rules 65*ter*, 73, 73*bis* and 73*ter*. For a more detailed analysis of Rules which reflect more the civil law systems of criminal justice, see Gideon Boas, "Creating Laws of Evidence for International Criminal Law: the ICTY and the Principle of Flexibility", (2001) 12 *Crim. L. Forum* 41.

104. For a detailed discussion of this Rule see Gideon Boas, *ibid*., and Gideon Boas, *supra* note 13. See also a recent Appeals Chamber decision interpreting and defining the application of the Rule: *Prosecutor* v. *Galić*, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), Case No. IT-98-29-AR73.2, 7 June 2002.

In fact, the work of the ICTY in this respect might be viewed as an attempt find a "third way", that is, a system of evidence and procedure for the prosecution of crimes under its jurisdiction that takes beneficial aspects of the common and civil law systems and blends then into new and workable code of procedure and evidence. This is evidenced by the considerable addition of rules over time, as just discussed, which are styled somewhat loosely on the civil law system of criminal justice. However, it is difficult to resist the conclusion that, in this respect, the ICTY can only hope for limited success. All the rules that have been enacted for the purpose of imposing flexibility on the evidentiary process so as to expedite proceedings are in a sense hamstrung by the overriding requirement that the accused be given the opportunity to test the evidence.

It is not suggested that the accused's important rights in this respect be compromised. What is necessary is a process that is from its inception governed by judicial control, such as in those civil law systems in which an investigating judge is responsible for the investigation of the case, the preparation of an indictment and the collection and presentation of a dossier upon which basis the court proceeds with the case. This means the system must be fundamentally civilian in structure, and not adversarial. The ICTY (and the ICC in turn) are premised on profoundly adversarial investigation procedures, under which the prosecutor, a party to the proceedings, investigates, collects evidence and decides what matters should be presented for indictment. Although the ICC Statute requires the Prosecutor to search for all evidence, incriminating and exonerating, in reality he or she still brings the case to court as an adversary. The indicia of reliability evident in an investigating judge's collection and presentation of evidence is not readily identifiable in such a structure.[105]

Safferling suggests that the "repeatedly invoked differences between the inquisitorial and the adversarial systems vanish at the investigating stage".[106] Whilst noting that "despite these similarities in structure, there are major dissimilarities in operation",[107] Safferling does not go on to identify how the differences in the two systems impact substantively on the trial process before

105. Article 54(1)(A) of the Rome Statute, *supra* note 21, also indicates that this process is undertaken by the Prosecutor "in order to establish the truth". Whilst the wording and philosophy behind the Prosecutor's role in this respect reflects civil law concepts of investigation practice, the rest of the structure of the ICC's pre-trial and trial structure mirrors the adversarial model and it is unlikely that the Prosecutor's hybrid role as impartial investigator and adversarial party will satisfy an accused's right and need to be able to test the evidence under restrictive evidentiary practices identified in the common law systems. It is noted, however, that Article 51(4) is a considerable improvement on Rule 68 of the ICTY Rules, which simply imposes an obligation upon the Prosecutor to hand over material in his or her possession which tends to suggest innocence or mitigate the guilt of an accused.

106. C. Safferling, *Towards an International Criminal Procedure*, 2001, p. 55.

107. *Ibid.*

the ICTY or ICTR, or indeed how it might impact upon the ICC. Part of the reason for this may be his selection of the national jurisdictions of Germany, England and the United States as a comparative law perspective, therefore omitting a continental system of criminal law which has the investigating judge as an institution for the investigation and collection of evidence. This institution is, in my opinion, essential to the development of an international criminal procedure which balances the rights of an accused to a fair and expeditious trial. The experience of the ICTY shows that without an independent body responsible for the investigation and collection of evidence, a tension will be created between the right of an accused to test all evidence presented by the prosecution in the best possible way, on the one hand, and, on the other, the expeditious disposal of the trial. Safferling states in his introduction:

> The [ICTY] has embarked on the great challenge of overcoming the gulf that exists between the different legal traditions. Thus far the work of the ICTY "demonstrates the difficulties inherent in melding civil law and common law rules and international human rights standards into a truly 'international' body of procedural and substantive criminal law".[108]

The experience of the ICTY does indeed represent such a proposition. But it also represents somewhat more than this. The ICTY has developed a body of Rules, based inherently upon the adversarial model of criminal procedure, with a considerable overlay of concepts from the civil law system. In doing so, it has succeeded in moving away from any traditional concept of criminal procedure identified in domestic law. It has focussed its Rule amendment process on resolving the problem of expediting trials whilst respecting the right of an accused to a fair trial under international law. This has taken it into a new field of inquiry and closer to the development of a truly international code of evidence and procedure. This is a legacy which will benefit the ICC in its development.

The Rules and Protection of Human Rights

If the Rules of the ICTY are to be looked at as a code of evidence and procedure for the prosecution of international criminal law, it is essential to consider whether the ICTY has achieved the proper balance between flexibility and the expeditious conduct of trials on the one hand, and the fundamental rights of accused persons on the other. As was mentioned in the introduction to this chapter, a full analysis of these procedural human rights issues is undertaken elsewhere in this book. The purpose of my consideration of the human rights issues here is limited to the question of whether the nature and content of rules, and their creation and amendment by the ICTY, is befitting of an international code of procedure and evidence.

108. *Ibid.*, pp. 1-2 (footnote omitted).

Earlier in this chapter, I discussed the manner in which the ICTY Rules are created and amended. I concluded that whilst there was considerable room for criticism, on the balance I believe that such a methodology is appropriate. The ICTY is the first international tribunal to develop a coherent set of rules based on international law for the prosecution of international crimes. Whilst I do believe that the ICTY could improve the openness of its amending procedures, the flexibility it is afforded by its creator, the Security Council, and the vigour with which it utilises this tool at its disposal, represent a desperate but considered and honourable attempt to achieve speedy trials and the protection of the rights of the accused.

The melange of legal systems identified in the ICTY Rules has been discussed. One interesting criticism recently made of the International Tribunal is the fact that whilst it has been imbued with an ostensibly adversarial model of litigation, it has failed to impose all of the evidentiary protections available to accused persons in adversarial systems of criminal law. Professor D. Krapac, Dean of the law school of the University of Zagreb, argued in a paper given to a seminar in March 2002[109] that the early abandonment of the prohibition against hearsay in proceedings before the ICTY effected a procedural deficit against the accused. This, according to Professor Krapac, has increased with the introduction of Rules allowing for the admission of statements in lieu of live testimony in Rule 92*bis*. Professor Krapac went on to make the controversial suggestion that this amounts to a shift in the burden of proof away from the prosecution to the accused. If this characterisation is correct, surely it would amount to a profound violation of the fundamental presumption of innocence of the accused. The burden of proof must lie on the prosecution to establish the guilt of the accused beyond a reasonable doubt.[110]

In fact, the ICTY's position with respect to the operation of the hearsay rule does not violate the rights of the accused. Judge May has noted in a recent article that hearsay material was admitted at the Nuremberg and Tokyo war crimes trials,[111] although this does not in itself meet the criticism. What needs to be shown is that the accused is not prejudiced by the admission of hearsay testimony (in oral or written form). The position with respect to the admissibility of hearsay testimony was set out in the first decisions of the International Tribunal. For example, in an early ruling in the *Tadić* case, the Trial Chamber stated that under the Rules of the ICTY, and in particular Rule 89(C), out-of-court (hearsay) statements that are relevant and found to have probative value

109. *Supra* note 30.

110. Article 21(3) of the Statute of the Tribunal states that the accused "shall be presumed innocent until proved guilty". Rule 87 dealing with deliberations by the Trial Chamber states: "A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

111. Richard May & Marieka Wierda, *supra* note 1, p. 745.

are admissible.[112] Rule 89(D), which provides for the exclusion of evidence where its probative value is outweighed by the need to ensure a fair trial, acts as a filter for hearsay evidence. In an interesting passage in a separate opinion to the *Tadić* case, Judge Stephen explained that this provision may be used to exclude all kinds of testimony of low probative value, not just hearsay:

> It is to be noted that Sub-rule (D), while it may be applicable to some instances of hearsay evidence, is by no means confined to such evidence. It will obviously also have a role to play where, for example, highly prejudicial first-hand testimony is for any of a multitude of reasons, to be accorded very little weight because of low probative value and should therefore be excluded from evidence.[113]

What the Trial Chambers have said more recently is that whilst they will admit hearsay evidence, they will consider seriously the reduced reliability of such testimony when weighing that evidence in proceedings before them. In some circumstances, Trial Chambers have said outright that hearsay material of an inherently irrelevant or unreliable nature will simply be ruled inadmissible because it cannot have the threshold indicia of relevance and reliability. For example, in response to an attempt in one case to introduce a report by a prosecution investigator summarising testimony of witnesses from a particular village, one Trial Chamber stated:

> [T]he position with regard to the Report is somewhat different. The Investigator is not reporting as a contemporary witness of fact, he has only recently collated statements and other materials for the purpose of this Application. He could, in reality, only give evidence that material was or was not in the Dossier. The Report therefore is of little or no probative value and will not be admitted into evidence.[114]

The Trial Chamber did not exclude the investigator's report because it violated the accused's right to cross-examine witnesses, as set out in article 21(4)(e) of the Statute. Rather, it said the investigator could not really give evidence of any utility to the Trial Chamber, thereby contravening Rule 89(D) and the balance of interests between probative value and prejudice.

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112. *Prosecutor* v. *Tadić*, Decision on the Defence Motion on Hearsay, Case No. IT-94-I-T, 5 August 1996, para. 7.

113. *Ibid*., Separate Opinion of Judge Stephen, p. 4. In a recent decision of the Appeals Chamber, the admission of a statement of a deceased witness by Trial Chamber III was overturned on the basis that it was "so lacking in terms of the indicia of reliability that that it [was] not 'probative'" and was therefore inadmissible: *Prosecutor* v. *Kordić & Čerkez*, Decision on Appeal Regarding Statement of a Deceased Witness, Case No. IT-95-14/2-AR73.5, 21 July 2000, para. 24.

114. *Prosecutor* v. *Kordić & Čerkez*, Decision on the Prosecution Application to Admit the Tulića Report and Dossier into Evidence, Case No. IT-95-14/2-T, 29 July 1999, para. 20.

The Rules have been amended recently to admit large quantities of documentary evidence, often hearsay in nature, without the automatic right of an accused to cross-examine on that material. Such a procedure is provided for in Rule 92*bis*, as set out briefly above. Article 21(4)(e) of the Statute has been interpreted as an affirmation of the accused's right to confront the witnesses, a right recognised in many jurisdictions. One Trial Chamber has stated:

> It is important to re-emphasise the general rule requiring the physical presence of the witness. This is intended to ensure confrontation between the witness and the accused and to enable the judges to observe the demeanour of the witness when giving evidence.[115]

In the same decision, however, the Trial Chamber recognised exceptions to the general rule requiring the physical presence of the accused, including video-conferences.[116] The Appeals Chamber has articulated its view that there are four exceptions to the principle that witnesses should testify in person.[117] This principle, based on Rule 90(A) prior to its recent deletion, has now been amended by a new Rule 89(F) which formulates it somewhat differently: "A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form."[118] This change in the way in which evidence is to be received by the Tribunal is expanded upon by the new Rule 92*bis*. This provision reflects the proposition that, as mentioned above, is settled by the Appeals Chamber. The accused's right to cross-examine is not absolute.[119]

It is not proper to characterise the ICTY's treatment of hearsay evidence, in oral testimony or through the admission of documentary material (either exhibits or testimonial material), as violating an accused's fundamental rights. It could do so where a Trial Chamber refuses an accused's request to cross-examine a witness whose testimony is crucial to his or her defence, but that could be said of the exercise of a court's discretion on any number of matters. The most that can be said is that Rule 92*bis* creates the potential for a shift in the procedural burden by requiring the accused to assert, where the testimony sought to be admitted in documentary form does not go strictly to the acts or

115. *Prosecutor* v. *Delalić* et al., Decision On The Motion To Allow Witnesses K, L And M To Give Their Testimony By Means Of Video-Link Conference, Case No. IT-96-21-T, 28 May, 1997, para. 15.

116. *Ibid*., para. 14. "[T]here are exceptions to the general rule where the right of the accused under Article 21(4)(e) is not prejudicially affected."

117. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 113, para. 19: Deposition evidence under Rule 71; testimony via video-link under Rule 71*bis*; expert witness statements under Rule 94*bis*; and affidavit evidence under (now deleted) Rule 94*ter*, which is reflected in the broader provision, Rule 92*bis*.

118. Rule 89(F).

119. *Prosecutor* v. *Kordić & Čerkez*, Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No. IT-95-14/2-AR73.6, 18 September, 2000, para. 26.

conduct of the accused, the reason why he or she wishes to cross-examine a witness's evidence. If this discretion is exercised properly by a Trial Chamber, then the right of an accused to test evidence properly should be respected. In other words, it is in the interpretation rather than the drafting that the rights of an accused may be violated.

Conclusion

This book is replete with discussion concerning the human rights implications of the Tribunal's practice and jurisprudence. In a very real sense, this is an underlying theme which should run through any analysis of the effective administration of a criminal justice system. The ICTY started with a virtually clean slate in creating a set of rules of procedure and evidence for the prosecution of international crimes committed in armed conflict. Whilst it relies heavily on the adversarial common law system of criminal law for the foundation of its procedural and evidentiary structure, it has increasingly tended towards civil law perspectives. In doing so it has freed itself of some of the constraints of the evidentiary rules of the adversarial system. From the start, it has allowed hearsay testimony and has gradually developed a flexible approach to the admission of documentary hearsay. It has developed greater judicial intervention at the pre-trial stage, instituting a pre-trial judge with broad powers to regulate disclosure, timetabling and other essential pre-trial matters. It has given the Trial Chambers considerable control over the number and nature of witnesses the parties may call in the proceedings. It has created a provision allowing for unsworn statements by the accused, something which, at least in principle, gives the accused a voice in the proceedings. In many ways, the evolution of the Rules of Procedure and Evidence reveals an awakening to the value of the more flexible approach to evidence and truth-finding seen in civil law systems.

Admirably, it has attempted to codify these evolutions which, in itself, has given more clarity to a process that has evolved at a considerable pace. The manner and quantity of the codification (and re-codification) process is, as discussed in this chapter, a matter which should be given critical attention. The Tribunal could certainly be more open in the reasoning behind its rule-amending process and questions should properly be asked where the power granted the judges of the ICTY to amend their own rules is used to overrule decisions of the Appeals Chamber. That said, however, the ICTY has done an exceptional job in developing a coherent and fair body of rules that balance the crucially important rights of the accused to a fair trial with the considerable burden placed upon it by the international community to expedite its proceedings. The fact is that these are incredibly complex proceedings, the breadth and nature of which have never been tried before by a truly international tribunal. Furthermore, the Rules were initially produced before the judges had heard a single case and could not possibly have accounted for

all of the developments and contingencies in such a new and complex area of criminal law. For these reasons, it is forgivable that the Tribunal would require the expansive use of its flexible rule-amendment powers.

Of course, the Rules and the manner in which they are amended are not perfect. They are not an academic experiment. They are a body of norms that regulate proceedings within which the liberty of the accused is determined, and the history of nations and the lives of people affected by war are considered. The decisions made within this context are profound. The Rules of Procedure and Evidence represent an attempt to regulate with legal fairness this important process.

The Rules of Procedure and Evidence of the ICTY represent a very good basis for a code of procedure and evidence for the prosecution of violations of international humanitarian law, and perhaps international criminal law more generally. However, this praise should be tempered with two observations. The first is that the process of amending a body of Rules like this should be more open to public explanation, understanding and scrutiny. As stated above, the creation and amendment process exercised by the judges is quasi-legislative in nature. This process would benefit greatly from a system of annotation, containing explanation of the reasoning and motivation for each amendment. The second observation is that the ICTY started with a procedural deficit. The adoption of a largely adversarial system of investigation, pre-trial and trial management bound the Tribunal early on to some restrictive and inflexible evidentiary procedures and rules. The history of the ICTY's regulatory conduct with respect to its Rules since this time is one which has been characterised by a more flexible approach to the rules of evidence and greater intervention by the judges in both the pre-trial preparation and the conduct of trials.

However, as argued above, the best way to evolve a system of criminal procedure and evidence for the kinds of crime prosecuted under international criminal law is to start from the civil law position. Without an investigation process governed by an independent judicial officer, it is impossible to place reliance upon the evidence *collection* process, as can be done in many civil law systems, which utilise an investigating judge for this purpose. Inevitably, the court will, as the ICTY has, be faced with the insurmountable argument of an accused that the evidence was collected by a party to the proceedings and must be subject to the right of an accused to test that evidence in the best way possible. This will require making available the primary source of the evidence for cross-examination or other appropriate scrutiny.

Unfortunately, the Statute and Rules of the ICC have been drafted in a similarly adversarial frame of mind (with some notable exceptions[120]).

120. For example, the ICC Prosecutor's role is not simply one of a party to the proceedings, with a purely adversarial role of collecting incriminating evidence against accused persons for the sole purpose of obtaining a conviction. The Prosecutor is rather conceived of under the Statute as both an adversarial party

However, the Court will have to interpret and re-interpret its own regulatory framework as it becomes increasingly overwhelmed by its caseload, so as to best carry out its work and to balance the often competing interests of the rights of the accused and the need to ensure an expeditious trial. The ICTY's experience and its considerable efforts to mould its Rules of Procedure and Evidence into a workable code for the prosecution of such crimes should assist the ICC in this process.

to the proceedings as well as an instrument of truth finding, a concept inherent in the civil law criminal system (Article 54(1)(a) of the Rome Statute, *supra* note 21). Under the Rome Statute, the Prosecutor performs his or her mandated tasks under the supervision of a Pre-Trial Chamber of the Court (Article 15(3)), and victims may take part in the proceedings of the ICC (Articles 19(3), 68(3) and 75(1)). However, see *supra* note 105.

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MICHAEL BOHLANDER*

The Defence

The Tribunal has not been established to satisfy the victims only, but to bring justice to all, including the accused.[1]

> Es ist unrecht, jemandem, der sich verteidigen will, er sei kein Zauberer, einen Rechtsbeistand zu verweigern. Es ist schon unrecht, wenn man ihm nicht möglichst den besten Anwalt, oder doch den gibt, den er selbst vielleicht zu haben wünscht. ... Man soll ihm eher bei der Verteidigung helfen und alles Erforderliche bewilligen, statt ihn irgendwie zu behindern. ... Je schwerer das Verbrechen, dessen einer beschuldigt wird, desto schwerer versündigt sich, wer ihm die Verteidigung verweigert. ... Der Richter hat selbst dafür zu sorgen, daß es den Gefangenen nicht an Advokaten fehlt.[2]

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* This chapter is dedicated to my former doctoral supervisor, Professor Dr. Dr. h.c. Heike Jung, University of the Saarland, on the occasion of his sixtieth birthday. The author has been a judge at the District Court for Southern Thuringia at Meiningen, Germany, since 1991, and is presently seconded to the State Supreme Court of Thuringia at Jena. The author was on special leave and acted as the senior legal officer of a Trial Chamber at the ICTY from 1999 until 2001. He holds his law degrees (First and Second State Examinations) and a doctorate in comparative criminal procedure from the University of the Saarland. He is an Honorary University Fellow at the School of Law of the University of Exeter, England. The views expressed herein are solely those of the author. I would like to thank Dr. Christian Rohde, Chief of the Office for Legal Aid and Detention Matters (OLAD) at the ICTY, for making materials available to me. I am also grateful to Diane M. Amann and John E. Ackerman for reading and commenting upon the first draft of the paper and for sharing useful insights during the drafting process. The chapter was finished in June 2002, and for editorial reasons only the internet websites referred to could be accessed in August 2002 for verification.

1. Opening remarks of Michaïl Wladimiroff in *Prosecutor* v. *Tadić*, Case No. IT-94-1-T, Hearing, 7 May 1996.

2. Friedrich von Spee, *Cautio Criminalis oder Rechtliches Bedenken wegen der Hexenprozesse*, 2nd ed., 1632, Question 18 I., II., IV.,VI., X (translation by the author):

> It is injust to deny legal assistance to somebody defending himself against a charge of sorcery. It is even injust not to provide him with the best advocate if possible, or at least the one he may desire to have. ... He should rather be supported in his defence and given everything that is necessary, instead of

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *35-74.*

> The prosecution … is only one aspect of the trial process. There is also the defence. The common law adversarial system of criminal trials, …, is largely reflected in the Statutes of the Tribunals and in their Rules of Procedure and Evidence. This, coupled with the presumption of innocence and the principles relating to self-incrimination, results in accused being uncooperative and insisting upon proof … of every element of the crime.., as is the accused's right under both the Statutes and … human rights law. From the standpoint of an accused, this represents optimum use of defence counsel. … Moreover, it is not uncommon for accused to believe that it is in their interest to engage in obstructive and dilatory tactics before and during trial. The crediting of detention time against the ultimate sentence may also bear on these tactics, along with the remuneration to defence counsel for legal services, which is … paid … mainly on the basis of time spent.[3]

This chapter deals with the law and jurisprudence developed by the Chambers and other organs of the International Criminal Tribunal for the former Yugoslavia (ICTY) with regard to the position of the defence.[4] It does not deal with the human rights angle or the rights of the accused in the stricter sense, although they are inevitably aspects of the defence of persons accused before the ICTY. The aim is to present an overview and analysis of the more institutional side of defence issues, such as the law on professional conduct, attorney discipline and legal aid. However, it is clear that these issues are legion and that it would by now, with over eight years of Tribunal jurisprudence and activities, take a book of its own to provide an in-depth analysis of every one of them.

The chapter will begin by looking at the constitutional aspects of the issue, setting out the main provisions in the Statute as the necessary background, and comparing the concept of defence counsel with that of *amici curiae* recently employed in the *Milošević* proceedings. It will then address the law on professional conduct, including the relevant Rules of Procedure and Evidence and the Code of Conduct. The third part will address the legal aid

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being obstructed in any manner. The greater the crime with which someone is charged, the greater the sin of those who deny him a proper defence. …The judge himself must take care that the prisoner is not without an advocate.

3. "Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda of 11 November 1999", UN Doc.A/54/634, paras. 22-25 and 67.
4. Under Rule 2(A) of the Rules of Procedure and Evidence, "defence" means the accused and/or the accused's counsel. It does therefore on strict interpretation not apply to the suspect and his or her counsel. But as Article 18 of the ICTY Statute extends the procedural guarantee of counsel also to suspects, this must be seen as a mere omission without substantive meaning, because no rule can abrogate a guarantee given by the Statute itself.

regime under the Directive for the Assignment of Defence Counsel and also take a look at the thorny issue of ineffective assistance of counsel as a ground for appeal.

The Defence and the Statute – Constitutional Background

The provisions of the Statute, mainly Articles 20 and 21 for the accused[5] and Article 18 for the suspect,[6] form the constitutional framework for everything the Chambers, the Registry and the Prosecutor may do with regard to the suspect, the accused and his or her defence counsel. The relevant parts merit reproduction.[7]

> Article 20
>
> Commencement and conduct of trial proceedings
>
> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, *with full respect for the rights of the accused* and due regard for the protection of victims and witnesses.
>
> …
>
> Article 21
>
> Rights of the accused
>
> …
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

5. According to Rule 2(A) an "accused" is a person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47.
6. A "suspect", under Rule 2(A), is a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction.
7. Parts of particular relevance for this chapter are emphasised in italics.

> *(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
>
> (c)…;
>
> (d) to be tried in his presence, *and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*
>
> …
>
> Article 18
>
> Investigation and preparation of indictment
>
> …
>
> 2. The Prosecutor shall have the power to question suspects,….
>
> 3. If questioned, *the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it*….

There is a discrepancy between accused and suspect in Articles 21(4)(d) and 18(3). Whereas for the accused the assignment of counsel is under the proviso that the "interests of justice so require", no such proviso exists for a suspect who is questioned by the prosecution, regardless of whether he or she is in pre-trial detention under Rule 40*bis*.[8] Rule 45(A), curiously enough, extends the "interests of justice" requirement to suspects. However, regardless of whether this is a breach of the norm hierarchy or some sort of authentic interpretation

8. John R.W.C. Jones, *Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2000, provides no commentary on this either under Article 21 or Article 18 and Rule 42. The same is true for John E. Ackerman & Eugene O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, 2000. The latter, however, refer to a decision by a Trial Chamber in *Prosecutor* v. *Delalić* et al. (at p. 140). The Trial Chamber said, at para 36 of that decision:

   > With regard to Article 21(4)(d), the rights thereby guaranteed are the rights of an accused person, not the rights of a suspect during questioning by the Prosecution. The Accused cannot claim the benefit of Article 21(4)(d) – benefit due to an accused – at a time when he was still a suspect. The right of a suspect to legal assistance which is guaranteed in Article 18(3) finds expression in Rule 42, a rule which … was not violated in relation to the Accused.

of the Statute by means of a secondary provision enacted by the Plenary under Article 15 of the Statute, or a mere oversight, it is unthinkable that there could ever be a case in which the interests of justice did not require assignment of counsel to an indigent person who is suspected of war crimes and who asks for counsel. This phrase was taken from Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and whilst it may have a meaning in minor domestic prosecutions, it is entirely meaningless in the legal environment of the ICTY.

It is also worth noting that the ICTY so far has not classified the public review of an indictment under Rule 61 as a trial which would trigger the guarantees under Article 21.[9] Attorneys representing an accused against whom such a procedure is applied do therefore not have the right of access to the courtroom or the materials used during the review.

Another issue is the scope of assistance covered by Article 21(4) of the Statute. The provision speaks of the "accused" and the "determination of any charge". On the face of it, this excludes convicted persons from the benefit of assigned counsel after the appeals stage. It would thus also exclude convicted persons in review proceedings according to Article 26 of the Statute and Rules 119 to 122. The Rules are silent on the procedure to be employed for the review. However, the Directive on the Assignment of Defence Counsel contains wording that might be supportive of the view that assignment is also possible for review proceedings. Article 16(A) of the Directive states: "A suspect or accused shall be entitled to have one counsel assigned to him and that counsel shall handle *all stages of the procedure* and all matters arising out of the conduct of the suspect's or accused's defence, including where two or more crimes are joined in one indictment." (emphasis added)

There is another argument in favour of extending the possibility of assignment to the review stage. Rule 122 deals with the case, not explicitly

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No further reasons were given. One wonders if the Trial Chamber was not a little bit short of the mark with this general statement. Neither Article 18(3) nor Rule 42 speak of the right of the suspect to be informed of the charges. Article 21(4)(d) is based on Article 14 of the ICCPR, which speaks of the "determination of any criminal charge", not necessarily of an *accused* within the meaning of Article 21(4)(d) of the Statute. Article 9(2) of the ICCPR states: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Neither Article 18(3) of the ICTY Statute nor Rule 42 contain a provision to that effect. If Article 21(4)(d) of the Statute is modelled on the ICCPR, would it not have been more in the spirit of the Statute to extend this right to the suspect by way of analogy if Article 18(3) somehow managed not to be modelled on Article 9(2) ICCPR? Or did the Trial Chamber actually mean to say that the prosecution does not need to inform the suspect of the charges?

9. See *Prosecutor* v. *Karadžić and Mladić*, Decision Rejecting the Request Submitted by Mr. Medvene and Mr. Hanley III, Defence Counsel for Radovan Karadžić, Case Nos. IT-95-R-61 & IT-95-18-R61, 5 July 1996.

mentioned in Article 26, of a judgment by a Trial Chamber that is under appeal at the time the motion for review is filed. The Rule empowers the Appeals Chamber to return the case to the Trial Chamber for disposition of the motion. At this time, the court is still dealing with the determination of the charges because the judgment is not final, and thus it appears to be rather clear that counsel assigned for trial and appeal could also represent the accused in the review proceedings. It would then seem to be unfair to refuse the assignment to a convicted person just because of bad luck that new evidence came to light after the appeal stage was completed. So either previous counsel can continue representing the accused, or if that counsel is not available anymore for whatever reason, new counsel can be assigned.

One interesting issue, which achieved prominence recently in the *Milošević* case, is the right of the suspect and the accused to waive representation by counsel. There the Trial Chamber resorted to the appointment of *amici curiae* who were to "assist the Chamber" and ensure a fair trial, but who were not meant to be defence counsel. Trial Chamber III reasoned as follows in issuing a decision inviting the Registrar to appoint an *amicus curiae*:

> THIS TRIAL CHAMBER of the International Tribunal…,
> CONSIDERING as follows:
> the accused is entitled to defend himself in person and has not appointed counsel to act on his behalf,
> the accused has informed the Registrar … that he has no intention of engaging a lawyer to represent him,
> Article 20 of the Statute of the International Tribunal requires the Trial Chamber to ensure that a trial is fair and that it is conducted with full respect for the rights of the accused,
> THE TRIAL CHAMBER therefore considers it desirable and in the interests of securing a fair trial that an *amicus curiae* be appointed as permitted by the Rules of Procedure and Evidence, not to represent the accused but to assist in the proper determination of the case, and pursuant to Rule 74,
> INVITES the Registrar to designate counsel to appear before it as *amicus curiae*, to assist the Trial Chamber by:
> (a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion;
> (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate;
> (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and
> (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial, and
> EXTENDS the time for filing by designated counsel of preliminary motions pursuant to Rule 72 until 30 days after designation by the Registrar, and

> DIRECTS the Registrar to provide designated counsel with all such material as is or has been provided to the accused.[10]

The idea behind this was on the face of it the assistance to the Trial Chamber, not the representation as defence counsel of the accused.

The three counsel appointed, Kay, Tapušković and Wladimiroff, obviously had problems with this role as evidenced by exchanges between the *amici* and the bench at later status conferences, first on 29 October 2001:

> MR. WLADIMIROFF: …The first observation I want to make deals with the position of the amicus curiae and the position of the accused. We pointed out in our brief that the accused should have full opportunity to express himself and to make any statement that is relevant to argue his case. …First of all, I want to say that the amicus curiae, during the pre-trial position, each of us, we feel that we should not raise issues that have not been raised by the accused. So at this stage, we feel appropriate to react to issues that have been raised by the accused. That's for the very reason that we do not want to replace him in terms of raising issues. It's for the accused to raise the issue and we are there to comment on that by assisting the Court in supplying legal reasoning for the argument raised by the accused. …
>
> JUDGE ROBINSON: Mr. Wladimiroff,... I understand what you have said, but in my view, it is perfectly open to the amici to raise any arguments that they wish so long as it will assist the Chamber, and that is perfectly clear from the motion, from the ruling that the Chamber gave. …for the purposes of the rest of the trial, I think it is important that you understand that your role is a bit wider than that. It is not simply to react to arguments raised by the accused. You are there to assist the Chamber in the consideration of this case. …
>
> MR. WLADIMIROFF: … I am confident that at the end of the day… the amici curiae will be able to do what we have to do in the interest of the accused and to assist the Court in finding the right answers to issues that have been raised in this Court. But please allow us to start as delicately as we can.[11]

The problem recurred a day later, on 30 October 2001, when even the Prosecutor, by a slip of the tongue, referred to the *amici* as defence counsel:

> MR. KAY: … Looking … at the issues as far as we're concerned, … we're not Mr. Milosevic's Defence counsel so we won't be advancing … a defence on instructions, … because we wouldn't have those instructions upon which to act and advance issues to the Court. That may have an impact on the length of the trial and any scheduling. We would, of course, be applying the order of the

10. *Prosecutor* v. *Miloševi*ć, Order Inviting Designation of *amicus curiae*, Case No. IT-99-37-PT, 30 August 2001.
11. Transcript of 29 October 2001, at pp. 30-32.

> Court that appointed us in the first place, which we've been paying particular attention to because that's the very basis of our existence within this courtroom..., but again as far as the amici curiae are concerned, we're not acting here as Defence counsel in relation to the issues within that indictment. We're here with a distinct role of performance…
>
> JUDGE MAY: I think that point needs to be underlined again so that the accused should hear it. He's heard it before….what you cannot do is put forward a positive defence case. You have a brief which is set out in the order. You can make submissions open to the accused. …You can cross-examine witnesses, as appropriate. You can draw to the Trial Chamber's attention any exculpatory material – and perhaps we can come back to that – and you can act in any way which you consider appropriate in order to secure a fair trial. Now, that's an important role but it is a limited one….And what it does mean is that no positive defence, except one that can be gleaned from material which is provided to the Court, can be put forward. …You're not in a position to call witnesses, not in a position to cross-examine on instructions. Only that can come from the Defence – …which means the accused.
>
> MR. KAY: … From the common law jurisdiction, this is something that we're very familiar with and understand, because it's how the system works. … When the Prosecutor this morning – and I forgive her for it; it's obviously a technical slip – referred to us as Defence counsel, I want to make it quite clear, we're not Defence counsel and that's not the basis of our appointment. We're here as amici curiae within a specific terms of reference that we have to follow. We can't go outside that terms of reference because we're here, appointed by the Court. The accused … may well advance issues on his own behalf and … take a part in the proceedings …, but that's a matter entirely for him. Particularly in the advancement of a defence case, that's something that the amici curiae are unable to perform on his behalf …, because we do not have instructions as counsel appointed by him…. What we have done to date so far was follow issues that were raised by him, … that we felt could properly be put before the Court for consideration…[12]

The *amici* and the bench were at pains to stress that they were not defence counsel. But is that really true? There is a Latin legal phrase, *falsa demonstratio non nocet*, which means that a wrong label is irrelevant, if you can glean the true meaning from the facts. The fact is that Rule 74 is not the real basis for the designation of counsel to act as the three *amici* do. The typical function of an *amicus*, as is also set out in Rule 74, is to make submissions on specified issues, usually of a legal nature, *e.g.*, as the Attorney-General and the Queen's Proctor in the United Kingdom, or the many law professors and non-governmental

12. Transcript of 30 October 2001, at pp. 139-142.

organisations (NGOs) in the United States – although in American federal civil procedure there exists a creature called the "litigating *amicus curiae*",[13] who is to differing degrees allowed to get involved in the trial process, but usually as a representative of *third-party* interests, not those of a *party* to the proceedings.

An *amicus* in the classical sense does not normally obtain access to confidential material[14] and will not be allowed to cross-examine[15] witnesses.[16] An *amicus* is not involved in a full scale trial proceeding from start to finish, but normally appears, very much like an expert, for a limited amount of time, maybe even in only one hearing. Was it an inadvertent slip of the tongue when Judge May told Mr. Kay that they have a "brief" in the order inviting their designation? A brief in *this* context is usually the document sent by a solicitor to counsel which contains the instructions by the client through the solicitor. One could almost think of the Trial Chamber instructing the *amici*.

Despite protestations to the contrary, the *amici* are *de facto* defence counsel[17] who are merely hampered in their work by the fact that the accused does not

13. On the use of *amici curiae* acting for third-party interests in American federal civil procedure, see Michael K. Lowman, "The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?", (1992) 41 *American U. L. Rev.* 1243.

14. The *amici* do. See *Prosecutor* v. *Milošević*, Order Concerning the Provision of Documents to *amici curiae*, Case No. IT-99-37-PT, 19 September 2001.

15. The *amici curiae* may assist the Trial Chamber by identifying witnesses whom the Trial Chamber may itself want to call pursuant to Rule 98 of the Rules; see *Prosecutor* v. *Milošević*, Order on *amici curiae*, Case No. IT-99-37-PT, 11 January 2002, and Order on Prosecution Motion for Variation, Case No. IT-99-37-PT, 21 January 2002. It would thus appear that the *amici* will not be in a position to call their own witnesses, even if no instructions from the accused should be necessary.

16. Which the *amici* will be allowed to do; see *Prosecutor* v. *Milošević*, Order on *amici curiae*, Case No. IT-99-37-PT, 11 January 2002, and Order on Prosecution Motion for Variation, Case No. IT-99-37-PT, 21 January 2002. The Trial Chamber confirmed that the *amici curiae* should also assist it by drawing the attention of the Trial Chamber to any defences which may be open to the accused, and making submissions as to the relevance of the NATO air campaign in Kosovo. The *amici curiae* should also assist the Trial Chamber in any other way they consider appropriate.

17. See also the decision by the Registrar of 27 November 2001, *Prosecutor* v. *Milošević*, Case No. IT-01-51-I, signed by the Deputy Registrar, designating the same three *amici* for one of the other two indictments and stating that they will be subject to the "Code of Professional Conduct for Counsel Appearing before the International Tribunal". There is no such Code. The full and correct name of the Code includes the words "Defence Counsel". Was this an omission by oversight or did the Deputy Registrar perhaps wish to avoid the invocation of evil spirits?

instruct them, does not trust the system and, hence, does not trust them.[18] Their role is an anomaly. It goes far beyond the traditional understanding of the *amicus* concept. That does, however, not mean that their designation is materially objectionable in and of itself.

To use Article 20, the duty to ensure a fair trial, in order to justify designation of counsel is, however, unusual against the background of the adversarial procedural model prevailing at the ICTY, because on the one hand the Chamber under Article 20 is expressly subject to the *full respect* for the rights of the *individual* accused, who may after all deliberately wish to defend himself *pro se,* which is his or her right. On the other hand, it represents a departure from the underlying *general* human rights issue of *free* choice of counsel as understood in adversarial systems, where a defendant is entirely free to defend himself or herself even against a murder charge with the possibility of a death sentence, if he or she so wishes, and a move towards a system of official interference where the law or the court decides what is in the best interests of the accused. Such a system can be found, for example, in the German criminal procedure code, where assignment of counsel is mandatory in some cases regardless of the intention of the defendant, because the law views the respective categories as so serious that to leave an accused without counsel might *per se* be tantamount to denying equality of arms with regard to the prosecution and the court.

Again, this is not in principle objectionable, but it represents a change in procedural paradigm. Interestingly enough, in this context, it also means that the court appears to be going back in time to eighteenth century England, when there existed the practice of the court appointing counsel on behalf of the accused to argue legal questions the judge thought merited discussion. In those days the judge was even called "counsel for the prisoner",[19] which has almost an inquisitorial ring to it – and indeed, except for state trials, defence counsel had no adversary counterpart.[20] Some commentators believe that counsel's position at that time was more akin to that of an *amicus curiae* than to that of defence counsel of present understanding, but that the *amicus curiae* conception of defence counsel disintegrated with the developments of the eighteenth century, when the role of defence and prosecution became more adversarial than it had been hitherto.[21]

18. The Trial Chamber on 16 April 2002 varied the order of 15 November 2001 in which it had granted Ramsey Clark and John Livingston the right of access to the accused, and substituted the two Yugoslav lawyers, Zdenko Tomanović and Dragoslav Ognjanović; see the orders in *Prosecutor* v. *Milošević*, Case No. IT-01-50-PT, 15 November 2001 and *Prosecutor* v. *Milošević*, Case No. IT-02-54-T, 16 April 2002. They were all subject to the Code of Conduct and any orders made by the Trial Chamber, but they were not defence counsel.

19. See David J. Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865*, 1998, p. 47 with reference at footnote 95 to Coke's Institutes.

20. *Ibid.*

21. *Ibid.*

As Milošević seems determined to make political speeches anytime he gets the opportunity to speak, something the Trial Chamber is understandably quite averse to letting him do and hence has repeatedly cut off his microphone, the *amici* may well actually perform the defence functions and speak for the accused without being instructed by him. Their mandate in the order is wide enough for that. The early stages of the trial have shown that the accused intends to call his own witnesses and exercise his right to cross-examine prosecution witnesses.

It is not too hard to see the reason behind this anomaly. The Trial Chamber feels that Milošević is not acting in his best interests as a defendant, even if he appears to show some talent for cross-examination. But if he had to be allowed to speak, as it were, in undiluted form, the trial would become a mere sequence of political statements cut short by a cut-off microphone, something which, even in the case of Milošević, would not go down too well in public human rights opinion if there was no safety-valve to which the court could point in order to show that it was protecting the rights of the accused and the dignity of the proceedings in some way. All in all, this is an interesting development on the merits of which the jury is still out.[22]

Professional Conduct of Defence Counsel Appearing Before the ICTY

The novel situation of the ICTY has raised the question of determining the rules of professional ethics for counsel appearing before the Trial and Appeals Chambers. Clearly, mere reference to their respective domestic systems[23] was impracticable and perhaps even legally impossible because of the need for a

22. It is of interest to note in this context that during the 25th Plenary in December 2001 the judges changed both Rules 77 and 91, providing for the appointment of an *amicus curiae* by the Registrar on a direction by the Chamber, to prosecute cases of contempt or perjury if the prosecution has a conflict of interest. Again, the use of the *amicus* concept here is problematic and, anyway, superfluous. There already exists a figure for what the ICTY judges meant to create, and that is a "special prosecutor", used, for example, in the United States for contempt prosecutions and sanctioned as such by the Supreme Court. Why not call it that instead of stretching the *amicus* concept even further? See, *e.g.*, the decision of the United States Supreme Court in *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801-02, 804, 107 S.Ct. 2124, 2134-35, 2136, 95 L.Ed.2d 740 (1987). Trial Chamber II used this new procedure for the first time, on 15 April 2002, when it directed the Registrar to investigate charges of misconduct against a co-counsel of the defence team of Radoslav Brđanin. See *Prosecutor* v. *Brđanin and Talić*, Order Requesting Investigation of Conduct of Co-counsel for Defendant Brđanin, Case No. IT-99-36-T, 15 April 2002.

23. The differences between the national attitudes are too wide. See Michael Bohlander, "A Silly Question? – Court Sanctions Against Defence Counsel for Trial Misconduct", (1999) 10 *Crim. L. Forum* 467.

common standard for the tribunals. This section presents an overview of the Code of Conduct and relevant Rules of Procedure and Evidence of the ICTY as well as an analysis of their provisions. Rules 44 to 46 also regulate the consequences of attorney misconduct. Rule 97 regulates the lawyer-client privilege.

Based explicitly on Rules 44 to 46, on 12 June 1997 the Registrar of the ICTY promulgated the current Code of Professional Conduct, which has not yet been amended (the "Code"). It entered into force on the same date. However, neither the Statute nor Rules 44 to 46 discuss anything regarding the Registrar's power to draw up and promulgate such a Code.[24] Even Rule 46(C), which came into force on a later date and could thus have provided some clarification of the Registrar's power, speaks only of "publishing" a Code and overseeing its implementation. Rule 44 implies that the Registrar is responsible for ensuring that only qualified practitioners are admitted to appear before the Tribunal. However, this issue is largely an academic matter, since the judges of the Tribunal, in whom the general rule-making power is vested under Article 15 of the Statute, were consulted before the promulgation and voiced no objections to the draft. Article 23 of the Code also empowers the Registrar to amend the Code only after prior consultation with the judges.

As the documentation on the drafting process by the Registrar and the Advisory Panel is confidential,[25] it was not possible to examine the substantive debate regarding why the Code was shaped in this manner. However, it is evident that the American Bar Association Model Rules of Professional Conduct of 1997 influenced the contents and even partially influenced the Code's wording.[26]

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24. The same applies to Rule 33(A) which refers to administration and servicing the Tribunal as the functions of the Registrar. It reads:

    > (A) The Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.

25. Anthony D'Amato, who represented Milan Kovačević, had this to say about the secrecy attaching to the *travaux préparatoires* for any given rule amendments:

    > Unfortunately, because the tribunal hides in secrecy their reasons for changing a rule, the rules may appear over time to acquire an imperviousness that renders them virtually unchallengeable. This false history may operate as a deterrent to any defence attorney who might otherwise wish to challenge a rule. Perhaps these European tribunals are influenced by canon law, which traditionally is changed in secret meetings of the church hierarchy who then tell the world that the canon law has never been altered.

    See Anthony D'Amato, "Defending a Person Charged with Genocide", (2000) 1 *Chicago J. Int'l L.* 469.

26. See, for a comparison of the wording, my article "International Criminal Defence Ethics", (2000) 1 *San Diego Int'l L. J.* 75.

Appointment, Qualification and Duties of Counsel

A lawyer retained by a suspect or an accused must file a power of attorney with the Registrar at the earliest opportunity.[27] A counsel is considered qualified to represent a suspect or accused upon satisfying the Registrar that he or she is admitted to the practice of law in a State, or is a university professor of law, and speaks one of the two working languages of the Tribunal. There is no requirement of a minimum level of professional experience in order to be added to the list of counsel for indigent accused.[28] At the request of the suspect or accused and where the interests of justice[29] demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as appropriate. A suspect or accused may appeal a decision of the Registrar in this respect to the President. In December 2001, the judges added a proviso to the effect that this qualification is subject to any decision of a Chamber under Rules 46 or 77, for misconduct or contempt.

In the performance of their duties, counsel are subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel. Again in December 2001, the Plenary of judges added the requirement that this Directive shall be prepared by the Registrar and approved by the permanent judges, as opposed to the *ad litem* judges, of the ICTY.[30]

Under Rule 44(D) an advisory panel shall be set up to advise the President and the Registrar on all matters regarding defence counsel. This is dealt with below when the ICTY's legal aid scheme is explained. However, the Directive

27. Rule 44.

28. The ICTR demands ten years' experience. See ICTR Rule 45(A) .

29. See *Prosecutor* v. *Erdemović*, Decision, Case No. IT-95-18-I, 28 May 1996, stating that exceptional reasons may be present when counsel has represented the accused before, possibly on the same charges but before a national court, and is therefore familiar with all the aspects of the case and has won the accused's confidence. Rule 3(D) additionally provides for the possibility of counsel requesting the Presiding Judge of a Chamber to use another language altogether; if leave to do so is granted, the costs of interpreting and translations may be borne totally or partially by the ICTY.

30. The ICTY has sixteen permanent judges who work full-time on pre-trial, trial and appeal proceedings, and an additional pool of twenty-seven *ad litem* judges, created by the Security Council and the General Assembly in mid-2001. The latter only sit on trials and, despite having the same rights and powers as far as their judicial decision-making functions are concerned, do not enjoy the same status in the overall administration of the Tribunal as the permanent judges.

required by this sub-rule was never issued by the Registrar, apart from a brief mention in the Directive on the Assignment of Defence Counsel.[31]

Assignment of Counsel

Assignment of counsel to suspects and accused[32] is subject to the Directive on Assignment dealt with below. The Registrar is required to keep a list of counsel who meet the conditions of Rule 44, who have shown reasonable experience in criminal and/or international law and who are prepared to take on cases as assigned counsel before the Tribunal, but the Registrar may assign a lawyer not yet on the list if he or she meets the requirements of Rule 44 and if a suspect or accused requests that particular lawyer. The refusal of a request does not bar the accused or suspect from making further requests. The Registrar is responsible for establishing the criteria for payment of fees in consultation with the permanent judges. The Rule also provides for a "clawback order" , *i.e.*, an order for repayment of fees advanced by the Tribunal, if the accused or suspect is later found not to be indigent.

A Trial Chamber of the ICTY has elucidated the ambit of the Registrar's discretion in selecting assigned counsel:

> The Statute does not specifically state that the right to assigned counsel is also a right to assigned counsel of the accused's own choosing. Indeed, the right to assigned counsel under the Directive is not totally without limit--counsel may only be assigned if they are on a list maintained by the Registrar of the International Tribunal. Counsel seeking inclusion on this list need only indicate: (1) that he is willing to be assigned to indigent suspects or accused; (2) that he is admitted to the practice of law in a State, or is a university Professor of law; and (3) that he speaks one or both of the working languages of the International Tribunal or, in exceptional cases, the language of the accused. However, the practice of the Registry of the International Tribunal has been to permit the accused to select any available counsel from this list and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria. The Trial Chamber supports this practice, within practical limits.[33]

31. Communication from Reinhold Gallmetzer and Dr. Christian Rohde to the author of 10 December 2001.

32. Rule 45. Rules 77(F) and 91(E), in the version of the twenty-fifth Plenary, provide for the assignment of counsel under Rule 45 to persons charged with perjury or contempt, but who are not accused in the strict sense.

33. *Prosecutor* v. *Delalić* et al., Decision on Request by Accused Mucić for Assignment of New Counsel, Case No. IT-96-21, 24 June 1996, para. 2.

The Appeals Chamber in a recent International Criminal Tribunal for Rwanda (ICTR) appeal[34] has made it clear again that this right is not absolute and expressed its disfavour at the manner in which the accused Akayesu had tried to manipulate the system:

> In general, the issue of the right of an indigent accused to counsel of his own choosing raises the issue of balancing two requirements: on the one hand, affording the accused as effective a defence as possible to ensure a fair trial, and on the other hand, proper use of the Tribunal's resources. The Appeals Chamber holds that, in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel. In this connection the Appeals Chamber recalls its findings in *Kambanda*:
>
> > "The Appeals Chamber refers [...] to the reasoning of Trial Chamber I in the *Ntakirutimana* case and concludes, in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with the right to choose one's counsel relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel."
>
> The Registrar assigns counsel to an indigent accused from a list of available counsel whom he finds eligible under the Tribunal's formal requirements. To be sure, in practice an indigent accused may choose from among counsel included in the list and the Registrar generally takes into consideration the choice of the accused. Nevertheless, in the opinion of the Appeals Chamber the Registrar is not necessarily bound by the wishes of an indigent accused. He has wide discretion, which he exercises in the interests of justice. …
>
> In the circumstances of this case, the Appeals Chamber finds that there were indeed reasonable grounds for denying *Akayesu*'s request for assignment of the two Counsel concerned. *Akayesu* failed to show any serious prejudice suffered by him. Accordingly, the Appeals Chamber dismisses all of *Akayesu*'s grounds of appeal in respect of choice of counsel and finds it appropriate to state its disagreement with the manner in which the right for an indigent accused to legal assistance paid for by the international community was abused in the instant case.[35]

34. The ICTR Appeals Chamber at that time was identical in composition to the ICTY Appeals Chamber. Only recently have two ICTR judges been appointed to the common Appeals Chamber.

35. *Prosecutor* v. *Akayesu*, Judgment, Case No. ICTR-96-4-A, 1 June 2001, paras. 60-62 and 64.

In the *Ntakirutimana* decision referred to, the Trial Chamber stated that the accused should normally be granted the right to choose from the list of counsel and that the Registrar would have to take the wishes of the accused into consideration, unless there were reasonable and valid grounds not to grant the request.[36] What that meant, in the view of the ICTR judges, was made clear when the Chamber declared that the Registrar could take into account "the resources of the Tribunal, competence and recognised experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates".[37]

This practice of the ICTR Registry led to a temporary moratorium on the assignment of lawyers from Canada, which outraged the international defence counsel community. The International Criminal Defence Attorneys Association (ICDAA), referring to the ICTY decision of 24 June 1996 in *Delalić*, reacted sharply with a resolution on 1 December 1998, demanding:

> An accused person before the International Criminal Tribunal for Rwanda should be entitled to legal assistance by a defence counsel of his/her own choosing who is willing to be assigned to him/her according to the Directive on Assignment of Defence Counsel;
> For this purpose, the accused person should have access to the full list of defence attorneys accepting to be assigned under the Directive on Assignment of Defence Counsel, with their curriculum vitae, and should be afforded a reasonable delay to obtain the required information;
> No accused person should be denied the right to choose legal assistance on the basis of discrimination of any kind;
> The Registrar should exercise his duties in a neutral and impartial manner.[38]

The ICTR Registrar replied with a *Note on Assignment of Defence Counsel* on 22 February 1999, accusing the ICDAA of a campaign of misinformation:

> Unfortunately, an orchestrated misinformation campaign against the ICTR has created many misconceptions about the Tribunal's policy and the state of the law. The ICTR has applied international law correctly, followed its mandate, and has been very mindful of the rights of accused persons. In conclusion, any

36. *Prosecutor* v. *Ntakirutimana*, Decision on the Motions of the Accused for Replacement of Assigned Counsel, Case Nos. ICTR-96-10-T & ICTR-96-17-T, 11 June 1997, p. 6.

37. *Prosecutor* v. *Nyiramasuhuko & Ntahobali*, Decision on a Preliminary Motion by the Defence for the Assignment of a Co-Counsel to Pauline Nyiramasuhuko, Case No. ICTR-97-21-T, 13 March 1998, para. 17.

38. Available on the website of the International Criminal Defence Attorneys Association (ICDAA) at <www.hri.ca/partners/aiad-icdaa/reports/> (30 August 2002).

> criticism of the ICTR's policy on assignment of counsel, therefore, lacks legal or substantive merit and can only be motivated by other factors.[39]

The situation at present appears to have calmed down again, yet the sequence of decisions from *Delalić* via *Ntakirutimana*, *Nyiramasuhuko & Ntahobali* and *Biçamumpaka* to the *Akayesu* appeal judgment of June 2001 could be read as indicating that the Appeals Chamber also endorses the *Nyiramasuhuko & Ntahobali* test, referring to "the resources of the Tribunal, competence and recognised experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates", with respect to the ICTY.

While it is true that resources, experience, competence and irrelevance of race may be reasonable factors to be taken into account, this is in my view clearly not the case as far as the geographical distribution and the balance of the principal legal systems of the world are concerned. Those criteria stem from the recruitment provisions of the United Nations for its own staff, something which defence counsel clearly are not. They are meant as safeguards against institutional nepotism based on national preferences or ignorance and disdain of other legal systems, and in the latter case have a further basis in Article 38 of the Statute of the International Court of Justice, which speaks about the sources of international law. An accused could not care less where counsel comes from, as long as that counsel is able to mount an efficient and effective defence.

To my knowledge, the ICTY Registry has never pursued a policy like that of the ICTR, and rightly so. It is to be hoped that the new Appeals Chamber, consisting of ICTY *and* ICTR judges, will have an opportunity soon to clarify its – at present somewhat nebulous – stance on these issues, and to refuse to accept geographic distribution and representation of the legal systems as criteria for including counsel in the list or for refusing requests for individual counsel by the accused. They are manifestly unreasonable in this context.[40] This view is supported by the comments of the ICTY Registry in the recently-published second report on the implementation of the recommendations of

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39. Available on the ICTR website under "Recent Developments, Press Releases, 1999 Archive".

40. In its judgment of 25 September 2001, Case No. 2 BvR 1152/01, cited in (2001) Neue Juristische Wochenschrift, p. 3695 *et seq*., the highest German court, the Federal Constitutional Court (*Bundesverfassungsgericht*), stated that based on the objective principle of the rule of law (*Rechtsstaatsprinzip*) expressed in Article 103 I of the German constitution, the Basic Law, but also under Article 6(3)(c) of the European Convention of Human Rights (ECHR), the desires of the accused must routinely take precedence before any other factors when a court has to decide on counsel to be assigned, unless those other factors are of a serious nature and weigh heavily against that assignment. The case in question was an especially glaring violation of that right, but significantly it referred to the mere assignment of co-counsel.

the Expert Group of March 2002, where the experts opted for establishing national criteria with respect to adding new counsel to the list, rather than denying the assignment of those already on the list. The ICTY stated that it "would be inappropriate … to establish a national priority list in this context".[41]

Misconduct of Counsel

Rule 46 empowers a Chamber to refuse audience to counsel who, after having been warned, acts in an offensive, abusive, or otherwise obstructive manner.[42] In effect, this involves what is commonly known as "courtroom decorum". The Chamber or a judge may, subject to the approval of the President, inform the bar association or another body which governs the counsel's conduct, of the attorney's misconduct. In the case of a law professor who is not otherwise admitted to a national bar, the court may also inform the governing body of his or her university. As of December 2001, a subsection was added stating that a Chamber may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal pursuant to Rules 44 and 45. There is now also a new Sub-rule stating that "in addition to the sanctions envisaged by Rule 46", a Chamber may impose sanctions against counsel if counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.[43]

There is no mention as to whether the court or the Registrar are entitled to have the name of that counsel struck from the Tribunal's list. This was, however, held to be the case by the Appeals Chamber of the ICTY in the contempt proceedings against Milan Vujin.[44] Trial Chamber II, in its decision of 14 March 2000, confirmed this ruling, and furthermore stated that the

41. See the "Comprehensive Report on the Results of the Implementation of the Recommendations of the Expert Group", UN Doc. A/56/853, 4 March 2002, para. 120.

42. A rather unusual case is that of counsel for Momir Talić, who neither thought it necessary to appear at trial sessions nor to inform their client or the Trial Chamber about this. See *Prosecutor* v. *Brđanin & Talić*, Order on the Legal Representation of the Accused Momir Talić, Case No. IT-99-36-T, 1 March 2002.

43. This is copied from ICTR Rule 73(E) , including the somewhat superfluous reference to Rule 46, which makes sense in the ICTR Rule, but not in a sub-rule of ICTY Rule 46.

44. *Prosecutor* v. *Tadić,* Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, Case. No. IT-94-1-A-R77, 31 January 2000, para. 172. Vujin was struck from the list by the Decision of the Registrar in *Prosecutor* v. *Tadić*, Case No. IT-94-1-A, 8 June 2001, and his appeal was denied by the ICTY's President. This was also communicated to the Serbian Bar Association.

Tribunal possessed an inherent power to deny audience to counsel beyond the boundaries of Rule 46, if the conduct of counsel showed that he or she was not "a fit and proper person to appear before the Tribunal".[45]

Lawyer-Client Privilege

Rule 97 states that all communications between lawyer and client shall be regarded as privileged and not subject to disclosure at trial, unless the client consents to such disclosure or the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure. There is no jurisprudence on Rule 97 proper as yet, but Trial Chambers in at least two cases have acknowledged the so-called "work product" or "legal professional privilege" doctrine.[46]

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45. *Prosecutor* v. *Kunarac* et al., Decision on the Request of the Accused Radomir Kovać to Allow Mr. Milan Vujin to Appear as Co-counsel Acting *pro bono*, Case Nos. IT-96-23-PT & IT-96-23/1-PT, 14 March 2000, paras. 13-17.

46. *Prosecutor* v. *Tadić*, Decision on Prosecution Motion for Production of Defence Witness Statements of 27 November 1996, with Separate Opinions by Judges Stephen and Vohrah, and a Dissenting Opinion by Judge McDonald, as well as a Corrigendum, 7 February 1997, Case No. IT-94-1-T, 21 January 1997. Judge Stephen said in his separate opinion, at p. 4:

> Rule 97 … does not, of course, deal with the present case since it is confined in subject-matter to communications between lawyer and client. Within that area it is broad indeed, not being confined to communications in anticipation of or in the course of litigation. The only guidance that it may offer is in relation to the suggestion that privilege for witness statements is waived once the witness gives evidence; in the case of an accused this is clearly not the case, his communications are "not subject to disclosure at trial" unless privilege is waived.

See also, more recently, *Prosecutor* v. *Brđanin & Talić*, Decision on Motion by Prosecution for Protective Measures, Case No. IT-99-36-PT, 3 July 2000, paras. 39-42, and in the same case, Decision on "Motion for the production of documents – Dzonlić testimony", Case No. IT-99-36-PT, 11 March 2002, delivered on 9 April 2002. The Chamber said, paras. 6 and 7:

> Legal professional privilege is a rule of evidence, which provides that confidential communications between legal practitioner and client made for the sole purpose of the client obtaining, or the legal practitioner giving, legal advice or for use in existing or contemplated litigation, cannot be given in evidence nor disclosed by the client or by the legal practitioner, without the consent of the client. Legal professional privilege is the privilege of the client and not the legal adviser. The Trial Chamber emphasises that legal professional privilege extends only to confidential communications and documents that come into existence or are generated for the purpose of giving or getting legal advice or in regard to prospective or pending litigation.

At least parts of this reasoning touch upon the rationale behind Rule 97, so one is left to wonder why the Chamber did not address that provision or at the very

The Code of Professional Conduct

The law on professional ethics is currently undergoing a fundamental overhaul. At the extraordinary Plenary Session on 23 April 2002, the judges agreed on the principle of establishing an international bar association whose *modus operandi* will be determined at the July 2002 Plenary. The bar association is meant to make it possible for defence counsel to come together in an organisation that ensures respect for their independence and professional ethics. Moreover, the judges initiated a reform of the code of professional conduct relating, in particular, to the specific prohibition of fee-splitting between the accused and their counsel.[47]

The Registrar, when issuing the 1997 Code of Conduct, stated that being subject to a Code of Conduct was an essential attribute of being qualified as counsel, and that all counsel appearing before the Tribunal should be subject to the same Code. In preparing the Code, the Registrar and the Advisory Panel had examined more than eleven different codes, statutes or regulations, including those from Australia, Belgium, Bosnia and Herzegovina, England, the European Community, France, the International Association of Penal Law, the International Commission of Jurists, the Netherlands, Spain, the Union Internationale des Avocats and the United States. On what basis these were selected is not a matter of public record.

The Preamble and the Preliminary

The Preamble voices the general maxim: legal practitioners must maintain a high standard of professional conduct; they must act honestly, fairly, skilfully, diligently and courageously. Legal practitioners have an overriding duty to defend their clients' interests, subject to the limitation that they must not act dishonestly or improperly prejudice the administration of justice. The Preliminary is basically a series of definitions of often-used terms such as "client" or "counsel". However, it also contains a few fundamental provisions on the interpretation of the Code. Sub-paragraph (2) gives the "Directive on Assignment of Defence Counsel" overriding power, if there is any conflict between the Code and the Directive. Sub-paragraph (3) takes over the definitions from the Rules insofar as the Code contains no specific definitions. Sub-paragraph (4) states the important principle that the Code is not a conclusive and definitive statement on the duties of counsel; the Tribunal's inherent jurisdiction and counsel's national Codes of Professional Ethics may impose additional standards and requirements. Sub-

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least the previous rulings mentioned above in this footnote, but cited common law cases from the eighteen and nineteenth centuries instead, at footnotes 6 and 7, namely *Wilson* v. *Rastall*, (1792) 4 TR 753 and *Bursill* v. *Tanner*, (1885) 16 QBD 1.

47. See the press release of 24 April 2002 at <www.un.org/icty> in the folder "Latest Developments" (accessed 30 August 2002).

paragraphs (5) and (6) make it clear that the interpretation of the Code should be guided by the aim of giving the greatest effect to the "objects and values" of the Preamble, and that the general rules of the Code should not be construed restrictively on account of particular or illustrative provisions.

General Obligations to Clients

Article 4 regulates the scope and termination of representation. It imposes an ongoing duty to advise and represent the client unless the latter ends the mandate, or counsel is otherwise withdrawn with the Tribunal's consent. Counsel must abide by the client's decisions as to how the defence is to be presented, unless that would collide with counsel's ethical duties, and counsel must consult with the client regarding defence strategy. Counsel must not advise or assist a client to engage in conduct which would run counter to the Statute, the Rules, the Code or the Directive on Assignment of Defence Counsel. Article 5 repeats the statement that counsel shall basically act honestly and diligently and retain independence of professional judgment in the face of pressure from the client or other external sources.

Article 6 repeats the essence of Articles 4 and 5 as to diligence and the ongoing duty to represent, whereas Article 7 imposes an ongoing duty to keep the client informed of the status of the matter before the Tribunal. Article 8 deals with the general regime of confidentiality under which no information gained during the attorney-client relationship may be disclosed, unless the client knowingly consents after full consultation on the issue, the client has voluntarily disclosed the communication to a third party who subsequently gives evidence about it, the information is essential for counsel to defend himself or herself against formally instituted criminal, disciplinary or civil proceedings, or this is necessary to prevent an act which counsel reasonably believes will be a criminal offence within the territory in which it is committed, or under the Statute or the Rules, *and* which may result in death or substantial bodily harm to any person. Article 8(3) extends these duties to all persons whose services are used by counsel, such as employees, associates and investigators.

Article 9 states the familiar prohibition against representation of a client when there is a conflict of interest, mainly for reasons of third-party involvement, counsel's own financial, business, property or personal interests, or a substantial relationship to a previous matter in which the lawyer had represented another person and the interests of the new client are materially adverse to those of the former. The former client can waive this prohibition. Counsel is also forbidden, save with the consent of the client, from accepting payment for the case from another source apart from the client or the Tribunal. When a conflict of interest comes to his or her knowledge, counsel must inform each potentially affected client promptly and fully and take all necessary steps to solve the conflict or obtain the consent of all potentially affected parties to continue the representation.

Article 10 discusses the special duties arising for an attorney from the fact that the client may be impaired in making adequately considered decisions with respect to representation because of age, mental disability or other reasons. Article 11 demands that counsel should keep detailed records of his or her activities in the case.

Conduct Before the Tribunal

Article 12 states the general obligation of counsel to abide by the Rules and other rulings as to conduct and procedure, and to respect the fair conduct of proceedings. *Ex parte* communications with the judges are forbidden, unless there are specific exceptions in the Rules. Article 13 makes it counsel's duty to exercise his or her own judgment upon the substance and purpose of the statements made and the questions asked. Counsel is personally responsible for the presentation and conduct of the client's case. Counsel must refrain from knowingly making false statements of material fact or from offering evidence known to be incorrect. Article 13(3) clarifies whether counsel can be deemed to have made an incorrect statement and be held responsible for not clarifying an error on a matter stated to him or her or to the court in the proceedings by stating that he or she cannot. Previously incorrect statements unknowingly made by counsel must be rectified to the best of counsel's abilities as soon as possible after the attorney learns that the statement is incorrect.

Article 14 forbids the tampering with and spoliation of (potential) evidence. Article 15 imposes on counsel a duty to respect the impartiality of the Tribunal by taking all necessary steps in order to avoid bringing the proceedings into disrepute or by unduly influencing judges or other officials. Article 16 forbids counsel from appearing as a lawyer in a case where he or she is likely to be a necessary witness, unless the issue is uncontested or it would cause the client substantial hardship.[48]

At least one Trial Chamber has had the opportunity to consider at some length when there is a conflict of interest and how to deal with it. Defence counsel had allegedly been involved in some of the events underlying the indictment or at least had intimate first-hand knowledge of them and was thus likely to be called as a witness. The Trial Chamber stated:

48. See *Prosecutor* v. *Delalić* et al., Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, Case No. IT-96-21-A, 7 December 1999, p. 6, stating that such hardship was not present in the case where trial counsel had been assigned as one of two counsel for the appeal when the possibility of his giving evidence on appeal was a necessary consideration from the beginning.

> A conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.
>
> Most systems of law have rules governing the participation of an attorney in a trial when there is a conflict of interest between the attorney and the client; such a conflict affects the essential fairness of the trial, and in respect of the Tribunal, implicates, first, the responsibility of the Trial Chamber under Article 20, paragraph 1, to "ensure that a trial is fair … with full respect for the rights of the accused…", and secondly, the right of the accused under Article 21, paragraph 2, of the Statute to a fair trial.
>
> Additionally, Sub-rule 44(B) provides that counsel are subject to the Code of Conduct. While the Code of Conduct does not define a conflict of interest in specific terms, Article 9 thereof sets out the responsibilities of counsel in a situation of a conflict of interest. Generally, that Article requires counsel to act at all times in the best interests of the client and to exercise all care to ensure that a conflict of interest does not arise in the course of representing a client.
>
> … Article 16 of the Code of Conduct prohibits counsel from appearing in a trial in which he is likely to be a necessary witness, except where the testimony relates to an uncontested issue or where substantial hardship would result from his non-appearance. The difference between the Prosecution and Mr Pisarević as to the factual bases of the conflict of interest shows that, at any rate, the first limb of the exception – an uncontested issue – does not apply.
>
> … Notwithstanding the assurances of confidence in Mr. Pisarević given by the accused, Mr. Zarić, and the statements by the other accused that they would not call Mr. Pisarević as a witness, or that there was no conflict of interest, the Trial Chamber is bound to say that at the end of the day it is left with a picture of Mr. Pisarević as an attorney who had personal knowledge of, and was intimately involved in many of the events at issue in this trial. …
>
> On the basis of the submissions, written and oral, of the Prosecution and the Defence the Trial Chamber finds that there is a potential for conflict arising at the trial between Mr Pisarević and his client. …
>
> Article 9(5) of the Code of Conduct … is an appropriate mechanism for dealing with the conflict at this stage. In the circumstances of this case, paragraph (b)(ii) is applicable. In terms of the proviso to that paragraph, the Trial Chamber finds that the consent of Mr Pisarević's client is compatible with the continued discharge of Mr Pisarević's other obligations under the Code of Conduct. Moreover, in determining that Article 9(5)(b)(ii) of the Code of Conduct is appropriate, the Trial Chamber has given due weight to the right of the accused to counsel of his choice pursuant to Article 21, paragraph 4(b) of the Statute. Mr. Pisarević must, therefore, obtain the full and informed consent of his client to continue the representation.[49]

49. *Prosecutor* v. *Simić* et al., Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarević, Case No. IT-95-9-PT, 25 March 1999, at part B.

It would appear that a Chamber will not be easily induced to order the withdrawal of counsel even in serious cases like this one. This is reinforced by the recent decisions of the Registrar regarding former ICTY staff members, one of whom had worked for the prosecution, another as an associate legal officer in Chambers, and the third as the *chef de cabinet* of President Jorda. The Registrar, and subsequently a Trial Chamber, held that there was no conflict of interest *per se* based on the former place of employment, absent further circumstances indicating a possible basis for a conflict of interest.[50]

Duties of Counsel to Others

Article 17 commands counsel to respect all other attorneys as professional colleagues, and to act fairly, honestly and courteously towards them and their

50. *Prosecutor* v. *Alagić*, Decision, Case No. IT-01-47-PT, 24 September 2001 (concerning the author of a standard manual on ICTY practice, John R.W.D. Jones), *Prosecutor* v. *Hadžihasanovic, Alagić & Kubura,* Decision, Case No. IT-01-47-PT, 26 November 2001 and *Prosecutor* v. *Hadžihasanovic, Alagić & Kubura,* Decision, Case No. IT-01-47-PT, 19 December 2001. Trial Chamber II upheld the decision of the Registrar relating to the former prosecution staff member, *Prosecutor* v. *Hadžihasanovic, Alagić & Kubura,* Decision on Prosecution's Motion for Review of the Decision of the Registrar to Assign Mr. Rodney Dixon as Co-counsel to the Accused Kubura, Case No. IT-01-47-PT, 26 March 2002. The Chamber said, at para. 56:

> On the specific question of how to assess possible conflicts of interest between former employees of the Prosecution now assigned to defend an accused before the Tribunal, the Chamber had to conclude that both the law of this Tribunal and national practice provide very little guidance. … The Chamber has developed the test that a real possibility must be proved that there is a conflict of interest between the former and present assignment of counsel. The most obvious example of such a conflict would be if the counsel, now representing the accused, had worked for the Prosecution on the very same case against this very accused. … In all other possible cases, the Chamber must be careful in drawing conclusions too readily.

The case of Stéphane Bourgon is even more complex. He had worked at the Office of the Prosecutor before becoming the *chef de cabinet* of President Jorda, and then moved on to the defence side. Due to the internal vacancy recruitment system of the United Nations there is the distinct possibility of a constant flow of employees from Chambers to the Prosecutor and *vice versa*. Given what at least one previous judge has said about the influence of staff members on the drafting of judgments and other decisions, there could be some cause for worry, too. See the critical papers by Patricia M. Wald: "Judging War Crimes", (2000) 1 *Chicago J. Int'l L.* 189; "Judging at the War Crimes Tribunal", (2000) *Judges' Journal*, spring issue, 40, "To 'Establish Incredible Events by Credible Evidence': The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings", (2001) 42 *Harv. Int'l L. J.* 353. See also the interview of Judge Wald in the *New York Times* of 24 January 2002, "An American With Opinion Steps Down Vocally at War Crimes Court".

clients, and not to communicate with other clients directly without the permission of counsel of those clients. Article 18 governs the treatment of unrepresented persons. Article 18 states that counsel must not render advice to such persons if there is a risk of conflict of interests with his or her own client, except that counsel may advise the person to secure legal advice. In any case, counsel must inform the unrepresented person about counsel's role and the nature of legal representation as well as the person's right to counsel.

Maintaining the Integrity of the Profession

Article 19 contains the general rule that the ICTY Code shall prevail in any conflict between it and a national code of professional responsibility. Article 20 lists several kinds of misconduct, namely: violating or attempting to violate the Code or knowingly assisting or inducing another person to do so, or doing so through the acts of another person; committing a criminal act which reflects adversely on Counsel's honesty, trustworthiness or fitness as Counsel; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; engaging in conduct which is prejudicial to the proper administration of justice before the Tribunal; or attempting to influence an officer of the Tribunal in an improper manner.

Article 21 gives counsel the *right* to inform the court of any attorney's serious misconduct if such misconduct raises a substantial question as to the offending lawyer's honesty, trustworthiness and professional fitness. Unlike Rule 8.3 of the American Bar Association Model Rules of Professional Conduct of 1997,[51] there is no duty imposed on counsel to "blow the whistle" on his or her colleagues. Article 22 requires all counsel to submit voluntarily and abide by any disciplinary and enforcement procedures established by the Tribunal under the Rules.

The Directive on Assignment of Defence Counsel

The Directive on Assignment of Defence Counsel is the ICTY's legal aid scheme for indigent suspects or accused. It has no relevance for counsel who have been privately retained.[52] These counsel are only regulated by the Code of Conduct, which has been described above, and the provisions on detention, which apply to all advocates. The Directive is based on the provisions in

51. Rule 8.3(a): "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *shall* inform the appropriate professional authority." (emphasis added)

52. Directive No. 1/94 (IT/73/Rev. 8), amended on 30 January 1995, 25 June 1996, 1 August 1997, 17 November 1997, 10 July 1998, 19 July 1998 and 15 December 2000.

Articles 18 and 21 of the Statute mentioned above which refer to the right of the suspect and accused to legal representation.

Articles 1 to 4 deal with matters such as the entry into force, definitions, authenticity of texts and the procedure for amendments. The latter is of some interest here. Proposals for amendments of the Directive may be made by a Judge, the Registrar or the Advisory Panel, and amendments are promulgated by the Registrar in accordance with Rule 45. Without prejudice to the rights of the accused in any pending case, an amendment of the Directive enters into force seven days after the day of issue of an official Tribunal document containing the amendment. This would appear to mean that if the Directive is tightened afterwards in some respect, this will not affect the position already obtained by a suspect or accused, i.e. the amendment cannot have retroactive effect to his detriment.

Articles 5 and 6 of the Directive repeat the Statute's commands regarding the right to counsel and specify the conditions under which counsel will be assigned. They read as follows:

> Article 5. Right to counsel
>
> Without prejudice to the right of an accused to conduct his own defence:
> (i) a suspect who is to be questioned by the Prosecutor during an investigation;
> (ii) an accused upon whom personal service of the indictment has been effected; and
> (iii) any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis;*
> shall have the right to be assisted by counsel.
>
> Article 6. Right to assigned counsel
>
> (A) Suspects or accused who lack the means to remunerate counsel shall be entitled to assignment of counsel paid for by the Tribunal.
> (B) A suspect or accused lacks the means to remunerate counsel if he does not dispose of means, which would allow him to remunerate counsel at the rates provided for by this Directive. For the purposes of Section III of this Directive, the remuneration of counsel also includes counsel's expenses.
> (C) For suspects or accused who dispose of means to partially remunerate counsel, the Tribunal shall pay that portion, which the suspect or accused does not have sufficient means to pay for.

Articles 7 to 10 regulate the procedure to be followed when assignment of counsel is requested. Subject to the provisions of Article 17, which deals with assignment of counsel away from the seat of the Tribunal in cases of emergency, a suspect or accused who wishes to be assigned counsel must make a request to the Registrar on a form provided by the Registry. The request is lodged with the Registry by the suspect or accused or by a person authorised to do so on his or her behalf. The Registrar will request the suspect or accused

seeking the assignment to make a declaration of his or her means on a form provided by the Registry. A suspect or accused who requests the assignment must produce evidence that he or she is unable to remunerate counsel.

Articles 11 and 12 deal with the decision by the Registrar on assignment of counsel.[53] After examining the declaration of means and any other relevant information, the Registrar determines the extent to which the suspect or accused lacks means to remunerate counsel, and decides, giving reasons, to assign counsel. This is without prejudice to Article 18, which deals with the case when the accused acquires sufficient means at a later stage.[54] The Registrar chooses a name from the list drawn up in accordance with Article 14. Where the suspect or accused disposes of means to remunerate counsel partially, the decision will indicate which costs are to be borne by the Tribunal. To ensure that the right to counsel is not affected while the Registrar examines the declaration of means and any information obtained, the Registrar may temporarily assign counsel to a suspect or an accused for a period not exceeding 120 days. If a suspect or an accused either requests assignment of counsel but does not comply with the above requirements within a reasonable time, or fails to obtain or to request assignment of counsel, or fails to state in writing that he or she intends to conduct his or her own defence, the Registrar may nevertheless assign counsel in the interests of justice. The Registrar notifies the suspect or accused, and also assigned counsel and counsel's professional or governing body, of the decision.

Article 13 provides for a remedy against the decision of the Registrar. A suspect whose request for assignment of counsel has been denied may, within fifteen days of the date of notification, seek the President's review of the decision. The President may either confirm the Registrar's decision or decide that counsel should be assigned. An accused whose request for assignment of counsel has been denied may, within two weeks of the date of notification, make a motion to the Chamber before which he or she is due to appear for immediate review of the Registrar's decision. The Chamber may confirm the Registrar's decision, or rule that the accused[55] has means to partially remunerate counsel, in which case it will refer the matter again to the Registrar for determination

53. The Trial Chamber in *Prosecutor* v. *Kupreškić* et al., Decision on Defence Request for Assignment of Co-counsel, Case No. IT-95-16-PT, 15 May 1998, made it clear that the Registrar has the primary jurisdiction with respect to requests for assignment.

54. However, it would appear that listed counsel are not under an obligation to take on an assignment, even if the accused has requested that lawyer expressly. See *Prosecutor* v. *Jelisić*, Decision of the Registrar, Case No. IT-95-10-PT, 21 April 1998, withdrawing initially assigned counsel who had informed the Registrar that he no longer wished to represent the accused.

55. Insofar as Article 13 also mentions the *suspect*, this must be an obvious error, because the Chamber acts only in those cases where the appellant is an *accused*, *i.e.*, after the indictment has been confirmed.

of which parts shall be borne by the Tribunal, or rule that counsel should be assigned.[56]

The professional requirements for counsel to be assigned under the Directive are set out in Articles 14 and 15. Any person may be assigned as counsel if the Registrar is satisfied that he or she is admitted to the practice of law in a State, or is a university professor of law, speaks[57] one of the two working languages of the Tribunal, possesses reasonable experience in criminal and/or international law, agrees to be assigned as counsel by the Tribunal and whose name has been included in the list under Rule 45(B). In particular circumstances, upon the request of a suspect or accused the Registrar may assign counsel who does not speak either of the two working languages[58] of the Tribunal, but speaks the language of the suspect or the accused.[59]

The Registrar may refuse a request for assignment where a procedure pursuant to Rule 77 for contempt has been initiated against that counsel, who may appeal against the Registrar's decision to the President within two weeks of having been notified of that decision. The Registrar must remove the name

56. During the review stage, an already assigned counsel can represent the accused until the final disposition, even after a referral to the Registrar for further investigation of indigence. See *Prosecutor* v. *Mrksić* et al., Decision on Defence Preliminary Motion on the Assignment of Counsel, Case No. IT-95-13a-PT, 30 September 1997.

57. The ICTY has not allowed counsel to file pleadings and other documents in a language other than one of the working languages, see *Prosecutor* v. *Zarić*, Decision on Defence Application for Leave to Use the Native Language of the Assigned Counsel in the Proceedings, Case No. IT-95-9-PT, 21 May 1998, referring to *Prosecutor* v. *Delalić* et al., Decision on Defence Application for Forwarding the Documents in the Language of the Accused, Case No. IT-96-21-T, 25 September 1996.

58. There is also the practice of assigning counsel subject to passing a language test, and then assigning counsel permanently. See, for example, *Prosecutor* v. *Kupreškić* et al., Decision of the Registrar, Case No. IT-95-16-T, 28 October 1998 and *Prosecutor* v. *Kupreškić* et al., Decision of the Registrar, Case No. IT-95-16-T, 15 January 1999.

59. This has been the practice since the early days of the ICTY. See, for example, *Prosecutor* v. *Erdemović*, Decision of the Registrar, Case No. IT-96-22-I, 10 April 1996, declining to assign counsel because he did not speak any of the working languages, and the Order on the Appointment of Defence Counsel of 28 May 1996, Judge Jorda, reversing that decision. In *Prosecutor* v. *Kupreškić* et al., Decision on Defence Requests for the Assignment of Counsel, Case No. IT-95-16-PT, 10 March 1998, the Trial Chamber allowed the assignment of counsel who did not speak the working languages, but raised the proviso that he was then under an obligation to choose co-counsel who does. This decision was repeatedly relied on later when the Registrar assigned lead counsel who did not speak a working language under explicit reference to the Chamber's decision. See, *e.g.*, *Prosecutor* v. *Jelisić,* Decision of the Registrar, Case No. IT-95-10-PT, 21 April 1998, *Prosecutor* v. *Meakić* et al., Decision of the Registrar, Case No. IT-95-4-PT, 20 May 1998 and *Prosecutor* v. *Meakić* et al., Decision of the Registrar, Case No. IT-95-4-PT, 22 June 1998.

of counsel from the list referred to in Rule 45(B), where the requirements of Article 14(A) are no longer satisfied. The Registrar may also remove the name upon a decision by a Chamber to refuse audience to assigned counsel for misconduct under Rule 46(A) or where counsel has been found to be in contempt pursuant to Rule 77. In such cases, counsel may again request that the President review this decision. In support of the necessary pre-requisites, the Registrar must be supplied with a certificate of professional qualification issued by the competent professional or governing body and such other documentation the Registrar deems necessary.

Articles 16 and 17 cover the scope of the assignment. A suspect or accused is entitled to have one counsel assigned. This counsel handles all stages of the procedure and all matters arising out of the conduct of the defence. Where persons accused of the same or different crimes are jointly charged or tried, each accused is entitled to the assignment of separate counsel. In the interests of justice and at the request of the person assigned as counsel, the Registrar may assign a second counsel to assist the lead counsel.[60] Under the authority of lead counsel, who is responsible for the defence,[61] co-counsel deals with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his defence. Lead counsel must sign all documents submitted to the Tribunal unless co-counsel is authorised, in writing, to sign on his or her behalf.

No counsel[62] is assigned to more than one suspect or accused at a time, unless an assignment to more than one suspect or accused would neither cause prejudice to the defence of either accused, nor a potential conflict of interest.[63] Away from the seat of the Tribunal, and in a case of urgency, a suspect

60. Counsel and the accused may also request the assignment of another lawyer as new lead counsel, as happens sometimes at the appellate stage. See, *e.g.*, *Prosecutor* v. *Jelisić*, Decision of the Registrar, Case No. 95-10-A, 1 February 2001.

61. Counsel is under an obligation to prepare the witness examination and may not rely on the work done by a legal assistant or investigator, and may consequently not ask the Chamber to allow that assistant to conduct the in-court examination, unless that assistant has acquired the status of co-counsel. See *Prosecutor* v. *Kupreškić* et al., Decision on the Request of 24 June 1999 by Counsel for the Accused Santic to Allow Mr. Mirko Vrdoljak to Examine the Defence Witnesses, Case No. IT-95-16-T, 25 June 1999.

62. See *Prosecutor* v. *Krajišnik,* Decision on Defendant's Application Concerning Representation, Case No. IT-00-39-PT, 14 July 2000, in which the accused had asked to be advised by five additional persons, two of whom were assigned as legal assistants in other cases, and others were assigned as counsel in other cases. The Chamber refused the request and only allowed one expert to sit with counsel at the bar table to advise him in court. The court emphasised that it was counsel's task to deal with all stages of the proceedings.

63. Such (re-)assignments usually are made for either the initial appearance or, with the consent of the accused and his other counsel, very often to enable a former co-counsel to take on a case as lead counsel with the ensuing increase in fees. See, *e.g.*, *Prosecutor* v. *Došen & Strugar*, Decision of the Registrar, Case Nos. IT-95-8-

who, during the investigation, requests assignment of counsel, may indicate the name of counsel if he or she knows one who may be assigned in accordance with the provisions of the Directive. Where the suspect fails to indicate a name, the Prosecutor, or a person authorised by him or her or acting under his or her direction, may contact the local bar association and obtain the name of counsel who may be assigned. In these situations the procedure for assignment of counsel applies *mutatis mutandis* but must be accelerated where necessary.

Articles 18 to 21 set out the procedure for the withdrawal of assignment. Assignment of counsel or partial remuneration of counsel and/or payment of counsel's expenses may be withdrawn by the Registrar if the suspect or accused comes into means which, had they been available at the time the request was made, would have caused the Registrar not to grant the request, or information is obtained which establishes that the suspect or accused has sufficient means to allow him or her to pay for the cost of the defence. The Registrar's decision must be reasoned and notified to the suspect or accused and to the counsel assigned, and takes effect from the date of receipt of the notification. The provisions of Article 13 apply *mutatis mutandis* as far as the review of the Registrar's decision is concerned. The burden of proof is on the Registrar if he or she wants to withdraw the assignment, other than at the initial assignment stage, when the burden is on the accused.[64]

In the interests of justice,[65] the Registrar may, at the request of the accused or the accused's counsel, withdraw the assignment of counsel,[66] or at the request

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T and IT-01-42-T, 12 November 2001; *Prosecutor* v. *Stakić & Kvočka*, Decision of the Registrar, Case Nos. IT-97-24-T and IT-98-30/1-T, 5 June 2001; *Prosecutor* v. *Krajišnik & Todorović*, Decision of the Registrar, Case Nos. IT-00-39&40-PT and IT-95-9/1-T, 10 April 2001 and corrigendum of 26 April 2001; *Prosecutor* v. *Plavšić*, Decision of the Registrar, Case No. IT-00-40-I, 11 January 2001; *Prosecutor* v. *Vuković*, Decision of the Registrar, Case No. IT-96-23-I, 28 December 1999.

64. See *Prosecutor* v. *Kupreškić* et al., Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, Case No. IT-95-16-T, 3 September 1999. This was one of the many cases where the Registrar withdrew the assignment of defence counsel for Croatian accused because there had been press reports that the accused were making millions out of selling paintings they had made in custody, the Trial Chamber pointing out, para. 7, that the Registrar must present substantiated evidence sufficient for use in a court of law. The decisions of the Registrar were all reversed. See also *Prosecutor* v. *Kordić & Čerkez*, Decision on the Registrar's Withdrawal of the Assignment of Defence Counsel, Case No. IT-95-14/2-T, 3 September 1999, referring to the *Kupreškić* ruling.

65. See *Prosecutor* v. *Delalić* et al., Order on the Request by Defence Counsel for Zdravko Mučić for Assignment of a New Co-counsel, Case No. IT-96-21-T, 17 March 1997, where the accused had asked for a counsel with experience in "Anglo-Saxon law" and the Chamber held that the re-assignment of an English barrister as co-counsel at that stage was acceptable because lead counsel had structured the defence case in a way that the new assignment would not lead to delays.

66. See *Prosecutor* v. *Delalić* et al., Decision of the Registrar, Case No. IT-96-21-T, 27 July 1998, refusing the request by Mučić to have counsel withdrawn because of a

of lead counsel withdraw the assignment of co-counsel.[67] The Registrar withdraws the assignment of counsel upon the decision by a Chamber to refuse audience to assigned counsel for misconduct under Rule 46(A), or where counsel no-longer satisfies the requirements of Article 14(A) of the Directive, or where counsel has been found to be in contempt pursuant to Rule 77. In such cases the withdrawal is notified to the accused, to the counsel concerned and to his or her professional or governing body. The Registrar must immediately assign a new counsel to the suspect or accused. Where a request for withdrawal has been denied, the person making the request may seek the President's review of the decision of the Registrar within two weeks of notification of the decision.

Where the assignment of counsel is withdrawn by the Registrar or where the services of assigned counsel are discontinued, that counsel may not withdraw until either a replacement counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his or her intention in writing to conduct his or her own defence. In the interests of justice, the withdrawn counsel may continue to represent the suspect or the accused for a period not exceeding thirty days after the date on which the replacement is assigned. During this period, the costs necessarily and reasonably incurred by both counsel shall be met by the Tribunal. When an assigned counsel is replaced in the same capacity by another assigned counsel for whatever reason, the remuneration shall be paid to each of them *pro rata temporis*.

Articles 22 to 31 deal with the costs of the representation. Where counsel has been assigned, the costs of legal representation of the suspect or accused which are necessarily and reasonably incurred are be met by the Tribunal subject to the budgetary provisions, rules and regulations, and practice set by the United Nations. All costs are subject to prior authorisation by the Registrar. If prior authorisation has not been obtained, the Registrar may refuse to meet the costs incurred. The remuneration paid to assigned counsel for any one case and at any one stage of the proceedings includes a fixed rate and fees calculated on the basis of a fixed hourly rate applied at any stage of the proceedings to the number of hours of work. Assigned counsel who receives remuneration from the Tribunal must not accept remuneration for

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complete loss of confidence on the basis that counsel had not examined all the witnesses that the accused had wanted to testify. The Registrar decided that even if there was a loss of confidence, that would not be a sufficient reason because the closing arguments were scheduled to take place one month later and counsel and co-counsel had already begun preparing the arguments. Such a course would be "manifestly contrary to the interests of the accused" as was also admitted by the counsel who would replace the previous one.

67. This sometimes happens when the trial is finished and the Chamber is deliberating. See, for example, *Prosecutor* v. *Tadić*, Order Granting Withdrawal of Co-counsel, 26 March 1997 and *Prosecutor* v. *Tadić*, Order Granting Withdrawal of Counsel, Case No. IT-94-1-T, 22 April 1997; *Prosecutor* v. *Kordić & Čerkez*, Notice of Consent to Withdrawal of Counsel, Case No. IT-95-14/2-T, 25 January 2001.

the assignment from any other source, unless the Tribunal pays only part of the expenses under Article 6(C) of the Directive. The fixed rate per procedural stage is equivalent to $2,000. The fixed hourly rate for fees is assessed by the Registrar on the basis of the seniority and experience of counsel, according to Annex I of the Directive. This rate includes general office costs. Payment of the fees is normally made at the conclusion of the relevant stage of procedure, on presentation by counsel of a detailed statement.

In the event of disagreement on questions relating to calculation and payment of remuneration or to reimbursement of expenses, the Registrar decides the matter after consulting the President and, if necessary, the Advisory Panel.

Article 32 creates the Advisory Panel as required by Rule 44(D),[68] consisting of two members chosen by the President by ballot from the list of counsel and those who have already appeared before the Tribunal, two members proposed by the International Bar Association, two members proposed by the Union Internationale des Avocats, and the President of the Nederlandse Orde van Advokaten or his or her representative. Each member of the Advisory Panel must have a minimum of ten years legal experience. The President of the Advisory Panel is the President of the Nederlandse Orde van Advokaten or his or her representative. The membership of the Advisory Panel is established by new appointment every two years on the anniversary of the entry into force of the Directive. The Advisory Panel may be consulted as and when necessary by the Registrar or the President on matters relating to assignment of counsel. The Advisory Panel may also of its own initiative refer to the Registrar, or to the Registrar and the President, any matter relating to the assignment of counsel.

Ineffective Assistance of Counsel

It is obvious that with lawyers coming from so many different places and legal systems, some will be totally unfamiliar with the adversarial trial system practiced at the ICTY. This is especially true of attorneys from the former Yugoslavia, a civil law system, who make up almost two thirds of all defence counsel acting before the Tribunal. Choice of counsel may thus have a dramatic impact on the position of the accused. The Appeals Chamber in the *Tadić* case, in connection with the admission of additional evidence under Rule 115, dealt with this problem as follows:

68. Rule 44(D): "An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel."

> Due diligence is a necessary quality of counsel who defend accused persons before the International Tribunal. The unavailability of additional evidence must not result from the lack of due diligence on the part of the counsel who undertook the defence of the accused. As stated above, the requirement of due diligence includes the appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber.
>
> Thus, due diligence is both a matter of criminal procedure regarding admissibility of evidence, and a matter of professional conduct of lawyers. In the context of the Statute and the Rules, unless gross negligence is shown to exist in the conduct of either Prosecution or Defence counsel, due diligence will be presumed. In this case, the parties agree that due diligence might have been lacking in respect of certain evidence which was not presented at trial because of the decision of the Defence team to withhold it. The Appeals Chamber is not, however, satisfied that there was gross professional negligence leading to a reasonable doubt as to whether a miscarriage of justice resulted. Accordingly, evidence so withheld is not admissible under Rule 115 of the Rules.
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> The Appeals Chamber considers it right to add that no counsel can be criticised for lack of due diligence in exhausting all available courses of action, if that counsel makes a reasoned determination that the material in question is irrelevant to the matter in hand, even if that determination turns out to be incorrect. Counsel may have chosen not to present the evidence at trial because of his litigation strategy or because of the view taken by him of the probative value of the evidence. The determination which the Chamber has to make, except in cases where there is evidence of gross negligence, is whether the evidence was available at the time of trial. Subject to that exception, counsel's decision not to call evidence at trial does not serve to make it unavailable…
>
> As indicated above, when evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, even if he did so reluctantly. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross professional incompetence. Such a case has not been made out by the Appellant. Consequently, it cannot be said that the witnesses and material were not available to the Appellant despite the exercise of due diligence.[69]

69. *Prosecutor* v. *Tadić*, Decision on Appellant's Motion for the Extension of Time Limit and Admission of Additional Evidence, Case No. IT-94-1-A, 15 October 1998, paras. 46-50 and 65. The Appeals Chamber recently confirmed this approach in *Prosecutor* v. *Kupreškić* et al., Judgment, Case No. IT-95-16-A, 23 October 2001, para. 60, referring to its ruling in the same case in the Decision on the Admission

I am not convinced that this reasoning is correct in the legal environment of international criminal proceedings. The problem becomes especially virulent when counsel has been assigned by the Tribunal *without a specific request* from the accused for a certain lawyer. In such cases, choice of counsel cannot be blamed on the accused, but is the direct responsibility of the Registry. However, the problem also arises in the cases of requested assigned counsel and those privately retained. There should be no debate that in the overwhelming majority of cases the accused is in no position whatsoever to gauge counsel's abilities. The decision to instruct a specific lawyer or request his or her assignment may be for all kinds of different reasons, but judging from my experience during my time at the Tribunal, I am not sure that more than 10 per cent would meet the requirements for such complex trials involving legal questions of a hitherto unseen intricacy.

The Appeals Chamber quite obviously appears to have been strongly influenced by the jurisprudence of the United States Supreme Court in its 1984 decision in *Strickland* v. *Washington,*[70] although this case is mentioned nowhere, let alone any other authority from which the Chamber has derived its conclusions. As I have argued elsewhere[71] with regard to implementing that American doctrine in German criminal procedure, this opinion with its heavy reliance on professional *ex ante* standards is misguided because the accused does not in the first place want to blame professional misconduct on counsel but rectify an objectively wrong procedural choice affecting his position that may have put him in danger of receiving a very long prison sentence or, as in the *Strickland* case, even the death penalty. The Appeals Chamber with its present jurisprudence will routinely not even get to that material choice issue. It will deny the appeal because no showing has been made that counsel acted with gross negligence.

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of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001, paras. 24 and 25. Para. 24 in particular reads:

> In determining whether a *prima facie* case of gross negligence exists the Appeals Chamber considers that there is a strong presumption that counsel at trial acted with due diligence, or putting it another way, that the performance of counsel fell within the range of reasonable professional assistance. In assessing whether trial counsel were "grossly negligent", the Chamber examining the allegation applies an objective standard of reasonableness. In determining whether the performance of counsel actually fell below that standard, an assessment must be made of counsel's conduct in the circumstances as they stood at that time. The Prosecution is correct when it argues that hindsight has no role to play in this assessment.

Another regrettable instance of a complete lack of comparative analysis in a very important area of law.

70. *Strickland* v. *Washington*, 466 US 668 (1984).

71. Die sogenannte "Widerspruchslösung" des BGH und die Verantwortung des Strafverteidigers – Ansatz zu einem Revisionsgrund der "ineffective assistance of counsel" im deutschen Strafprozeß? in *Strafverteidiger* (1999), p. 562.

The Tribunal will also have to apply its attention to the question of whether one can just adopt the "save-it-or-waive-it" approach developed over a long time in well-defined common law domestic systems with an adversarial setting, or whether it is not more realistic to admit that the law as practiced before and by the ICTY is anything but well-defined and settled, and that the Tribunal and its judges have a responsibility towards the accused to ensure that no-one is sent to prison only because counsel was not up to the task (something which German courts have labelled *gerichtliche Fürsorgepflicht* – judicial duty of care). To refer the accused to a request for withdrawal of counsel and to conclude from the absence of such a request that the accused has acquiesced in his counsel's strategy, has the cynical ring of a scheme designed to avoid disruptions in mid-trial because of a change in defence counsel.

What is the accused going to do if the lawyer says that a certain strategy is his or her considered opinion and possibly even that of co-counsel? Should the accused get another lawyer to check these views for gross negligence? Should the accused call and examine the witness in question by himself or herself, and would the judges allow this if the accused had a lawyer? Can he or she ask the Registrar, who is after all in charge of the withdrawal proceedings, to check whether counsel is doing the right thing? How could the Registrar possibly be in a position to form an opinion on that issue? Or should perhaps the accused ask the Trial Chamber judges for an evaluation? Given the general aversion of the judges at the ICTY to "descend into the arena", this would not seem to be a very helpful option.

As indicated above in connection with the *amici curiae*, there may be a change in procedural paradigm in the offing, one leaning more towards the protection of the accused's position as a participant, and not a mere object of the proceedings. If that were to be the case, it should also reflect on the issue of ineffective assistance of counsel. One way around it – and admittedly the German way around it under section 244 II of the Code of Criminal Procedure – would be to enable, encourage and if need be require trial judges to sift through all the proposed evidence themselves well before the trial starts, and to require additional evidence to be presented at the trial stage if necessary. If, under such a procedure, something important is left out by a party, especially if it is the defence, the Chamber should ask the missing questions itself, instead of sitting back and letting the trial run its course with possibly disastrous consequences on appeal. In my view, the Tribunal is not an adequate forum for the "sporting theory of justice".

Evaluation of the Code and the Administration of Defence Matters

Given the fact that by July 2002 the ICTY will have implemented a new Code of Conduct and installed a kind of international bar association, the following remarks and criticisms may be somewhat out of date by the time they are

published. It is hardly surprising that the concept of lawyering underlying the present ICTY Code and Rules follows a distinctly common-law-oriented approach. The American Bar Association Model Rules had a direct influence on the wording of some of the provisions. Given the fact that not all members of the United Nations subscribe to that kind of approach (including the Member States with civil law jurisdictions), the common law community might be blamed for imposing a legal *octroi* on the civil law countries.

It must be borne in mind that the Security Council at that time, and subsequently the Registrar, had to move quickly, and that finding common ground would in all likelihood have taken just as long as the negotiations for the ICC Statute. The Statute and the Rules basically created an adversarial system. It was thus natural that the Code of Conduct for this tribunal would follow the same development. It was probably more a matter of who first had a passably working set of rules. This is, anyway, only a criticism by way of principle. It does not mean that the Code is not working in the Tribunal's everyday practice, although the development of the new Code and the remarks by the Expert Group and the second report of March 2002 may shed a different light on this.[72]

It remains to be seen what influences the ICTY and ICTR experience will have on the treaty-based ICC's future codes of conduct. Regardless of the manner of creating a code of professional conduct and discipline, any parties concerned will be well advised to listen to the defence bar's experience. Defence lawyer organisations have for some time complained about the institutional inequality between the prosecution and the defence, mainly because of the overwhelming financial, logistical and institutional power of the prosecution and the lack of equivalent powers and resources on the side of the defence.[73]

The Expert Group report that looked into the efficiency of both the ICTR and ICTY had many things to say about the way the assignment of counsel was handled and the effects of the current system. Though the comments date from 1999, they are in substance still pertinent. The report shows that large amounts of money are involved. The 1999 budget of the ICTY Defence Counsel Unit in respect of payments to assigned counsel was $14,000,000,

72. See the "Comprehensive Report", *supra* note 41, paras. 17-20, 28-31, 67-68, 87, 94-97, 104-121.

73. See, for example. John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, in Richard May *et al*., eds., *Essays on ICTY Procedure and Evidence*, 2001, p. 168, and Michaïl Wladimiroff, one of the *Milošević amici curiae* and the first defence counsel in a full trial before the ICTY, "*Prosecutor* v. *Tadić*, Rights of Suspects and Accused", in Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts*, Vol. I, 2000, p. 415. See also the papers available on the website of the International Criminal Defence Attorneys Association (ICDAA), at <www.hri.ca/partners/aiad-icdaa/reports/> (accessed 30 August 2002).

approximately 15 per cent of the entire ICTY budget. ICTR estimates for 2000 for this purpose amounted to $10,195,000, or almost 10 per cent of the total expenditure estimates.[74]

On average in the ICTY, a defence team at the pre-trial stage costs the Registry from $22,000 to $25,000 per month, and during trial the monthly cost increases to about $45,000. At the ICTR, payments per case made in 1998 and the first nine months of 1999 varied from a low of $5,822 to a high of $483,391. Significantly, both figures relate to proceedings at the pre-trial stage. Since payments are made primarily on the basis of hourly rates, there is little financial incentive for assigned counsel to expedite proceedings.[75]

These sums pale in comparison with the prosecution's budget. There is, however, also a striking discrepancy regarding the question of whether the rates are adequate for all counsel appearing before the Tribunal, and it is not clear whether all cases must be treated alike.[76]

As far as the necessary qualifications of counsel under the Directives on Assignment of Counsel are concerned,[77] the Expert Group considered them inadequate. The group felt that in both the ICTY and ICTR, mere admission to the practice of the law was no assurance that an attorney was qualified with respect to trial or appellate work or criminal law, much less international criminal law. Nor did a law professorship automatically carry with it knowledge or experience with respect to criminal trials or appeals. The Group considered that it was certain that inadequate qualifications had had a negative impact upon operations in both tribunals, although it could not say to what extent. Both judges and defence counsel had expressed misgivings regarding the qualifications of some assigned counsel. In some instances in which the accused had sought replacement of assigned counsel, assertions had been made questioning their competence. It appeared to the Group that the ICTY standards

74. "Report of the Expert Group", *supra* note 3, para. 203.

75. *Ibid.*, para. 205.

76. The Report said, paras. 206 and 207:

> The Registries consider that there can be no variations between different national groups in the hourly rates payable to lawyers even though a windfall may thus result for some. Although this is plainly consistent with United Nations principles governing Professional staff remuneration, it is not necessarily the case with respect to differently situated independent contractors, which is what the assigned lawyers are. As things now stand, there is dissatisfaction on the part of some assigned counsel who believe that hourly rates are too low, particularly for co-counsel. … A lump-sum system of payment, agreed upon at the outset, based on the assumed difficulty of the case is … under consideration by the … Registry. … The assumption is that different levels of importance and difficulty could be assigned to different stages of a case. The Expert Group is doubtful that this would be feasible, not only because of likely opposition from assigned counsel, but also because of the individuality of cases. What may be a most difficult and critically important stage of one case may be the opposite in another.

77. *Ibid.*, para. 210.

for experience should be brought more in line with those of ICTR, and in both cases elevated to require at least five years of criminal trial experience.

The current Rules 44 and 45 do not contain any new requirement as indicated by the Expert Group, and only Articles 14 and 15 of the Directive state that counsel must have "reasonable experience in criminal and/or international law". That is a very lax requirement, open to a very wide discretion. It is difficult to see why, especially with regard to the issue of ineffective assistance by assigned counsel, the Tribunal has not yet tightened the requirements. The second report of March 2002 took up this issue and found that the ICTY did not consider it useful to follow the ICTR's lead, because a five-year experience requirement was "not a measure which would be able to guarantee proficiency".[78]

Directly connected to this is the matter of training new counsel in the law and practice of the ICTY.[79] The Group felt that owing to the unique character of the Tribunals and the elaborate Rules of Procedure and Evidence, many lawyers representing accused were significantly disadvantaged by their unfamiliarity with the subject matter. This was compounded in the case of lawyers who had not been trained in the common law adversarial system. The result was a degree of inefficiency in their representation, tending to prolong and delay proceedings. The Group suggested[80], as has been suggested not only by judges and court administrative personnel but also by experienced defence counsel as well, that a short training programme to introduce inexperienced lawyers to the rudiments of ICTY practice should be developed. The ICTY started such training programmes with a four-day course for fourteen defence counsel, given by seventeen international experts in May 2001. But experience shows that not all defence counsel accept these courses, especially the practical inductions to courtroom technology.

The second report of March 2002 contains a comment from the ICTY's Registry stating that it intends to run one or two courses for the coming year for new defence counsel, but that these programmes are dependant on the continued receipt of voluntary contributions. Some € 86,700 has been allocated to this project out of a grant from the European Community, half of which was spent on the first seminar alone.[81] This is hardly enough.

The ICTY Defence Counsel Association had several proposals to make to the experts regarding the institutional relationship between counsel and the Tribunal, the creation of an Office of the Defence,[82] improving the qualification

78. "Comprehensive Report", *supra* note 41, para. 110.

79. "Report of the Expert Group", *supra* note 3, para. 214.

80. *Ibid*., para. 215.

81. "Comprehensive Report", *supra* note 41, paras. 113-116.

82. "Report of the Expert Group", *supra* note 3, para. 219:

> Creation of an Office of the Defence. There exists a "defence room" used by all defence counsel that has three computers, a fax machine and a photocopier. Internal and local phone calls are free, international calls are not. What is suggested is an office, manned by an administrator and secretary paid for by

of defence counsel and issues of remuneration.[83] The Expert Group recognised the validity of some of these, but did not share the overall evaluation of how the problems should be solved. The Group felt with respect to the creation of an Office of the Defence[84] that such an office would doubtless facilitate the work of defence counsel. However, it appeared to the Expert Group that an arrangement of this nature should not be the responsibility of the United Nations, but rather that of the Association, with the cost borne by the latter. The legal fees reimbursed by the United Nations already included a factor representing overhead costs. The ICTY contribution of the defence room would seem to be a reasonably sufficient measure for the convenience of defence counsel. Consequently, the second report of March 2002 does not mention this matter again, save for a short recommendation on the use of library resources.[85]

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the United Nations, that would have the function of coordinating the defence requirements of the defence teams in every trial and appeal. This would include the vital functions of establishing a library of decisions and rule/procedure modifications, acting as a central "clearing house" and liaison point with the Registry, and coordinating the training envisaged under paragraph 3, *post*, and the creation and maintenance of an Internet web site. Such an office would streamline the administration of defence counsel, save very considerable Registry time by providing a single reference point (as opposed to the existing system of trying to deal with individual lawyers) and vastly improve the efficiency and competence of defence activity. That should result in shorter and more efficient proceedings and, overall, cut costs.

83. *Ibid*., para. 219.

The current rates do not begin to reflect the seriousness and nature of the cases. In publicly funded cases in the United Kingdom of Great Britain and Northern Ireland, the Netherlands, France and Germany, lawyers of twenty years' experience would get two to three times the hourly rate for a relatively straightforward murder case. To add to the problems, there is no payment at all for work done in excess of 175 hours per month. A sixty-hour working week is commonplace for a senior lawyer and the disparity is unjustifiable. When ICTY was first set up, the International Bar Association recommended an hourly rate of US$200, sensibly recognizing that to attract lawyers of the right experience and quality, who had to concurrently pay their share of their home-based Chambers or partnership, such a figure was appropriate. The daily subsistence allowance, only US$183 in any event, is currently being reduced by 25 per cent after sixty days; that reduced rate is simply inadequate to try to maintain a temporary domestic and law practice base in The Hague, a city not noted for its low cost of living.

84. *Ibid*., paras 220-222.

85. "Comprehensive Report", *supra* note 41, paras. 122-125.

Conclusion

Perhaps with the advent of a new international bar association the necessary administrative structures for guaranteeing equality of arms between the prosecution and the defence will be created. This project, however, can – without overly malicious imagination – be interpreted as an elegant method of shifting the responsibility of safeguarding that equality to the bar, with the convenient effect that the ICTY retains the ultimate control over admission of counsel and their conduct, but is no longer concerned with the necessities of providing a proper groundwork for their work before the Chambers as a balance against the overwhelming human, administrative, financial *and* political resources of the prosecutor. The new Code will tell which way the ICTY is heading.

At the moment, and, if one judges by the opinions in the two reports on the functioning of the Tribunals, for the foreseeable future, the procedural and administrative law and practice of the ICTY will continue to be liable to charges of prosecutorial bias. The different treatment by the Chambers of serious prosecutorial misconduct, as for example in the *Furundžija* case, where potentially vital information was withheld from both the defence and the Trial Chamber, and that of misconduct by the defence in relatively minor matters, as was, for example, the case with Anto Nobilo's negligent disclosure of a witness's name, leaves a sour taste.

To repeat the words of Friedrich von Spee, mentioned already at the beginning of this chapter:

> It is unjust to deny legal assistance to somebody defending himself against a charge of sorcery. It is even injust not to provide him with the best advocate if possible, or at least the one he may desire to have. ... He should rather be supported in his defence and given everything that is necessary, instead of being obstructed in any manner. The greater the crime with which someone is charged, the greater the sin of those who deny him a proper defence. … The judge himself must take care that the prisoner is not without an advocate.

The ICTY still has some way to go to convince the legal practitioners fighting for the rights of their clients that it does everything it can to strive for real equality of arms between the two sides. Great care must be taken not to see and employ war crimes trials as a modern version of the witch hunts of bygone centuries. The international criminal justice community, with its fervent and sometimes even self-righteous zeal for the prosecution of the worst criminals of modern times, needs to remember that there are two meanings to the word "justice". The dangers arising out of that zeal were aptly expressed by Nietzsche: "When you fight monsters, beware that you do not turn into a monster yourself. And when you look into an abyss long enough, the abyss looks back into you."[86]

86. Friedrich Nietzsche, *Jenseits von Gut und Böse*, Nr. 146 (translation by the author).

PASCALE CHIFFLET*

The Role and Status of the Victim

> In modern criminal justice systems, victims of crime and abuse can rightfully be called the 'forgotten persons'.[1]

Traditionally, criminal justice deservedly focuses on providing rights and protection to the accused in order to guarantee that he or she is tried in accordance with fundamental principles of due process, as he or she is facing a potential conviction and deprivation of liberty. This statement is applicable both to common law and civil law criminal systems, although the modalities for effectuating this principle vary between the systems.

The procedure and practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) with respect to the victim show that this principle also applies to the international criminal law regime. The victim is first and foremost dealt with as a witness, having no right to representation or participation – as seen in most civil law systems – and little provision for compensation.

The purpose of this chapter is to explain the role and status of the victim in proceedings before the ICTY. The first part of this chapter explores the role of the victim as a witness in trials before the ICTY and the regime of witness protection. The ICTY has developed a thorough set of procedures for in and out of court protection for witnesses in a jurisdiction in which they often testify at considerable risk to themselves and their families. These procedures

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1. *Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations Office for Drug Control and Crime Prevention*, 1999, p. 1.

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *75-111.*

are applied, developed and elucidated in the case law and represent the first such body of protective provisions for complex international criminal trials. Pre-trial and trial protection, non-disclosure of confidential material to the public, witness anonymity and protective measures for vulnerable witnesses are examined. The second part of this chapter deals with the victim in criminal trials before the Tribunal. The regime for reparations to victims before the Tribunal is extremely limited, and victims do not have any right to participation as such in the trial process. Whether a broader regime is appropriate in such a criminal trial process is considered, as well the comparatively wide-ranging victim representation and compensation regime before the new International Criminal Court (ICC).

The Victim as Witness: The Protection Regime

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.[2]

Victims and witnesses are at the core of criminal trials before the Tribunal.[3] The need to protect victims and witnesses, admitted in most national legal systems, is also recognised in international law. Principle 6(d) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by […t]aking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."[4]

The provisions of the ICTY Statute and its Rules of Procedure and Evidence dealing with victims almost exclusively concern their protection.

2. *Prosecutor* v. *Brđanin and Talić*, Motion for Protective Measures, Case No. IT-99-36-PT, 10 January 2000, para. 14.
3. While the Nuremberg Tribunal relied heavily on documents in the course of its proceedings and only allowed a very limited number of witnesses to appear and testify, the ICTY finds itself in a very different position. Contrary to post-war Germany, the States of the former Yugoslavia kept their hands free and the co-operation with the Tribunal's requests for assistance in terms of the production of documents remained non-existent for some time. As a result, stories are told and offences proved directly from testimony of the witnesses of the crimes, many of them victims of those crimes.
4. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985, para. 6.

They are in fact part of a witness protection scheme and are not addressed to victims as such. Indeed, victims who do not intend to testify will not benefit from them. On the other hand, witnesses who are not direct victims of crimes under the jurisdiction of the Tribunal can access such protection. It is noteworthy that none of these provisions refers exclusively to victims.[5] The regime set up under the Rules is clearly designed to protect "victims and witnesses" who are intending to testify before the Tribunal. However, the definition of a witness is broad[6] and includes persons whom a party initially intends to call but eventually decides not to call, as well as persons who initially show interest in testifying before deciding not to.[7] Those persons who fall into any of these categories are considered as witnesses for protection purposes from the moment that they participate in one aspect of the proceedings. As such, they may benefit from protective measures.

Article 20 of the Statute of the Tribunal provides: "Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Article 22 of the Statute specifies that the "International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses […]". In the first trial before the Tribunal, the Trial Chamber stated that the Statute created an "affirmative obligation to provide protection to victims and witnesses".[8] This proposition has subsequently

5. Some privileged observers of the ICTY have noted:

   > These sections [the Victims and Witnesses Sections in the ICTY and ICTR] are misnamed by the Statute to the extent that their title implies responsibilities with respect to victims other than witnesses. In fact, the work of the sections involves only potential or actual witnesses (whether or not victims) for proceedings in both Tribunals.

   "Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda of 11 November 1999", UN Doc.A/54/634, para. 187. In this part of the Chapter, both terms will be used indiscriminately.

6. According to figures available from the Victims and Witnesses section Unit, 12 per cent of those who actually come to The Hague for the purpose of testifying do not do so.

7. This approach is consistent with the jurisprudence of the European Court of Human Rights (ECtHR), which has considered the definition of a witness as an "autonomous" concept, basically including "any person, irrespective of his or her status under national criminal procedural law, who possesses information relevant to criminal proceedings" (see *Kostovski* v. *Netherlands*, Series A, Vol. 166, para. 40).

8. *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-PT, 10 August 1995, para. 27.

been accepted as uncontroversial.[9] While Article 22 includes two forms of protective measures as examples,[10] the protection regime is only fully set out in the Rules of Procedure and Evidence.

The provisions of the Rules dealing with protection of victims are scattered throughout, and no distinct section addresses these concerns.[11] However, the absence of a coherent and unified scheme as such in the Rules has been compensated by the relatively abundant case law developed by the Tribunal, which has now become well established.

It is clear from the jurisprudence of the Tribunal that different stages of the proceedings necessitate different requirements, both in terms of the type of measures required for the protection of the victims and circumstances which would warrant such measures. The overarching and inevitable limit to the granting of protection to a victim is the respect of the right of the accused to a fair trial, and in particular the right to a public trial,[12] the right to have adequate time and facilities for the preparation of the defence[13] and the right to cross-examine witnesses.[14] It is in response to these rights, which are also exercised at different stages of the proceedings, that the available protective measures will differ depending on whether they are to be applied in the course of the pre-trial stage, during the testimony itself or after the trial. The present study will therefore be divided into two sections: in-court protection and out-of-court protection.

9. See, for example, *Prosecutor* v. *Milošević*, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, Case No. IT-02-54-T, 19 February 2002, para. 23.
10. Article 22 of the Statute: " … [including], but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity".
11. Namely, Rules 34 (Victims and Witnesses Section), 53 (Non-disclosure), 69 (Protection of Victims and Witnesses), 75 (Measures for the Protection of Victims and Witnesses) and 96 (Evidence in case of sexual assault). Rules 105 and 106, while pertaining to victims, do not concern their protection and will therefore be examined in the second part of this chapter dealing with reparation and participation.
12. Article 21(2) of the Statute provides that "the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute".
13. Article 21(4)(b) of the Statute provides that the accused shall have the right "to have adequate time and facilities for the preparation of his defence…"
14. Article 21(4)(e) of the Statute provides that the accused shall have the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".

In-court Protection

In-court protection refers to the protection of a victim or witness while he or she is testifying before the Tribunal. This is the most "visible" aspect of witness protection. Because victims most often appear as prosecution witnesses, there must be a balancing of the right of the accused to a fair and public trial, and to cross-examine witnesses, with the right of victims to protection and privacy.[15] The hierarchy between these interests is clearly reflected in Article 20 of the Statute, which provides expressly that the rights of the accused take precedence over the protection of victims, as they are to be given "full respect", while the protection of the victims is to be given "due regard". This priority is further confirmed by the wording of Rule 75(A) of the Rules of Procedure and Evidence, allowing a Chamber to order protective measures, "provided that [they] are consistent with the rights of the accused". But the balance is a fine one. As Judge Stephen asked in his Separate Opinion in the *Tadić* case: "how to respond to the very natural concern of witnesses while at the same time according justice to the accused and ensuring a fair trial?"[16] The public administration of justice also needs to be considered, and this includes transparency, public accountability and the educational value of the Tribunal's work. Rule 75[17] deals with specific in-court protective measures that can be granted by a judge

15. Article 68(1) of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, provides that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses".

16. *Prosecutor* v. *Tadić*, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995, p. 2. The European Court of Human Rights has stated quite clearly that "principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify". See: *Doorson* v. *the Netherlands*, Reports 1996-II, p. 70.

17. Rule 75 reads as follows:

> (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
> (B) A Chamber may hold an *in camera* proceeding to determine whether to order:
> (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
> (a) expunging names and identifying information from the Tribunal's public records;
> (b) non-disclosure to the public of any records identifying the victim;
> (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
> (d) assignment of a pseudonym;

or a chamber in conformity with Article 22 of the Statute. Figures show that 44 per cent of witnesses called to testify since 1 January 1998 have sought such protection.[18] A wide range of measures is provided for, and the list included in the Rules is not exhaustive. They are mainly aimed at protecting the identity of the witness and other identifying information, and can be addressed either to the public or, more controversially, to the accused. Furthermore, measures can be taken in order to avoid traumatising vulnerable witnesses, especially in cases involving rape or sexual assault.

Non-disclosure to the Public

The right to a public hearing is a fundamental safeguard of criminal procedure. As the European Court of Human Rights (ECtHR) put it in *Werner v. Austria*, this

> public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6§1, namely a fair trial.[19]

(ii) closed sessions, in accordance with Rule 79;
(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.
(D) Once protective measures have been ordered in respect of a victim or witness, a party seeking to vary or rescind such an order must:
(i) apply to the Chamber that granted such measures to vary or rescind them or to authorise the release of protected material to another Chamber for use in other proceedings; or
(ii) if, at the time of the request for variation or release, the original Chamber can no longer be constituted by the same Judges, apply to the President to authorise such variation or release who, after consulting with any Judge of the original Chamber who remains a Judge of the Tribunal and after giving due consideration to matters relating to witness protection, shall determine the matter.
During appellate proceedings from proceedings before a Trial Chamber in which an order has been made for protective measures, the Appeals Chamber is in the same position as the Trial Chamber to vary or rescind the order made by the Trial Chamber."

Paragraph (D) of this Rule will be examined below, in the course of the discussion concerning out-of-court protective measures.

18. "Témoins sous haute protection", *Le Monde*, 18 February 2002.
19. *Werner* v. *Austria*, Reports 1997-VII, para. 45. See also, *Sutter* v. *Switzerland*, Series A, Vol. 74, para. 26 ("By rendering the administration of justice visible, publicity contributes to the achievement of the aim … [of] … a fair trial, the guarantee of which is one of the fundamental principles of any democratic society").

It is therefore also the general interest, rather than the limited one of the accused, that is being guaranteed by keeping the proceedings public.

Indeed, this preference for public hearings appears very clearly in the relevant provisions of the Statute, Article 20(4) requiring that "hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence". Accordingly, Rule 78 of the Rules provides that "[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.".

However, the lack of publicity does not affect *per se* the right of the accused to a fair trial. In fact, measures of non-disclosure to the public and the media of the identity of a victim are expressly allowed by international human rights instruments,[20] and the Tribunal, acting pursuant to its duty to protect victims and witnesses, may "order that the press and the public be excluded from all or part of the proceedings for reasons of… [*inter alia*]…safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75 […]".[21] Such qualifications on the right to a public hearing are therefore clearly permitted under the law of the ICTY.

A Chamber may order the non-disclosure to the public of the identity of a victim who is testifying. It may do this in a number of ways, ranging from the use of a pseudonym to a fully closed session. As is provided in Rule 75, withholding the identity and identifying information of a witness from the public can be achieved by the use of a pseudonym, a facial or voice altering device, or by closed session hearings, accompanied by the redaction of personal data from the public record. These measures are designed to protect both the safety and privacy of victims and witnesses.

In the *Tadić* case, the Trial Chamber defined the test to be applied in balancing the interests between the right of the accused to a public trial and the need to protect witnesses by stating that it had to ensure "that any curtailment of the accused's right to a public hearing is justified by a genuine fear for the safety of [the] witness".[22] The expression "genuine fear" might have been interpreted as a subjective criteria, meaning that the witness's expression of fear would be accepted as genuine grounds for granting the protection sought,

20. See Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that the "press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or *when the interest of the private lives of the parties so requires* […]" (emphasis added). Similarly, Article 6(1) of the European Convention on Human Rights (ECHR) specifies that "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, *where the interests of juveniles or the protection of the private life of the parties so require* […]" (emphasis added).

21. Rule 79 (Closed Sessions).

22. *Prosecutor* v. *Tadić*, *supra* note 8, para. 6.

as opposed to the requirement that this fear be objectively grounded.[23] This, however, is not the case. In fact, the same Chamber elaborated on the applicable criteria in a further Decision, and settled any possible doubt on the matter. It stated: "The Trial Chamber concludes, however, that for a witness to qualify for protection of his identity from disclosure to the public and the media, this fear must be expressed explicitly by the witness and based on circumstances which can objectively be seen to cause fear."[24] Moreover, this determination, involving a balance between the rights of the accused, the right of the public and the protection of victims and witnesses, is made on a case by case basis, "blanket measures" to protect witnesses not being permitted.[25]

It has been argued that the objective criterion was not realistic in light of the reality of the situation in the former Yugoslavia. Thus, Judge Mumba pleaded against the requirement that the fear expressed by the witness must be proved to be objectively real. She claimed that "[d]ue to the situation in the former Yugoslavia, there should be no need for witnesses who testify before the Tribunal to justify their fear or provide evidence of the dangers they face by testifying".[26]

Obviously, the Tribunal had to acknowledge, especially at its beginning, that the situation on the ground was not resolved and that, as a direct result of this, the threshold for granting protective measures had to be lowered if protection was to be effective. Indeed, the Trial Chamber dealing with the *Tadić* case took into account the circumstances still prevailing in the former Yugoslavia at the time, as well as the "context of its own unique legal framework".[27] It stated that "it is also relevant that the International Tribunal is operating in the midst of a continuing conflict and is without a police force or witness protection program to provide protection for victims and witnesses".[28]

Some of those circumstances have now changed. Nevertheless, the Tribunal is still operating far away from the former Yugoslavia and still lacks a police

23. Especially in light of the corresponding criteria set up for the granting of anonymity, that is the existence of a *real* fear, see *infra*.

24. *Prosecutor* v. *Tadić*, Decision on the Defence Motion to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, Case No. IT-94-1-T, 25 June 1996, para. 25. See also, *Prosecutor* v. *Brđanin and Talić*, Decision on Prosecutor's Motion for the Protection of Victims and Witnesses, Case No. IT-99-36-PT, 3 July 2000.

25. *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, Case No. IT-94-1-T, 31 July 1996, p. 4: "How the balance is struck will depend on the facts on each case."

26. *Ibid*., p. 3.

27. *Prosecutor* v. *Tadić*, *supra* note 8, para. 27.

28. *Ibid*.

force to guarantee the safety of witnesses. But most of all, the nature[29] and the scale of the crimes remain the same as when the Tribunal started its work. The risk of reprisals against witnesses naturally increases when people feel personally affected by a particular prosecution. The conflict in the former Yugoslavia has clearly enhanced that feeling. When a political or military leader of that community is being tried, it goes without saying that members of that community might feel as if they are on trial as well. As a result, the risk of intimidation or reprisals against a witness or his or her family is greatly increased.

On the other hand, it has also been argued that protective measures have been used by the Tribunal too often and have become the norm rather than the exception. This approach does not seem to take into account the fact that victims and witnesses coming to testify are participating in the administration of justice by an extraordinary judicial body dealing with extraordinary crimes. As we have seen, confidentiality affects the right of the public as well as the right of the accused. Nevertheless, most human rights instruments provide even for the possibility of a full trial to be conducted in closed session, where extraordinary circumstances warrant such a measure.[30] However, the real question is whether an infringement upon the right to a public trial is consistent with these fundamental rights while at the same time providing an effective regime for the protection of victims and witnesses.

Anonymity

While the frequent or, some would argue, even systematic use of measures of non-disclosure to the public may raise some issues as to the public nature of the trial, and therefore the right of the accused to a public trial, the conflict between the right of a witness to protection and the right of an accused to a fair trial is best illustrated by the jurisprudence relating to the admissibility of anonymous testimony. In the *Tadić* case, the Chamber allowed the testimony of three anonymous witnesses.[31] It determined that anonymity could be granted in exceptional circumstances,[32] which it found to have existed, as the

29. See "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 108: "In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses."

30. See Article 14(1) of the ICCPR and Article 6(3) of the ECHR.

31. *Prosecutor* v. *Tadić*, *supra* note 8: "the Prosecutor may withhold from the Defence and the accused […] the names of, and other identifying data concerning witnesses H, J and K", at p. 39.

32. In the *Blaškić* case, the Trial Chamber was not satisfied of the existence of an "exceptional case, the pre-requisite for taking into consideration the five conditions which might lead to the granting of the protective measures the Prosecutor

armed conflict had not come to an end in the region. It imposed five strictly defined conditions:[33]

(1) First and foremost, there must be a real fear for the safety of the witness or his or her family; even more so in cases of anonymity than in cases of confidentiality, there is a requirement that this fear be objectively grounded as the implication for the rights of the accused cannot be accepted as a measure of comfort for the witness. Nevertheless, the Trial Chamber acknowledged that "it is generally sufficient for a court to find that the ruthless character of an alleged crime justifies such fear of the accused and his accomplices".[34]

(2) The testimony of the particular witness must be important to the prosecution case, and such an assertion must be supported by objective evidence.[35] This condition reflects the inherent contradiction in the concept of anonymity. Indeed, the ECtHR has found that a conviction should not be based, either solely or to a decisive extent, on anonymous statements.[36] In numerous cases, it has ruled as follows:

> The Court has also had regard to its rulings in a series of cases concerning reliance on witness testimony which was not adduced before the trial court that Article 6§3(d) [of the European Convention on Human Rights] only required the possibility to cross-examine such witnesses in situations where this testimony played a main or decisive role in securing the conviction.[37]

While it seems obvious that anonymity should only be granted if the testimony is important to the case, anonymous testimony cannot play any "main or decisive role" in grounding a conviction. This reflects a more general contradiction. Why grant such a severe measure, bearing such consequences for the rights of the accused, unless the testimony is crucial? Why not just rely on other evidence if the witness for whom anonymity is sought is not that important to the case? At the same time, if the anonymous testimony is indeed crucial to secure a conviction, it cannot be admitted. Otherwise, how could one assert that the accused received a fair trial? Thus, it is hard to imagine how this particular condition can actually ever be met.

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has requested"; *Prosecutor* v. *Blaškić*, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, Case No. IT-95-14-T, 5 November 1996, para. 45.

33. *Prosecutor* v. *Tadić*, *supra* note 8, paras. 62 to 66.

34. *Ibid*., para. 77.

35. *Prosecutor* v. *Blaškić*, *supra* note 32, para. 42.

36. *Doorson* v. *Netherlands, supra* note 16.

37. See *Delta* v. *France*, Series A, Vol. 191-A, para. 37; *Asch* v. *Austria*, Series A, Vol. 203, para. 28; *Artner* v. *Austria,* Series A, Vol. 242-A, paras. 22-24; and *Saïdi* v. *France*, Series A, Vol. 261-C, para. 44.

(3) The Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy. Subsequent case law has specified that there is a positive obligation to support the credibility of the witness and that this obligation rests on the party requesting the anonymity.[38]
(4) The ineffectiveness or non-existence of a witness protection programme will have considerable bearing on any decision to grant anonymity. In this respect it is interesting to note that anonymity has not been granted again since the creation of a relocation programme within the ICTY.[39]

Any measures should be strictly necessary, meaning that if a less strict measure can secure the required protection, that measure should be applied. This condition is absolutely consistent with the jurisprudence of the ECtHR, which recently reiterated that

> any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.[40]

To ensure that the accused benefits from a fair trial, and to meet the standards set by the ECtHR, the Trial Chamber in the *Tadić* case set out guidelines concerning witness anonymity:

> The majority of the Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure a fair trial when granting anonymity. It believes that some guidance as to what standards should be employed to ensure a fair trial can be ascertained both from the case law of the European Court of Human Rights and from domestic law. It recognises, however, that these standards must be interpreted within the context of the unique object and purpose of the International Tribunal, particularly recognising its mandate to protect victims and witnesses. The following guidelines achieve that purpose.
> Firstly, the Judges must be able to observe the demeanour of the witness, in order to assess the reliability of the testimony […] Secondly, the Judges must be aware of the identity of the witness, in order to test the reliability of the witness […] Thirdly, the defence must be allowed ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable […] Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness.[41]

38. *Prosecutor* v. *Blaškić*, *supra* note 32, para. 43.
39. On this matter, it is interesting to note that while being one of the most extreme protective measure, the relocation programme remains largely outside the remit of the Trial Chamber. Indeed, such measures are decided upon by the Registrar, assisted by the Victims and Witnesses Section.
40. *Visser* v. *Netherlands*, Judgment, 14 February 2002, para. 58.
41. *Prosecutor* v. *Tadić*, *supra* note 8, paras. 70 and 71.

These guidelines, and in particular the active role of the judges,[42] are consistent with what the ECtHR has qualified as a process of "counterbalancing" by the judicial authorities. In the *Doorson* case, the European Court considered that no violation of the right to a fair trial could be found if it was established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities.[43] In this respect, it should be recalled that even when "counterbalancing" procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements.[44] Nevertheless, the use of anonymous witnesses is extremely controversial, and the general rule leaves no room for ambiguity: "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument."[45]

The ECtHR has warned against the risks and implications involved for the rights of the accused with the use of anonymous witnesses, in particular if those witnesses remain anonymous throughout the procedure:

> The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6.[46]

In a similar fashion, in the *Blaškić* case the Trial Chamber stated: "The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; *from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media*."[47]

It is indeed hard to conceive of how an accused can be given a fair trial – that is, adequate time for the preparation of the defence, the ability to be present at trial and to cross-examine witnesses – if he or she does not know

42. In the *Doorson* case, *supra* note 16, the European Court admitted anonymous testimonies under two conditions: 1) the existence of other evidence; 2) the active involvement of a judge, who knew the identity of the witness.

43. *Doorson* v. *Netherlands*, *supra* note 16, para. 72.

44. *Ibid*., para. 76.

45. *Kostovski* v. *Netherlands*, *supra* note 7, para. 41. See also, *Delta* v. *France*, *supra* note 39.

46. *Kostovski* v. *Netherlands*, *supra* note 7, para. 44.

47. *Prosecutor* v. *Blaškić*, *supra* note 32, para. 24 (emphasis added).

who the witnesses are. In the *Kostovski* case, the ECtHR commented on these difficulties :

> If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.[48]

More radically, Judge Stephen opposed the conclusions of the Trial Chamber in the *Tadić* case and stated that the Rules "give no support to anonymity of witnesses at the expense of fairness of the trial and the rights of the accused spelt out in Article 21".[49] According to his Separate Opinion, the Rules and the Statute of the ICTY, while subjecting the right to a public trial to the protection of witnesses, do not allow any qualification on the right to a fair trial and in particular, the minimum rights guaranteed under Article 21(4) of the Statute.[50]

In support of this argument, Morris and Scharf added that when "witness protection cannot be provided consistent with the rights of the accused, the Prosecutor may have to consider calling other witnesses or offering other documentary or physical evidence rather than seriously jeopardising the physical safety of a particular witness in the absence of adequate protection".[51] Interestingly, it appears that this is what the Prosecutor has been doing since the authorisation by the Tribunal to admit three anonymous witness testimonies. Indeed, the Trial Chamber seized of the *Tadić* case is the only one to have granted anonymity to witnesses. In doing so, it set up criteria and procedures to guarantee, as much as it could, that the accused would receive a fair trial. It seems, however, that anonymity does not constitute an adequate solution, and cannot, at any rate, be used as a substitute for a proper witness protection programme that continues after testimony and trial. At any rate, in view of the jurisprudence, the existence of such a programme would stand, and does stand, as a legal obstacle to the use of such controversial measures.

48. *Kostovski* v. *Netherlands*, *supra* note 7, para. 42.

49. *Prosecutor* v. *Tadić*, *supra* note 16, p. 15.

50. *Ibid.*, at p. 10.

51. Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, 1995, p. 244.

Measures Aimed at Minimising the Trauma of Vulnerable Victims

There is no doubt that victims of rape and sexual assault require special treatment in respect of their testimony, for two main reasons. First, to protect the privacy of this special category of victim, especially in the light of the likely social consequences that a woman may suffer if her community discovers that she has been a rape victim in the former Yugoslavia.[52] Secondly, to avoid causing the victim the further trauma of having to face the offender, which has often been described as amounting to reliving the violence.[53] Accordingly, while referring to the general need to protect victims and witnesses, the Secretary-General insisted in his Report setting up the Tribunal that particular attention be given to victims of rape or sexual assault.[54]

To guarantee the privacy of the victim, and to guard against retraumatisation, Rule 96 of the Rules provides several tools of protection and specific mechanisms for the admissibility of evidence.[55] These come in addition to the general duty of the Chamber "to control the manner of questioning to avoid any harassment or intimidation".[56] This discretion will naturally prove of great importance when it comes to the testimony of victims of rape or sexual assault.

Protection may take a number of forms. Its purpose is to protect the victim's privacy and to avoid confrontation with the accused, while allowing the latter

52. See, for example, the expressed consequences for Kosovar Albanian victims of rape, in *Prosecutor* v. *Milošević*, Testimony of Fred Abrahams, Transcript, Case No. IT-02-54-T, 3 June 2002.

53. See *Prosecutor* v. *Tadić*, *supra* note 8, para. 46: "Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time."

54. See "Report of the Secretary-General", *supra* note 29, para. 108: "Necessary protection measures should therefore be provided in the rules of procedures and evidence for victims and witnesses, especially in cases of rape or sexual assault." Also, on the particular issue of crimes against women, see the chapter in this book by Michelle Jarvis.

55. Rule 96 reads:

> In cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
> (iv) prior sexual conduct of the victim shall not be admitted in evidence.

56. Rule 75 (C) reads: "A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."

to observe and question the witness. Closed hearings satisfy this first purpose. As for relieving the victim from the ordeal of confrontation with the alleged offender, the Chambers have had recourse to one-way closed circuit television, which prevents the victim from seeing the accused but allows the accused to see the victim, therefore not involving the procedural risks of anonymity. The Chambers have also considered alternative methods, which do not involve removing the witness from the courtroom, such as the placing of a screen between the witness and the accused and the use of monitors allowing the accused to see the witness.[57] Such measures protect the right of the accused to be present at the trial and to examine witnesses.

Restrictions to the rules governing the admissibility of evidence in respect of sexual assault victims take a number of forms. The testimony of the victim requires no corroboration and the defence of consent cannot be raised in specific circumstances, and in any case can only be raised if the Chamber determines, *in camera*, that the evidence of consent is credible and relevant. Finally, evidence of prior sexual conduct is not admissible. In this respect, Judge Mumba pointed out that the "pattern of sexual violence during the war in the former Yugoslavia shows that the defence of consent and evidence of prior sexual conduct is less relevant in cases before the Tribunal than in most cases before national courts".[58]

Finally, the Victims and Witnesses Section of the Tribunal provides constant support during the time the witness spends in The Hague. This is true for all witnesses, as they benefit from the Witness Assistant Programme, providing twenty-four-hour live-in assistance for witnesses while they are in The Hague. These assistants are also specifically trained in supporting female witnesses testifying to crimes of sexual violence.[59]

Out-of-court Protection

The effectiveness of the measures ordered to protect victims and witnesses within the courtroom depends to a large extent on the protection they receive before and after testifying. While the Rules expressly contemplate the granting of protective measures before the witness gives evidence, they do not envision any mid or long-term protection after the testimony is heard by the Chamber. This further confirms the proposition that the victim is intended to be an instrument of the trial rather than a participant as such.

57. See *Prosecutor* v. *Tadić*, *supra* note 8, para. 51.

58. Florence Mumba, "Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?", in Richard May *et al.*, eds., *Essays on ICTY Procedure and Evidence*, 2001, p. 366.

59. Statement by Wendy Lobwein, Support Officer at the Victims and Witnesses Section of the ICTY, Women's Caucus for Gender Justice, Preparatory Commission meeting on the International Criminal Court, New York, 26 July-13 August 1999.

Rule 69(A) Non-disclosure

Rule 69(A) provides that "[i]n exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal". This Rule belongs to the section dealing with pre-trial production of evidence and constitutes an exception to the general duty on the Prosecutor to make available to the defence copies of the supporting material accompanying the indictment as well as all prior statements obtained by the Prosecutor from the accused.[60] In fact, Rule 66, dealing with the Prosecutor's disclosure obligations, expressly subjects its provisions to Rules 53 and 69, both dealing with non-disclosure of material. Therefore, Rule 69(A) pertains to the protection of victims and witnesses at the pre-trial stage, that is before they come to the Tribunal to testify under any protective measures the Trial Chamber deems to be appropriate. This pre-trial protection is ensured through the non-disclosure of the identity of victims and witnesses, if exceptional circumstances are established and if they may find themselves at risk.

The application of Rule 69(A) has raised a number of issues, some of which have been dealt with in the Tribunal's jurisprudence. With respect to the criteria for establishing the existence of "exceptional circumstances", the Trial Chamber in the *Brđanin & Talić* case found that the prevailing circumstances in the former Yugoslavia, while having prompted the adoption of the Rule,[61] did not amount, by themselves, to "exceptional circumstances" under the Rule. To be exceptional, "the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances- in the former Yugoslavia […]".[62] Indeed, in this case, the prosecution had invoked the facts and circumstances concerning Tribunal

60. Rule 66(A)(i), which reads as follows:

> (A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
> (i) Within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused […]

61. See *Prosecutor* v. *Brđanin & Talić*, supra note 24, para. 11, in which the Trial Chamber stated that

> Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives.

62. *Ibid*., para. 11.

cases generally to justify the redaction of all identifying material in every statement provided under Rule 66(A)(i) (the material provided to support confirmation of the indictment). The Chamber described this as both "unauthorised and unjustified". Similarly, the Trial Chamber hearing the *Milošević* case has reiterated that "what is required under Rule 69(A) is a showing of "exceptional circumstances" with respect to *each* witness for whom the prosecution seeks non-disclosure of identifying information", confirming that the provision does not authorise blanket protection.[63]

The Trial Chamber in the *Brđanin & Talić* case set three criteria to be considered in determining whether there are exceptional circumstances warranting the application of Rule 69(A), namely: the likelihood that the witness will be interfered with or intimidated once his or her identity is made known to the accused and his or her counsel, but not to the public[64]; the extent to which the power to make protective orders can be used only to protect individual victims or witnesses in the particular trial, as opposed to making it easier for the prosecution to bring cases against other persons in the future[65]; and the length of time before the trial at which the identity of the witnesses will be disclosed to the accused.[66]

In the *Milošević* case, the Prosecutor also raised, in support of her claim, the fact that the accused did not recognise the authority of the Tribunal and that a member of the accused's Socialist Party of Serbia made a threat on Belgrade television against anyone planning to give evidence against the accused. The Chamber found, however, that this "cannot be taken as a factor which would weigh so heavily as to persuade it to grant a blanket protection order".[67]

It is apparent in the jurisprudence that the likelihood of interference does not amount to exceptional circumstances and that this must be established by specific evidence of the danger that each witness is individually facing.[68] The fears expressed by potential witnesses are not sufficient in themselves to warrant such protective measures. These can only be ordered on an individual basis, as they may affect the ability of an accused to investigate the case, in spite of the fact that the accused may only disclose identifying information to the "direct and specific extent necessary for the preparation" of his or her case.[69] It is admitted that there is a risk that people the defence will talk to in the course of its investigation may reveal the identity of protected witnesses and therefore put them at risk, and that the potential for interference is pro-

63. *Prosecutor* v. *Milošević*, *supra* note 9, para. 17.
64. *Prosecutor* v. *Brđanin & Talić*, *supra* note 24, para. 24.
65. *Ibid*., para. 29.
66. *Ibid*., para. 33
67. *Prosecutor* v. *Milošević*, *supra* note 9, para. 29.
68. *Ibid*., at para.19; See also *Prosecutor* v. *Brđanin & Talić*, supra note 24, paras. 8 and 11.
69. *Ibid*., paras. 21 and 24.

portional to the length of time between the disclosure of the identity of a witness and the time of his or her testimony. However, disclosure must occur within a reasonable time to allow the accused to prepare the case, and that time must be "before the trial commences rather than before the witness gives evidence",[70] and "not less than thirty (30) days before the firm trial date".[71]

This deadline has recently been revisited in the *Milošević* case to take into account the exceptional security risks that a limited number of witnesses have faced concerning their testimony. The Trial Chamber ordered that unredacted statements of witnesses would be disclosed to the *amici curiae* not less than thirty days *before the witness is expected to testify*, and to the accused not less than ten days before the expected testimony. The criteria of the length of time before the trial at which the identity of the witnesses will be disclosed to the accused have therefore been relaxed to meet the needs of protection of extremely sensitive witnesses.[72]

The relationship between Rule 69(A) and Rule 66(A)(i) has also raised some concern. In the *Brđanin & Talić* case, the prosecution argued that the obligation placed upon it to disclose the supporting material to the accused within thirty days of his initial appearance could not be reconciled with the need to protect victims and witnesses. As a result, it proposed an alternative procedure to remedy this conflict. The prosecution would take it upon itself to redact the identifying information concerning every witness that it deemed to be vulnerable and the accused could then make a reasonable request for dis-

70. *Prosecutor* v. *Brđanin & Talić*, *supra* note 24, para. 33. In this case, the deadline was set for disclosure at thirty days before the commencement of the trial.

71. *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, Case No. IT-94-1-T, 14 November 1995, para. 21. Recently, in the *Bagosora* case, a Trial Chamber of the ICTR allowed the Prosecutor to "disclose to the Defence the identity of its protected witnesses and their non-redacted statements not later than thirty-five days before the date of expected testimony" (emphasis added). See *Prosecutor* v. *Bagosora*, Separate Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ICTR-96-7, 7 December 2001, para. 2.

72. *Prosecutor* v. *Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-02-54-T, 3 May 2002, at p. 8. See also, *Prosecutor* v. *Plavšić & Krajišnik*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, Case No. IT-00-39 & 40-PT, 24 May 2002, in which the Trial Chamber allowed the delayed disclosure to the Defence of seven unredacted statements to occur not less than thirty days *before the witness is expected to testify*, reserving its right to subsequently exclude the testimony pursuant to Rule 89 (D), where "non-disclosure of such information impinges unfairly upon the ability of the accused to challenge the testimony of the witness", at p. 9. This approach, restricted to sensitive witnesses, reverses the balance in requiring that the delayed disclosure be proved to be unfair to the Defence for the testimony to be excluded, instead of disallowing the delayed disclosure in the first place.

closure of the identity of a particular witness, giving reasons why such disclosure was required.

The Trial Chamber dismissed this suggestion for several reasons. First, it assumed that every witness is in fact vulnerable, something which could not be presumed. Second, it reversed the appropriate onus which, under Rule 69(A), lies with the Prosecutor. Finally, it amounted to a transfer to the prosecution of a role that under the Rules resides with the Trial Chamber, to determine whether a witness is vulnerable. Reiterating that Rule 69(A) did not provide for a blanket protection, the Chamber held that there was no conflict with Rule 66(A)(i). Accordingly, the prosecution was allowed to submit copies of redacted statements only to the extent that it could establish the existence, at this early stage of the proceedings, of exceptional circumstances warranting the non-disclosure of the identity of witnesses.[73]

Finally, the applicable test for non-disclosure articulated in Rule 69(A) and Rule 53(A)[74] has proved to be of interest. The Trial Chamber hearing the *Milošević* case drew a somewhat peculiar distinction between the application of the two Rules. It stated that "whilst an application under Rule 69(A) goes to the heart of an accused's ability to prepare his defence, applications under Rule 53(A) do not materially impede the preparation of an accused's defence so long as he is expressly allowed to make public such material for this strict purpose".[75] One could construe this finding as meaning that Rule 69(A) deals with non-disclosure to the accused, while Rule 53(A) governs non-disclosure to the public. However, such an interpretation of the two Rules seems erroneous.

One of the major reasons for this is that it would be inconsistent to impose a stricter test on non-disclosure to the public than to the accused. Rule 53(A) requires the existence of exceptional circumstances and that non-disclosure be in the interest of justice. Rule 69(A) only requires that exceptional circumstances be established. A more consistent interpretation would be that Rule 53(A) constitutes a general provision allowing a judge or Chamber to order that certain material remain confidential, while Rule 69(A) applies to non-disclosure both to the public and to the accused. Indeed, no other provision in the Rules, apart from Rule 53(A), confers on a judge or a Chamber the power to order the non-disclosure to the public of certain material. The Rule provides expressly that it governs non-disclosure *to the public*. On the other hand, Rule 69(A) refers to non-disclosure without specifying to whom non-disclosure may be directed. Therefore, this generic term leaves open the possibility of its application to both the accused and the public. This interpretation is also consistent with the incorporation of the terms "in the

73. *Prosecutor* v. *Milošević*, *supra* note 9, paras. 14-21.

74. Rule 53(A) provides that "[i]n exceptional circumstances, a Judge or a Trial Chamber may, in the interest of justice, order the non-disclosure to the public of any documents or information until further order".

75. *Prosecutor* v. *Milošević*, *supra* note 9, para. 32.

interests of justice" in Rule 53(A), as it pertains to non-disclosure ordered *at the initiative of the Chamber*. It is here that there lies a distinction with Rule 69(A), which is expressly subject to an application by the Prosecutor.

Therefore, it seems that Rule 53(A) is the provision that gives a judge or Chamber a general power, in exceptional circumstances and in the interest of justice, to order the non-disclosure of material, whatever form it may take. On the other hand, Rule 69(A) allows the prosecution to seek authorisation, under exceptional circumstances, to withhold the identity of a victim and witness who may be in danger, but only this. As a consequence, it can be argued that Rule 53(A) is misplaced and should be part of the section of the Rules dealing with orders and warrants, rather than indictments. This is further confirmed by the fact that the other paragraphs of Rule 53 govern expressly the disclosure of an indictment or part thereof, while paragraph (A) of the Rule constitutes a general provision, with no reference made to its sole applicability to indictments.

Rule 75(D) Jurisprudence

Rule 75(D) deals with the variation or lifting of protective measures previously ordered by a Chamber.[76] It was first adopted at the twenty-first Plenary Session on 7 December 1999,[77] as a response to a procedural void that the Tribunal had attempted to fill through its jurisprudence. The issue was first raised in a motion submitted by the defence in the *Kordić* case for access to confidential material in the related Lašva valley cases, including transcripts,

76. In its current version (IT/32/Rev.22, 28 December 2001), Rule 75(D) reads:

> (D) Once protective measures have been ordered in respect of a victim or witness, a party seeking to very or rescind such an order must:
> (i) apply to the Chamber that granted such measures to very or rescind them or to authorise the release of protected material to another Chamber for use in other proceedings; or
> (ii) if, at the time of the request for variation or release, the original Chamber can no longer be constituted by the same Judges, apply to the President to authorise such variation or release who, after consulting with any Judge of the original Chamber who remains a Judge of the Tribunal and after giving due consideration to matters relating to witness protection, shall determine the matter.
> During appellate proceedings from proceedings before a Trial Chamber in which an order has been made for protective measures, the Appeals Chamber is in the same position as the Trial Chamber to vary or rescind the order made by the Trial Chamber.

77. IT/32/Rev.17.

exhibits and orders and decisions of the Tribunal.[78] The Trial Chamber dealing with the then pre-trial phase of the *Kordić* case reminded the parties that many witnesses agreed to testify on the sole basis that they would be granted protective measures and that any variation of those measures might deter future witnesses from appearing before the Tribunal. Nevertheless, it considered that it had a duty to ensure the prosecution was discharging its disclosure obligations under the Rules and set forth the principle that was then to become the core of Rule 75(D). In essence, the Chamber declined to assume jurisdiction and referred the matter to the judges who had initially granted the measures.[79]

Pursuant to this referral, the Chamber hearing the *Blaškić* case issued an interesting opinion, proposing ways to ensure that the witnesses would continue to enjoy "an at least equivalent level of protection".[80] Having determined that the disclosure obligations deriving from Rules 66(A) and 68 of the Rules remained binding on the Prosecutor regardless of the confidential character of the documents, the Chamber held that it was appropriate to reinforce the protective measures previously granted in light of the increased risk inevitably resulting from the multiplication of individuals allowed access to the confidential material. It held that those previous measures would apply *ipso facto* to the parties requesting the disclosure of the confidential documents and imposed additional measures, including: the designation of a single receiver of the confidential documents responsible to the Chamber; the keeping of a record; the obligation to obtain authorisation of the Chamber before disclosing part or all of the confidential material to any other person; the adoption of different pseudonyms in the context of the various cases; and, a prohibition on mentioning, should such be the case, that the witness had testified previously.[81]

Subsequently, the Appeals Chamber confirmed that once protective measures have been granted to a victim or witness, only the Chamber that initially granted them can vary or rescind them.[82] Interestingly, one Trial

78. *Prosecutor* v. *Kordić & Čerkez*, Motion of the Accused Dario Kordić for Access to Non-public Materials in the Lašva Valley and Related Cases, Case No. IT-95-14/2-PT, 2 June 1998. The related cases concerning the Lašva valley in Central Bosnia at the time were the *Blaškić*, the *Kordić & Čerkez*, the *Furundžija*, the *Aleksovski* and the *Kupreškić* cases.

79. *Prosecutor* v. *Kordić & Čerkez*, Decision on the Motion of the Accused for Access to Non-public Materials in the Lasva Valley and Related Cases, Case No. IT-95-14/2-PT, 12 November 1998, pp. 4-5.

80. *Prosecutor* v. *Blaškić*, Opinion Further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordić and Mario Čerkez dated 12 November 1998, Case No. IT-95-14-T, 16 December 1998, p. 6.

81. *Ibid.*, pp. 6-7.

82. *Prosecutor* v. *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, Case No. IT-95-14-A, 26 September 2000, para. 55.

Chamber recently interpreted Rule 75(D) "as including a reference to the Trial Chamber however composed during the course of the pre-trial or trial proceedings".[83] This issue can certainly benefit from a clarification of the Rule. Indeed, while Rule 75(D) expressly refers to the original Chamber as meaning "constituted by the same Judges",[84] it expressly provides that the Appeals Chamber is in the same position as the Trial Chamber to vary any protective measures. The purpose of this distinction is neither clear nor legitimate. A Trial Chamber hearing the merits of a case remains bound by previous orders and decisions issued by a Trial Chamber of a different composition during the pre-trial phase. Furthermore, in light of the current practice of the Tribunal that a Trial Chamber dealing with the pre-trial phase of a case is not likely to hear the merits of this case, especially as *ad litem* judges have been nominated for that specific purpose, it would be sensible to consider the Trial Chamber as a single entity, irrespective of its actual composition.

Moreover, according to the jurisprudence, unless the material falls within the ambit of Rules 66(A) and 68, "the onus is on the requesting party to identify exactly what material it seeks and the purpose the material would be used for".[85] The requesting party must establish that access may materially assist in some *identified* way in the conduct of its case, and that such assistance is not otherwise reasonably available.[86] Such a finding has been justified by the following statement, which comes back to the core of the issue concerning the effectiveness of the protection given to victims and witnesses: "The purpose of the protective measures granted in favour of those witnesses in the other proceedings would be destroyed if the benefit of those protective measures could be lost merely because there is a good chance that their evidence would materially assist an accused person in other proceedings."[87]

However, a recent Appeals Chamber decision has upheld the very test that was dismissed by this Trial Chamber, namely the likelihood that access to the confidential documents will assist the case of the requesting party materially. The Appeals Chamber held that "a party may not engage in a fishing expedition, but that, provided it does not do so, it may seek access to confidential material in another case if it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, and if it can show that such access is likely to assist his case materi-

83. *Prosecutor* v. *Plavšić & Krajišnik*, Decision on Prosecution's Request and Second Request Pursuant to Rule 75(D) for Variation of Protective Measures, Case No. IT-00-39 & 40-PT, 8 April 2002, at p. 3.

84. Rule 75(D)(ii).

85. *Ibid.*

86. *Prosecutor* v. *Brđanin & Talić*, Second Decision on Motions by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, Case No. IT-99-36-PT, 15 November 2000, para. 12.

87. *Ibid.*, para. 11.

ally".[88] Accordingly, the Appeals Chamber found that the geographic, temporal and substantive overlap between the two cases concerned was sufficient to conclude that access is likely to be of material assistance.[89] This jurisprudence opens the door to a systematic access of parties in a proceeding to confidential documents submitted in other proceedings involving similar events, even if those documents do not fall within the ambit of the Prosecutor's disclosure obligations pursuant to Rules 66 and 68. Certain defence teams have, within a few days after the accused's initial appearance, already seized the opportunity given to them by the Appeals Chamber to request access to the confidential material presented in related cases.[90]

As far as the protection of victims and witnesses is concerned, the Tribunal is faced with a triple challenge: ensuring protection of victims of extraordinary crimes; doing so without the support on the ground that national courts would normally enjoy; and, in this regard, filling a void in the legal system of the former Yugoslavia following years of war. Those difficulties and the critical role played by the Tribunal are best encapsulated by former ICTY Judge, Patricia Wald, who recently stated:

> After listening to hundreds of witnesses who suffered hideous assaults on their bodies, minds and souls yet found the courage to come to the Hague to testify against their accused violators, I cannot imagine that the bulk of them would have testified willingly in their local courts which in many cases were located in villages and towns still populated and in some areas dominated by forces sympathetic to the alleged wrongdoers rather than to their victims. I am convinced that the ICTY filled a critical void in that respect, that no national courts were prepared or able to fill.[91]

88. *Prosecutor* v. *Hadžihasanović* et al., Decision on Appeal From Refusal to Grant Access to Confidential Material in Another Case, Case No. IT-01-47-AR73, 23 April 2002, at p. 3.

89. *Ibid.*

90. *Prosecutor* v. *Milošević*, General Dragoljub Ojdanić's Motion for Access to Transcripts and Documents, Case No. IT-02-54-T, 1 May 2002. The Trial Chamber held the initial appearance of the accused Dragoljub Ojdanić on 26 April 2002.

91. "International Justice or Show of Justice", by former Judge Patricia Wald, speaking before the House International Relations Committee, 28 February 2002.

The Victim as a Party: Issues of Participation and Reparation[92]

"Cognisant that millions of people throughout the world suffer harm as a result of crime and the abuse of power and that the rights of these victims have not been adequately recognised."[93] While the testimony of victims before the Tribunal is absolutely essential to the fulfilment of its mandate, they are treated as mere witnesses to a crime, and their status as victims of crime does not give them any additional rights, or the status of a party to the proceedings. In this respect, whilst the Statute and the Rules seem to recognise that victims have a right to reparation, they leave it to other appropriate bodies or jurisdictions to enforce this right. At the same time, the related issue of participation of victims is not even contemplated. The justification that is often provided in this respect is that the Tribunal was primarily set up as a criminal jurisdiction to try persons responsible for serious violations of humanitarian law.[94] However, this approach ignores the theory of restorative justice and the idea that no reconciliation can take place in the former Yugoslavia if victims are not compensated for their losses. In this respect, the Tribunal is not the "tool for promoting reconciliation and restoring true peace"[95] that it is supposed to be.

92. The term compensation is more often used to describe the issue that will be dealt with here. However, we decided to use the term reparations as it incorporates all forms of remedies, namely financial compensation, rehabilitation, restitution, and satisfaction and guarantees of non-repetition. See "Final Report of the Special Rapporteur, Mr. Cherif Bassiouni, Submitted in Accordance with Commission Resolution 1999/33", UN Doc. E/CN.4/2000/62 (18 January 2000); See also Roger S. Clark & David Tolbert, "Towards an International Criminal Court", in Y. Danieli *et al.*, eds., *The Universal Declaration of Human Rights: Fifty Years and Beyond*, 1999, p. 103. Only the issues of restitution and compensation, as they appear in the ICTY Rules, are addressed in this chapter.

93. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34, 29 November 1985.

94. Article 1 of the Statute. See also: Security Council Resolution 827, UN Doc. S/RES/827 (1993), adopted 25 May 1993, whose preamble describes as a primary objective of the Tribunal "to bring to justice the persons who are responsible".

95. "Annual Report of the International Tribunal to the General Assembly of the United Nations, 29 August 1994", UN Doc. A/49/342, para. 16.

Reparation to victims: the limits of the existing regime before the ICTY

The ICTY does not provide for an autonomous and comprehensive regime of reparation to victims. Indeed, the only form of reparation that is encompassed in the Statute[96] and the Rules[97] is the restitution of property. The Statute does not address the issue of compensation. Rule 106 provides for the bringing of an action to obtain compensation "in a national court or other competent body", not before the Tribunal. It is interesting to note that one of the main arguments against granting the Tribunal the general power to order reparation to victims by, for example, financial compensation, is that its main objective lies in the prosecution of persons responsible for serious violations of international humanitarian law, and that it should therefore not act as a civil jurisdiction but only as a criminal court. Yet, the Tribunal was given the power to order restitution, even though the process of determining the legitimate owner of property is typically a civil one.

96. Article 24(3) of the Statute reads: "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."

97. Rule 105 (Restitution of Property) reads:

> (A) After a judgment of conviction containing a specific finding as provided in Rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.
> (B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.
> (C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.
> (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
> (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them to so determine.
> (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
> (G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F).

An Unused Procedure for the Restitution of Property

Rule 105 establishes a procedure allowing the Tribunal to order the restitution of property, in application of the general principles of law that an offender should not benefit from crime and that property illegally acquired should be restituted. Bringing of the restitution proceedings is subject to three conditions: a conviction must be pronounced against the accused, and a specific finding made as to the unlawful taking of property,[98] the unlawful taking of property must be "associated with the crime", and the Chamber must be seized of a request by the Prosecutor or act *proprio motu*.

The requirement of the existence of a conviction against the accused and of a specific finding comes clearly out of the reading of both Rule 105(A) and Rule 98*ter*(B) of the Rules. One may wonder whether to fulfil this condition, the accused must have been specifically convicted of looting or plunder of property. According to one writer, "the person may be convicted of any crime and restitution of property is not dependent on which crime the convicted person is found liable. It must only be possible to conclude the unlawful taking of property from the evidence in the case".[99]

In theory, this is true. Indeed, the second requirement that there be an association between the unlawful taking of property and the crime for which the accused has been convicted does not demand identity between those two offences. However, the related condition that a specific finding be made, while completely legitimate, will be harder to prove if the accused is not charged with specific events leading to the unlawful taking of property, either directly or by others. This is especially the case in trials where, for example, the accused are high level commanders or officials under whose authority thousands of victims may have been deprived of their property as part of a large-scale campaign of persecutions. Is it possible for the Tribunal to hear evidence on every potential claim of unlawful taking of property brought against subordinates of the accused? And would it be fair to the accused to do so, considering the time such a process would inevitably take? In reality, unless the trial is relatively limited in scope, it will be virtually impossible for all such victims to obtain restitution.

Furthermore, the person convicted does not have to be in actual possession of the property. This has two consequences: first, the person convicted does not have to be the main perpetrator of the unlawful taking of property; secondly, the Tribunal can order that property "in the hands of third parties oth-

98. See Rule 98*ter*(B) which provides that if the Trial Chamber

> finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgment. The Trial Chamber may order restitution as provided in Rule 105.

99. Susanne Malmström, "Restitution of Property and Compensation to Victims", in Richard May *et al.*, *supra* note 58, at p. 376.

erwise not connected with the crime"[100] be restituted. This latter proposition is expressly provided for in Rule 105(C), according to which third parties shall be given the opportunity to justify their claim and prove their good faith.[101]

Moreover, as individual victims do not enjoy *locus standi* before the Tribunal, the decision to initiate such a restitution procedure rests with the Prosecutor, who can file a request to that effect, or with the Chamber, which can act *proprio motu*. To date, neither the Prosecutor nor the Chambers have had recourse to such a procedure. The *Naletilić & Martinović* case might prove to be a first, as in its pre-trial brief the prosecution has expressed an intention to raise the issue of restitution. While a formal request will only be admissible if the accused are found guilty, the prosecution has already tried to expand as much as possible the scope of the application of Rules 105 and 106. It has suggested in particular that "Article 24(3) of the Statute includes both the restitution of property as well as compensation for injuries",[102] and that the unlawful taking of property also covers the "use of human beings as property through acts such as enslavement, forced prostitution, or forced labour".[103] It even goes as far as to claim that, in the context of widespread or systematic acts of persecution, a finding that the accused is liable for the pillaging and destruction of homes and other property "should confer standing in subsequent restitution proceedings to all […] victims associated with such acts during the relevant time period", even if they are not expressly included in the indictment or factual finding, thereby giving a very broad interpretation of the requirement set forth in Rule 98*ter*(B).[104]

Upon fulfilment of these conditions starts a process that traditionally belongs to the procedure applicable to civil claims in a domestic jurisdiction, the Tribunal being responsible for determining the rightful owner of property on the balance of probabilities.[105] To that effect, the Chamber must convene

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100. Rule 105(C).

101. The Rule does not say whether the person who has acquired disputed property in good faith will be entitled to keep it even though it had been unlawfully acquired in the first place. The norms governing such matters in national legal systems vary dramatically from one system to another and from one type of property to another. One factor to take into account in responding to this question is that a strict interpretation of the Rules would prevent the Tribunal ordering financial compensation to the victim if the property cannot be restituted (see Rule 106). On the contrary, such an option is expressly provided for in Article 109(2) of the Rome Statute, *supra* note 15.

102. *Prosecutor* v. *Martinović & Naletilić*, Prosecutor's Pre-Trial Brief, Case No. IT-98-34-PT, 11 October 2000, para. 4.190.

103. *Ibid*., para. 4.194.

104. *Ibid*.

105. This standard of proof, traditionally applicable for civil claims, and one that is less strict than the "beyond reasonable doubt" standard applicable to criminal trials, is applied in determining the existence of mitigating circumstances: *Prosecutor* v. *Kunarac* et. al., Judgment, Case No IT-96-23-T & IT-06-23/1-T, 22 February

a hearing[106] and request the assistance of the competent national authorities to determine the rightful owner if it is not able to do so.[107] However, it is not certain whether the national authorities will always be in a position to make an "affirmative determination" as to who the rightful owner is, as required by Rule 105(E), especially in the potential absence of documents such as real-estate property records. Moreover, the Chamber may "in the meantime order such provisional measures for the preservation and protection of the property and proceeds as it considers appropriate".[108] It has, however, been pointed out that as such provisional measures aiming at preserving the property can only be ordered after a judgment of conviction has been entered, its impact may be limited.[109]

As stated above, Rule 105 has yet to be applied by the ICTY. However, on its own, this procedure will not be an answer for the thousands of persons whose lost property, destroyed in the course of the wars and the various campaigns of ethnic cleansing, cannot be retrieved, especially in light of the lack of authority of the Tribunal to compensate them.

2001, para. 847. See also *Prosecutor* v. *Sikirica* et al., Sentencing Judgment, Case No. IT-95-8-S, 13 November 2001, para. 110. The Chamber, in the latter case, stated, in respect to the existence of diminished mental capacity as a mitigating circumstance, that the accused had to establish that "more probably than not" he suffered from such a condition, para. 188.

106. Rule 105(D).

107. Rule 105(E).

108. Rule 105(A).

109. See Susanne Malmström, *supra* note 99, at p.378. This goes back to the issue of frozen assets. While the Tribunal can order that the assets of the accused be frozen when acting pursuant to Rule 61 (Procedure in case of failure to execute a warrant), the judge confirming an indictment does not expressly have such power. However, in the *Milošević* case (Kosovo Indictment), the confirming judge ordered the freezing of assets under Article 19(2)of the Statute and Rules 47(H) and 54, which confer on judges the general power to issue orders as necessary. He noted that the freezing of assets was ordered, *inter alia*, "for the purpose of granting restitution of property or payment from its proceeds (which may be ordered by a Trial Chamber pursuant to Rule 105 after conviction, subject to the appropriate findings having been made in the judgment pursuant to Rule 98*ter*)". See *Prosecutor* v. *Milošević*, Decision on Review of Indictment and Application for Consequential Orders, Case No. IT-99-37-I, 24 May 1999, para. 27. Besides, with respect to the effective nature of such a measure, it should be noted that the accused will not always be in possession of the unlawfully acquired property, while at the same time, not all assets of the accused will have been unlawfully taken in association with a crime falling under the jurisdiction of the Tribunal.

The Lack of Authority of the Tribunal to Order Compensation

While Rule 106[110] is dedicated to the issue of compensation, the Statute has not conferred on the Tribunal the power to order such measures. The Security Council has affirmed that "the work of the International Tribunal shall be carried out without prejudice to the right of the victim to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law".[111] However, according to some writers, while aware of the issue of compensation, the Council excluded the possibility that the Tribunal process compensation claims submitted by victims.[112]

According to Rule 106, a victim may bring an action for compensation before a national jurisdiction or other competent body, but not before the Tribunal. Former ICTY President Antonio Cassese described the underlying context in which Rule 106 was adopted in the following terms: "This is a sort of a hint to the victim: please go to the national court and try to get some sort of vindication of your rights."[113] However, this approach has not produced any results so far,[114] and in light of the state of the jurisdictions in the region to date, it is unlikely to produce any in the near future.[115]

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110. Rule 106 (Compensation to victims) reads as follows:

> (A) The Registrar shall transmit to the competent authorities of the States concerned the judgment finding an accused guilty of a crime which has caused injury to a victim.
> (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.
> (C) For the purposes of a claim made under paragraph (B) the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

111. Security Council Resolution 827, *supra* note 94, para. 7. See also, in this respect, article I of Annex 7 of the Dayton Peace Agreement, signed in Paris on 14 December 1995: "All refugees and displaced persons […] shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them."

112. Virginia Morris & Michael P. Scharf, *supra* note 51, pp. 286-287.

113. Albrecht Randelzhofer & Christian Tomuschat, eds., *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights*, 1999, p. 48.

114. It seems that to date, Rule 106 has never been invoked to support a claim for compensation before a national court in the territory of the former Yugoslavia.

115. Report attached to a letter dated 12 October 2000 from the President of the International Tribunal for the former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, annex, para. 45.

In the course of the first years of its existence, the ICTY focused primarily, and understandably so, on setting up the means to ensure that accused persons would be tried with full respect for their rights. Only when the procedures were established and the resources obtained to achieve this primary objective could the Tribunal turn its attention to the issue of victims. This coincided more or less with the adoption, in Rome, of the Statute of the International Criminal Court,[116] and the subsequent drafting of the Court's Rules of Procedure and Evidence.[117] These instruments set a very ambitious regime for the role of victims and contrast dramatically with the relative silence of the Statute of the ICTY in this regard.

Towards a more comprehensive regime allowing victims' compensation and representation before the ICTY?

In July 2000, the Office of the Prosecutor (OTP) submitted two proposals to the Plenary relating to the compensation and the participation of victims. These included amendment of the Rules and the possibility of the matter being referred to the Security Council to amend the Tribunal's Statute, in order to incorporate the twin principles of participation and compensation of victims. The right to participation is only envisioned as encompassing the right to obtain compensation, not to any other form of representation in the ICTY's criminal proceedings. In other words, victims would not acquire the status of *partie civile* in the criminal proceedings.

A few months later, in October 2000, having concluded that substantial changes to the procedure and amendment of the Statute were necessary to effect the goal of victim compensation, the President of the Tribunal, Judge Claude Jorda, proposed to the Security Council that "methods of compensating victims of crimes in the former Yugoslavia, notably a claims commission, be considered by the appropriate organs of the United Nations",[118] thereby putting an end to any prospect that the proceedings before the Tribunal would be extended to include the granting of compensation.

This proposition of an international compensation commission was based on the determination that "the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation

116. See Rome Statute, *supra* note 15.

117. "Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized draft text of the Rules of Procedure and Evidence", UN Doc. PCNICC/2000/INF/3/Add.3. This draft is subject to approval by the Assembly of States Parties to the Rome Statute.

118. Report from the President of the ICTY, *supra* note 115.

in the Balkans".[119] This statement echoes those expressed by certain governments and numerous non-governmental organisations in the course of the adoption of the Statute of the International Criminal Court. According to one of them, the "making of reparations from perpetrator to victims can play a critical role in the healing process of victims, of societies as a whole and of the perpetrators themselves, and as such can be a factor in preventing future violations".[120] Similarly, the French Justice Minister at the time expressed her Government's support for a new approach to international criminal justice, by calling upon States to give themselves the means to allow victims to become true parties to the trial.[121] It was this approach that had inspired the victim-related provisions of the Statute of the International Criminal Court, which, on paper at least, indicate a significance advance in this area. One writer has noted that these provisions make offenders more aware that they are not only

119. *Ibid*. On the right of victims to compensation, see: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, (1987) 1465 UNTS 85, Article 14(1): "Each State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of death of the victim as a result of an act of torture, his dependants shall be entitled to compensation"; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, para. 4: "Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered"; Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, as revised in 1997, UN Doc. E/CN.4/1997/104; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62, para. 15: "Adequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered."

120. See Human Rights Watch, Commentary to the Preparatory Commission on the International Criminal Court, Elements of Crimes and Rules of Evidence and Procedure, July 1999, p. 36.

121. International symposium "Accès des victimes à la Cour pénale internationale", Paris, 27 April 1999, Speech of the Garde des Sceaux, Elisabeth Guigou (unofficial translation):

> Victims are and must remain at the heart of our concerns. The recognition of their rights and the reparation of the harm they have suffered are both the origin and the purpose of international criminal law […] This ambition must translate into our will to depart from the traditional models of international criminal justice and modify the idea itself that we have of the victim. We must cease, once and for all, to consider that victims are mere witnesses. I wish to state this loud and clear this morning, so that we do not return to it: victims are not mere witnesses, and their participation in the proceedings should not be limited to the gathering of the information they can provide.

in breach of public and moral order, but that they have also inflicted injury and suffering on identifiable human beings. Furthermore, they establish a link between punitive measures and measures of reparation and, finally, they help to expedite action by victims to obtain civil damages.[122]

However, the regime of compensation proposed by the President of the ICTY differs in nature from that of the International Criminal Court, which would prove very difficult to implement in the context of the Tribunal. There are several reasons for this, some of which are related to the nature of the proceedings before the Tribunal, and as such, might also apply to the future operation of the International Criminal Court. Others are related to the specific circumstances in which the Tribunal finds itself.

The main obstacle that the Tribunal will have to face in setting up a regime for victim compensation is its lack of adaptability, or even incapacity, on a procedural level to deal with the claims involved, while at the same time ensuring that an accused is tried fairly and expeditiously. Can the incorporation of civil claims for compensation into a criminal trial be reconciled with the adversarial nature of the proceedings before the Tribunal? Such provisions allowing the victim to be a party to the proceedings have never been implemented before an international or typically adversarial domestic jurisdiction.[123] Moreover, this raises the related issue of the number of potential victims whose claims a Chamber might have to hear and their legal representation for the purposes of obtaining compensation. There can be little doubt that the length of the proceedings would be substantially increased, and that new procedural steps would have to be added to an already laborious process. This consideration stems very strongly from the Report of the President, which states that in the light of the efforts made to expedite the trials, "any steps that impact on the length of the Tribunal's proceedings must be considered very carefully".[124]

Fundamentally, the nature of the proceedings themselves would have to be altered, evolving from a strictly criminal trial to a more comprehensive justice aimed not only at prosecuting the persons responsible for the offences but also at providing a remedy for the victims of the said offences. Such an exercise would include determining whether a claimant falls into the definition of a victim before the Tribunal, whether the damage is sufficiently associated with the crime for which the accused has been convicted, the extent of the prejudice suffered and the quantum of compensation appropriate in such circumstances. Such an exercise would further require that victim claimants be given a right to effective legal representation, even if they are indigent (a scenario likely to occur quite often), and a right to be heard. Finally, such an exercise might have to be repeated as many times as there are victims. In the

122. Sam Garkawe, "The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimology Analysis", (2001) 8 *Int'l Rev. Victimology* 284.

123. See Report, *supra* note 115.

124. *Ibid.*, para. 33.

context of the Tribunal, they could be counted in the tens or even hundreds of thousands.

The International Criminal Court is likely to face some if not all of these issues. One can wonder how well equipped it is in reality to perform the ambitious mission that it has been given by the States parties. It certainly currently lacks a convincing procedural framework for the enforcement of the regime of victims' rights provided for in its Statute, and it will need to deal with the complex array of issues attaching to victim compensation and representation under a regime of international criminal law.

Unlike the International Criminal Court, the Tribunal finds itself in a position where it has already tried and convicted a large number of accused. Should the victims of the crimes of which those accused have previously been found guilty benefit from such a new procedure? While from a moral point of view, the answer seems obvious, in view of the need for a comprehensive and equal approach to the issue, it might legally and concretely prove impossible to implement at this stage of the Tribunal's existence, especially as pressures are increasing for the Tribunal to finish its mandate within the next few years. In this respect, the opportunity for the adoption of such a compensation procedure, or rather lack thereof, seems to have been determined by political and practical considerations, and to have outweighed the arguments proffered by the partisans of victims' rights.

In fact, the proposal stands half way between the existing regime and the procedure created for the processing of claims arising from the invasion and occupation of Kuwait by Iraq in 1990-1991.[125] Unlike the procedure before the International Criminal Court,[126] the process of adjudicating compensation claims resulting from crimes falling under the jurisdiction of the Tribunal would not be part of the criminal trial, but would be remitted to an international compensation commission, on the model of the one created for the victims of the Gulf War. However, whilst within this commission compensation for claims was based on the recognition of the international State responsibility of Iraq, the claims that would be submitted before the Tribunal would arise out of the individual criminal responsibility of an accused. Hence serious problems arise with respect to how such compensation is to be financed.

125. See Security Council Resolution 687 (1991), para. 16, which establishes a United Nations Compensation Commission to hear claims from States and international organisations for claims for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". Individual victims can bring claims through their respective States.

126. See Articles 75 and 79 of the Rome Statute, *supra* note 15.

In 1999, one commentator observed:

> The Rules relating to restitution and compensation open up, albeit in a limited and embryonic fashion, the possibility that the Tribunal may assist victims in obtaining reparation and justice for themselves. However, what is more likely is that these provisions were included in the Rules as a symbolic afterthought rather than being expected to produce concrete results.[127]

His words of scepticism proved well founded and, as the Tribunal became a fully operational criminal jurisdiction, it is clear that it gave up the idea of ever embarking on such a task, however crucial that task might be for reconciliation in the former Yugoslavia. A year and a half after the report of the President, no compensation commission has been created and the issue is still in the hands of the Security Council.

The Forgotten Issue of the Right to Participation

The ICTY Statute and Rules do not at all contemplate the possibility of giving victims the right to participate in the criminal proceedings as *partie civile*. Accordingly, victims, as mere witnesses, can only testify within the ambit of examination and cross-examination by the parties; they cannot have a lawyer present to assist them in the course of their testimony; they cannot be present when other witnesses are testifying; they have no right (beyond that of the public) to access the evidence, and no right to information concerning the proceedings in which they are personally concerned. But, perhaps most of all, they have no power to bring a criminal action, as this lies within the exclusive discretion of the Prosecutor.[128] As a result, the prosecution is the sole representative of the interests of the international community, including the interests of victims.

However, several things can prompt a divergence of interests between the prosecution and victims. For example, where the crimes are not serious enough to disturb peace and security or where the strategy of a case and

127. Theo van Boven, "The Position of the Victim in the Statute of the International Criminal Court", in Herman von Hebel, Johan G. Lammers & Jolien Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos*, 1999, pp. 81-82.

128. Article 18(1) of the Statute provides that "[t]he Prosecutor shall initiate investigations *ex officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed". In this respect, the Appeals Chamber stated: "It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments." See *Prosecutor* v. *Delalić* et al., Judgment, Case No. IT-96-21-A, 20 February 2001.

expeditiousness of a trial require that an accused only be tried for the most serious or most easily demonstrable offences, such a divergence is likely to manifest itself. This is best illustrated by the plea agreement practice at the Tribunal, whereby a deal is made between the prosecution and an accused providing that certain counts will be withdrawn in exchange for a guilty plea on other counts.[129] In such cases, the victims of the offences charged in the counts being withdrawn are simply sacrificed to prosecutorial and defence strategies that they cannot influence in any way, and for which they have no redress or voice. Nothing in the provisions dealing with the plea process,[130] nor in the case law of the ICTY, indicates that the Chamber, in controlling the plea process and determining its acceptability, should or has addressed the interests of the victim in this process.

Conclusion

A few months after having issued his report on the issues of victim compensation and participation, the President of the Tribunal, Judge Claude Jorda, also welcomed the national initiative of the establishment of a truth and reconciliation commission in Bosnia and Herzegovina as a mechanism which complements the work of the Tribunal.[131] This statement can reasonably be taken as

129. See for example, *Prosecutor* v. *Sikirica* et. al., Joint Submission of the Prosecution and the Accused Dragan Kolundžija of a Plea Agreement, Case No. IT-95-8-T, 31 August 2001; *Prosecutor* v. *Sikirica* et. al., Admitted Facts Relevant to the Plea Agreement for Dragan Kolundžija, Case No. IT-95-8-T, 4 September 2001; *Prosecutor* v. *Sikirica* et. al., Joint Submission of the Prosecution and the Accused Duško Sikirica Concerning a Plea Agreement and Admitted Facts, Case No. IT- 95-8-T, 7 September 2001; *Prosecutor* v. *Sikirica* et. al., Joint Submission of the Prosecution and the Accused Damir Došen Concerning a Plea Agreement and Admitted Facts, Case No. IT-95-8-T, 7 September 2001.

130. The plea agreement process is governed by Rule 62*ter*, which reads as follows:

> (A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
> (i) apply to amend the indictment accordingly;
> (ii) submit that a specific sentence or sentencing range is appropriate;
> (iii) not oppose a request by the accused for a particular sentence or sentencing range.
> (B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).
> (C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty

131. "The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina", President Claude Jorda, Press Release No 591, 17 May 2001, p. 2.

an acknowledgement of the limitation of the impact the Tribunal on national reconciliation. Acting "only from the specific angle of the criminal responsibility of the perpetrators", the Tribunal cannot hear the tens of thousands of victims of crimes, and only those victims considered useful in establishing the guilt or the innocence of the accused are invited to testify by the parties. A truth and reconciliation commission can fill a large void in this respect, allowing all victims who so wish to have their voices heard and their stories told. Moreover, besides the truth-telling function, such a commission may be an appropriate forum in which to determine issues such as reparation, rehabilitation and compensation for victims. President Jorda noted the fundamental role that such a commission would play in this respect, in stating clearly that this issue "is not a priority for the International Tribunal".[132] He stated that "[u]pon collecting the statements of many victims – who must represent different ethnic, political or religious origins – … the commission should be in a position to propose to the political authorities forms of symbolic reparations which take into account the *collective* nature of the harm caused by war".[133] This statement sounds like an admission of the inability of the Tribunal to ensure, within the ambit of its Statute and the will of its creator, the Security Council, that the harm suffered by victims be properly compensated.

Almost ten years after the creation of the ICTY, victims still cannot turn to their domestic jurisdictions in order to obtain compensation, nor can they turn to the Tribunal. Moreover, the Security Council has not yet responded to the invitation to create a compensation commission. Furthermore, the draft law on the establishment of a truth and reconciliation commission in Bosnia and Herzegovina has not yet been passed. The role and status of victims of the conflicts in the former Yugoslavia remains confined to that of a witness to proceedings before the ICTY. It is apparent from the inquiry in this chapter that the Tribunal is not the appropriate forum for the compensation of victims. Such a process is better facilitated by a truth and reconciliation commission or a dedicated compensation commission, which can concentrate on such issues free from the concerns of a criminal court, which must necessarily focus first and foremost on the conduct of a fair and expeditious trial.

The future of the issues of victim representation and compensation will be developed in proceedings before the International Criminal Court, as its applicable law provides for such matters. The experience of the ICTY will assist the new Court with respect to issues such as victim and witness protection and associated disclosure issues critical to the criminal trial process. The ICTY has, in this respect, contributed substantially to the role and status of the victim in international crime. However, the areas of victim participation and compensation with regard to international crime remain virgin territory

132. *Ibid.*, p. 3.
133. *Ibid.*

and it will be interesting to see how these important issues are developed by the International Criminal Court.

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THOMAS HENQUET*

Accountability for Arrests: The Relationship between the ICTY and NATO's NAC and SFOR

On 27 September 1998, the NATO-led "Stabilisation Force" (SFOR) apprehended the accused Stevan Todorović in Tuzla, Bosnia and Herzegovina, and handed him over to the International Criminal Tribunal for the former Yugoslavia (ICTY).[1] This was yet another example of the invaluable assistance of the military force, deployed pursuant to the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement" or "Peace Agreement"), to the Tribunal.[2] In apprehending persons indicted by the Tribunal, SFOR has helped overcome the notorious failure of some of the States and entities of the former Yugoslavia to comply with their obligation to co-operate with the Tribunal.[3]

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1. ICTY Case Information Sheet (25 September 2001), available at <http://www.un.org/icty/latest/latestdev-e.htm> (accessed 30 August 2002).

2. In total, SFOR apprehended twenty-three out of sixty-six indicted persons who, at some point, have been in the custody of the Tribunal. On 18 December 2001, for example, eighteen out of forty-three accused detained at the ICTY Detention Unit were apprehended by SFOR. Fifteen accused surrendered voluntarily, and ten were arrested and surrendered by national police forces. See ICTY Fact Sheet "Detainees and Former Detainees", available at <http://www.un.org/icty/glance/index.htm> (accessed 30 August 2002). SFOR has also assisted the Tribunal in other ways, for instance by providing protection during exhumations programmes. See "Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991", UN Doc. A/53/219-S/1998/737, 10 August 1998 ("Fifth ICTY Annual Report"), para. 123.

3. The Republika Srpska, which together with the Federation of Bosnia and Herzegovina constitutes the Republic of Bosnia and Herzegovina, has been particularly uncooperative. See, generally, Fifth ICTY Annual Report, *supra* note 2, para. 213. As for the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro), the new regimes in these States are gradually improving their co-operation with the Tribunal. See "Report of the

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *113-155.*

The *Todorović* case, however, soon made clear that the legal relationship between SFOR, NATO's North Atlantic Council (NAC) and the Tribunal is cloudy. Upon arrival in The Hague, Todorović petitioned the Trial Chamber for a writ of *habeas corpus*. He contended that he had been illegally abducted from his residence in the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY) and requested release and return as a remedy.[4]

The parties never litigated the merits of this claim, however, and the Trial Chamber did not pronounce on it. Rather, the proceedings revolved around a preliminary issue, namely the production of evidence pertaining to the factual circumstances of the arrest. The Trial Chamber initially rejected Todorović's *habeas corpus* motion for lack of "sufficient factual and legal material"[5]; and the Appeals Chamber affirmed this ruling.[6] Todorović subsequently requested the Trial Chamber to order SFOR to provide documents and witnesses for use in the evidentiary hearings on the alleged illegality of his arrest. The Prosecution prepared a one-page report on the arrest. It opposed the requested order to SFOR on the basis, *inter alia*, that the information pertaining to arrests is highly sensitive and that, in any event, Todorović would not be entitled to the relief sought.[7] Having been granted leave by the Trial Chamber to intervene, SFOR made similar submissions.[8]

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991", UN Doc. A/56/352-S/2001/865, 17 September 2001, paras. 196-197.

4. Todorović claimed that four unknown men kidnapped and abducted him in the FRY and that they transported him across the border between the FRY and Bosnia and Herzegovina. There, the men contacted other unknown individuals by radio and a helicopter of unknown national registration appeared which delivered him into the custody of SFOR forces in Tuzla, Bosnia and Herzegovina. Todorović was thereafter delivered to the jurisdiction of the ICTY in The Hague. See *Prosecutor* v. *Simić* et al., Notice of Motion for an Order Directing the Prosecutor to Forthwith Return the Accused Stevan Todorović to the Country of Residence/Stevan Todorović's Statement in Support of Motion, Case No. IT-95-9-PT, 20 October 1999.
5. Oral ruling of 4 March 1999 and written decision of 25 March 1999. See *Prosecutor* v. *Simić* et al., Prosecutor's Response to Stevan Todorović's "Notice of Motion for Judicial Assistance", Case No. IT-95-9-PT, 8 December 1999, para. 2.
6. The Appeals Chamber held that the Trial Chamber had not abused its discretion in denying the Motion. See *Prosecutor* v. *Simić* et al., Decision on Appeal by Stevan Todorović Against the Oral Decision of 4 March 1999 and the Written Decision of 25 March 1999 of Trial Chamber III, Case No. IT-95-9-A, 13 October 1999.
7. *Prosecutor* v. *Simić* et al., Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Case No. IT-95-9-PT, 18 October 2000, paras. 14-17.
8. *Ibid*., paras. 18-26.

The Trial Chamber held that the essential legal issue before it was whether, on the basis of Article 29 of the Statute, it could order SFOR to provide the information sought, "bearing in mind that Article 29 is, on its face, confined to the issuing of orders to States".[9] It concluded: "A purposive construction of the Statute yields the conclusion that such an order should be as applicable to collective enterprises of States as it is to individual States."[10] The Trial Chamber consequently ordered SFOR and NATO's NAC, as the responsible authority for SFOR,[11] to provide evidence on the arrest.[12]

The Prosecution, SFOR and several of the States participating in SFOR sought review of this decision by the Appeals Chamber.[13] SFOR put forward submissions with the specific reservation that they were "without prejudice to the International Tribunal's power to issue orders to the NAC or SFOR".[14] However, before the Appeals Chamber ruled on the requests for review, the Prosecution and Todorović reached a plea agreement, one condition of which

9. *Ibid*., para. 38.

10. *Ibid*., para. 48.

11. The Trial Chamber issued the same order to the thirty-three States participating in SFOR. These are the nineteen NATO members and fourteen other States participating in SFOR through special agreements. The Trial Chamber pointed out that these States are individually obliged to co-operate with the Tribunal in accordance with Article 29 of the Statute. In the event of a conflict between their obligations towards NATO and SFOR, and their obligations under the Charter of the United Nations, pursuant to Article 103 of the Charter, the latter prevail: *Prosecutor* v. *Simić* et al., *supra* note 7, para. 64. The Trial Chamber further decided that "in due course…it would be appropriate to issue a subpoena to General Shinseki," the United States Commanding General of the Tuzla Air Force Base, "requiring him to testify in the ongoing evidentiary hearing in this matter." *Ibid*., para. 63.

12. The materials are:
Copies of all correspondence and all reports by SFOR relating to the apprehension of the accused, Stevan Todorović; (b) the original or a copy of all audio and video tapes made by SFOR on 27 September 1998 of the initial detention and arrest of the accused, Stevan Todorović, at the Tuzla Air Force base; (c) copies of all SFOR pre- and post-arrest operations reports relating to the arrest and detention of the accused, Stevan Todorović; and (d) the identity, if known, of the individual or individuals who transported the accused, Stevan Todorović, by helicopter to the Tuzla Air Force base, Bosnia and Herzegovina, on or about 26 and 27 September 1998; (e) the identity, if known, of the individual or individuals who placed the accused, Stevan Todorović, under arrest and who served the arrest warrant issued by the International Tribunal on the accused, Stevan Todorović, on or about 28 September 1998.

See *Prosecutor* v. *Simić* et al., *supra* note 7, Disposition, para. 1.

13. The review proceedings took place pursuant to Rule 108 *bis* (B) ("State request for review") of the ICTY's Rules of Procedure and Evidence.

14. *Prosecutor* v. *Simić* et al., Submission of the Legal Adviser of NATO, Case No. IT-95-9-AR108*bis*, 15 November 2000.

being that Todorović withdrew his *habeas corpus* motion.[15] This terminated the proceedings.[16]

The *Todorović* proceedings thus left two major questions unanswered. First, do the mandatory powers of the Tribunal under Article 29 of the Statute extend to NAC and SFOR? Second, would Todorović be entitled to release and return to the Federal Republic of Yugoslavia (FRY) if it were established that he had in fact been illegally abducted?[17] With regard to the second question, from the decision of the Trial Chamber to order the co-operation of SFOR in establishing the facts surrounding the arrest it may be inferred that it presumed a remedy was available in case the arrest turned out to be illegal. However, according to a trend in national and international practice – discussed below – courts are required to remedy an illegal apprehension only if the authorities of the forum State are implicated in the arrest. Applied to the Tribunal in the case of SFOR arrests, it is suggested in the literature and accepted by the parties in the *Nikolić* case that an accused is entitled to a remedy only if SFOR acts as an agent of the Tribunal.

Prior to the *Todorović* case, the issue of the alleged illegality of an arrest came before a Trial Chamber of the ICTY in the *Dokmanović* case.[18] Contrary to the proceedings in *Todorović*, the Trial Chamber in that case evaluated the factual allegations of the defence. It found that the accused had been "lured"

15. The Prosecution agreed to withdraw all charges but one (persecution, a crime against humanity pursuant to Article 5(h) of the Statute), to which Todorović pleaded guilty. He was subsequently sentenced to 10 years' imprisonment. On the *Todorović* proceedings, See generally, S. Murphy, "ICTY Order for Disclosure of Information by NATO/SFOR", (2001) 95 *Am. J. Int'l L.* 401.

16. *Prosecutor* v. *Simić* et al., Order on the Request for Review Pursuant to Rule 108 bis of Decision on Motion for Judicial Assistance to be Provided by SFOR and Others Dated 18 October 2000, Case No. IT-95-9-AR108*bis*, 27 March 2001. Presiding Judge Shahabuddeen preferred the Appeals Chamber to proceed to a final ruling on the issues raised in the proceedings. *Ibid.*, Declaration of Judge Shahabuddeen, pp. 5-6 ("[T]he Appeals Chamber could take into consideration that the Tribunal is a temporary body, that its mandate relates to matters of consequence to the international community, that it has no coercive machinery of its own, and that it is largely dependent on other mechanisms for apprehending accused persons. It might assist these mechanisms to operate correctly if the matter were clarified.")

17. The relevance of these questions is apparent from the high number of arrests carried out by SFOR and the potential for further allegations of illegal arrests or other violations of the rights of the accused during the arrest. Indeed, Dragan Nikolić recently made essentially the same claim as Todorović. See *Prosecutor* v. *Nikolić*, Defence Motion for Relief Based inter alia upon Illegality of Arrest Following upon the Prior Unlawful Kidnapping and Imprisonment of the Accused and Co-related Abuse of Process within the Contemplation of Discretionary Jurisdictional Relief Under Rule 72, Case No. IT-94-2-PT, 17 May 2001.

18. *Prosecutor* v. *Mrksić* et al., Decision on Motion for Release by the Accused Slavko Dokmanović, Case No. IT-95-13a-PT, 22 October 1997.

into leaving the territory of the FRY to territory controlled by the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES), where he was subsequently arrested.[19] The Trial Chamber held that this did not constitute an illegal arrest,[20] but it left open the broader question of whether it would have been entitled to exercise jurisdiction in case the accused had been illegally transported from the territory of the FRY. Since there is no other ICTY case law on this issue, a Trial Chamber called to pronounce on it will turn for guidance to relevant national and international case law.[21]

The Authorities

This case law may be divided into three categories. According to the first category, an illegal abduction entitles the accused to a remedy if the abduction can be attributed to the forum State. This may be the case where the State is directly or indirectly (*i.e.*, through its agents) involved in the abduction. According to a second category constituted by a limited number of decisions, the State is required to provide a remedy to the accused even if it was not involved in the illegal abduction. A third category consists of case law of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR). According to these ICTR precedents, an egregious violation of the rights of an accused requires the Tribunal to provide a remedy irrespective of the entity responsible for the violation. In the author's view, only the first category of case law is applicable to the case in point.

19. *Ibid*., paras. 27-32 ("Mr. Dokmanović did not have his freedom of movement restricted or liberty deprived until he arrived at Erdut … the accused was arrested and detained only once he arrived at the UNTAES Erdut base in Croatia".)

20. However, according to a different view, "[t]he international community appears to view the practice of abduction by fraud as a violation of territorial sovereignty and international law". See J. Paust *et al.*, *International Criminal Law: Cases and Materials*, 1996, pp. 435-437. It has further been argued that the arrest of Dokmanović was illegal because the proper surrender procedures were not observed. See M. Scharf, "Prosecutor v. Slavko Dokmanović: Irregular Rendition and the ICTY", (1998) 11 *Leiden J. Int'l L* 376; G. Sluiter, "Commentary to Prosecutor v. Mrksić et al., Decision on Motion for Release by the Accused Slavko Dokmanović", in André Klip & Göran Sluiter, eds., *I Annotated Leading Cases of International Tribunals*, Antwerp: Intersentia, 1999, pp. 151, 153 .

21. As to the importance the Tribunal can attach to case law, see *Prosecutor* v. *Kupreškič* et al., Judgment, Case No. IT-95-16-T, 14 January 2000, paras. 537-542.

Attribution to the Forum State

Courts in the United Kingdom, Australia, France, South Africa, Israel and the United States have historically held that the manner in which a person is brought before the court does not effect its jurisdiction (*male captus bene detentus*).[22] This is still the position of the United States Supreme Court. In 1886, in *Ker* v. *Illinois*, the Court held that "forcible abduction is no sufficient reason for the party not to answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court".[23] Subsequently, in *Frisbie* v. *Collins*, the Supreme Court stated:[24]

> This Court has never departed from the rule announced in *[Ker]* that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

In a recent case, *United States v. Alvarez-Machain*, the Supreme Court affirmed the so-called *Ker-Frisbie* doctrine.[25]

However, a trend in national and international decisions deviates from United States doctrine. Courts increasingly decline to exercise jurisdiction where the forum State is complicit in an abduction of an accused from the

22. See generally, S. Lamb, "The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia", (1999) 70 *British Y.B. Int'l L.* 165, pp. 230-231.

23. *Ker* v. *Illinois*, 119 US 436, 444 (1886).

24. *Frisbie* v. *Collins,* 342 US 519, 661-662 (1952).

25. *United States* v. *Alvarez-Machain*, 504 US 655, 662 (1992). The only condition that the Court added was that the abduction of the accused should not violate the extradition treaty between the United States and, in this case, Mexico. The Supreme Court found that neither the treaty's language, nor the history of negotiations and practice under it, or general principles of international law, prohibited abductions outside its terms (pp. 663-670). In this respect, in his dissenting opinion, Justice Stevens, joined by Justices Blackmun and O'Connor, stated that "it is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory" (p. 679). Professor Reisman has observed how "governments across the ideological spectrum condemned the decision for licensing forcible extradition": W.M. Reisman, "Covert Action", (1995) 20 *Yale J. Int'l L.* 419, p. 422.

territory of another State.[26] For example, the English House of Lords, in *Ex parte Bennett*, held that the courts will refuse to exercise jurisdiction over an accused who "has been forcibly brought within our jurisdiction in disregard of [lawful] procedures by a process to which our police, prosecuting or other executive authorities have been a knowing party".[27] In *Ebrahim*, the South African Supreme Court held that

> where the State is itself party to a dispute, as for example in criminal cases, it must come to the court with 'clean hands' as it were. When the state is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.[28]

According to the case law, if State A or its agents engage in an illegal abduction from the territory of State B, State A incurs responsibility under international law.[29] Furthermore, the case law also establishes that such an abduction constitutes a violation of the human rights of the accused under Article 9(1) of the International Covenant on Civil and Political Rights and Article 5(1) of the European Convention on Human Rights.[30] For example, in *Lilian Celiberti de Casariego*, the Human Rights Committee concluded

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26. For an overview of how "[c]ourts in New Zealand, Australia South Africa, Canada and the United Kingdom have distanced themselves from the traditional rule to which U.S. courts still cling", see Paul Michell, "English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain", (1996) 29 *Cornell Int'l L.J.* 383.

27. *R.* v. *Horseferry Road Magistrate's Court, ex parte Bennett*, [1994] 1 AC 42, 62 (HL). In *R* v. *Bow Street Magistrates, ex parte Mackeson*, (1981) 75 Crim.App.R 24, the Court required that the English authorities knew that local or international law was violated. Furthermore, according to *R* v. *Swindon Magistrates' Court, ex parte Nangle*, [1998] 4 All ER 210, [1998] 1 WLR 652, abuse of process can only be established where there is participation and positive collusion on the part of the prosecuting authorities.

28. *State* v. *Ebrahim*, [1991] 2 SALR. 553(q), 31 ILM 442 (South Africa Supreme Court, Appellate Division).

29. For example, the United Nations Security Council referred to the abduction of Adolf Eichmann from Argentina as an act affecting "the sovereignty of a Member State". It requested "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law". See UN Doc. S/RES/138 (1960), paras. 1-2.

30. Article 9(1) of the ICCPR provides: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." Article 5(1) of the ECHR states that "everyone has the right to liberty and security of person". Furthermore, under the Convention, no one shall be deprived of liberty save in a limited number of enumerated cases and "in accordance with a procedure prescribed by law". The principle in these treaty provisions appears to have become a norm of customary international law: R. Higgins, *Problems and Process: International Law and How We Use It*, 1994, p. 70.

that forcible abduction of a person from one State to another constituted a violation of Article 9(1) of the Covenant.[31] As for Article 5(1) of the ECHR, in *Stocké* the European Commission of Human Rights stated:

> An arrest made by the authorities on the territory of another State, without the prior consent of the State concerned, does not, therefore, only involve State responsibility vis-à-vis the other State, but also affects that person's individual right to security under Art. 5(1). The question whether or not the other State claims reparation for violation of its rights under international law is not relevant for the individual right under the Convention.[32]

The findings in the above cases are limited to irregularities in the arrest and detention of an accused which are attributable to the authorities of the forum State.[33] Applied to the current discussion, it has been stated that "[t]hese cases are of relevance to the Tribunal jurisprudence in circumstances where there is evidence that the Office of the Prosecutor (OTP), or other Tribunal personnel and their agents, have committed or colluded in the commission of internationally unlawful conduct".[34] Likewise, the parties in the ICTY proceedings in the *Nikolić* case agreed that the Trial Chamber should resolve by way of a preliminary decision whether "SFOR act[s] as an agent of the [OTP] and/or the Tribunal in the detention and arrest of suspected persons".[35]

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31. *Lilian Celiberti de Casariego* v. *Uruguay* (No. 56/1979) UN Doc. CCPR/C/13/D/56/1979.

32. *Stocké* v. *Federal Republic of Germany*, (App. No. 11755/85), Admissibility Decision, 9 July 1987, 13 EHRR 167. The Court joined the Commission in rejecting the complaint of the appellant: *Stocké* v. *Germany*, Series A, Vol. 199, para. 54 ("Like the Commission, the Court considers that it has not been established that the cooperation between the German authorities and Mr Köster extended to unlawful activities abroad.") Furthermore, the United Nations Working Group on Arbitrary Detention declared the detention of Humberto Alvarez-Machain to be in contravention of Article 9 of the ICCPR. See "Report of the Working Group on Arbitrary Detention", UN Doc. E/CN.4/1994/27, pp. 139-140. For further references, See S. Lamb, *supra* note 22, p. 234, n. 245.

33. S. Lamb, *supra* note 22, p. 237. In *R.* v. *Guildford Magistrates' Court, ex parte Healy*, [1983] 1 WLR 108 (HC), 77 ILR 345, the court upheld jurisdiction over the accused because the decision to illegally deport him from the United States had not been prompted by the authorities of the United Kingdom.

34. S. Lamb, *supra* note 22, p. 240. By implication, "[w]here the ICTY or its agents were themselves neither involved nor complicit in any irregularities which may have occurred in the course of effecting an arrest, these irregularities would not suffice to vitiate the ICTY's jurisdiction, at least where that jurisdiction was otherwise well-founded". S. Lamb, *supra* note 22, p. 237.

35. *Prosecutor* v. *Nikolić*, Prosecutor's Response to Defence "Motion to Determine Issues as Agreed Between the Parties and the Trial Chamber … and the Consequences of any Illegal Conduct Material to the Accused, his Arrest and Subsequent Detention", Case No. IT-94-2-PT, 12 November 2001, Annex I.

A Remedy Despite no Attribution to the Forum State/Tribunal

Arguably, "there may be some cases in which the Tribunal, by accepting custody of the accused, is alleged to have adopted and ratified such conduct, thus adopting such violations for itself".[36] In *Eichmann*, for instance, Argentina contended that even if the abduction originally was a private act, Israel would still incur responsibility because of its decision to detain and try the accused.[37] Furthermore, in *United States Diplomatic and Consular Staff in Teheran*, the International Court of Justice based responsibility for breaches of the law of diplomatic relations on the Iranian authorities for, *inter alia*, their adoption and approval of the acts of the militants.[38]

One might argue on the basis of this practice that Tribunal involvement in an illegal arrest is no prerequisite for a remedy. On balance, however, it would appear that the practice is too sparse for the Tribunal to rely on.

"Egregious Violations" of Rights Irrespective of the Involvement of the Forum State or Tribunal

According to a third category of cases, courts may decline to exercise criminal jurisdiction over an accused if law enforcement officials of the forum State have been involved in truly egregious conduct against this person. For example, in *United States v. Toscanino*, the accused claimed to have been illegally abducted from Uruguay and to have suffered torture at the hands of United States officials. The Court of Appeals for the Second Circuit held that "due process [now requires] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitu-

36. S. Lamb, *supra* note 22, p. 241.

37. *Ibid.,* p. 241, n. 276, and references.

38. *United States Diplomatic and Consular Staff in Teheran Case (United States* v. *Iran)*, [1980] ICJ Reports 3, pp. 29-30 and 33-36. See S. Lamb, *supra* note 22, p. 221, n. 192. Arguably, this precedent is only marginally relevant to the present inquiry.

tional rights".[39] The ICTY *Dokmanović* ruling cites *Toscanino* with apparent approval.[40]

The relevance for the Tribunal of the involvement of State authorities or agents in egregious conduct has been considerably diminished by a ruling of the Appeals Chamber of the ICTR in *Barayagwiza*.[41] In this case, the Trial Chamber rejected a defence motion for review and/or nullification of the arrest and detention of Jean Bosco Barayagwiza, who was charged with genocide.[42] The Appeals Chamber overruled and found that the detention of the accused was tainted by very serious irregularities.[43] It dismissed the indictment "with prejudice to the Prosecution" (to whom it attributed some irregularities).[44] The Appeals Chamber relied on the "abuse of process doctrine", which is "a process by which the judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations

39. *United States* v. *Toscanino*, 500 F 2d 267, 275 (2d Cir.1974). Thus, the Court held that the accused was entitled to a hearing on his allegations. Subsequent interpretations of this case, however, set a very high benchmark for the type of egregious conduct required to deviate from the *Ker-Frisbie* rule. For example, in *Yunis* the District of Columbia Circuit held that there was no evidence that "the type of cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*" had occurred: *United States* v. *Yunis*, 681 F.Supp. 909, 920 (DDC 1988), reversed on other grounds, 859 F.2d 953 (DC, Cir. 1988). Another example is *Bennett, supra* note 27, p. 76. ("[T]he court, in order to protect its own process, from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process had been abused.").

40. *Prosecutor* v. *Mrksić* et al., *supra* note 18, paras. 70 and 75 ("[T]here was no 'cruel, inhumane and outrageous conduct that would warrant dismissal under *Toscanino*.")

41. Pursuant to Article 12(2) of the ICTR Statute, its Appeals Chamber consists of the bench of the ICTY Appeals Chamber. The ICTY Appeals Chamber's finding that it should in principle follow its own decisions formally applies only to the ICTY (*Prosecutor* v. *Aleksovski*, Appeal Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 107). In practice, however, the judges develop and apply a single body of jurisprudence for both Tribunals.

42. *Prosecutor* v. *Barayagwiza*, Indictment, Case No. ICTR-97-19, 13 April 2000, Count 2.

43. *Prosecutor* v. *Barayagwiza*, Decision, Case No. ICTR-97-19, 3 November 1999. These irregularities included violation of the rights of the accused to be promptly charged and to appear before a judge without delay upon arrival at the Tribunal. *Ibid*., paras. 100-101.

44. *Ibid.*, Disposition.

45. *Ibid*., paras. 74, 101.

of the accused's rights would prove detrimental to the court's integrity".[45] Significantly, the Appeals Chamber stated:

> [I]t is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal – *or is the result of the actions of a third party*, such as Cameroon – it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, *it is irrelevant which entity or entities were responsible for the alleged violations* of the Appellant's rights.[46]

Whether an accused is entitled to a remedy for an egregious violation of his or her rights thus does not depend on the position of the perpetrator.[47] Arguably, however, an illegal abduction as such does not constitute a sufficiently serious violation of the rights of the accused. Therefore, this category of practice is not relevant for present purposes.[48]

Remedies for an Illegally Apprehended Accused

The main remedy sought by an accused for alleged unlawful abduction is termination of the proceedings, following which the court can no longer exercise jurisdiction. The national and international practice referred to above concerns cases in which the courts accepted this. However, State practice also suggests that where the accused faces charges of extreme gravity, on balance an otherwise competent court will uphold its jurisdiction, notwithstanding irregularities in his or her apprehension.[49] In this regard, it has been proposed that

46. *Ibid*., para. 73 (emphasis added).

47. A note of caution should be added. The *Barayagwiza* ruling is largely *obiter dictum*, since the Appeals Chamber in fact attributed considerable responsibility to the Prosecutor. *Prosecutor* v. *Barayagwiza*, *supra* note 43, paras. 91-99, 106. ("[I]t appears that the *Prosecutor*'s failure to prosecute this case was tantamount to negligence.")

48. However, it is conceivable that an accused could claim to have suffered egregious violations of his rights at the hands of SFOR troops. *Cf.* the allegations of torture by Gratien Kabiligi before the ICTR: *Prosecutor* v. *Kabiligi*, Decision on Defence Motion to Lodge Complaint and Open Investigation into Alleged Acts of Torture under Rules 40 (C) and 73(A) of the Rules of Procedure and Evidence, Case No. ICTR-97-34-I, 5 October 1998.

49. S. Lamb, *supra* note 22, p. 238, referring *inter alia* to the *Eichmann* case and *Fédération Nationale des Déportés et Internes Résistants et Patriotes* et al. v. *Barbie*, Court of Casssation (Criminal Chamber), 20 December 1985, 78 ILR 124, 129-130. In both cases, the courts dismissed the claims of irregularities in the arrest of the accused with reference to the extreme gravity of their alleged crimes.

with respect to the most serious crimes under international law, these crimes might be "decoupled" from the violations of international law which came about during the arrest of the alleged perpetrator.[50] Of course, this is particularly relevant to the Tribunal, which was established for the purpose of trying the most serious crimes under international humanitarian law. Consequently, it is unlikely that the principal remedy sought, that is, dismissal of the indictment, will be granted.

ICTR precedent, however, suggests that alternative remedies are available that allow the Tribunal to strike a balance between the gravity of the alleged crimes and the rights of the accused. In a further decision in the *Barayagwiza* case, on a motion by the prosecution, the ICTR Appeals Chamber reviewed its first decision, discussed above. It found that "new facts diminish the role played by the failings of the Prosecutor as well as the intensity of the violation of the rights of the Appellant".[51] The Appeals Chamber reinstated the indictment but awarded the following alternative remedies to the accused: "a) if the Appellant is found not guilty, he shall receive financial compensation; b) if the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights".[52]

The *Barayagwiza* decisions pertain to violations of the rights of the accused during detention. However, that the remedies awarded in the second decision may apply to the case of an illegal arrest seems to be supported by Rule 5(C) of the ICTY Rules of Procedure and Evidence. According to this provision, "the relief granted by a Trial Chamber [for non-compliance with the Rules] shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness".

In this respect, it is noteworthy that prior to *Barayagwiza*, the prosecution in *Todorović* conceded in oral argument that "international norms may require that the accused have an appropriate [civil] remedy in respect of any unlawful conduct that may have occurred in the process of affecting his arrest, and

50. R. Higgins, *supra* note 30, p. 72.

51. *Prosecutor* v. *Barayagwiza*, Decision (Prosecutor's Request for Review or Reconsideration), Case No. ICTR-97-19-AR72, 31 March 2000. As to the new facts, the Appeals Chamber found, for example, that counsel for the defence had agreed to postpone the initial appearance of the accused. (*Ibid*., para. 61). Interestingly, the Rwandan Government had openly threatened to terminate its co-operation with the Tribunal should the Prosecutor's Motion for Review be unfavourable to it. The Appeals Chamber replied, at para. 34, that "the Tribunal is an independent body, whose decisions are based solely on justice and law. If its decision in any case should be followed by non-cooperation, that consequence would be a matter for the Security Council." For a critical discussion of the two Appeals Chamber decisions in the *Barayagwiza* case, see W. Schabas, "International Decisions", (2000) 94 *Am. J. Int'l L.* 563.

52. *Ibid*., para. 75. The Appeals Chamber awarded the compensation without any discussion of the nature of this award.

other appropriate exclusionary remedies in the course of the Trial process".[53] Therefore, in light of the extreme gravity of the alleged crimes, an accused who is illegally apprehended by the Tribunal or its agent is unlikely to be entitled to dismissal of the indictment and release.[54] Instead, the Tribunal would probably consider the award of alternative remedies based on the *Barayagwiza* precedent.

Whether SFOR is an Agent of the Tribunal

Stevan Todorović claimed that he was abducted from the FRY by four men of unknown identity who rendered him to SFOR. The prosecution claimed to have only limited knowledge about the apprehension of the accused.[55] If the prosecution had no direct involvement in the detention, under the first category of cases discussed above, the question is whether the Tribunal can be implicated through SFOR. As stated above, the literature and the parties in *Nikolić* suggest that this depends on whether SFOR is an agent of the Tribunal. An agent is a person or entity *through which* the Tribunal participates in the violation of the rights of the accused. According to the prosecution in the *Nikolić* case, this depends upon demonstrating that there is control of the agent by the principal.[56]

A "control" test finds support in the doctrine of State responsibility under general international law. For example, in the *Nicaragua* case,[57] the question before the International Court of Justice (ICJ) was whether because of its financing, training, equipping and planning of operations of the Nicaraguan *contras*, the United States incurred responsibility for the violations of international humanitarian law committed by these rebels.[58] The Appeals Chamber of the ICTY in the *Tadić* case interpreted this judgment when considering the prerequisites for prosecution for grave breaches of the 1949 Geneva

53. Transcript of Trial Chamber hearing of 4 March 1999, cited in S. Lamb, *supra* note 22, p. 242, n. 279. The reference to "exclusionary remedies" is to the application of certain exclusionary rules of evidence. See, *e.g.*, Rule 89(D): "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."

54. However, release may be required in exceptional circumstances, namely: "where the divestiture of its jurisdiction is thought by the Tribunal to be necessary to safeguard the integrity of the conduct of international criminal justice". S. Lamb, *supra* note 22, p. 243.

55. *Prosecutor* v. *Simić* et al., Prosecutor's Response to the Defence Notice to Trial Chamber as to Specific Relief Sought on Motion for Judicial Assistance, Case No. IT-95-9-PT, 31 July 2000, para. 5, note 8.

56. *Prosecutor* v. *Nikolić*, *supra* note 35, para. 8, note 10.

57. *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *United States of America*) (Merits), [1986] ICJ Reports 70.

58. See *Prosecutor* v. *Tadić*, Judgment, Case No IT-94-1-A, 15 July 1999, para. 100.

Conventions.[59] It found the *Nicaragua* judgment to set out two tests for state responsibility: "(i) responsibility arising out of unlawful acts of *State officials*; and (ii) responsibility generated by acts performed *by private individuals acting as de facto State organs*".[60] The ICJ set a high threshold for responsibility to arise under the second test, requiring *inter alia* the issuing of specific instructions by the United States. The *Tadić* Appeals Chamber did not find the *Nicaragua* test persuasive.[61] Instead, for State responsibility to arise it found that

> international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies.[62]

Although the ICJ in *Nicaragua*, and the ICTY in *Tadić*, decided on State responsibility in different contexts, the notion of "control" over non-State officials is instructive. In this respect, it is recalled that in international law, illegal abduction is evaluated not only in terms of a violation of the human rights of the accused, but also as a breach of sovereignty of the State from whose territory the abduction occurs. On the basis of precedents such as *Nicaragua*, whether a State incurs responsibility for a breach of sovereignty by non-State actors will presumably depend on the control it exercises over such actors.

Thus, in order to conclude whether SFOR may be considered to act as an agent of the Tribunal it is suggested that one must determine whether SFOR is under control of the ICTY. This issue will be discussed in two parts. The first part looks at the co-operation of SFOR with the ICTY on the basis of the Dayton Peace Agreement, Security Council resolutions, decisions of the NAC and an agreement between NATO and the ICTY, as well as SFOR's obligations under the 1949 Geneva Conventions. The second part discusses whether the mandatory compliance powers of the ICTY extend to NAC and SFOR.

59. For the purpose of applying Article 2 of the Statute ("Grave breaches of the Geneva Conventions of 1949"), the Appeals Chamber needed to determine whether the conflict in point was international in nature. It stated that internationality of a conflict was determined either by evidence of direct involvement by another State in an internal armed conflict (where that State intervenes through its troops), or where some of the participants in an internal armed conflict act on behalf of that other State – in the latter context the question of control by the other State became relevant. *Ibid*., para. 84.

60. *Ibid*., para. 114

61. *Ibid*., para. 115.

62. *Ibid*., para. 137. The Appeals Chamber then proceeded to set out the requisite levels of control required in different situations.

Co-operation with the ICTY under International Instruments Other than the Statute

Before discussing the establishment of SFOR under the Dayton Peace Agreement, it is necessary to introduce briefly SFOR's parent body, NATO. The North Atlantic Treaty, signed in Washington on 4 April 1949, created NATO as an alliance for collective defence as defined in Article 51 of the Charter of the United Nations. Its current members are: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom and the United States.

Article 9 of the Treaty establishes the North Atlantic Council ("NAC"), in which all members are represented, "to consider matters concerning the implementation of [the] treaty". The Council, which is chaired by the Alliance's Secretary-General, has effective political authority and powers of decision. It meets at various levels of government. Under Article 9, the NAC has set up a great number of subsidiary bodies in support of its work or with specific responsibilities, such as defence planning, nuclear planning and military matters.

NATO members contribute forces which together constitute the integrated military structure of the Alliance. The military command structure of the Alliance has undergone change in the aftermath of the Cold War. It has been influenced by factors such as the reduction and restructuring of defence forces, and the assumption of new tasks and responsibilities in the sphere of peace support operations and crisis management. The concepts of "command" and "control", which concern the nature of the authority which NATO military commanders exercise over the forces assigned to them, have also developed. Once assigned to NATO for a specific operation (and exceptionally on a permanent basis), national contingents are integrated into the Alliance's military command structure to the extent of "operational" command and control.[63]

NATO's Military Committee is composed of all member countries. It is the senior military authority of the Alliance and operates under the overall authority of the NAC and the Defence Planning Committee. The Military Committee is superior to the Supreme Allied Commander Europe (SACEUR).[64] SACEUR is tasked to contribute to the preservation of peace, security and territorial integrity of NATO Member States. To this end,

63. By contrast, "full command" over all aspects of operations and administration of those forces is retained by the national governments.

64. As well as to the Supreme Allied Commander Atlantic (SACLANT) and the Canada-US Regional Planning Group (CUSRPG). SACEUR, who is a strategic commander, is superior to two regional commanders: the Commander-in-Chief Forces North Europe (CINCNORTH) and the Commander-in-Chief Allied Forces South Europe (CINCSOUTH).

SACEUR is responsible for taking all military measures within his or her capability and authority. SACEUR further conducts military planning and makes recommendations to NATO's military and political authorities on any military matters potentially affecting his or her ability to carry out his or her responsibilities. SACEUR is also the senior military spokesperson for the Supreme Headquarters Allied Powers Europe (SHAPE).

As mentioned, NATO's role in peacekeeping is one of the new tasks of the Alliance in Europe's new security environment after the Cold War. In June 1992, the NAC announced NATO's readiness to support peacekeeping activities, on a case-by-case basis and pursuant to its own procedures, under the responsibility of the Conference on Security and Co-operation in Europe (CSCE).[65] In December of that year, the Council agreed to extend this support to peacekeeping operations under the authority of the United Nations Security Council. NATO has been involved in operations in the former Yugoslavia since July 1992. These operations include the monitoring of the arms embargo against the republics of the former Yugoslavia, the enforcement of the no-fly zone over Bosnia and Herzegovina, and the carrying out of air strikes against Bosnian Serb positions.[66]

The Dayton Peace Agreement

The Peace Agreement was negotiated at Dayton, Ohio, and signed in Paris, on 14 December 1995, by Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. Annex I-A to the Agreement, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska (the "Annex"),[67] concerns the military aspects of the Peace Agreement. It envisions an unprecedented role for NATO through the establishment of the Implementation Force (IFOR), the military force preceding the Stabilisation Force (SFOR).

Article I of Annex I-A sets out the general obligations of the parties. Paragraph (1)(a) invites the United Nations Security Council to authorise the establishment of a "multinational military Implementation Force [which] may be composed of…units from NATO and non-NATO nations". Paragraph (1)(b) stipulates that "NATO may establish such a force, *which will operate under the authority and subject to the direction and political control of the NAC through the NATO chain of command*" (emphasis added). Under paragraph

65. Subsequently renamed the Organization for Security and Co-operation in Europe (OSCE).

66. NATO Handbook (2001).

67. Annex I-A was endorsed by the three signatories of the Peace Agreement. The Peace Agreement and the Annexes thereto are reproduced in UN Doc. S/1995/999.

(2)(b), the parties agree to allow SFOR to implement its mandate, which includes ensuring compliance with Annex I-A.

Article VI concerns the deployment of IFOR. Paragraph 1 specifies that the invitation to the Security Council is to authorise the establishment of SFOR under Chapter VII of the Charter of United Nations. Paragraphs 2 and 3 describe the tasks of IFOR, which include "help[ing] to ensure compliance by all Parties with this Annex". Importantly, pursuant to paragraph 4, "further directives from the NAC may establish additional duties and responsibilities for the IFOR in implementing this Annex". Paragraph 5 stipulates that the authority of the IFOR Commander is "to do all that [he or she] judges necessary and proper" for the implementation of IFOR's responsibilities under paragraphs 2, 3 and 4.

Article X of Annex I-A is the provision that most clearly, albeit indirectly, links SFOR to the ICTY. It requires the parties to co-operate fully with all entities involved in the implementation of the Peace Agreement, including explicitly with the ICTY. Thus, read in conjunction with Article I(2)(b), the co-operation of the parties with the ICTY is one of the obligations SFOR is to see implemented.

The day after the signing of the Peace Agreement, the United Nations Security Council did as requested. Acting under Chapter VII of the Charter of the United Nations, it adopted Resolution 1031 (15 December 1995) which, in paragraph 14: "authorizes the Member States acting through or in co-operation with [NATO] to establish a multinational implementation force (IFOR) *under unified command and control* in order to fulfil the role specified in Annex I-A and Annex 2 of the Peace Agreement" (emphasis added). Paragraph 5 of the resolution recognises more explicitly that the parties to the Peace Agreement are obliged to co-operate with IFOR and that they "have in particular authorised [IFOR] to take such actions as required…to ensure compliance with Annex I-A of the Peace Agreement". On 16 December 1995, NAC approved the Operational Plan for the establishment of IFOR, drafted by SACEUR, and approved the deployment of the military force.

Increased Links between the ICTY, and IFOR and its Successor SFOR

When the NAC approved the deployment of IFOR, it took the important decision that this military force "should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks in order to assure the transfer of these persons to the International Criminal Tribunal".[68] The NAC further "approved a supplemen-

68. This decision was first cited in *Prosecutor* v. *Simić* et al., Order, Case No. IT-95-9, 5 February 1996, and reproduced in *Prosecutor* v. *Simić* et al., *supra* note 7, para. 43 (hereinafter "NAC Decision").

tal rule of engagement on the detention and transfer of such indicted persons with application limited to Bosnia and Herzegovina, to be implemented once practical arrangements have been agreed with the International Criminal Tribunal for the transfer of such indicted persons".[69]

In May 1996, relations between NATO and the ICTY formalised when NATO's SHAPE and the Tribunal concluded a Memorandum of Understanding on such practical arrangements. Only the following relevant portions are in the public domain:[70]

> 1.2 The Point of Contact (POC) at the Tribunal in the Hague will be the Office of the Prosecutor. The POC at SHAPE will be the Office of the Legal Advisor (OLA). All policy level matters will be dealt with by these two POCs.
>
> [Article 2 sets out details relating to the arrest of persons indicted for war crimes.]
>
> 3.2 Upon the arrival of the competent representative of the Tribunal, that representative will also be responsible for confirming that the person detained by IFOR is the person named in the relevant arrest warrant and for informing said person of the substance of the arrest warrant issued against him. The Tribunal will also defend SHAPE and IFOR for any errors or omissions occurring as a result of the application of Articles 1, 2 and 3 by IFOR personnel acting in good faith during such detentions.
>
> 3.5 Upon transfer of the detained PIFWC (person indicted for war crimes) to the competent representative of the Tribunal, the IFOR Provost Marshal will furnish the Tribunal representative with a brief report concerning the details of the PIFWC's detention, including notations of any statements made by the detained PIFWC relevant to the PIFWC's indictment and arrest warrant.

The legal advisor of SHAPE provided the following formal clarification of the intent and meaning of Article 3(2) of the above Memorandum:[71]

> It is understood that the UN assumes no legal responsibility for the acts or omissions of IFOR personnel as a result of this MOU (Memorandum of Understanding). Article 3.2 of the MOU shall not be construed as a waiver of any of the privileges and immunities of the United Nations or the Tribunal. The intent of Article 3.2 is merely to secure the agreement of the Participants that the Prosecutor of the Tribunal will, in the event of challenge, make legal representations or submissions during the Tribunal proceedings in support of actions or omissions made in good faith by IFOR personnel as a result of the application of Articles 1, 2 and 3 of this MOU. *It is understood that relevant nations and*

69. *Prosecutor* v. *Simić* et al., *supra* note 7, para. 43.
70. *Ibid.*, para. 44.
71. Letter of 9 May 1996, reproduced *ibid.*, para. 45 (emphasis added).

international military headquarters, not the UN, remain legally responsible for the acts or omissions of IFOR personnel.

After the peaceful elections in September 1996, NATO considered that IFOR ("Operation Joint Endeavour") had successfully completed its mission of implementing the military agreement annexed to the Peace Agreement. The NAC, constituted by foreign and defence ministers of Member States, now agreed that NATO should organise a peace Stabilisation Force, SFOR ("Operation Joint Guard/Operation Joint Force").[72]

In paragraph 18 of Resolution 1088 (12 December 1996), the Security Council authorised the establishment of SFOR as the legal successor to IFOR "under unified command and control" in order to fulfil the role specified in Annex I-A of the Peace Agreement. The Security Council initially approved deployment of SFOR for a period of eighteen months; it has since renewed this mandate on an annual basis until the present time.[73]

Based on the above, the preliminary conclusion seems to be warranted that over time, on the one hand, the Tribunal, and, on the other, IFOR and its successor SFOR, have clearly approached each other and developed an increasingly close working relationship. However, none of the above instruments seem to structurally establish ICTY control over SFOR.[74]

The relationship between the ICTY and SFOR in the context of the execution of Tribunal arrest warrants has been the object of closer study in the literature. This issue is relevant because if SFOR is under a legal obligation to execute Tribunal arrest warrants, then this implies that the Tribunal exercises control over it. To start with, it is broadly accepted that under the Peace

72. NATO Handbook (2001), p. 116.

73. See the following Security Council resolutions: UN Doc. S/RES/1174 (1998), UN Doc. S/RES/1247 (1999), UN Doc. S/RES/1305 (2000) and UN Doc. S/RES/1357 (2001).

74. In a Separate Opinion to the *Todorović* decision, presiding Judge Robinson reached the opposite conclusion in view of the extended role of SFOR pursuant to Article VI(4) of Annex I-A. See *Prosecutor* v. *Simić* et al., *supra* note 7, Separate Opinion of Judge Robinson, p. 6:

> "This extension of SFOR's function gives SFOR a role comparable to that of a police force in some domestic legal systems, and creates, as between itself and the Tribunal, through the Office of the *Prosecutor*, a relationship of which the analogue in such systems is the relationship between the police force, the prosecuting authority and the courts … It would be odd if the Tribunal had no competence in relation to the exercise of certain aspects of this quasi police function, and in particular, I would find it inconceivable that the Tribunal would have no power to require SFOR to produce, in proceedings challenging the legality of an arrest, material relevant to its detention, and to its transfer to the Tribunal, of a person indicted by the Tribunal."

Agreement, SFOR has the right to detain Tribunal indictees.[75] Commentators differ, however, as to the provisions in the Agreement that provide the legal basis for this right. Some argue that Article I(2)(b) and Article X of Annex I-A of the Agreement provide this legal basis.[76] Accordingly, when SFOR effects an arrest order it really ensures that the parties co-operate with the Tribunal. The problem with this argument is that it presupposes that the multinational force has the power to substitute for the parties to the Agreement whenever they fail to co-operate with the Tribunal. It furthermore implies that SFOR is empowered to carry out *any* Tribunal order, including orders for the seizure of evidence. The better view is that SFOR's right to carry out arrests stems from Article VI(4) of the Agreement.[77] Pursuant to this provision, the NAC has established the additional duty for SFOR to apprehend Tribunal indictees. Article VI(5) then allows the SFOR Commander to employ all he or she "judges necessary and proper" to carry out this additional duty, that is, to make arrests.

However, the real issue is whether SFOR not only has the right but also the obligation to apprehend indictees. In this regard, while the Russian Federation has contended that SFOR lacks any power of arrest of Tribunal indictees, the United States has taken the view that SFOR's responsibility with regard to the Tribunal exists but is limited:

> [W]ith respect to the responsibility of IFOR, IFOR's responsibility -- or NATO's responsibility -- is to turn over the war criminals if they come into possession of them, or if they come into contact with them, or if the war criminals do something to obstruct the implementation process. But it is not part of the NATO obligation -- not part of IFOR's responsibility -- to hunt down or

75. However, in a speech to the United Nations General Assembly, the Permanent Representative of the Russian Federation contended that SFOR lacked the power to arrest Tribunal indictees. In his view, planned operations leading to such arrests could not be characterised as co-operation with or support to the Tribunal. He further stated that "such deliberate actions are not in the mandate of the multinational stabilisation forces, as defined by the Peace Agreement" and that "[e]ven during the talks on the conditions for Russia's participation, [Russia] objected to an interpretation of the mandate that would endow the multinational forces with police functions". See Speech of the Representative of the Russian Federation to the Plenary Session of the United Nations General Assembly on the Report of the International Tribunal for the Former Yugoslavia (Item 49 on the Agenda), 4 November 1997 (unofficial translation), cited in P. Gaeta, "Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?", (1998) 9 *Eur. J. Int'l L.* 175, note 2.

76. J. Jones, "The Implications of the Peace Agreement for the International Criminal Tribunal for the Former Yugoslavia", (1996) 7 *Eur. J. Int'l L.* 238. Likewise, K. Ambos, "Kurzbeitrag – Zur Rechtsgrundlage der Festnahme mustmasslicher Kriegsverbrecher durch die Sfor im ehemaligen Jugoslawien", *Juristenzeitung* (1997), pp. 887, 887-888.

77. P. Gaeta, *supra* note 75, pp. 177-178.

> to seek out war criminals. That's the responsibility of the countries involved, but it's not part of the NATO mission, except insofar as I mentioned in the course of my answer.[78]

The argument is nonetheless made that SFOR is under a legal obligation to pro-actively pursue the arrest of Tribunal indictees.[79] Particularly, it is argued that the obligation of States to search and prosecute perpetrators of grave breaches of the 1949 Geneva Conventions extends to international forces. Arguably, the duty to "respect" and "ensure respect" for the Geneva Conventions[80] is part of international customary law and as such binds international organisations as well as States.[81] Therefore, "as international forces are established by the United Nations, there is room for the view that they too are bound to respect these obligations".[82] It is doubtful, however, that this duty can be equated with a positive power of arrest. Moreover, under international law the State obligation to search for and prosecute alleged violators of the Geneva Conventions does not extend beyond the State's borders.[83]

In conclusion, neither the Peace Agreement, nor Security Council resolutions or any agreement between the ICTY and SFOR, establish a hierarchical relationship between them in the sense that the ICTY exercises control over SFOR. In particular, while SFOR arguably has the right to arrest accused indicted by the Tribunal, Annex I-A to the Peace Agreement imposes on it no obligation to do so. Nor can such an obligation be construed under the Geneva Conventions.

Mandatory Compliance Powers of the ICTY

The discussion now turns to a further possible source of control. The question is whether under Article 29 of the Statute, the mandatory compliance powers of the Tribunal extend to SFOR. It is recalled that the *Todorović* Trial Chamber found that they did. It reached this conclusion, however, in the context of the production of evidence on the circumstances of the arrest of Todorović. The Trial Chamber did not consider whether SFOR is an agent of the Tribunal.

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78. Remarks of Secretary of State Warren Christopher at NATO Headquarters in Brussels, on 5 December 1995, Federal News Service, 5 December 1995, cited in J. Jones, *supra* note 76, p. 239, note 48.
79. J. Jones, *supra* note 76, p. 239; K. Ambos, *supra* note 76, p. 888.
80. See, *e.g.*, Article 1 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in The Field, (1950) 75 UNTS 31.
81. See S. Lamb, *supra* note 22, p. 192. See also P. Sands & P. Klein, *Bowett's Law of International Institutions*, 2001, para. 14-037.
82. S. Lamb, *supra* note 22, p. 192.
83. *Ibid.*, pp. 193-194.

The mandatory powers of the ICTY over States and individuals are firmly rooted in the legal basis of the Tribunal. The Tribunal was established as an enforcement measure pursuant to Articles 39 and 41 of the Charter of the United Nations. According to Article 25 of the Charter of the United Nations, Member States have agreed to "accept and carry out" such Security Council decisions. Echoing the Report of the Secretary-General,[84] in the preamble to Resolution 827, the Security Council decided: "[A]ll states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of states to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute."[85]

Article 29 of the Statute of the ICTY ("Co-operation and judicial assistance") reads as follows:

> 1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons of persons accused of committing serious violations of international humanitarian law.

84. "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 125:

> In practical terms, this means that all states would be under an obligation to cooperate with the International Tribunal and to assist it in all stages of the proceedings to ensure compliance with requests for assistance in the gathering of evidence, hearing of witnesses, suspects and experts, identification and location of persons and the service of documents. Effect shall also be given to orders issued by the Trial Chambers, such as warrants of arrest, search warrants, warrants for surrender or transfer of persons, and any other orders necessary for the conduct of trial.

85. See UN Doc. S/RES/827 (1993), para. 4. Pursuant to Rule 2 of the ICTY Rules, all State obligations under the Rules extend not only to United Nations Member States but also to non-members and any "self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not". As discussed, the obligation to co-operate with the Tribunal for the states and entities of the former Yugoslavia is reiterated in the Peace Agreement and Annex I-A thereto. During the negotiations leading to the Peace Agreement, the Federal Republic of Yugoslavia committed itself to ensure that Republika Srpska complies with its obligation to co-operate with the Tribunal. Consequently, the former can be held accountable for non-compliance by the latter. See *Prosecutor* v. *Karadžić & Mladić*, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paras. 98-101. Likewise, with regard to the responsibility of the Republic of Croatia for the Federation of Bosnia and Herzegovina, see *Prosecutor* v. *Rajić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-12-R61, 13 September 1996, paras. 62-70.

> 2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
> (a) the identification and location of persons;
> (b) the taking of testimony and the production of evidence;
> (c) the service of documents;
> (d) the arrest and detention of persons;
> (e) the surrender or the transfer of the accused to the International Tribunal. [86]

As explained above, in spite of this stringent obligation on the part of States, the history of the Tribunal is tainted by the refusal of most States and entities of the former Yugoslavia to co-operate with it. This refusal has manifested itself in the refusal to give effect to Tribunal arrest warrants and surrender orders or to comply with orders to produce evidence.

Turning first to the issue of arrest warrants, the refusal by States to co-operate is notorious. Such refusal violates Article 29(2)(d) of the Statute as well as Rules 55 through 59 of the ICTY Rules. Most notably, Rule 56 provides that "the State to which a warrant of arrest…is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof". The FRY and Republika Srpska have attempted to justify their refusal to comply with this provision by arguing that the surrender of nationals is precluded by their respective constitutions. However, this argument pertains only to extradition practice between States and not to the ICTY which is established on the basis of Chapter VII of the Charter of the United Nations.[87]

In the event that the relevant State does not execute the arrest warrant addressed to it "within a reasonable time",[88] Rule 61 of the ICTY Rules provides that the judge who confirmed the indictment must order the Prosecutor to submit the indictment to the entire Trial Chamber. The Trial Chamber then reviews the evidence in support of the indictment in open court. If it is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, the Trial Chamber "shall so determine". It then issues an international arrest warrant for the accused, which is sent to all States. Furthermore, if the Trial Chamber is satisfied that the State or entity to which the initial arrest warrant was sent

86. The obligation for States to co-operate with the Tribunal relates to the investigation and prosecution stages. On the issue of voluntary State co-operation in the enforcement of sentences pursuant to Article 27 of the Statute, See D. Tolbert, "The International Tribunal for the Former Yugoslavia and the Enforcement of Sentences", (1998) 11 *Leiden J. Int'l L.* 655.

87. The ICTY rejected this position in "Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991", UN Doc. A/52/375-S/1997/729, 18 September 1997, para. 189.

88. Pursuant to Rule 55(D) of the Rules, this is the State "in whose territory or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found". This provision is discussed further below.

has refused to co-operate with the Tribunal in accordance with Article 29, it must so certify. The President of the Tribunal must subsequently notify the Security Council of this non-co-operation.

Secondly, another known difficulty in the functioning of the Tribunal has been the refusal of States and entities to comply with Tribunal orders for the production of documents believed to be of evidentiary value in respect of the guilt or innocence of accused. The Appeals Chamber considered this issue at length in its "Subpoena Decision" rendered in the case of Tihomir Blaškić.[89] This decision is relevant to the present discussion because the *Todorović* Trial Chamber relied on it.[90]

Tihomir Blaškić, a Bosnian Croat, was indicted for crimes against humanity and violations of the laws or customs of war. The prosecution sought to rely on documentary evidence which it believed to be archived in the Republic of Croatia. It obtained from the Presiding Judge of an ICTY Trial Chamber a "subpoena duces tecum", addressed to Croatia and its Minister for Defence and seeking the production of various categories of documents.[91] Croatia unsuccessfully argued before the full Trial Chamber that the Tribunal did not have the power to subpoena sovereign States and high government officials.[92] On appeal, the Appeals Chamber noted that the Tribunal has no enforcement agents of its own. It found that Article 29 derogates from customary international law insofar as it "accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States".[93] The Appeals Chamber explained that the binding force of Article 29

89. *Prosecutor* v. *Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108*bis*, 29 October 1997. See generally, R. Wedgwood, "International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić", (1998) 11 *Leiden J. Int'l L.* 635.

90. The *Todorović* proceedings, however, must be distinguished from those in *Blaškić*. The former concerned the production of evidence pertaining to an allegedly illegal arrest, not the guilt or innocence of the accused.

91. See *Prosecutor* v. *Blaškić*, Subpoena Duces Tecum, Case No. IT-95-14-T [*sic*], Judge McDonald, 15 January 1997.

92. See *Prosecutor* v. *Blaškić*, Decision on the Objections of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95-14-PT, 18 July 1997.

93. *Ibid*., paras. 26-31. The Appeals Chamber refuted the contention made by *amicus curiae* Professor Ruth Wedgwood that the Tribunal's powers are limited to the States and entities of the former Yugoslavia. Instead, the Tribunal's mandatory powers extend to all United Nations Member States, while non-Member States may submit to the Tribunal's powers under Article 29 by expressly accepting this obligation in writing in accordance with Article 35 of the Vienna Convention on the Law of Treaties. The Appeals Chamber did not confirm the finding of the Trial Chamber that in addition to the explicit statutory power in Article 29 of the Statute, the Tribunal also has the inherent power to order the co-operation of States. It did find, however, that the Tribunal has the inherent power to make a finding that a State fails to co-operate with it and to refer such a finding to the Security Council. *Ibid*.., para. 33.

stems from the provisions of Chapter VII and Article 25 of the Charter of the United Nations which underlie the establishment of the Tribunal.[94]

Before requesting the Tribunal to resort to its mandatory powers, however, the Appeals Chamber held that it is "sound policy" for the parties first to seek the desired assistance through co-operative means. Furthermore, once at the mandatory stage, the Tribunal's powers are not unrestricted. The Appeals Chamber defined four criteria to which binding orders for the production of documents must conform. Such an order must:

> identify specific documents and not broad categories...
> set out succinctly the reasons why such documents are deemed relevant to the trial…
> not be unduly onerous…
> give the requested State sufficient time for compliance.[95]

The Appeals Chamber was also alive to the fact that the disclosure of certain documents could raise legitimate national security concerns. The Appeals Chamber rejected Croatia's claim that the powers of the Tribunal do not extend to assessing such concerns. However, it specified possible practical measures and procedures that may be applied during the disclosure process. While the Tribunal must at all times be mindful of whether a State is acting bona fide, the Appeals Chamber suggested the following strategies:

1. Submitting the required documents to a single Judge during *in camera* and *ex parte* proceedings of which no transcripts are made.[96]
2. Providing certified translations of documents so as to obviate the need for translation by the Tribunal's services.
3. Scrutinising of the documents during *in camera* and *ex parte* proceedings of which no transcripts are made.
4. Returning irrelevant documents to the State, rather than filing them with the Registry of the Tribunal, and allowing the State to redact portions of other documents while attaching an explanatory affidavit from a senior state official.
5. In exceptional cases, allowing the State not to submit a document if its sensitivity outweighs, in its view, the relevance to the trial proceedings. In such a case, the responsible government minister is required to explain the refusal in an affidavit, and the reviewing judge may require additional explanations, including during *ex parte* and *in camera* proceedings. If in the

94. *Ibid*., para. 26.

95. *Ibid*., para. 32.

96. However, Judge Karibi-Whyte rejected the possibility of review by a single Judge. See *Prosecutor* v. *Blaškić*, Separate Opinion of Judge Adolphus G. Karibi-Whyte, Case No. IT-95-14-AR 108*bis*, 29 October 1998.

> final evaluation, the judge is not satisfied by the validity of the arguments, he or she may make a finding of non-compliance and suggest that the President of the Tribunal refer this finding to the Security Council. [97]

The Judges of the Tribunal subsequently adopted Rule 54*bis* of the Rules ("Orders Directed to States for the Production of Documents"), which largely codifies the conclusions of the *Blaškić* Subpoena Decision.[98]

Whether the Mandatory Powers of the ICTY Extend to NAC and SFOR

The Trial Chamber in *Todorović* reasoned as follows: "In principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations and, in particular, their competent organs such as SFOR in the present case."[99] From the perspective of the Tribunal, the power to issue binding orders to an international military force on the territory of Bosnia and Herzegovina is likely to be viewed in a very positive light. But whether this reflects a legal reality is quite another issue.

The Trial Chamber approached the matter by noting that the purpose of Article 29 of the Statute "is to secure cooperation with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law in the former Yugoslavia". It remarked in this connection that "the need for such cooperation is strikingly apparent, since the International Tribunal has no enforcement arm of its own – it lacks a police force". Both statements are certainly true, but they are no more than legal aspirations. The Trial Chamber continued:

> Although this cooperation would, more naturally, be expected from States, it is also achievable through the assistance of international organizations through their competent organs which, by virtue of their activities, might have information relating to, or come into contact with, persons indicted by the International Tribunal for serious violations of international humanitarian law. The existing relationship between SFOR and the International Tribunal is indicative of such cooperation in practice.[100]

But the fact that SFOR may co-operate with the Tribunal is not evidence of an underlying positive obligation on SFOR to do so.

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97. *Ibid.*, para. 68.
98. The Rule provides *inter alia* for the hearing of States in regard to a request for the production of documents.
99. *Prosecutor* v. *Simić* et al., *supra* note 7, para. 46.
100. *Ibid.*

The Trial Chamber turned to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, which provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[101] The Trial Chamber noted that Tribunal case law repeatedly emphasises the importance of giving due weight to the object and purpose of provisions. In this light, the Trial Chamber analysed Article 29 as follows: "The mere fact that the text of Article 29 is confined to States and omits references to other collective enterprises of States does not mean that it was intended that the International Tribunal should not also benefit from the assistance of States acting through such enterprises in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."[102]

This reasoning is not altogether convincing. Indeed, it is suggested that this interpretation of the object and purpose of Article 29 reflects rather what the Trial Chamber seems to view the provision *should* provide, as opposed to what it in reality does provide. That by relying on the "object and purpose" of the provision the Trial Chamber engaged in "lawmaking" rather than "law finding" becomes even clearer from its conclusion:

> A purposive construction of the Statute yields the conclusion that such an order should be as applicable to collective enterprises of States as it is to individual States. Article 29 should, therefore, be read as conferring on the International Tribunal a power to require an international organisation or its competent organ such as SFOR to cooperate with it in the achievement of its fundamental objective of prosecuting persons responsible for serious violations of international humanitarian law, by providing the several modes of assistance set out therein.

In addition to this conclusion, the Trial Chamber also observed that, in terms of organisation and structure, SFOR is in a position to implement a Tribunal order for mandatory co-operation. It then turned to consider whether its own conclusions as to the application of Article 29 to SFOR were consistent with prior Tribunal case law. The Trial Chamber reviewed three cases.

Firstly, in the *Kovačević* case, the Trial Chamber rejected a defence motion for a subpoena to the Bosnian Mission of the Organisation for Co-operation and Security in Europe (OSCE). Without discussion, the Trial Chamber in that case held that: "the International Tribunal has no authority to issue such subpoena to the OSCE, it being an international organisation and not a State".[103] The Trial Chamber in the *Todorović* case simply considered itself not bound by this decision.[104] Technically speaking, this assessment was cor-

101. Vienna Convention on the Law of Treaties, (1980) 1155 UNTS 331.

102. *Prosecutor* v. *Simić* et al., *supra* note 7, para. 48.

103. *Prosecutor* v. *Kovačević*, Decision Refusing Defence Motion for Subpoena, Case No. IT-97-24-PT, 23 June 1998.

104. *Prosecutor* v. *Simić* et al., *supra* note 7, para. 56.

rect.[105] It is suggested that in fact the *Kovačević* ruling has little value as precedent. This is not only because the finding was unreasoned, but also because it was *obiter*, since the Trial Chamber had earlier concluded that the information sought from the OSCE was otherwise available.[106]

Secondly, and perhaps more difficult to disregard, was a decision which the Trial Chamber hearing the *Todorović* case itself rendered in the case of *Simić* et al.[107] In that case, the Trial Chamber considered whether the International Committee of the Red Cross (ICRC) was entitled to confidentiality with regard to information gathered by a former employee in the course of his or her official duties. The *Simić* Trial Chamber held that the *Blaškić* Subpoena Decision was not applicable because it concerned the "relationship between the International Tribunal and States under Article 29 of the Statute, which provision does not apply to international organisations".[108] The same Trial Chamber in *Todorović* stated that the finding in *Simić* was *obiter* because of its context, that is, the question whether the ICRC was entitled to confidentiality. It is suggested that a more persuasive distinguishing factor on which the Trial Chamber in the *Todorović* case could have relied was the fact that the nature of the entities under consideration in both cases differed. The ICRC (considered in *Simić*) differs from SFOR (considered in *Todorović*) because the ICRC is a non-governmental organisation, while SFOR is a multinational military force established by an international organisation, NATO.

Thirdly, in *Kordić & Čerkez*, the Trial Chamber, ruling on a defence motion, requested the Presidency of the European Union Council and the Commission of the European Commission/Union to produce documents of the European Community Monitoring Mission (ECMM). Neither complied. On a further defence motion, the Trial Chamber issued an order to the Member States of the European Community at the time of the entry into force of a "Memorandum of Understanding on Monitoring Activities in Bosnia and Herzegovina".[109] It also issued an order to the Presidency of the European Union Council and the Commission of the European Community/Union.

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105. The *Todorović* Trial Chamber correctly relied on the *Aleksovski* appeals judgment according to which Trial Chambers are not bound to follow decisions of other Trial Chambers. *Prosecutor* v. *Aleksovski*, *supra* note 41, para. 114.

106. *Prosecutor* v. *Kovačević*, *supra* note 103, p. 2: "Noting further that information essentially the same as, or similar to, that sought to be obtained by the issue of such subpoena is already in the public domain and has been submitted to the International Tribunal in other matters."

107. *Prosecutor* v. *Simić* et al., Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9-PT, 27 July 1999.

108. *Ibid.*, para. 78.

109. *Prosecutor* v. *Kordić & Čerkez*, Order for the Production of Documents by the European Community Monitoring Mission and its Member States, Case No. IT-95-14/2-T, 4 August 2000. The Memorandum was concluded between, on the one hand, the then twelve member States and the Commission, and, on

The *Todorović* Trial Chamber stated that the Presidency of the European Union Council produced materials in response to the *Kordić* order. It found the *Kordić* decision "particularly relevant" to the case before it.[110] However, the *Kordić* ruling does not contain any analysis of Article 29 of the ICTY Statute, nor does it consider the application of this provision to collectives of States. Moreover, two out of the three judges in *Kordić*, Judge Bennouna and Judge Robinson, were part of the *Todorović* panel. For these reasons, it is suggested that the decision carries little persuasive weight.

An alternative interpretation of the three decisions could have provided an interesting perspective. The Trial Chamber could have placed more weight on the nature of the institutions under consideration and the resulting obligations. The three decisions in question considered the OCSE, the ICRC and the ECMM, respectively, as *international organisations*. The *Todorović* Trial Chamber did not place any weight on this factor in its consideration of the obligations of NATO, NAC and SFOR.[111] However, considering NATO, NAC and SFOR in the framework of international institutional law offers an interesting – although ultimately unpersuasive – perspective on the obligations of these entities.

Legal obligations of NATO's NAC and SFOR under International Institutional Law

Do the legal rules that govern NATO and, by extension, NAC and SFOR, oblige these entities to co-operate with the Tribunal? Under international institutional law, the "internal" rules of an international organisation must be distinguished from its "external" rules.[112] The former are those adopted by the organisation, *i.e.*, NATO or SFOR. This category can be quickly disposed of. As discussed above, NAC decided that IFOR/SFOR should only detain indictees of the Tribunal when they come into contact with it "in its execution of assigned tasks".[113] NAC did *not* decide that the military force should proactively seek to apprehend such accused.

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the other, the federal authorities of the SFRY and the Republic of Bosnia and Herzegovina. The *Kordić* Trial Chamber noted that "pursuant to 'Article VII (chain of responsibility)' of the Memorandum the ECMM operates under the responsibility, and reports to, its 'Head […] who is a national of the member State of the European Community holding the EC Council Presidency'." *Ibid.*, p. 2.

110. *Prosecutor* v. *Simić* et al., *supra* note 7, para. 57.

111. However, it has been suggested that the Trial Chamber in fact adopted the "Schermers/Blokker argument" concerning the legal obligations of international organisations. See G. Sluiter, *supra* note 20, p. 152, n. 12.

112. P. Sands & P. Klein, *supra* note 81, para. 41-001.

113. See *Prosecutor* v. *Simić* et al., *supra* note 79.

The "external" rules, that is, the rules of international law that apply to NATO, NAC and SFOR, require a more detailed discussion.[114] The International Court of Justice has stated in an advisory opinion that international organisations are subject to two categories of obligations: "International organisations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law… or under international agreements to which they are parties."[115] With regard to obligations arising out of international agreements, neither NATO nor SFOR have concluded agreements with the ICTY or the United Nations which state that they are bound by orders issued by the Tribunal. The only relevant agreement is the one concluded between NATO's SHAPE and the Tribunal, discussed above.[116] However, this agreement merely concerns practical arrangements for the detention and transfer of detained indictees and is therefore of limited importance.

Obligations arising out of "general rules of international law" are of more interest. Firstly, the obligation to co-operate with the Tribunal is grounded in a Security Council resolution. For lack of "evidence of a general practice accepted as law" it cannot be said to have developed into a norm of customary international law which might be binding on NATO and SFOR.[117] Secondly, and more significantly, an international organisation may also have to comply with decisions of another international organisation. If the members of one organisation are also members of another, then the latter may be bound by decisions of the former.[118] Thus, one scholarly authority contends that: "it is difficult to imagine that the [European Community] could entirely ignore acts of the UN General Assembly or Security Council".[119] Even more pertinently, according to another writer,

> [d]ecisions of the Security Council can bind all UN members. They will therefore be binding on all organisations formed by UN Member States.[120]

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114. P. Sands & P. Klein, *supra* note 81, p. 41-001.

115. *Interpretation of the Agreement of March 25, 1951 between the WHO and Egy*pt, Advisory Opinion, [1980] ICJ Reports 73, at pp. 89-90.

116. Memorandum of Understanding, *supra* note 109.

117. P. Sands & P. Klein, *supra* note 81, p. 458. States and entities of the former Yugoslavia have objected to the obligation to co-operate with the ICTY pursuant to a Security Council resolution. NATO and SFOR has never accepted to be subject to the jurisdiction of the Tribunal. Furthermore, as explained above, the United States repudiated any obligation of, at the time, IFOR to proactively execute arrest warrants. With regard to SFOR, the Russian Federation even denied that it had any power of arrest.

118. P. Sands & P. Klein, *supra* note 81, para. 14-041.

119. *Ibid*.

120. H. Schermers & N. Blokker, *International Institutional Law*, 1995, para. 1580 (footnote omitted).

One may accordingly be inclined to conclude that NATO, NAC and SFOR are bound by the Security Council resolution establishing the Tribunal and obliging States to co-operate with it. However, the following analysis of the precise scope of the obligation of States to co-operate with the Tribunal demonstrates that this conclusion is erroneous.

The State Obligation to Co-operate with the Tribunal

In the Preamble to Resolution 827, which established the Tribunal, the Security Council states:

> All states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the Tribunal *and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution* and the Statute, including the obligation of states to comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute. (emphasis added)

The italicised text suggests that the obligation to co-operate with the Tribunal was addressed primarily to States with respect to their national jurisdictions. Although the *Todorović* Trial Chamber interpreted Article 29 of the ICTY Statute in light of its object and purpose in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, Article 29 of the same Convention restates a fundamental principle of treaty law: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."[121] Therefore, a first issue to be resolved is what constitutes the territory of a State.

The argument has been made that national SFOR contingents deployed in Bosnia and Herzegovina assume rights and responsibilities analogous to those of an occupying force. Accordingly, the argument goes that the territory-based obligations of States that provide troops extend to the territories in Bosnia and Herzegovina where their respective troops are deployed.[122] Consequently, for instance, United States SFOR troops would be obliged to implement Tribunal orders in their sectors in Bosnia and Herzegovina.[123] Support for this view is found in Rule 55(D) of the ICTY Rules, which provides as follows: "Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed, including the national authorities of a State in whose territory

121. *Cf.* P. Gaeta, *supra* note 75, p. 179.

122. J. Jones, *supra* note 76, p. 179.

123. For example, United States troops were at one point deployed in the operational area which included Srebrenica. *Ibid.*

or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found."[124]

That SFOR exercises vast powers in Bosnia and Herzegovina is clear from Article VI(9)(a) of Annex I-A of the Peace Agreement, which provides that:[125]

> The IFOR shall have complete and unimpeded freedom of movement by ground, air, and water throughout Bosnia and Herzegovina. It shall have the right to bivouac, manoeuvre, billet, and utilise any areas or facilities to carry out its responsibilities as required for its support, training, and operations, with such advance notice as may be practicable.

However, several objections may be advanced against the "extended-territory" argument. Firstly, whilst it is true that the federal authorities of Bosnia and Herzegovina experienced problems in controlling their territory, which resulted, for example, in an inability to co-operate with the Tribunal,[126] the country's constituent entities (the Federation of Bosnia and Herzegovina and Republika Srpska), did exercise effective authority over their territories.[127] Thus, it cannot be said that SFOR troops exercised exclusive jurisdiction in Bosnia and Herzegovina. Secondly, in any event, any authority exercised by SFOR is controlled through the NATO chain of command as established in Annex I-A of the Peace Agreement, and not by the constituent national SFOR contingents.[128] Thirdly, Rule 55(D) of the ICTY Rules does not require national SFOR contingents to co-operate with the Tribunal. However, even if it did, the Rules are adopted by the judges pursuant to Article 15 of the ICTY Statute, which confers on them the power to "adopt rules for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and *other appropriate matters*" (emphasis added). It is questionable whether the judges of the ICTY are competent to legislate on an issue as sensitive as State co-operation. The same argument applies to any "direct" duty of NATO or SFOR – as opposed to obligations attaching to the respective national troops that constitute SFOR – to co-operate with the Tribunal under Rule 59*bis* of its Rules.[129]

124. Emphasis added. Jones refers to Rule 55(B), but this provision has subsequently become Rule 55(D). *Ibid.*

125. Jones points out that "[t]he prerogative to billet is normally that of the Sovereign, and then only in times of war". In this respect he points to the Third Amendment to the United States Constitution, according to which "[n]o soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law". *Ibid.*, p. 239, n. 49.

126. See, *e.g.*, "Report of the International Tribunal", *supra* note 87, Annex II ("Detailed survey of execution or non-execution of arrest warrants by States, entities and international organizations on the territory of the former Yugoslavia").

127. P. Gaeta, *supra* note 75, p. 180.

128. *Ibid.*

129. According to this provision, "[t]he Registrar shall transmit to an … international body … a copy of the warrant for the arrest of the accused".

For these reasons, it is the view of the author that the obligation of States to co-operate with the Tribunal does not extend to the territories of Bosnia and Herzegovina where the national contingents of these States are deployed as part of SFOR. The second limb of Article 29 of the Vienna Convention questions whether it was intended that the obligations of States under Article 29 of the ICTY Statute should extend beyond their territories or whether this is otherwise established. A review of the decision-making process in relation to the establishment of the Tribunal, and IFOR and SFOR, clarifies that this is not the case.

At the time of the establishment of the Tribunal in 1993, it had not been decided that there would be an international military force operating on the territory of Bosnia and Herzegovina. In December 1995, it was NATO that established IFOR with the agreement of the parties to the Peace Agreement. NATO members voluntarily agreed to support the peace effort in Bosnia and Herzegovina under the conditions stated in the Peace Agreement. Accordingly, IFOR and later SFOR were created to assist the Tribunal on NATO's conditions. For example, it was accepted that these forces would arrest indictees, but only if they came into contact with them. The Security Council authorised the establishment of IFOR and SFOR. This authorisation did not impact on the responsibilities of these forces. Rather, as the United Nations organ with the "primary responsibility for the maintenance of international peace and security",[130] empowered to take measures that trump national sovereignty, the Security Council provided a legal basis to back up the establishment and empowerment of these multinational forces.[131] Thus, there is no evidence that the obligations of States resulting from the establishment of the Tribunal were intended to extend beyond their national territories. Any additional responsibilities accepted by NATO States on the territory of Bosnia and Herzegovina appear to have been voluntarily accepted.

Under the theory being discussed, the obligations of an international organisation are no greater than those of each member individually. Therefore, just as the Tribunal lacks the power to order the co-operation of foreign States on the territory of Bosnia and Herzegovina, it also lacks the power to order the co-operation of NATO, NAC or SFOR. Finally, if the Tribunal lacks the power to order these entities to arrest indictees or to produce documents for use as evidence in its trials, then it also lacks the power to order them to produce information pertaining to arrests which they have voluntarily executed.

130. Article 24(1) of the Charter of the United Nations.

131. This really was a "back up", because the parties to the Peace Agreement agreed to the establishment and deployment of IFOR and SFOR on their territories.

Reconsidering the "Agency Test" and its Application to the ICTY

During the *Todorović* proceedings, the NAC strongly argued that it was not subject to the jurisdiction of the Tribunal. The noticeable decline in the number of arrests during the proceedings suggests that it meant business. First, the number of arrests fell shortly after Todorović's *habeas corpus* motion (there was a six-month period during which no arrests occurred). Secondly, and most importantly, in clear deviation from the established pattern of arrests, no arrest occurred during the months leading up to the Trial Chamber's *Todorović* decision and the Appeals Chamber ruling terminating the proceedings (in total, a period of about eight months).[132] This decreasing co-operation did not discourage the Trial Chamber from ordering SFOR to co-operate with it. However, a less bold bench might have succumbed to the pressure and ruled in SFOR's favour, meaning that it would have proceeded without pronouncing on the circumstances of the arrest. This may be understandable if one considers the dependency of the Tribunal on SFOR in light of failing State co-operation. Without accused there are no trials. Against this backdrop, it is no surprise that until the *Todorović* proceedings, the Tribunal conspicuously avoided a discussion of the legal aspects of the assistance rendered by SFOR.[133] But does this dependency mean that the Tribunal and SFOR should interact on SFOR's terms, that is, that the Tribunal should unreservedly accept as many accused as SFOR decides to leave on its doorstep?

The purpose of the Tribunal, indeed the legal basis for its establishment, is to contribute to the restoration of peace and security in the former Yugoslavia. Thus, it might be argued, if the Tribunal is to succeed in this task it must be perceived as credible and just. This requires it to uphold the highest standards of justice. If the "agency test" were correct, then the finding that there is no agency relationship between the ICTY and the NAC and SFOR, this would imply that SFOR arrests take place in a legal vacuum. That is, that even if it were established that SFOR was responsible for the illegal abduction of an accused, he or she would still not be entitled to a remedy from the Tribunal. However, at stake is nothing less than the fundamental rights of the accused and the sovereignty of States from which territory the abduction allegedly occurred. The high standards of justice which the Tribunal would have to observe are not limited to the actual trial of the accused. Rather, they extend to all stages of criminal proceedings before the Tribunal, including the apprehension phase. It is questionable whether non-accountability for the

132. See Fact Sheet on ICTY Proceedings (4 January 2002), available at <http://www.un.org/icty/glance/index.htm> (accessed 30 August 2002). See also "Report of the International Tribunal", *supra* note 3, para. 195.

133. One might also consider in this regard the willingness of the Prosecution in the *Todorović* case to trade off all but one charge in the indictment against a withdrawal of Todorović's *habeas corpus* motion.

numerous SFOR arrests will be beneficial to the mission of the Tribunal. Thus, a strong case can be made for the argument that the Tribunal must be in a position to remedy an illegal abduction.

Earlier in this chapter, distinctions were made between three categories of cases that deal with violations of the rights of an accused. The first two categories concern remedies for illegal abductions.[134] The analysis proceeded on the basis only of the first category. That category, which includes the *Ebrahim* case, establishes preconditions to the right to a remedy for an illegal abduction on the involvement of the forum State in the abduction. By contrast, precedent in the second category, such as the *Eichmann* case, suggests that a court should remedy violations of the rights of an accused irrespective of the identity of the perpetrator of these violations.[135] The author had initially disregarded this category due to the limited number of decisions in which it is expounded. However, it might be argued that in light of its responsibility as "guardian of legality", the Tribunal should in fact rely on it. The reasoning would be that there is a trend in decisions that moves away from the increasingly exceptional *male captus bene detentus* principle and towards greater responsibility for illegal arrests; the ICTY should observe this trend to the maximum extent.

A corollary of the *Ebrahim* test is that where the arrest is carried out by a third party, the court is not bound to provide a remedy. At the national level, third party arrests will be the exception, but in light of the failure of States to co-operate with the Tribunal, quite the contrary would apply if SFOR were to be considered a third party. Thus, there would be a relatively disproportionate number of third party arrests for which no entity bears responsibility. There is an additional, more pragmatic argument. In contrast to national courts when faced with irregularities in the arrest of an accused, the Tribunal is not confined to two opposing choices, being the "dramatic" decision of whether or not to exercise jurisdiction over an illegally obtained person who is charged with serious international crimes. As already discussed, under the *Barayagwiza* precedent the Tribunal may award alternative remedies, such as reduction of sentence or monetary compensation. Thus, it contemplates a flexible mechanism to respond to such violations. In sum, the first approach argues that the purpose of the Tribunal requires it to remedy any violation of the rights of an accused during an arrest because it has ratified this illegal conduct by exercising jurisdiction over the accused.[136] Thus, this approach departs from an "agency" test.

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134. The third category deals with egregious violations of the human rights of an accused.

135. As discussed above, in accordance with the third category of precedent, the Tribunal is required to remedy any egregious violation of the rights of an accused no matter what entity bears responsibility for the violation.

136. Indeed, this would imply that the ICTY should remedy *any* violation of the human rights of the accused irrespective of the identity of the perpetrator, not just an illegal abduction or an "egregious" violation.

The second approach applies but re-defines the "agency" requirement. It returns to the perceived origin of the requirement, namely, international and national decisions concerning the exercise of jurisdiction by courts over illegally apprehended accused. The reasoning of these decisions is that where the prosecuting authorities of the forum State are involved in the illegal abduction, the proceedings are "tainted". In *Ebrahim*, the South African Supreme Court stated that

> where the State is itself party to a dispute, as for example in criminal cases, it must come to the court with 'clean hands' as it were. When the state is itself involved in an abduction across international borders as in the instant case, its hands cannot be said to be clean.[137]

As stated above, academic writers argue that this case and others "are of relevance to the Tribunal jurisprudence in circumstances where there is evidence that the Office of the Prosecutor, or other Tribunal personnel *and their agents*, have committed or colluded in the commission of international unlawful conduct".[138]

The parties in the *Nikolić* case are also proceeding on this basis.[139] However, on close examination of cases like *Ebrahim* it is suggested that such an interpretation of this precedent is in fact too narrow. What *Ebrahim* emphasises is the involvement of the State authorities in both the illegal abduction of an accused and subsequent prosecution. What matters is that ultimately the entities involved in the abduction and those subsequently prosecuting the case in court operate on behalf of the same authority. Furthermore, consistent with the rationale of *Ebrahim*, this authority must be able to exercise control over the actions of the arresting and the prosecuting entities. At the national level this authority is "the State".[140]

Applied to the ICTY and SFOR, the question therefore is not whether the latter is an agent of the former, but whether both are backed by the same authority. The Tribunal was established by unanimous decision of the United Nations Security Council. The members of the United Nations entrusted this organ with "primary responsibility for the maintenance of international peace and security".[141] The Prosecutor of the ICTY is independent, pursu-

137. *State* v. *Ebrahim*, *supra* note 28, p. 442. See note 29 *supra*.

138. S. Lamb, *supra* note 22, at p. 237 (emphasis added).

139. *Prosecutor* v. *Nikolić*, *supra* note 35, Annex I.

140. Whether or not national prosecutors are subject to political control, a State's military and civilian law enforcement forces typically are.

141. Article 24(1) of the Charter of the United Nations. The ICTY Appeals Chamber upheld this legal basis. See *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995. However, at his initial appearance before an ICTY Trial Chamber, Slobodan Milošević contended that the ICTY could only have been lawfully established by the General Assembly. See Transcript of 3 July 2001, p. 2.

ant to Article 16(2) of the ICTY Statute. But just as the Security Council will at some stage terminate the existence of the ICTY,[142] it may amend the Tribunal's Statute by a decision under Chapter VII of the Charter of the Untied Nations.[143]

If SFOR had been established by the United Nations Security Council – like, for example, the United Nations Operation in Somalia (UNOSOM)[144] – it would have been temping to conclude that this organ is the "authority" which is analogous to the "State" in *Ebrahim*. One might in fact even reach this conclusion on the current facts. The argument would go as follows. SFOR was established by NATO, but the parties to the Dayton Peace Agreement requested and obtained the approval of the Security Council for the establishment of the Force. Although it has been suggested earlier that this was a "back up" legal basis, it nonetheless makes clear the extent to which the authority of the Security Council was recognised. The authorisation further implies that the Security Council is in a position to control SFOR under Chapter VII of the Charter. It could, for example, enjoin SFOR from carrying out illegal arrests.

Against this interpretation of the role of SFOR *vis-à-vis* the ICTY, one might object that under the ICTY enforcement system devised by the Security Council, only individual States assist the Tribunal. In the words of a former President of the ICTY, Antonio Cassese, the Tribunal resembles a "giant without arms and legs" and States are obliged to perform the role of artificial limbs.[145] However, few States have been able to render meaningful co-operation to the Tribunal. This is because, of course, most of the accused and the criminal evidence are on the territory of the States and entities of the former Yugoslavia. They have generally either been unable to co-operate with the Tribunal or simply unwilling to do so.[146] Thus, the mandatory co-operation paradigm set up by the international community is largely an illusion. Against this backdrop, there is room for the argument that when SFOR

142. The Security Council established the Tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia *between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace* …". UN Doc. S/RES/827 (1993) (emphasis added).

143. It has in fact done so previously. See UN Doc. S/RES/1166 (1998), and UN Doc. S/RES/1329 (2000).

144. See UN Doc. S/RES/751 (1992).

145. See Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations, 7 November 1995, in Yearbook of the International Criminal Tribunal for the former Yugoslavia 1995, p. 312.

146. Although state co-operation with the Tribunal has gradually improved, at present altogether no less than 30 publicly indicted accused still remain at large. Outstanding Public Indictments, available at <http://www.un.org/icty/glance/indictlist-e.htm> (accessed on 30 August 2002).

makes arrests, it provides an alternative, but equally valid, way of empowering the Tribunal.[147]

Thus, the argument would conclude that the Tribunal is linked to SFOR, because the Tribunal was established by the Security Council, which also controls SFOR. Returning to the *Ebrahim* case, if the Security Council, acting on behalf of the United Nations, allows SFOR to engage in an illegal abduction, its hands cannot be said to be clean when the Prosecutor of the ICTY subsequently proceeds against the accused. Thus, the ICTY must provide a remedy for SFOR's violation of the rights of an accused.

However, this analysis fails to appreciate the reality of the decision-making process in regard to SFOR arrests of ICTY accused. Admittedly, SFOR troops act "under the authority and subject to the political control of the NAC through the NATO chain of command".[148] It is also true that by decision of NAC, SFOR must arrest accused who come into contact with it.[149] However, it is common knowledge that SFOR troops regularly encounter persons indicted by the ICTY, but that they only make arrests when given the green light from their governments. Indeed, it appears that SFOR arrests are contingent on political decisions in the respective capitals, not in Brussels or New York.

SFOR Member States were involved in the establishment of the ICTY through their membership of the United Nations, including as permanent members of the Security Council. They may or may not be able to influence the activities of the ICTY Prosecutor through the Security Council.[150] What matters is that they are in control of their SFOR contingents, just as they control their law enforcement agents at the municipal level. Thus, it is suggested that under the *Ebrahim* test, the shared authority behind the ICTY and SFOR is the SFOR Member State whose troops make the arrest in question. For this reason, the ICTY must remedy a violation of an arrest carried out by SFOR troops. The question that next arises is how the Tribunal can obtain information necessary in order to evaluate the allegations made by an accused.

147. One might add that this should not result in less accountability for arrests. The ICTY will have to remedy a violation of the rights of an accused in the course of regular state co-operation. Surely the same should apply to SFOR.

148. See Article 1(1)(b) of Annex I-A of the Dayton Peace Agreement. Furthermore, the Security Council "authorise[d] the Member States acting through or in co-operation with [NATO] to establish a multinational force (IFOR) *under unified command and control*". See UN Doc. S/RES/1031 (1995) (emphasis added).

149. See *Prosecutor* v. *Simić* et al., *supra* note 67.

150. The permanent members of the Security Council in fact appear to be among the States that most actively arrest ICTY accused.

Co-operation between the Tribunal and SFOR

In the absence of mandatory arrest powers of the ICTY over SFOR, any co-operation by the latter with the former would be on a voluntary basis.[151] There are important policy considerations in support of the conclusion that Article 29(2) of the ICTY Statute does not extend to SFOR and its Member States. Equipping the Tribunal with mandatory compliance powers over SFOR would mean that SFOR and its members are obliged to implement *any* Tribunal order, including for the arrest of an accused. SFOR's resistance to this kind of co-operation can be easily understood. Because the operative links between SFOR and the Tribunal are so tenuous, the Tribunal is arguably not in a position to appreciate the reality of SFOR's work on the ground in Bosnia and Herzegovina. To start with, in effecting arrests SFOR troops run considerable security risks. SFOR and its constituent troops are best placed to decide when to make arrests that minimise such risks. Moreover, SFOR performs multiple tasks under the Dayton Peace Agreement. As explained, under the Peace Agreement, SFOR's task in relation to the Tribunal is but one, and arguably even a minor, responsibility. Other responsibilities include: "to help secure conditions for the conduct by others of other tasks associated with the peace settlement, including free and fair elections",[152] and "to assist the UNHCR and other international organisations in their humanitarian missions".[153] Again, only SFOR and its Member States, and not the Tribunal, will be in a position to decide how to approach the totality of tasks and decide at what stage and under what circumstances it will be appropriate to make an arrest. Against this backdrop, why would SFOR voluntarily co-operate with the Tribunal? There are two possible approaches to this question.

The first approach is that both entities really pursue the same interest, namely the effective and proper functioning of the Tribunal so that it may contribute to the restoration of peace in the former Yugoslavia. There is an argument that it would make little sense for States to set up a tribunal (by Security Council decision) with the goal of rendering justice in support of peace, whilst denying such tribunal the capacity to achieve this result (through the illegal actions of their SFOR contingents). SFOR troops must therefore recognise that if SFOR is to arrest ICTY accused at all, they must produce evidence relating to the arrest in order to allow the Tribunal to conduct a review. Exactly what materials and the conditions under which the Tribunal may review them should be determined by consultations between the Tribunal, and SFOR and

151. Thus, the co-operation would take place under Article 29(1), of the ICTY Statute, not Article 29(2). In this respect, it is unfortunate that in the *Prosecutor* v. *Blaškić*, *supra* note 91, the Appeals Chamber equated "orders" with "requests". In view of its common connotation, the latter term would have been appropriate here.

152. Dayton Peace Agreement, Annex 1-A, Article VI, para. 3(a).

153. *Ibid*., para. 3(b).

its members.[154] Specifically, the Tribunal should observe most carefully the proceedings in Rule 54*bis*. In particular, unlike the *Todorović* Trial Chamber, it should allow SFOR and the States participating in it to make submissions on both the relevance and the sensitivity of the materials requested by the defence. This will not only allow the Tribunal to make a better judgment about these materials, but will also increase the trust of SFOR and its Member States in the Tribunal. Furthermore, once it has decided which materials it deems indispensable, the Tribunal should carefully apply the protective measures in Rule 54*bis*(I). It is thus clear that the judges must at the same time be alive to the concerns of SFOR and its Member States, the interests of the States and entities in the former Yugoslavia, and the rights of the accused. In this light, the dissatisfaction of SFOR and its members with the proceedings before the Trial Chamber in the *Todorović* case, as evident from the submissions in the review proceedings, is to be avoided at all costs.

Still under the "shared interest approach", what options are available to the Tribunal if it deems it indispensable to review evidence which SFOR and its members refuse to provide? As discussed above, the Tribunal might hold that its credibility and integrity would be jeopardised if it were to leave aside the allegations and the possible award of remedies. Therefore, if the allegations of the accused are credible and if the ICTY is satisfied upon reconsideration that its request for production of evidence is carefully reached, it might decide to award remedies as if the allegations were proven. This decision might be perceived as too lenient towards the accused – in the sense that the accused would not get his or her "just desert" – and thus diminish the impact of the ICTY's justice on the peace process. However, it might be argued that in the long run this would lead to a more widespread acceptance of the Tribunal through respect for its high standards of justice. Furthermore, such a decision might cast SFOR and its members in a negative light, which in turn would compromise them in performing their multiple tasks in Bosnia and Herzegovina. Thus, this might be considered a further incentive to SFOR and its members to co-operate with the ICTY.

The second approach rejects the idea that the Tribunal, and SFOR and its Member States, necessarily share the same interest. It recognises that while there may be ostensible agreement that the Tribunal should contribute to the restoration of peace and security, in reality there are various perspectives and potentially conflicting policy interests. Turning first to the perspective of the Tribunal, practice shows that once it has custody over an accused, the Tribunal aspires to uphold the highest standards of justice. If the Tribunal is to contribute to peace through justice it must be perceived as credible and just. The Tribunal

154. Note that under part 9 of its Statute, the International Criminal Court will have limited mandatory powers over state parties. However, the Statute on several occasions prescribes that the Court and states engage in consultations. See, *e.g.*, Article 97 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

vigorously seeks to observe the most humane detention conditions, finances a very expensive defence counsel programme, and observes fair trial standards. In addition to a genuine belief that the Tribunal can only contribute to peace if it acts as a "guardian of legality", there are other, more personal, factors that may motivate Tribunal judges to uphold high standards of justice. For example, judges may see their work at the Tribunal as an opportunity to foster their reputation as human rights advocates. Furthermore, they may feel pressured to observe the highest standards of justice because they feel they are under close scrutiny by the human rights community. Indeed, after an initial period of almost blind support, human rights watchers are increasingly critical of certain practices of the Tribunal.[155]

To what extent do these objectives coincide with those of the States involved and the international community at large? Accountability for serious violations of international humanitarian law in the former Yugoslavia may have been an objective for the establishment of the Tribunal in 1993. Perhaps some States even believed that the Tribunal would make an important contribution to the establishment of world order under the rule of law. However, there may have been other, perhaps overriding, policy reasons for the decision to establish the Tribunal.

Turning now to the category of conflicting policy considerations concerning the individual interests of the States, one such concern may be the protection of national security interests. As discussed above, Croatia has argued before the ICTY that national security may legitimately preclude a State from co-operating with the Tribunal. The Appeals Chamber did not accept this and ordered Croatia to submit sensitive information to the Tribunal. Croatia complied with this order, but it would be naïve to presume that Croatia did so out of a sense of legal obligation. Rather, it seems more likely that it gave in because considerable financial support from the international community was made contingent on its co-operation with the Tribunal. The same applies to the FRY's surrender of Slobodan Milošević. The situation would of course be quite different if the national security concerns at stake were those of a powerful nation like the United States. In this regard, in the negotiations leading to the establishment of the International Criminal Court, the United States staunchly objected to a discretionary power of the Court to review sensitive material. Instead it argued that in the final analysis the decision whether or not to submit material to the Court should be left with the State.[156]

A further reason why a State might look less favourably on the activities of the Tribunal is because of its purported standard-setting activities. The Tribunal tends to ascertain in rather categorical terms what it deems to be customary international law or "general principles of law common to the

155. See, *e.g.*, M. Scharf, *supra* note 20.

156. This position essentially prevailed. See Article 72 of the Rome Statute, *supra* note 154.

major legal systems of the world". There is no dialogue between States and the Tribunal, and it might be embarrassing for a State to object explicitly to Tribunal findings *ex post facto*.[157] Yet, at the same time, the position taken by the Tribunal may go contrary to the policy interests of a State.

An example is the perceived trend towards accountability for human rights violations during the arrest of an accused. If the Tribunal were to observe and apply this trend, as this chapter suggests it should, it would explicitly distance itself from the *male captus bene detentus* principle applied, for example, by courts in the United States. From a human rights policy point of view this might be applauded. For the United States, however, the moral and legal legitimacy of its policy to exercise jurisdiction over illegally-obtained accused would be undermined by an ICTY ruling that such accused are entitled to compensation. The terrorist attacks on 11 September 2001 only appear to reinforce the position taken by the United States. This is evidenced, for example, by the decision to transport al-Qaeda prisoners from Afghanistan and detain them at Guantanamo Bay in Cuba. Likewise, the United States has a clearly expressed objective to try the alleged principal culprit of the attacks, Osama bin Laden, and it appears that it will make every effort to do so. Lofty pronouncements by the Tribunal on human rights standards might not be favourable to this objective.[158]

The above examples are meant to illustrate how the Tribunal may in fact not be backed by a unique policy objective. Rather, the Tribunal and SFOR and its Member States may have quite divergent objectives. As to SFOR States, their willingness to co-operate with the Tribunal will depend on an evaluation of all interests at stake. Thus, SFOR and its Member States may refuse to make available information pertaining to arrests. Indeed, they may refuse to surrender accused at all. If the Tribunal is aware of the policy objectives of SFOR States, it may be able to anticipate better the consequences of its decisions. A proper understanding of these objectives may in fact lead the Tribunal to reconsider its own objectives. Questions which the Tribunal might consequentially pose itself include the following. What is the implication of a finding that, as a matter of law, an illegally abducted accused is entitled to a remedy? In this regard, can the Tribunal distance itself from the law applicable in the United States, a State with paramount influence in both the Security Council and NATO? Is it better to try a limited number of accused under the highest

157. However, exceptionally, a State may communicate its position to the Tribunal when granted leave to appear as *amicus curiae*.

158. In this regard, the position taken in the chapter raises the following questions. If the State whose SFOR contingent made the arrest is to be considered as the "authority" for purposes of applying the *Ebrahim* case, should the Tribunal not apply the national standards as they would apply to these forces when operating on behalf of their home jurisdiction? Would the different standards applied by the Tribunal not in fact be a reason for such SFOR troops not to make arrests at all?

standards of justice, or may it be worth trying a greater number on less ambitious terms? Can the Tribunal afford to displease SFOR States over an issue of co-operation or should it avoid this, for example, by searching for a settlement as in the *Todorović* case?

Conclusion

The Security Council established the ICTY to try persons allegedly responsible for serious violations of international humanitarian law committed during the conflicts in the former Yugoslavia. Rather than by treaty or General Assembly resolution, the Security Council established the Tribunal on the basis of Chapter VII of the Charter of the United Nations. In so doing, the Security Council endorsed, at least on paper, the reasoning proposed by the Secretary-General that justice is an indispensable ingredient for peace.

If this is in fact the mission of the Tribunal, then arguably the Tribunal must be perceived as just and credible, which means that it must apply the highest standards of justice. This in turn requires that the Tribunal be able to review the legality of an arrest and to award remedies, if necessary. Departing from the doctrine still prevalent in the United States, courts around the world increasingly refuse to turn a blind eye to the involvement of the forum State's authorities in the illegal abduction of the accused before them. In construing the implications of this development for the Tribunal, academic commentary as well as the arguments of the parties in the *Nikolić* case suggest that the crucial question is whether SFOR is an agent of the Tribunal. This test is not met since it appears that the Tribunal does not exercise control over SFOR. However, the "agency test" seems to have been incorrectly derived from the case law. Arguably, the ICTY must remedy an illegal abduction when the arresting entity operates on behalf of the same authority as the Tribunal. This entity is the SFOR member State responsible for the arrest, because of the control which it retains over its contingent when it comes to making arrests for the ICTY.

If the Tribunal must remedy a violation of the rights of an accused during his or her arrest, it must have access to information pertaining to the arrest. In the absence of mandatory compliance powers, the Tribunal depends on the voluntary co-operation by SFOR States. Whether such co-operation is forthcoming depends on whether this would coincide with the policy objectives of SFOR and its Member States.

Stevan Todorović may have been entitled to a review of the circumstances of his arrest and possibly to a reduction of his sentence, if convicted, or to financial compensation, if acquitted. The parties thought it convenient to negotiate a settlement, and perhaps this way of least resistance was the best way out. Whether such a solution is also available and appropriate in the *Nikolić* case depends on the position on law and policy assumed by the Tribunal, and SFOR and its Member States.

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MICHELLE JARVIS*

An Emerging Gender Perspective on International Crimes

> We must ask the questions that will force us to rethink the boundaries: how are apparently natural dichotomies gendered?; why is the category 'woman' so limited in international law?;…international law has both regulative and symbolic functions. We should use its regulative aspects where we can to respond to particular harms done to women, and harness its symbolic force to reshape the way women's lives are understood in an international context, thus altering the boundaries of international law.[1]

International criminal law, in common with all other areas of international law, is a gendered regime.[2] Historically, many of the harms that befall women were not designated as international crimes. When they have been criminalised, they have been disproportionately omitted from efforts to enforce the law and to punish those who violate the relevant legal tenets. The failure of the post-World War II war crimes tribunals to address the issue of wartime sexual violence is a well-known example of the historical gender selectivity of international criminal law.[3]

There are signs of change. Increasingly, the international community is recognising that the experiences of women must be taken into account in designating and prosecuting crimes. Developments within international criminal

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1. H. Charlesworth & C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, 2000, pp. 336-337.
2. There are other factors apart from gender, such as race and culture, that also affect the content and enforcement of international criminal law.
3. K. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, 1997; and J. Gardam & M. Jarvis, *Women, Armed Conflict and International Law*, 2001, pp.204-208.

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *157-191.*

law since the early 1990s provide a powerful example of the potential of international law to be transformed provided that, as Chinkin and Charlesworth urge, we continue to ask the right questions and to harness the symbolic force of international law to reshape the way that women's lives are understood.

The jurisprudence and practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) have made an important contribution towards the creation of a body of international criminal law that more accurately reflects the experiences and perspectives of women. The most dramatic development has been increased recognition that wartime sexual violence, in its many forms, is an international crime that requires a decisive response by the international community. Events in the former Yugoslavia prompted a re-consideration of the seriousness of wartime sexual violence and the manner in which it should be prosecuted. In the cases brought before it, the ICTY has considered whether sexual violence falls within a broad range of the provisions of its Statute, such as "torture", "enslavement", "crimes against humanity" and "genocide". The ICTY has also confronted the absence of a definition of rape in international law as well as procedural issues associated with the prosecution of wartime sexual violence and the protection of victims and witnesses.

Developments outside the context of sexual violence prosecutions are more difficult to identify in the case law of the ICTY, although there are some. For example, a Trial Chamber of the ICTY has held a former Bosnian Serb army general criminally *responsible* for the forcible transfer of women (along with children and the elderly) out of the former United Nations safe area of Srebrenica after it was taken over by Bosnian Serb forces in 1995. Further, the ICTY has jurisdiction over certain violations of international humanitarian law regulating the means and methods of warfare that particularly affect civilians.[4] This is of significance for women, who are most likely to experience armed conflict as civilians.

This chapter begins with an examination of the ICTY's jurisprudence on the issue of wartime sexual violence, followed by an assessment of the priority accorded to the issue of sexual violence in proceedings before the ICTY. Some explanations as to why the ICTY has been relatively successful, to date,

4. Widespread, and in some cases, arguably disproportionate civilian deaths and casualties were a feature of both the Persian Gulf War (1990-91) and the 1999 NATO bombing of Kosovo. See J. Gardam, "Proportionality and Force in International Law", (1993) 87 *Am. J. Int'l L.* 391 393, note 13 (in relation to the Gulf conflict), and see "Draft Special Report by Special Rapporteur V. Kroning, Kosovo and International Humanitarian Law, 15 October 1999", paras. 12-21, Civilian Affairs Committee NATO Parliamentary Assembly; R. Falk, "Kosovo, World Order, and the Future of International Law", (1999) 93 *Am. J. Int'l L.* 847, pp. 851-852 (discussing the level of civilian damage caused by the NATO operation in Kosovo); and Human Rights Watch, Civilian Deaths in the NATO Air Campaign (February 2000) (describing the high level of civilian casualties). Despite some pressure, particularly in the case of the NATO bombing regarding Kosovo, no action has been taken in response to these acts.

in addressing the issue of sexual violence will then be canvassed. Finally, the chapter considers gender developments in the case law of the ICTY outside the context of sexual violence.

Overall, this chapter concludes that, although the ICTY has made an important contribution towards engendering international criminal law, continued vigilance is required. Furthermore, a better understanding of how international criminal law could respond to the broad range of women's experiences is necessary. Part of the difficulty in this respect is that the international community has only belatedly expressed an interest in obtaining data that could inform its understanding of gender issues in international criminal law. For example, in October 2000, the United Nations Security Council, for the first time in history, held an open debate on the topic of women, peace and security. At the conclusion of the debate, the Security Council adopted a resolution on women and armed conflict that, amongst other things, noted "the need to consolidate data on the impact of armed conflict on women and girls". Most significantly, the Security Council invited the Secretary-General to undertake a study on the impact of armed conflict on women and girls as well as to submit a report to the Security Council on the results of this study.[5] The Secretary-General's study could potentially be a valuable source of information by which to assess the responsiveness of international criminal law to gender issues. As this chapter ultimately concludes, the process of re-formulating the boundaries of international criminal law has only just begun.

International Concern over Wartime Sexual Violence in the Former Yugoslavia

The end of 1992 was a turning point for the issue of wartime sexual violence. At the time, the world was stunned by reports of sexual atrocities committed on a massive scale during the armed conflict in the former Yugoslavia. It was reported that rape and other sexual crimes were a deliberate and systematic part of a military strategy to ethnically cleanse certain territories. A perception was generated that detention camps had been set up specifically for the purpose of raping women and that the policy of rape had been planned at the highest levels of the military structure. There were also reports of women being deliberately impregnated and then detained until it was too late to terminate their pregnancies, in an effort to force them to bear the children of the opposing side.[6]

5. UN Doc. S/RES/1325 (2000). On the distinctive impact of armed conflict on women, see also J. Gardam & M. Jarvis, *supra* note 3, pp. 19-51; and International Committee of the Red Cross, Women Facing War, 2001.

6. For information on the nature and prevalence of sexual violence during the conflict in the former Yugoslavia, see for example A. Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia and Herzegovina*, 1994; L. Pitter & A. Stiglmayer,

At around the same time, the efforts of feminist scholars, non-governmental organisations (NGOs) and others to highlight the issue of violence against women were intensifying.[7] Previously, violence against women, such as domestic abuse, mutilation, burning and rape, had been regarded as private matters and, therefore, not appropriate for government or international action. Reports of sexual violence committed against women in the former Yugoslavia, and the world wide outrage that accompanied them, provided powerful support for the argument that violence against women is a fundamental human rights violation of concern to the international community at large.[8] For the first time ever, the treatment of women during armed conflict was linked with international peace and security and the United Nations system as a whole was prompted to take action.

In 1993, the United Nations Security Council established the ICTY in order to prosecute persons suspected of having committed serious violations of international humanitarian law during the conflict in the former Yugoslavia. In stark contrast to the entrenched history of silence on the issue of wartime sexual violence, Security Council resolutions and debates on the establishment of the ICTY support the proposition that sexual violence against women in the former Yugoslavia was one of the foremost concerns of Member States.[9] The international community appeared unanimous in its determination that the ICTY should prosecute rape and other acts of sexual violence, along with all the other crimes committed.

However, with this determination came the realisation that international criminal law was not particularly well equipped to facilitate such prosecutions. Certainly, rape had been prohibited by military codes for centuries.[10] International humanitarian law provisions that refer to protecting women against any attack on their "honour" or "dignity" and some even use the

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"Will the World Remember? Can the Women Forget?", 3(5) *Ms* (1993), p. 19; and Amnesty International, Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces, 1993.

7. J. Gardam & M. Jarvis, *supra* note 3, pp. 146-147.

8. *Ibid*. pp. 148-151.

9 UN Doc. S/RES/808 (1993), preamble para. 11 (expressing grave concern over the treatment of Muslim women in the former Yugoslavia); UN Doc. S/RES/827 (1993), preamble para 3 (referring to the "massive organised and systematic detention and rape of women…"); Statement of the United States representative Madeleine Albright, UN Doc. S/PV.3217, and also the statements of Sir David Hannay (United Kingdom), Mr Barbosa (Cape Verde), Mr Sardenberg (Brazil). See also UN Doc. S/PV.3175, statements by Mr de Arujo Castro (Brazil), Mr Merimee (France), Mr Richardson (United Kingdom of Great Britain and Northern Ireland), Mr Vorontsov (Russian Federation), Mr Arria (Venezuela) and Mr Olhaye (Djibouti).

10. See *e.g.*, C. Chinkin, "Rape and Sexual Abuse of Women in International Law", (1994) 5 *Eur. J. Int'l L.* 326, and T. Meron, "Rape as a Crime under International Law", (1993) 87 *Am. J. Int'l L.* 424.

words "rape" and "enforced prostitution".[11] Whether these provisions would cover the range and extent of sexual violence committed during the conflict in the former Yugoslavia was a more difficult question and the subject of considerable scholarly attention in the mid-1990s.[12] Another difficulty was that international law provided no guidance regarding the rules of criminal procedure to be applied during international prosecutions of sexual violence. Despite these uncertainties, the ICTY has exercised jurisdiction over crimes of sexual violence and has formulated rules of procedure and evidence with respect to the prosecution of those crimes.

The ICTY Statute and Rules of Procedure and Evidence

The ICTY has jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). Of these provisions, only Article 5 (crimes against humanity) expressly refers to rape. Recognition of rape as a crime against humanity can be traced to Article I (1)(c) of Control

11. Geneva Convention Relative to the Protection of Civilians, (1950) 75 UNTS 287, Article 27; Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3 ("Additional Protocol I"), Article 75(2); Protocol Additional to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609 ("Additional Protocol II"), Article 4(2)(e). See also the discussion on the evolution of the prohibition of rape and serious sexual violence in customary international law in *Prosecutor* v. *Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 168.

12. See for example, A. Stiglmayer, *supra* note 6; D. Aydelott, "Mass Rape During War: Prosecuting Bosnian Rapists Under International Law", (1993) 7 *Emory Int'l L. Rev*. 585; C. Chinkin, *supra* note 10; C. Cleiren & M. Tijssen, "Rape and Other Forms of Sexual Assault in Armed Conflict in the Former Yugoslavia: Legal, Procedural and Evidentiary Issues", (1994) 5 *Crim. L. Forum* 471; J. Green *et al*., "Affecting the Rules for the Prosecution of Rape and other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique", (1994) 5 *Hastings Women's L.J*. 171; Hastings Law School Symposium, "Rape as a Weapon of War in the Former Yugoslavia", (1994) 5 *Hastings Women's L.J*. 69; S. Healey, "Prosecuting Rape under the Statute of the War Crimes Tribunal for the Former Yugoslavia", (1995) 21 *Brooklyn J. Int'l L*. 327; A. Jones, "Gender and Ethnic Conflict in ex-Yugoslavia", (1994) 17 *Ethnic and Racial Studies* 115; J. Kalajdzic, "Rape, Representation and Rights: Permeating International Law with the Voices of Women", (1996) 21 *Queen's L.J*. 457; C. Krass, "Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court" (1994) 22 *Denver J. Int'l L. & Policy* 317; T. Meron, *supra* note 10; C. Niarchos, "Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia", (1995) 17 *Human Rights Q*. 649; A. Wing & S. Merchan, "Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America", (1995) 25 *Columbia Human Rights L. Rev*. 1.

Council Law No. 10, which was enacted by the Allied Control Council for Germany as the basis for the trial of non-major war criminals following World War II. This provision on crimes against humanity covered "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated".[13]

By contrast, neither the Charter of the International Military Tribunal (Nuremberg)[14] nor the Charter of the International Military Tribunal for the Far East[15] made any express reference to rape as a crime against humanity. However, the "crimes against humanity" formulations in both of these instruments included the residual category of "other inhumane acts" and rape could, undoubtedly, have been prosecuted under these provisions.[16]

Despite the absence of any express reference to rape or other acts of sexual violence under other heads of jurisdiction contained in its Statute, the ICTY has accepted that sexual violence is also included under the umbrella of other relevant crimes, such as persecution, torture, and enslavement, where the other required elements of those crimes are proven. This is a commendable approach that involves a re-interpretation of general international criminal law norms to more accurately reflect the experiences of women.

Some of the specific needs of women arising in the context of war crimes prosecutions are recognised in the ICTY Statute and ICTY Rules. Prompted largely by the anticipated high volume of prosecutions for sexual violence, the ICTY Statute and ICTY Rules prescribe a system of protection for victims of witnesses that is to be balanced against the rights of the accused.[17] The

13. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany, 50-55 (emphasis added).

14. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, (1951) 82 UNTS 279, annex, Article 6(c).

15. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 4 Bevans 20, as amended, 4 Bevans 27, Article 5(c). The Tokyo Charter was created by the executive decree of U.S. General Douglas MacArthur. See R. Minear, *Victor's Justice: The Tokyo War Crimes Trial,* 1971, at p. 20.

16 For a further discussion of this issue see J. Gardam & M. Jarvis, *supra* note 3, pp. 197-198.

17. See ICTY Statute, Article 15 (requiring the adoption by the ICTY of rules of procedure and evidence to *inter alia*, "regulate the protection of victims and witnesses"); Article 20(1) (requiring the Trial Chamber to "ensure that a trial is fair and expeditious and the proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses"); and Article 22 (requiring the Tribunal to provide for the protection of witnesses in its rules of procedure and evidence).

protective measures can include expunging names and identifying information from the Tribunal's public records; non-disclosure to the public of any records identifying the victim; giving evidence through image or voice altering devices or closed circuit television; the assignment of pseudonyms; and closed sessions.[18]

ICTY Rule 34 provides for the establishment of a Victims and Witnesses Section in the Registry of the ICTY to "recommend protective measures for victims and witnesses", and to "provide counselling and support for them, in particular in cases of rape and sexual assault".

Finally, ICTY Rule 96 expressly governs evidentiary matters in cases of sexual assault. It provides that in cases of sexual assault,

(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
(iii) has been subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
(iv) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(v) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
(vi) prior sexual conduct of the victim shall not be admitted into evidence.

ICTY Jurisprudence on the Issue of Sexual Violence

Sexual Violence as Torture

Throughout history, sexual violence has been frequently used as a means of torturing women. The severe physical and mental pain inflicted by the act itself is compounded by the resulting social and cultural implications for women, as well as the risk of contracting sexually transmitted diseases, damage to the reproductive system, or pregnancy. Sexual violence often objectively satisfies the legal definition of torture. Historically, however, it has been perceived neither as a violent act, nor one that is used strategically. The reconceptualisation of sexual violence as torture began within the context of international and regional human rights instruments prohibiting torture and is now also reflected in the jurisprudence of the ICTY.[19]

18. ICTY Rule 75. For a full discussion of the protective measures regime, see the chapter by Pascale Chifflet in this book.

19. For a discussion of the crime of torture in international humanitarian law, see *Prosecutor* v. *Furundžija*, *supra* note 11, paras 134-142.

Conventional international humanitarian law does not contain a definition of torture. Not surprisingly, the initial jurisprudence of the ICTY drew heavily upon definitions of torture contained in international human rights instruments, particularly Article 1(1) of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[20] For example, in the *Furundžija* case,[21] the Trial Chamber found that torture, for the purposes of international criminal law,

(i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
(ii) this act or omission must be intentional;
(iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discrimination, on any ground, against the victim or a third person;
(iv) it must be linked to an armed conflict;
(v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ or a State or any other authority-wielding entity.[22]

However, the *Kunarac* Trial Chamber recognised that "(h)uman rights law is essentially born out of the abuses of the State over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities." Consequently, "the role and position of the state as an actor is completely different in both regimes".[23] Accordingly, the Trial Chamber found that the crime of torture in international humanitarian law does not require the presence of a State official or any other authority-wielding person in the torture process.[24] The Trial Chamber thus formulated the following definition of torture:

(i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
(ii) The act or omission must be intentional.
(iii) The act or omission must aim at obtaining information or a confession, or at punishing intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person. [25]

20. GA Res. 39/46, UN Doc. A/39/51 at 197 (1984).
21. *Prosecutor* v. *Furundžija*, *supra* note 11.
22. *Ibid*., para. 162, and *see* generally at paras. 159-164.
23. *Prosecutor* v. *Kunarac* et. al., Judgment, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 470.
24. *Ibid*., para. 496.
25. *Ibid*., para. 497. On appeal, the Appeals Chamber in the *Kunarac* case endorsed the Trial Chamber's finding that the public official requirement is confined to the framework of the *Torture Convention*. The Appeals Chamber noted, however, that

The *Kunarac* Trial Chamber's definition of torture was subsequently adopted by the Trial Chamber in the *Kvočka* case.[26] Although not yet fully tested before the Appeals Chamber of the ICTY, the elimination of the requirement that a public official is involved in the torture process and the requirement that the act must be carried out in a "non-private capacity" is a potentially significant advancement for women. As Professors Charlesworth and Chinkin note, "(a)lthough many women are victims of torture in this 'public sense', by far the greatest violence against women occurs in the "private" non-governmental sphere".[27]

The Prosecutor has charged sexual violence as torture under relevant articles of the ICTY Statute, including Article 2 (grave breaches of the Geneva Conventions of 1949)[28], Article 3 (violations of the laws or customs of war),[29] and Article 5 (crimes against humanity).[30] The status of rape as torture was given detailed consideration in the *Delalić* judgment of November 1998. One of the four accused was charged with the rape of two women detained in the Čelebići prison camp in Konjic municipality in central Bosnia and Herzegovina during 1992. The Prosecutor alleged that, in the circumstances, these rapes were torture, constituting a grave breach of the 1949 Geneva Conventions, and a violation of the laws or customs of war.[31] In considering these arguments, the Trial Chamber found that there was no question that acts of rape could constitute torture under international law. In the Trial Chamber's view, "rape causes severe pain and suffering, both physical and psychological".[32]

One of the required elements of the crime of torture is that the act must be inflicted for a designated "purpose". Historically, the identified purpose was to obtain information from the victim, but additional motives have

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the Appellants had not raised the issue of whether a person acting in a "private capacity" could be found guilty of the crime of torture and declined to make a finding on this point. *Prosecutor* v. *Kunarac* et. al., Judgment, Case No. IT-96-23 & IT-96-23/1-A, 12 June 2002, at para. 148.

26. *Prosecutor* v. *Kvočka* et al., Judgment, Case No. IT-98-30/1, 2 November 2001, para. 139.
27. H. Charlesworth and C. Chinkin, *supra* note 1, p. 234.
28. See for example, *Prosecutor* v. *Delalić* et al., Indictment, Case No. IT-96-21, 21 March 1996; *Prosecutor* v. *Nikolić*, First Amended Indictment, Case No. IT-94-2-I, 4 November 1994.
29. See for example, *Prosecutor* v. *Delalić* et al., *ibid*.; *Prosecutor* v. *Furundžija*, Amended Indictment, Case No. IT-95-17/1, 2 June 1998; *Prosecutor* v. *Kvočka* et al., Amended Indictment, Case No. IT-98-30-I, 31 May 1999.
30. See for example, *Prosecutor* v. *Kunarac*, Indictment, Case No. IT-96-23, 26 June 1996. *Prosecutor* v. *Kvočka* et al., *supra* note 29; and *Prosecutor* v. *Nikolić*, *supra* note 28.
31 *Prosecutor* v. *Delalić* et al., *supra* note 28.
32. *Prosecutor* v. *Delalić* et al., Judgment, Case No. IT-96-21-T, 16 November 1998, paras. 494-497.

subsequently been accepted as sufficient.[33] In *Delalić*, the Trial Chamber held that the required purpose can include "obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind".[34] The Trial Chamber referred to the work of the Committee on the Elimination of Discrimination against Women that violence directed against a woman, because she is a woman, is a form of discrimination.[35] Moreover, the Trial Chamber stated that "it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."[36]

The accused was found guilty of torture as a grave breach of the 1949 Geneva Conventions and as a violation of the laws or customs of war, for raping the two women.[37] The Trial Chamber commented that the rapes were inflicted for the purposes specified in the definition of torture, including obtaining information, to punish, to coerce, and to intimidate.[38] Furthermore, the violence was inflicted on each of the women because they were women. This, the Trial Chamber found, is a form of discrimination that constitutes a prohibited purpose for the offence of torture.[39] Recognition of sexual violence as torture has been confirmed in other ICTY cases.[40]

Sexual Violence as a Crime against Humanity

The ICTY Statute marks the first express reference to rape in the context of crimes against humanity since Control Council Law No. 10. Article 5(g) confers on the Tribunal the power to prosecute persons responsible for, *inter alia*,

33. Refer to the discussion of the definition of torture adopted by the ICTY in the *Prosecutor* v. *Furundžija*, *supra* note 11 and the *Prosecutor* v. *Delalić* et al., *ibid.*

34. *Prosecutor* v. *Delalić* et al., *ibid*., para. 494.

35. *Ibid*., para. 493.

36. *Ibid*., para. 495. See also at paras. 942 and 964 (describing the severe mental and physical pain suffered by the victims of rape in that case).

37 *Ibid*., paras. 943 and 965.

38. *Ibid*., paras. 941 and 963.

39. *Ibid.*

40. See for example, *Prosecutor* v. *Furundžija*, *supra* note 11, para. 267; *Prosecutor* v. *Kunarac* et. al., *supra* note 23, paras. 883 (counts 3, 11: torture as a violation of the laws or customs of war) and 888 (count 35: torture as a violation of the laws or customs of war); *Prosecutor* v. *Kvočka* et al., *supra* note 26, paras. 572 and 761 (count 16: torture as a violation of the laws or customs of war).

rape as a crime against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". According to the ICTY's jurisprudence the following elements are required to establish a crime against humanity pursuant to Article 5 of the ICTY Statute:

(i) there must be an attack
(ii) the acts of the perpetrator must be part of the attack
(iii) the attack must be "directed against any civilian population
(iv) the attack must be "widespread or systematic"
(v) the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack
(vi) the crime must have been committed during an armed conflict. [41]

The Prosecutor of the ICTY has issued indictments charging rape expressly as a crime against humanity,[42] and the jurisprudence of the ICTY confirms this classification.[43] The ICTY has also entered convictions for sexual violence as a crime against humanity constituting other expressly enumerated crimes under Article 5 of the ICTY Statute. Article 5(f) covers torture as a crime against humanity. The Trial Chamber in the *Kunarac* case entered convictions for torture as a crime against humanity stemming from sexual violence.[44] Article 5(c) refers to "enslavement" as a crime against humanity. During armed conflict, women experience enslavement of many forms, and sexual violence is often a factor. For example, women are frequently detained and raped over prolonged periods; forced into marriages; and forced or sold into prostitution.[45] Despite these serious abuses, the international community has historically been slow to act upon the connection between sexual violence and enslavement.[46]

However, in the *Kunarac* case, the Prosecutor alleged that, when Foča municipality was taken over by Bosnian Serb forces in April 1992, many Muslim women were detained in houses, apartments, schools and other buildings, and were subjected to repeated rape by soldiers. The prosecution further alleged that women and girls were enslaved in houses run like brothels.

41. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 410.
42. See for example, *Prosecutor* v. *Meakić* et al., Amended Indictment, Case No. IT-95-4, 2 June 1998; *Prosecutor* v. *Kunarac* et al., *supra* note 30; *Prosecutor* v. *Kvočka* et al., *supra* note 29; and *Prosecutor* v. *Nikolić*, *supra* note 28.
43. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, paras. 883 (count 2, count 9, count 19), 886 (count 23) and 888 (count 34).
44. *Ibid*., paras. 883 (count 1) and 888 (count 33).
45. See J. Gardam & M. Jarvis, *supra* note 3 at pp. 25-30.
46. A striking example of this complaint is the failure of the international community to recognise and redress the crimes committed against the women and girls who were forced into military sexual slavery by the Japanese Army in the lead up to, and during, World War II. See J. Gardam & M. Jarvis, *ibid*., pp. 144-145, 231-232.

The indictment stated that, although the women were not guarded or locked inside the house, they were, nonetheless, held captive. They were surrounded by Serbs, both soldiers and civilians, and had no hope of escape. In addition to constant sexual violence, the women and girls were forced to perform domestic work, such as cleaning rooms, cooking for the soldiers, and washing the soldiers' uniforms. Overall, the women were treated as the "personal property" of their captors.[47] The Prosecutor alleged that these acts constituted crimes against humanity by way of enslavement.

In its judgment in the *Kunarac* case, the Trial Chamber found two defendants guilty of enslavement as a crime against humanity.[48] In doing so, the Chamber emphasised that the women and girls were treated as the personal property of their captors. The accused claimed sexual exclusivity over some of their detained victims, ordered them to cook and perform other household chores and, in some cases, ultimately sold them. The Trial Chamber recognised that the women and girls were physically and psychologically detained because, even if they had managed to escape, they had nowhere to go and no means of survival in the prevailing wartime conditions.[49] The Trial Chamber also specifically accepted that control of sexuality is a relevant factor in determining whether the crime of enslavement has been committed.[50]

Article 5(h) of the ICTY Statute recognises that persecution can be a constituent act of crimes against humanity. The Prosecutor has issued indictments treating sexual violence on political, racial and/or religious grounds, as a crime against humanity by way of persecution.[51] Persecution has been defined in the jurisprudence of the Tribunal as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5".[52] In the *Tadić* case, the defendant was found guilty of crimes against humanity by way of persecution, based on, *inter alia*, rapes and other forms of sexual violence.[53] Defendants have also been convicted of persecution based on acts of sexual violence in other ICTY cases.[54]

47. *Prosecutor* v. *Kunarac* et al., *supra* note 30.
48. *Prosecutor* v. *Kunarac* et. al., , *supra* note 23, paras. 883 (count 18) and 886 (count 22).
49. *Ibid*., paras. 728-745 and 746-782.
50. *Ibid*., para. 543.
51. See the indictments cited *infra* note 124.
52. *Prosecutor* v. *Kunarac* et al., *supra* note 23, para. 621.
53. *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94-1-T, 7 May 1997. For further discussion of treatment of sexual violence in the *Tadić* judgment see K. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", (1999) 93 *Am. J. Int'l L.* 97, pp.100-105.
54. *Prosecutor* v. *Kvočka* et al., *supra* note 26, paras. 752, 755, 758, 761 and 763 (count 1); *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, paras. 617-618 (finding that sporadic rape crimes were a foreseeable consequence of a joint criminal enterprise to commit persecution).

Finally, acts of sexual violence (other than rape) have been charged before the ICTY as inhumane acts, also a form of crime against humanity.[55] The classification of "serious sexual assault" as a crime against humanity by way of inhumane acts was confirmed by the ICTY in the *Furundžija* decision.[56]

Sexual Violence as War Crimes

War crimes have been broadly defined as "violations of the laws or customs of war", although not all transgressions of international humanitarian law result in criminal responsibility.[57] Recent developments in the prosecution of war crimes have confirmed the existence of two main categories of these crimes: grave breaches of the 1949 Geneva Conventions and Additional Protocol I, which apply only to international armed conflicts; and other violations of the laws or customs of war, which apply to both internal and international armed conflicts.

Despite the absence of any express reference to sexual violence, it has always been possible to interpret the grave breach provisions of the 1949 Geneva Conventions and Protocol I, applying to international armed conflict, so as to include sexual violence. For example, "inhuman treatment" is a grave breach pursuant to Article 147 of the fourth Geneva Convention of 1949. The Commentary to the Convention draws upon examples of "humane" treatment in order to clarify the meaning of "inhuman" treatment. In particular, Article 27 of the Convention, requires that protected persons must be treated humanely at all times, and *inter alia* that "[w]omen shall be especially protected against any attack of [*sic*] their honour, in particular against rape, enforced prostitution, or any form of indecent assault", thereby linking sexual violence with inhumane treatment.[58] This supports the proposition that rape and other forms of sexual violence qualify as the grave breach of "inhuman" treatment.[59] Furthermore, for

55. *Prosecutor* v. *Kvočka* et al., *supra* note 29, and *Prosecutor* v. *Nikolić*, *supra* note 28.

56. *Prosecutor* v. *Furundžija*, *supra* note 11, para. 175.

57. See Y. Dinstein, "The Distinctions Between War Crimes and Crimes against Peace", in Y. Dinstein & M. Tabory, eds. *War Crimes in International Law*, 1996, p. 1, at p. 3; G. Draper, "The Modern Pattern of War Criminality", in *ibid.*, p.141, at p. 156. See also the definition proposed by Fenrick, who describes a war crime as: "(a) one of a list if acts generally prohibited by treaty but occasionally prohibited by customary law … (b) committed during an armed conflict … (c) by a perpetrator linked to one s*id*e of the conflict, and (d) against a victim who is neutral or linked to the other s*id*e of the conflict." W. Fenrick, "Should Crimes against Humanity Replace War Crimes?", (1999) 37 *Colum. J. Transnation'l L.* 767, at p. 771. For the historical development of war crimes, see L. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation*, 1997, pp. 163-172.

58. J. Pictet, ed., *Commentary to IV Geneva Convention Relative to the protection of Civilian Persons in Time of War*, 1958, p. 598.

some time, the International Committee of the Red Cross has taken the view that rape constitutes a grave breach by way of "wilfully causing great suffering or serious injury to body or health".[60] The United States Department of State has supported the categorisation of rape as a grave breach,[61] as did the United Nations commission of experts that investigated violations of international law in the former Yugoslavia.[62] Indictments have been issued by the ICTY Prosecutor in which sexual violence is treated as a grave breach by way of torture and/or inhuman treatment;[63] and wilfully causing great suffering.[64] In practice, however, the Office of the Prosecutor has, increasingly, avoided charging defendants with grave breaches to avoid the considerable time and expense involved in proving the existence of an international armed conflict.

The ICTY also has jurisdiction over violations of the laws or customs of war. Article 3 of the ICTY Statute gives a non-exhaustive list of such violations, which makes no reference to sexual violence. Because acts other than those expressly mentioned may, nonetheless, be covered, the Prosecutor has issued indictments in which sexual violence is treated as a violation of the laws or customs of war applicable to international and internal armed conflict.[65]

The extent to which sexual violence can be prosecuted as a violation of the laws or customs of war under Article 3 of the ICTY Statute was considered

59. See also the discussion *supra* notes 56-57 and accompanying text, on the categorisation of sexual violence as an inhumane act in the context of crimes against humanity.

60. ICRC, Aide-Memoire (3 December 1992), cited in T. Meron, *supra* note 10, p. 426. In addition, the 1993 Final Declaration of the International Conference for the Protection of War Victims reiterates that sexual violence, notably that directed against women and children, constitutes grave breaches of international humanitarian law.

61. Letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (27 January 1993), cited in Meron, *ibid.*, p. 427 (referring to wilful killing, torture or inhuman treatment and willfully causing great suffering or serious injury to body or health).

62. Annex II, Rape and Sexual Assault: A Legal Study, UN Doc. S/1994/674/Add.2 (Vol. I), Part II.

63. See the sources cited *supra* note 28 regarding charges of sexual violence as a grave breach by way of torture.

64. *Prosecutor* v. *Meakić* et al., *supra* note 42, and *Prosecutor* v. *Nikolić*, *supra* note 28.

65. See for example, *Prosecutor* v. *Delalić* et al., *supra* note 28(torture, and cruel treatment); *Prosecutor* v. *Meakić* et al., *supra* note 42 (cruel treatment); *Prosecutor* v. *Kunarac* et al., *supra* note 30 (torture, rape, outrages on personal dignity); *Prosecutor* v. *Furundžija*, *supra* note 29 (outrages upon personal dignity); *Prosecutor* v. *Karadžić & Mladić*, Indictment, Case No. IT-95-5-I, 24 July 1995 (outrages on personal dignity); *Prosecutor* v. *Kvočka* et al., *supra* note 29 (torture and outrages upon personal dignity); *Prosecutor* v. *Nikolić*, *supra* note 28 (outrages upon personal dignity).

in the *Furundžija* case.[66] The Trial Chamber confirmed that Article 3 is an "umbrella" rule that covers "any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule".[67] The Trial Chamber found "rape and other serious sexual assaults" to fall within the definition.[68] Furundžija was found guilty of, *inter alia*, violations of the laws or customs of war by outrages on personal dignity, including rape.[69] This development was confirmed in the *Kunarac* case, where the Trial Chamber convicted each of the three defendants of rape as a violation of the laws or customs of war.[70] In addition, two of the accused were convicted of torture as a violation of the laws or customs of war based on sexual violence.[71] The Trial Chamber in the *Kunarac* case specifically stated that "there can be no doubt whatsoever that rape, torture and outrages upon personal dignity, as charged in the present case, are serious offences".[72]

Sexual Violence as Genocide

The Genocide Convention[73] was adopted in response to acts perpetrated by the Third Reich during World War II, and sought to name the crime of genocide, identify its characteristics and take steps for its prevention and punishment.[74] Genocide is defined in Article II of the Genocide Convention as

66. See *Prosecutor* v. *Furundžija*, Decision of the Trial Chamber on the Preliminary Motion of the Defence, Case No. IT-95-17/1, 29 May 1998; see also *Prosecutor* v. *Furundžija*, *supra* note 11.

67. *Prosecutor* v. *Furundžija*, *supra* note 11, paras. 132-133. Defence counsel for Furundžija had previously argued that torture and sexual violence committed in an international armed conflict, could only be charged as grave breaches. See *Prosecutor* v. *Furundžija*, *supra* note 66, and *Prosecutor* v. *Furundžija*, *supra* note 11, paras. 14 and 258.

68. *Prosecutor* v. *Furundžija*, *supra* note 11, para. 169.

69. *Ibid*., para. 274.

70. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, paras. 883 (counts 4, 10, 12 and 20), 886 (count 24) and 888 (count 36).

71. See the discussion *infra* note 110 and accompanying text.

72. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 408.

73. Convention on the Prevention and Punishment of the Crime of Genocide, (1948) 78 UNTS 277 was adopted and opened for signature, ratification and accession by the United Nations General Assembly on 9 December 1948.

74. See generally N. Robinson, *The Genocide Convention: A Commentary*, 1960; M. Lippman, "The 1948 Genocide Convention on the Prevention and Punishment of the Crime of Genocide-Forty Five Years Later", (1994) 8 *Temple Int'l Comp. L.J.* 1; L. Sunga, *supra* note 57, pp. 103-119. The term "genocide" was coined by Raphael Lemkin. See R. Lemkin, *Axis Rule in Occupied Europe*, 1944.

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Genocide is a specific example of the broader category of crimes against humanity. It is distinguished from other crimes against humanity by the presence of a specific intent to destroy the specified group in whole or in part.

Men and women are often targeted in different ways during genocide. Acts directed at women, such as sexual violence, can be used as an integral component of a genocidal strategy. However, the mischaracterisation of sexual violence as incidental, non-violent crimes, has for many years impeded a reconceptualisation of genocide that accurately reflects the experience of women.

To date, the most notable developments concerning the prosecution of sexual violence as genocide have occurred in the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR), rather than the ICTY.[75] However, there has been some consideration of this issue by the ICTY. Although the Trial Chamber in the *Furundžija* case was not directly called upon to decide the issue, it noted in passing that, under the ICTY Statute, rape could constitute genocide.[76] Furthermore, during the *Karadžić and Mladić* Rule 61 hearing,[77] the ICTY heard evidence about the physical and psychological harm inflicted as a result of sexual violence against women in Bosnia, and the proximity of the sexual violence and the killings. The Trial Chamber expressly recognised that the occurrence of systematic rape could be a relevant factor in determining genocidal intent.[78] There are several cases pending before the ICTY where the issue of sexual violence as genocide will be considered, including the trial of Slobodan Milošević.[79]

75. *Prosecutor* v. *Akayesu*, Judgment, Case No. ICTR-96-4, 2 September 1998.
76. See *e.g.*, *Prosecutor* v. *Furundžija*, *supra* note 11, para. 172.
77. In cases where an arrest warrant has been issued but not executed, ICTY Rule 61 allows the Prosecutor to submit the indictment to a Trial Chamber, together with supporting evidence for the indictment. This procedure is done in the absence of the accused. The Trial Chamber then determines whether there are reasonable grounds for believing the accused has committed the acts alleged. If so, an international arrest warrant is issued, and the Security Council can be informed. See ICTY Rule 61(D) and (E).
78. *Prosecutor* v. *Karadžić and Mladić*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case Nos. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para. 94.
79. See the sources cited *infra* note 124.

The Definition of Rape in International Law

The first definition of rape in international law was formulated by the ICTR in the *Akayesu* case. The *Akayesu* Trial Chamber's definition of "rape" as "a physical invasion of a sexual nature, committed under circumstances which are coercive…"[80] was enthusiastically greeted by many women's groups as a formulation that did not rely upon a mechanical description of body parts. Initially, it appeared that the ICTY would adopt this progressive definition.[81] However, in the *Furundžija* case, the Trial Chamber found it necessary to further particularise the elements of rape along more traditional lines. It formulated the *actus reus* of rape as:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.[82]

Subsequently, the Trial Chamber in *Kunarac* found that the *Furundžija* definition of rape did not allow adequately for situations other than coercion, force, or threat of force that could render sexual penetration non-consensual.[83] The emphasis, it found, must be on penalising violations of sexual autonomy.[84] Thus the *Kunarac* Trial Chamber applied the following definition of the *actus reus* of rape:

> The sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.[85]

The *mens rea* of rape was formulated as "the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the

80. *Prosecutor* v. *Akayesu*, *supra* note 75, para. 597.
81. *Prosecutor* v. *Delalić* et al., *supra* note 32, paras. 478-479.
82. *Prosecutor* v. *Furundžija*, *supra* note 11, para. 185.
83. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 438.
84. *Ibid*., para. 440.
85. *Ibid*., para. 460.

victim".[86] The *Kunarac* definition of rape was subsequently adopted by the Trial Chamber in the *Kvočka* case.[87]

By expanding the definition of rape in this way, the *Kunarac* Trial Chamber introduced the notion of consent, which has been so problematic in rape prosecutions in many domestic criminal law systems. The difficulties are well known, including the existence of strong evidentiary presumptions that consent was present and considerable deference to the claims of defendants that they subjectively believed consent was present. The potential for such problems to arise in proceedings before the ICTY is perhaps lessened by the existence of ICTY Rule 96, which states that a "defence"[88] of consent cannot be introduced in situations of threats or fears of violence, duress, detention or psychological oppression. The *Kunarac* Trial Chamber referred to ICTY Rule 96 and concluded that the reference to these factors in the Rule "serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given".[89] ICTY Rule 96 further provides that the Trial Chamber must be satisfied in camera that the evidence of the victim's consent is relevant and credible, prior to admission of evidence on this issue.

Indeed, the *Kunarac* Trial Chamber dealt swiftly with the claims of two of the accused that some of the women and girls had, in fact, consented to sexual intercourse with them. On the basis of the evidence presented, the Trial Chamber soundly rejected arguments made by the accused Kovač that one of his victims was actually his girlfriend, that their sexual relationship was consensual and that she had subsequently sent him a love letter to thank him.[90] Similarly, the Trial Chamber rejected the contention of the accused Kunarac that one incident of sexual violence happened at the instigation of the girl in question. The Trial Chamber found it

> highly improbable that the accused Kunarac could realistically have been "confused" by the behaviour [of the girl] given the general context of the existing war-time situation and the specifically delicate situation of the Muslim women and girls detained…in the Foča region during that time…She was in captivity and in fear for her life…[91]

86. *Ibid*., para. 460.

87. *Prosecutor* v. *Kvočka* et al., *supra* note 26, para. 177. The *Kunarac* Trial Chamber's definition of rape was upheld by the Appeals Chamber: *Prosecutor* v. *Kunarac* et al., *supra* note 25, paras. 127-133.

88. In accordance with the *Kunarac* Trial Chamber's definition of rape, consent is not a "defence" but rather the absence of consent is an element of the offence. See *Prosecutor* v. *Kunarac* et al., *supra* note 23, para. 463.

89. *Ibid*., para. 464.

90. *Ibid*., paras. 762.

91. *Ibid*., para. 646. Similarly, the *Kunarac* Appeals Chamber which specifically noted that in most situations giving rise to charges of war crimes or crimes against humanity, particularly those involving detention, non-consent should be presumed. In the case at hand, the women and girls were detained in

Gender Perspectives on ICTY Practice and Procedure

There have been some encouraging signs that the ICTY will not allow defendants charged with rape and other crimes of sexual violence to resort to unacceptable tactics of the type that are frequently used in domestic rape trials to shift blame to the victim. ICTY Rule 96 provides a solid starting point by making it clear that no evidence of the prior sexual conduct of a victim may be admitted into evidence. In accordance with this Rule, the Trial Chamber in the *Delalić* case ordered the deletion from the public record of the trial of references made in open court to the prior sexual conduct of a prosecution witness, who testified to sexual assault, as irrelevant and inadmissible.[92]

Trial Chambers of the ICTY have generally exhibited an understanding of the difficulties that survivors of rape and other crimes of sexual violence encounter in criminal proceedings. For example, the *Kunarac* Trial Chamber recognised that,

> By their very nature, the experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or the exact dates and times, of the events they have described. The fact that these witnesses were detained over weeks and months without knowledge of dates or access to clocks, and without the opportunity to record their experiences, only exacerbated their difficulties in recalling the detail of those incidents later. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail.[93]

During the course of the trial, the *Kunarac* Trial Chamber also rejected a joint application by the defence for medical and psychological examinations to be carried out on certain witnesses. The Trial Chamber was not satisfied that the examinations sought would be reasonably likely to assist the accused and considered that the likelihood that the tests would verify the alleged crimes was too remote to justify such a highly intrusive process for the victims.[94]

By way of contrast, the *Furundžija* case provides an example of the exercise of judicial discretion in a manner that may deter women from coming forward

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circumstances that "were so coercive as to negate any possibility of consent". *Prosecutor* v. *Kunarac* et al., *supra* note 25, paras 130-133.

92. *Prosecutor* v. *Delalić* et al., *supra* note 32, para. 70. See also *Prosecutor* v. *Delalić et. al.*, Decision on the Prosecution's Motion for the Redaction of the Public Record, Case No. IT-96-21-T, 5 June 1997.

93. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 564.

94. *Ibid*., para. 917.

with evidence of sexual violence. In late June 1998, the prosecution disclosed to the defence documentation concerning psychological treatment received by a prosecution witness (known as "A"), at the Medica Women's Therapy Centre in Bosnia and Herzegovina. The defendant was charged with the rape and torture of Witness A. The disclosure of these documents came several days after the closing arguments had been heard in the trial.

The Trial Chamber found the prosecution guilty of misconduct in not disclosing this information earlier and ordered that the case be reopened.[95] Part of the defence argument was that Witness A's memory of the relevant events was flawed due to the trauma she had suffered and the time that had elapsed.[96] The Trial Chamber considered that an opportunity should be accorded to the defence for further investigation of the "medical, psychological or psychiatric treatment or counselling" received by Witness A.[97] Subsequently, documentation provided by Medica concerning Witness A's treatment was disclosed in accordance with a subpoena issued at the request of the defence. This documentation revealed that Witness A may have been suffering from post-traumatic stress disorder.[98]

In coming to this decision the Trial Chamber accorded insufficient weight to the right to privacy of women who have survived sexual violence and failed to confront the discriminatory attitudes that underlie requests for confidential counselling information. It is common practice for defence lawyers in domestic settings to manipulate stereotypes of victims of sexual violence as mentally or emotionally unstable, in order to attack their credibility. Similar methods are rarely employed against victims of other types of crimes. In some jurisdictions, these practices have prompted legislation to protect women from bias in the judicial system.[99]

The potential prejudice to women survivors of sexual violence from the finding of misconduct by the prosecution in failing to disclose the documentation relating to psychological counselling in the *Furundžija* case was mitigated to some extent in the judgment. In finding the accused guilty of violations of the laws or customs of war for sexual violence, the Trial Chamber expressly stated that a witness suffering post-traumatic stress disorder may be, nonetheless, a reliable witness. The Trial Chamber took the view that, in all probability, Witness A was suffering from the disorder, but was prepared to

95. *Prosecutor* v. *Furundžija*, Decision on Defence Motion to Strike Testimony of Witness A, Case No. IT-95-17/1-T, 16 July 1998, paras. 90-109.

96. *Prosecutor* v. *Furundžija*, *supra* note 11, para. 67.

97. *Prosecutor* v. *Furundžija*, *supra* note 95.

98. *Prosecutor* v. *Furundžija*, *supra* note 11, para. 94.

99. Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998, *Prosecutor* v. *Furundžija*, Case No IT-95-17/1-T (10 December 1998), Submitted by Working Group on Engendering the Rwandan Criminal Tribunal, International Women's Human Rights Law Clinic, Centre for Constitutional Rights.

accept her evidence.[100] Nevertheless, the likelihood that confidential counselling or medical information will be made available to the defence will discourage women from coming forward. If the process becomes too intrusive, the benefit for women of seeing offenders prosecuted will be outweighed by the trauma of the trial.

The Priority Accorded to Sexual Violence

During his opening address to the Nuremberg Tribunal, Prosecutor Robert H Jackson referred to the need to address crimes "so calculated, so malignant, and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated".[101] These words reflect the perception that the crimes under consideration at Nuremberg had attacked the very foundations of humankind and had, thereby, become a matter for the community of nations to address.

These sentiments echo loudly in the Security Council's debates on the establishment of the ICTY. The most recurrent justification given for the creation of an *ad hoc* war crimes tribunal to address crimes committed in the former Yugoslavia was the need to take action in response to crimes that shock the conscience of the international community.[102] Thus the ICTY was established to address crimes that were perceived to inflict injury upon the international community, as well as on the individuals directly affected. The fact that during the ICTY establishment process wartime sexual violence was recognised as the type of crime that shocks the conscience of humankind supports the proposition that there has been a change of attitude towards harms inflicted upon women.

From the commencement of its operations, the prosecution has been conscious of the need to repress sexual violence effectively.[103] For example, an investigation team, comprised of both men and women, was established to look specifically into sexual violence allegations.[104] In addition, a Legal Adviser

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100. *Prosecutor* v. *Furundžija*, *supra* note 11, paras. 113-116.

101 As cited in T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, 1992, p. 167.

102. UN Doc. S/PV.3217.

103. See for example, P. Viseur-Sellers & K. Okuizumi, "International Prosecution of Sexual Assaults", (1997) 7 *Transnat'l L. & Contemporary Problems* 45; and "Report of the Secretary-General, Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia", UN Doc. A/51/557, 25 October 1996, especially para. 22 (giving statistics for sexual violence prosecutions by the ICTY).

104 "Report of the Secretary-General on Rape", *ibid*., para. 23. See also, *Prosecutor* v. *Karadžić & Mladić*, Rule 61 Hearing, Transcript for Tuesday, 2 July 1996, Case No. IT-95-18-R61 (statement of Irma Oosterman, an investigator in the ICTY "sexual assault" team).

for Gender Issues was appointed "[i]n order conscientiously to address the prevalence of sexual assault allegations…"[105]

Even so, the ICTY made a precarious start in the prosecution of sexual violence. One of the first indictments issued was against Dragan Nikolić in relation to acts alleged to have taken place at the Sušica detention camp in eastern Bosnia and Herzegovina. The indictment contained no charges of sexual violence.[106] Subsequently, a hearing was held in the matter pursuant to Rule 61 of the Tribunal's Rules. During the course of the hearing, several witnesses gave testimony regarding the prevalence of sexual violence at the Sušica camp. In its Rule 61 Review, the Trial Chamber invited the Prosecutor to amend the indictment to include charges of sexual violence, stating:

> From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Sušica camp. Dragan Nikolić and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances.
>
> The Trial Chamber feels that the Prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes.[107]

The Prosecutor subsequently amended the indictment to include charges of sexual violence.[108] Nonetheless, the failure of the Prosecutor to include sexual violence charges in the initial indictment against Nikolić calls into question the extent to which pro-active strategies for investigating sexual violence were

105 "Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 covering the period from 1 July 1996 to 30 June 1997", UN Doc. A/52/582-S/1997/868 (1997), para. 44.

106. *Prosecutor* v. *Nikolić*, Indictment, Case No. IT-94-2-I, 4 November 1994 (in relation to acts alleged to have taken place at the Sušica detention camp in eastern Bosnia and Herzegovina.)

107. *Prosecutor* v. *Nikolić*, Review of Indictment Pursuant to Rule 61, Case No. IT-94-2, 20 October 1995, para. 33.

108. *Prosecutor* v. *Nikolić*, *supra* note 28. This indictment was amended again in January 2002 and the number of counts against *Nikolić* was reduced. Some charges of sexual violence have been omitted in the Second Amended Indictment. However, sexual violence is still charged as part of the crime of persecution. In addition the accused is charged with torture and rape as crimes against humanity for the rape of one woman who is named in the indictment.

employed, and/or the extent to which investigations are being conducted in a gender sensitive manner.

Despite this shaky beginning, the ICTY has now made considerable progress in the prosecution of wartime sexual violence. A number of indictments have been issued charging sexual violence under various heads of jurisdiction contained in the ICTY Statute and several milestones have been reached. However, the *Kunarac* case has, to date, been the most highly publicised. It was the first trial ever by an international war crimes tribunal dealing exclusively with sexual violence. The case concerned crimes committed in the Foča municipality, southeast of Sarajevo in Bosnia and Herzegovina, following the Bosnian Serb take-over of the area in April 1992. The prosecution alleged that the Bosnian Muslim women and girls (one as young as twelve years of age) from the broader area were separated from the men and then detained in schools and sports halls where they were subjected to terrible treatment, including sexual violence. The prosecution also maintained that these women and girls were taken to apartments and hotels that were run like brothels and were further subjected to repeated rapes and other sexual assaults. Over twenty women who suffered sexual violence in the Foča region were called to testify before the Trial Chamber.

In February 2001, Trial Chamber II convicted the three Bosnian Serb defendants of sexual violence-related crimes, sentencing them to terms of imprisonment ranging from twelve to twenty-eight years. In rendering judgment, the presiding judge admonished the accused for their roles in the sexual violence. Although the Trial Chamber recognised that none of the accused was a high level political or military figure in the conflict, it reiterated that "lawless opportunists should expect no mercy, no matter how low their position in the chain of command may be".[109] The judgment was heralded by the press and the NGO community as a long-overdue warning to those who commit sexual violence during armed conflict that they will be held accountable.[110] It marked the first convictions in history for enslavement as a crime against humanity, based on acts of sexual violence. The Trial Chamber's findings were subsequently upheld on appeal.[111]

109. ICTY Press Release, Judgment of Trial Chamber II in the *Kunarac*, *Kovač* and *Vuković* Case, 22 February 2001.

110. See *e.g.*, Amnesty International, News Release, "Conviction of Bosnian Serbs on Rape and Torture Charges: A Significant Step for Women's Human Rights", 22 February 2001; Human Rights Watch, "Bosnia: Landmark Verdicts for Rape, Torture and Sexual Enslavement", 22 February 2001; "UN War Court Makes 'Historic' Ruling in Bosnian Serb Rape Trial", Agence France Presse, 23 February 2001; M. Simons, "3 Bosnian Serbs are Convicted in Wartime Rapes", *New York Times*, 23 February 2001; P. Finn, "Watershed Ruling on Rape: Serbs Found Guilty of 'Crime against Humanity'", *Washington Post*, 23 February 2001, p. A01.

111. See above section "Sexual Violence as a Crime against Humanity", and *Prosecutor* v. *Kunarac* et al., *supra* note 25. The Appeals Chamber upheld virtually all of the trial judgment, with a few minor exceptions relating to sentencing matters that did not, however, affect the length of the sentences handed down for each of the accused.

Despite the historic significance of the *Kunarac* judgment, Bosnian Muslim women reacted with fury to the sentences, expressing the view that they were too lenient on the accused.[112] Although there is no doubt that the *Kunarac* Trial Chamber recognised that crimes of sexual violence result in serious mental and physical pain for the victims,[113] there is very little discussion in the judgment about the impact of the crimes upon the women and girls in question. In determining the sentences of each of the accused, the Trial Chamber focused predominantly upon the youthful age of some of the victims and the fact that some of the offences were "committed against particularly vulnerable and defenceless women and girls…" as aggravating factors.[114]

Nor did the Trial Chamber use its powers under the ICTY Statute to order the restitution of property that was taken from some of the women and girls during the attacks committed against them. For example, one witness testified that the accused Kunarac took about 600 Deutschmarks from her, as well as expensive items of jewellery and clothing.[115] Initially, Kunarac was charged with plunder based on these allegations. However, at the close of the prosecution's case, the Trial Chamber found that there was no case to answer on the plunder charge. In particular, it found that "plunder" as a violation of the laws or customs of war could not include "theft from only one person or from only a few persons in the one building".[116] However, even if it was not satisfied that Kunarac had committed the crime of plunder, the Trial Chamber could have explored its power under Article 24(3) of the Statute and Rule 105 to hold a special hearing to determine whether to order restitution of the property. The Trial Chamber made it clear that its decision to acquit Kunarac of the plunder charges was based on the technical legal definition of the crime and not because it doubted that the property in question had in fact been taken.[117]

Perhaps one of the biggest concerns following the *Kunarac* case is the possibility that, having completed such a symbolically important prosecution, sexual violence will disappear as an investigative priority, particularly in cases where there is no suggestion of a "rape camp" scenario.[118] Indeed, even in some of the cases involving camps that were the focus of intensive media reporting on systematic rape, the prosecution has not adduced as much evidence of sexual violence as might have been expected. In the *Kvočka* case, which focused on the

112. See *e.g.*, A. Osborne, "Mass Rape Ruled a War Crime", *The Guardian*, 23 February 2001.

113. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 669.

114. *Ibid.*, paras. 864, 867, 874 and 879.

115. *Ibid.*, para. 344.

116. *Prosecutor* v. *Kunarac* et. al., Decision on Motion for Acquittal, Case No. IT-96-23 T and 96-23/1-T, 3 July 2000, para. 16.

117. *Prosecutor* v. *Kunarac* et. al., *supra* note 23, para. 347.

118. ICTY Prosecutor Dirk Ryneveld stated, following the judgment in the *Kunarac* case, "What sets this apart is that this is a case in which we have a large rape camp organisation." A. Osborne, *supra* note 112.

Omarska camp, the Trial Chamber heard evidence from five witnesses about the occurrence of rape in the camp. The Trial Chamber did make a finding that "it was commonplace for women to be subjected to sexual intimidation or violence in Omarska…"[119] and that "female detainees were subjected to various forms of sexual violence in Omarska camp".[120] Nonetheless, the attention given to sexual violence in this case was minimal compared to the media and NGO reports about the occurrence of these crimes in Omarska.[121]

Moreover, as the pressure intensifies for the ICTY to rapidly complete its mandate and to close its doors, there is a risk that gender issues will be marginalised. For example, although the ICTY does not formally have a system of plea bargaining, increasingly, the prosecution has demonstrated a willingness to enter into negotiations with defendants in order to precipitate a guilty plea in the interests of expediency. In September 2001, midway through their trial, the three defendants in the *Sikirica* case entered into plea agreements with the prosecution. The accused were charged in connection with crimes committed in the Keraterm detention camp in the municipality of Prijedor in north-western Bosnia and Herzegovina.[122] All three ultimately entered a guilty plea to a single count of persecution as a crime against humanity. The indictment alleged that sexual assault and rape formed part of the persecutory campaign. However, this sexual violence was included in the plea agreement of only one of the three defendants. The others each entered their pleas on a reduced factual basis that excluded, *inter alia*, the sexual violence crimes.[123] It is true that some other categories of crimes, such as murder, were also excluded in these two plea agreements. However, certainly it sounds a warning that the continuing commitment of the international community to punish the perpetrators of wartime sexual violence may be tested at this juncture when the resources of the Tribunal become increasingly stretched. There are several pending ICTY cases involving relatively high level accused where sexual violence is alleged as an integral part of ethnic cleansing strategies (generally

119 *Prosecutor* v. *Kvočka* et al., *supra* note 26, para. 98.

120. *Ibid*., para. 108.

121. See *e.g.* Human Rights Watch (Helsinki Watch), *War Crimes in Bosnia-Hercegovina,* 1993, pp. 18 and 163-186 (focusing on rape in the Omarska and Trnopolje camps); and *Calling the Ghosts: A Story about Rape, War and Women* (Documentary Film by Bowery Productions, 1996, focusing on sexual violence in the Omarska Camp).

122. *Prosecutor* v. *Sikirica* et al., Sentencing Judgment, Case No. IT-95-8-S, 13 November 2001, paras. 1 and 17.

123. *Ibid*., paras. 18-37 (Sikirica's plea agreement covered the facts set forth in paragraph 36(a)-(e) of the indictment, which included sexual violence; Došen's plea agreement covered the facts set forth in paragraph 36(b), (d) and (e) of the indictment, which excluded sexual violence; and Kolundžija's plea agreement covered the facts set forth in paragraph 36(e) of the indictment, which excluded sexual violence.)

charged as persecution as a crime against humanity and/or genocide) in Bosnia and Herzegovina.[124] Provided that the international community does not waver on the commitment it made in the early 1990s to prosecute sexual violence, there is, potentially, a significant body of jurisprudence on this issue yet to come.

We cannot be entirely confident, however, that the practice of the ICTY on the prosecution of wartime sexual violence demonstrates a decisive change of attitude in international criminal law more generally towards the issue of sexual violence. Events in Rwanda just one year after the establishment of the ICTY sounded a grave warning that the international community's new-found concern about wartime sexual violence may have been a selective one. As was the case during the conflict in the former Yugoslavia, sexual violence was inflicted upon women on a massive and brutal scale during the 1994 conflict in Rwanda.[125] However, in a marked departure from the establishment process for the ICTY, the Security Council made no reference to these crimes during its discussion of the conflict.[126] Nor was sexual violence mentioned during the Security Council debates that led to the establishment of the ICTR. Furthermore, the ICTR was extremely slow to address crimes committed against women in Rwanda.[127] Thus, while the sexual violence experienced by Bosnian women shocked the conscience of the international community, the sexual violence inflicted upon women in Rwanda was, at least initially, overlooked. Fortunately, the considerable effort of advocates for women's human rights has ensured that this poor record on gender issues has been, at least partly, rectified. The ICTR has now issued several important judgments condemning crimes against women.[128]

Nonetheless, it is imperative that the occurrence of sexual violence during the conflict in the former Yugoslavia is not considered to be exceptional or unique

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124. *Prosecutor* v. *Milošević*, Kosovo Second Amended Indictment, Case No. IT-02-54-T, 29 October 2001; *Prosecutor* v. *Milošević*, Croatia Indictment, Case No. IT-01-50-I, 8 October 2001; *Prosecutor* v. *Milošević*, Bosnia Indictment, Case No. IT-01-51, 22 November 2001; *Prosecutor* v. *Karadžić & Mladić*, *supra* note 65; *Prosecutor* v. *Plavšić & Krajišnik*, Consolidated Indictment, Case Nos. IT-00-39 & 40, 9 March 2001; *Prosecutor* v. *Brđanin & Talić*, Prosecutor's Corrected Version of Fourth Amended Indictment, Case No. IT-99-36-I, 10 December 2001; and *Prosecutor* v. *Stakić*, Second Amended Indictment, Case No. IT-97-24-PT, 31 August 2001.

125. See *e.g.*, African Rights, *Rwanda: Death, Despair and Defiance*, rev. ed, 1995; and Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 1996.

126 The Security Council did make specific reference to the deaths of innocent civilians *including women* on several occasions. See for example, UN Doc. S/RES/912 (1994) and UN Doc. S/RES/918 (1994). However, no reference was made to acts of sexual violence against women.

127. See J. Gardam & M. Jarvis, *supra* note 3, pp. 214-215.

128. See in particular, *Prosecutor* v. *Akayesu*, *supra* note 75. See generally, J. Gardam & M. Jarvis, *supra* note 3, pp. 187-203.

and that the international community acts with equal determination in relation to sexual violence committed against all women in all geographic regions of the world.

Factors Contributing to the ICTY's Generally Positive Record on Gender Issues

The composition of the mechanisms created to investigate and prosecute international crimes has a marked influence on decisions as to which crimes will be addressed. It is important that women and staff with expertise on gender-related issues be well represented at all levels. This increases the likelihood that the experiences of women resulting from armed conflict will be effectively recognised and addressed.

Despite the pivotal role played by the prosecution in determining which crimes to investigate and prosecute,[129] neither the ICTY Statute nor the ICTY Rules contain any requirements regarding the employment of women or staff with gender expertise in this section of the Tribunal.[130] In some respects, gender sensitivity and gender composition have been better than expected having regard to the governing documents. The first Prosecutor, Richard Goldstone of South Africa,[131] recognised that international law had previously paid insufficient attention to sexual violence, primarily because "the laws were conceived of and drafted by men".[132] Since then, two women have held the position of Chief Prosecutor.[133] Upon taking up office, Louise Arbour, the first of them, stated her commitment to prosecuting crimes of sexual violence

129. See ICTY Statute Articles 16 and 18.

130. The Report of the Secretary-General leading to the adoption of the Statute of the ICTY noted that due consideration should be given to the employment of qualified women in the Office of the Prosecutor. This comment was prompted by reference to the sexual violence crimes that had been committed during the conflict in the former Yugoslavia. See "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 88. However, no express requirement regarding gender composition in the Office of the Prosecutor was ultimately included in the ICTY Statute, or in the ICTY Rules.

131. Goldstone was appointed on 8 July 1994 and took office on 15 August 1994. See "Second Annual Report", *supra* note 105, para. 36.

132. Interview with Richard Goldstone in S. Saywell, Rape: A Crime of War, Canadian National Film Board Documentary, 1996.

133. Louise Arbour of Canada was appointed by UN Doc. S/RES/1047 (1996), and took up her position on 1 October 1996. See "Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991", UN Doc. A/51/292, S/1996/665, 16 August 1996, para. 87. Carla Del Ponte of Switzerland was appointed pursuant to UN Doc. S/RES/1259 (1999), and took up her position on 15 September 1999.

effectively.[134] Furthermore, the appointment and subsequent work of the prosecution's Legal Adviser for Gender Issues has had a significant bearing on the attention paid to crimes committed against women.[135] However, in other areas of international law, "special" mechanisms for women have been marginalised.[136] Ideally, gender expertise should be "mainstreamed" throughout the ICTY. Realistically, though, both "special" and "mainstreaming" initiatives, will be needed for the duration of the ICTY's existence.

The appointment of women judges and judges with gender expertise also has an influence on the extent to which crimes against women are effectively dealt with. Only four women judges have, so far, been appointed to the ICTY in its nine-year history (although one of them, Judge Gabrielle Kirk McDonald, served a term as president of the Tribunal and another, Judge Florence Mumba, served a term as vice-president.)[137] Elections held in 2001 resulted in the appointment of only one woman, Judge Florence Mumba, as a permanent judge of the ICTY, from a total of sixteen permanent judges. In practice, the presence of women is not as scarce as might be imagined in the halls and courtrooms of the ICTY. In 2000, the Security Council approved the appointment of *ad litem* (temporary) judges to the ICTY in an attempt to move the Tribunal's caseload to completion more rapidly.[138] Of the six *ad litem* judges who were sworn in September 2001, five are women. However, the power and influence of the *ad litem* judges is, in several important respects, more limited than those of the permanent judges. For example, *ad litem* judges cannot be appointed as the presiding judge in a trial and, therefore, are not primarily responsible for the day to day courtroom proceedings. Nor do they have a right to participate in the deliberations of the Rules Committee, which meets regularly to amend the ICTY's Rules of Procedure and Evidence.

The equal representation of women, and the inclusion of gender expertise, is also important among the staff recruited to assist the judges. The Chambers Legal Support section of the ICTY has no focal point on gender issues. Nor does it have a formal policy on gender, the recruitment of women or training for judges and other staff members on gender issues. Indeed, reflections of

134. "Second Annual Report", *supra* note 105, para. 52.

135. See C. Steains, "Gender Issues", in R. Lee, ed., *The International Criminal Court: The Making of the Rome Statute-Issues, Negotiations, Results*, 1999, p. 380 (recounting the references by delegations to the instrumental role played by Patricia Viseur-Sellers as Legal Adviser for Gender Issues, during the negotiations of the ICC Statute).

136. See, for example, B. Clark, "The Vienna Reservations Regime and the Convention on Discrimination Against Women", (1985) 85 *Am. J. Int'l L.* 281, and R. Cook, "Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women", (1990) 36 *Virg. J. Int'l L.* 643.

137. In addition to Judge McDonald (United States of America) and Judge Mumba (Zambia), the other two women judges who have served at the ICTY are Judge Odio Benito (Costa-Rica) and Judge Wald (United States of America).

138. UN Doc. S/RES/1329 (2000).

the glass ceiling, evident throughout the United Nations system as a whole,[139] are visible in Chambers. Women are well represented at the lower end of the spectrum. They constitute 100 per cent of the Chambers' administrative and support staff. Of approximately thirty associate legal officers or legal officers (who are employed at the UN P2 and P3 levels to provide legal research and drafting assistance for the judges and to coordinate the trials) twenty-one are women. However, only one of the four P5 senior legal officers in Chambers is a woman and, as already noted, only one of sixteen permanent judges is a woman. The ICTY could improve its performance on issues affecting women by adopting a formal policy on gender, including the recruitment of women, and the training of judges and staff members on gender issues.

One of the most significant factors contributing to the emerging gender perspective in international criminal law in the case law of the ICTY has been the pivotal role played by NGOs focusing on women's issues and other advocates for women's rights. Women's groups and scholars have submitted *amicus curiae* briefs to the Tribunal on issues concerning women[140] and have ensured that gender issues have remained in the media spotlight.

Other Gender Issues

While, overwhelmingly, advances in the ICTY's case law from a gender perspective have centred on the issue of wartime sexual violence, there is some evidence that the focus on gender has also permeated other aspects of international criminal law. However, the few developments that have occurred outside the context of sexual violence have assumed a much lower profile than the sexual violence cases.

139. H. Charlesworth & C. Chinkin, *supra* note 1, pp. 174-187.

140. See *eg.*, Amicus Curiae Brief submitted by Professor Christine Chinkin, Dean and Professor of Law, University of Southampton, United Kingdom, in the case of *Prosecutor* v. *Tadić*; Amicus Curiae Brief submitted by Rhonda Copelon, Felice Gaer, Jennifer Green and Sara Hossain in the matter of protective measures for victims and witnesses in the case of *Prosecutor* v. *Tadić*; Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted by the Centre for Civil and Human Rights, Notre Dame Law School, *Prosecutor* v. *Furundžija*, Case No. IT-95-17/1-T (10 December 1998). See also Green et al., *supra* note 12 (recounting submissions made to the judges of the ICTY "for the purpose of influencing the rules adopted by the Tribunal for the prosecution of rape and other sex crimes") and the Amicus Brief cited *supra* note 99.

Attacks against the Civilian Population

The prosecution of attacks against the civilian population is another significant issue for women as they are most likely to experience armed conflict as civilians, rather than as combatants. Women, along with children, are increasingly the largest casualties of modern-day conflicts, particularly during internal conflicts where communities become the battlefield in a very direct way.[141]

Prosecuting attacks against the civilian population, however, leads inevitably to the intractable rules of international humanitarian law that seek to strike a balance between the achievement of military objectives and unacceptable levels of "collateral" (*i.e.*, civilian) damage. Despite the humanitarian aspirations of international humanitarian law (and international criminal law), military establishments of States have a strong interest in preserving their freedom to conduct their military campaigns as they choose. Perhaps not surprisingly, attacks against the civilian population were not mentioned in the judgment of the Nuremberg Tribunal, despite the fact that the Nuremberg Charter recognised "wanton destruction of cities towns or villages, or devastation not justified by military necessity" as a war crime. The expected reference by the Nuremberg Tribunal to the wanton destruction of cities in the trial of Herman Goering, the Commander-in-Chief of the Luftwaffe, was not forthcoming,[142] and the illegal conduct of air warfare was not pursued in the forum of the United Nations War Crimes Commission.[143] Commentators suggest that one factor leading to the failure of the Nuremberg Tribunal to pursue these crimes was the culpability of the Allies themselves for extensive civilian casualties and damage to civilian objects resulting from aerial bombardment.[144]

Trial Chambers of the ICTY have, however, convicted several high ranking political and military figures of deliberate attacks upon the civilian population during the conflict in the former Yugoslavia.[145] Other cases involving attacks of this nature are pending.[146]

141. See J. Gardam & M. Jarvis, *supra* note 3 at pp. 1-2.

142. See W. Fenrick, "Attacking the Enemy Civilian as a Punishable Offence", (1997) 72 *Duke J. Comp. & Int'l L.* 539, at p.550.

143. *Ibid*., p. 550.

144. *Ibid*., p. 550.

145. See for example, *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95-14-T, 3 March 2000 (convicting General Blaškić for attacks on towns and villages, destruction and plunder of property in the Lasva Valley region of Bosnia); *Prosecutor* v. *Kordić & Čerkez*, Judgment, Case No. IT-95-14/2-T, 26 February 2001 (convicting both Kordić & Čerkez of "unlawful attacks on civilian objects" in the Lasva Valley region of Bosnia).

146. *Milošević* indictments, *supra* note 124; *Prosecutor* v. *Galić*, Indictment, Case No. IT-98-29-I, 26 March 1999 (attacks on Sarajevo); *Prosecutor* v. *Martić*, Indictment, Case No. IT-95-11-I, 25 July 1995 (attacks on Zagreb in May 1995); *Prosecutor* v. *Rajić*, Indictment, Case No. IT-95-12, 29 August 1995 (attacks on the village of Stupni Do on 23 October 1993); *Prosecutor* v. *Karadžić & Mladić*, *supra* note 65 (attacks on civilians in Tuzla, 1995).

Most of the indictments issued by the ICTY focus on deliberate, rather than indiscriminate attacks against the civilian population, eliminating the need for more complex judgments about the relative value of the lives of civilians compared to the attainment of military objectives.[147] In the *Krstić* case, the accused was charged only with crimes that occurred after the Bosnian Serb take-over of the United Nations safe area of Srebrenica in 1995 and not for the attack on Srebrenica itself. The Trial Chamber heard evidence from several witnesses that, during the Bosnian Serb military offensive, the Srebrenica enclave was shelled excessively, although it ultimately noted that the prosecution did not allege that the attack on Srebrenica was, of itself, a violation of international law.[148]

Nonetheless, even the prosecution of deliberate attacks directed against the civilian population is a marked development in international humanitarian law and immediately prompted criticism from some who see it as an unjustified intrusion on the conduct of warfare, revealing shades of the Nuremberg reluctance to condemn such attacks.[149] Perhaps the restricted mandate of the ICTY as a temporary institution entrusted only with investigating and prosecuting crimes committed on the territory of the former Yugoslavia since 1991 initially generated a certain level of comfort amongst members of the international community that their own military strategies would not be similarly examined. That sense of security was, no doubt, challenged when the compliance with international humanitarian law of the NATO bombing campaign regarding Kosovo came under close scrutiny.

"Ethnic Cleansing"

Many of the cases brought before the ICTY, particularly those involving higher level military and political figures, concern conduct that was labelled as "ethnic cleansing" in the media reports on the conflict in the former Yugoslavia. "Ethnic cleansing" is not a legal term and is not referred to anywhere in the ICTY Statute. Rather it is a popular label that has been used to describe a course of conduct that is prompted by the desire of one ethnic group to eliminate the presence of another ethnic group from a particular piece of territory. Such campaigns usually involve a broad range of strategies, including the denial of fundamental human rights to the targeted ethnic group, terrori-

147. One exception was the indictment issued against *Djukić*, (see *Prosecutor* v. *Djukić*, Indictment, Case No. IT-96-20-I, 29 February 1996), which included charges for indiscriminate attacks against civilian targets in Sarajevo). However, the case against *Djukić* was closed after his death in May 1996. For a discussion of issues raised in the context of prosecutions for indiscriminate attacks against the civilian population, see W. Fenrick, *supra* note 142.

148. *Prosecutor* v. *Krstić*, *supra* note 54, paras. 122, 332.

149. See *e.g.*, W. Fenrick, *supra* note 142, pp. 539-540 (recounting criticism directed at the ICTY for charges issued against Djukić, by E. Cody in "Is it a War Crime or Just War?", *Washington Post*, 7 April 1996, p. C5).

sation, deportation or forcible transfer, physical violence and killings. Cases falling within this category at the ICTY are typically charged as persecution as a crime against humanity and/or genocide. Undoubtedly these "ethnic cleansing" cases will form a significant part of the jurisprudential legacy of the ICTY.

Overwhelmingly, however, the witnesses who are called to testify in proceedings before the ICTY are men. The Victims and Witnesses Section of the ICTY has estimated that as few as 20 per cent of witnesses are women. In these circumstances, the picture painted of ethnic cleansing before the ICTY inevitably reflects men's experience of this crime more than women's experiences. The bulk of the testimony covers activities that occurred in the public sphere: violations of civil and political rights, such as the right to employment and political participation. For women who live out their lives in the private sphere, which, overwhelmingly, was the case for women in the patriarchal society of Bosnia and Herzegovina, the impact of ethnic cleansing was undoubtedly different, although equally devastating. How did ethnic cleansing impact upon women's lives in their roles as carers and workers in the domestic realm? To what extent does the crime of persecution recognise the denial of rights that fall into the category of economic, social and cultural rights in addition to those traditionally recognised as civil and political rights? These questions are yet to be fully addressed by the ICTY.

It is not clear what steps the prosecution has implemented to ensure that it obtains information from women in the course of its investigations. Redressing the imbalance in the number of women appearing as witnesses before the Tribunal requires a genuine commitment to seeking out the places where women spend their time and to gaining the trust of women, many of whom may not be used to functioning in the public sphere and who, understandably, exhibit some reluctance when contacted by officials of an organisation such as the ICTY.

Deportation/Forcible Transfer of Women and Children during Armed Conflict

Increasingly, there is an understanding and acceptance that men and women experience armed conflict in very different ways.[150] One of the most recurrent themes is that men are more likely to be deliberately killed during conflict, whereas women are more likely to become refugees or displaced persons, or to be forcibly transferred or deported out of territory over which war is being waged. While the massacre of men is a crime that generally assumes a high profile in the response of States to armed conflict, the experiences of women who are refugees or displaced persons are frequently unacknowledged and not redressed.

150. J. Gardam & M. Jarvis, *supra* note 3, pp. 19-51.

However, the Trial Chamber's judgment in *Krstić* case signals a welcome recognition of the need to ensure that both men's and women's experiences are accounted for. The defendant, General Radislav Krstić, was indicted for crimes, including genocide and crimes against humanity, for the events that followed the July 1995 Bosnian Serb take-over of the former United Nations safe area of Srebrenica. Within a few days of the attack, approximately 25,000 Bosnian Muslims living in the area, most of them women, children and elderly, were uprooted and, in an atmosphere of terror, loaded onto over-crowded buses by the Bosnian Serb authorities and transported across the confrontation lines into Bosnian Muslim held territory.[151] The so called "military aged" Bosnian Muslim men, however, were consigned to a separate fate. As thousands attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed *en masse* by Bosnian Serb forces. More than 7,000 men were never seen again.[152] Thus the case of Srebrenica is a striking example of the way that men and women experience warfare differently.

It is obvious, and imperative, that those who played a role in killing the men must be brought to justice. However, the judgment in the *Krstić* case also recognised some of the ways that the women of Srebrenica suffered as a result of these events. General Krstić was convicted of forcible transfer as a crime against humanity for the role he played in bussing the women and children out of Srebrenica.[153] The Trial Chamber found that, given the abhorrent conditions they were being forced to live in and the climate of pure terror created by the Bosnian Serb forces, these women and children were not exercising a genuine choice to leave and that the transfer was unjustifiable under international law.[154]

Furthermore, in concluding that the mass execution of the Muslim men from Srebrenica was an act of genocide, the Trial Chamber in the *Krstić* case drew support from the fact that the massacre of the men took place at the same time as the forcible transfer of the women and children. This, the Trial Chamber found, was further evidence that the Bosnian Serbs intended to destroy a part of the Bosnian Muslim group, namely the Bosnian Muslims of Srebrenica. The Trial Chamber concluded that "the Bosnian Serb forces knew, by the time they decided to kill all of the military aged (Muslim) men, that the combination of those killings with the forcible transfer of the women, children and the elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica".[155] The Trial Chamber also relied upon the fact that the bodies of the men were subsequently exhumed, mutilating them in the process, and reburied in more remote locations. As a

151. *Prosecutor* v. *Krstić, supra* note 54, paras.1, 48-51.

152. *Ibid*., paras. 1, 53-84.

153. *Ibid*., para. 617.

154. *Ibid.,* paras.145-149, 530.

155. *Ibid.*

result, the bodies could not be given decent burials in accordance with religious and ethnic customs causing terrible distress to the mourning survivors.[156] Thus the Trial Chamber looked at a broad range of factors in determining genocidal intent, not just the killing of the men in isolation.

Nonetheless, the fact remains that international criminal law is ill equipped to address many aspects of the suffering of the Bosnian Muslim women of Srebrenica. Certainly, the *Krstić* Trial Chamber acknowledged the catastrophic impact of the crimes upon the surviving Muslim community of Srebrenica, the majority of whom are women. It recognised that, in a patriarchal society, such as the one in which the Bosnian Muslims of Srebrenica lived, the elimination of virtually all the men has made it almost impossible for the women who survived to successfully re-establish their lives. Most remain homeless and unemployed and have unique impediments to their recovery.[157] Counsellors speak of the "Srebrenica Syndrome" as a new pathology category.[158] One of the primary factors giving rise to the Syndrome is that, with few exceptions, the fate of the survivor's loved ones is not officially known: the majority of the Srebrenica men are still listed as missing. Very few bodies have been conclusively identified from the Srebrenica mass graves.[159] These women experience a collective guilt because they survived and their husbands, sons, brothers and fathers did not. In sum, the surviving women's lives have been destroyed by war.[160] That, unfortunately, is not an offence recognised by international criminal law.

Conclusions: Assessing the Progress

There has been marked improvement in the determination of the international community to prosecute crimes of sexual violence, when compared with the multinational World War II war crimes trials. The relevant rules of international law were always amenable to an interpretation that acknowledged the particular experiences of women, although the opportunity was rarely taken up, reflecting a failure to understand the impact of these crimes or the importance of redress for women. The ICTY's approach to the question of what constitutes an international crime more accurately reflects the perspective of women affected by sexual violence during armed conflict. However, the jurisprudence of the ICTY is not a primary source of international law,[161]

156. *Ibid.*, paras. 78, 547, 596.

157. *Ibid.*, paras. 90-94.

158. *Ibid.*

159. *Ibid.*

160. *Ibid.*

161. See Article 38, Statute of the International Court of Justice. See further C. Chinkin, *supra* note 10, p. 326, at pp. 336-337; and T. Meron, "War Crimes in Yugoslavia and the Development of International Law", (1994) 88 *Am. J. Int'l L.* 78.

although it has considerable normative effect and will, undoubtedly, lay important groundwork for cases brought before the International Criminal Court ICC. Still, challenges lie ahead in ensuring that sexual violence is not swept from view, as the ICTY's exit date looms closer. For the international community more generally the challenge lies in ensuring that history does not categorise the sexual violence that occurred during the former Yugoslavia, and the response it prompted, as a special and isolated case.

Greater attention should also be accorded to gender issues other than sexual violence within the ICTY framework. The developments described in this chapter regarding the prosecution of attacks against the civilian population and of crimes such as deportation, forcible transfer and persecution are examples of such issues. Overall, international criminal law has a long way to travel before it can shed the label of a gendered regime.

Labelling international criminal law as a gendered regime that does not adequately reflect the experiences of women is not a mechanism for levelling blame, but rather a simple statement of fact. To the contrary, it would be truly remarkable if international criminal law had managed to avoid the inherent gender bias discernible in all legal regimes, international and domestic. The reality is that international criminal law began its development at a time well-before women's distinctive experience of armed conflict was fully recognised or their voices truly represented in the dialogue on this issue. Indeed, we are far from achieving these objectives even today. It would be a tragedy if, after the formative steps now taken by the international community in the work of the ICTY, international criminal law turned its back upon the considerable insight and benefit that feminist scholarship has brought to international law. To do so would be to lose a critical opportunity to promote improvement in the capacity of international law to respond to the humanitarian problems that arise for women as a result of armed conflict. When the journalists and the cameras have gone, when NATO or the United Nations have withdrawn their troops and when the world has grown tired of hearing about the prosecution of high level war criminals, the women are left to rebuild their shattered homes, lives and communities in the aftermath of conflict. Now is the time to build upon the growing consciousness of gender perspectives in international criminal law to achieve some lasting improvement in the lives of all women caught up in armed conflict.

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GABRIELLE MCINTYRE *

Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY

In the first case brought before the International Criminal Tribunal for the former Yugoslavia (ICTY), it premised its legality as a functioning legal institution upon its full adherence to the rule of law. It interpreted the rule of law at international law as obliging it to adhere fully to international human rights principles. In a decision rendered shortly thereafter the Tribunal held that it was not bound by universal human rights principles as interpreted by other human rights bodies. The Tribunal reasoned that because of its unique structure as an international tribunal and because of the nature of the subject matter with which it dealt, those universal human rights principles were not applicable to it in the same way in which they were applicable to municipal jurisdictions. It suggested that it was more akin to a military tribunal and as such it would adopt a contextual approach to the interpretation of universal human rights principles.[1]

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1. By characterising itself as more akin to a military tribunal the Tribunal brings itself into immediate conflict with concerns of the human rights regime. See "General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)", UN Doc. CCPR/C/21/Add.3, where the Human Rights Committee expressed its concern at the administration of justice by military or special courts and observed, at para. 4:

> Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in Article 14 [of the International Covenant on Civil and Political Rights (ICCPR)].

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *193-238.*

By adopting such an approach to the application of universally established human rights principles, the Tribunal has left itself open to the criticism that it is an operational contradiction: existing to uphold principles of international humanitarian law but in the process permitting departure from certain principles of international human rights law.[2] The contradiction becomes more marked when it is considered that the idea of an international community exists in large part because of the recognition of the proper treatment of humans enshrined in human rights laws and conventions. Human rights by their very nature do away with the distinction traditionally drawn between the internal and international legal orders. The interference in the rights of States that claim the human rights of their citizens are a matter of internal concern has been the fulcrum around which the concept of an international community has developed. By justifying departure from universal principles recognised by the international community, it is arguable that the Tribunal establishes a hierarchy of law to which those universal norms can be subverted. It also fragments the idea of an international community by distinguishing the internal legal order of States from the international legal order – a distinction that human rights law had hitherto denied.

However, more importantly from the perspective of the Tribunal, by adopting a contextual approach the Tribunal raises questions about its legality as a functioning legal institution. After examining the framework the Tribunal set itself, this chapter will consider the operation of the Tribunal as a judicial body. It will be argued that although the departures of the Tribunal from universal human rights principles as interpreted by other human rights bodies is difficult to reconcile with the jurisdictional obligation of the Tribunal to respect fully the rights of an accused in its criminal trial processes, this is only because those universal principles had, at the time of the conception of the Tribunal, no other meaning than that derived from their application in the municipal criminal trial process. The Tribunal is the first truly international forum to apply universal human rights principles to international criminal proceedings. Accordingly, if it accepted that human rights are principles that can only have meaning in context[3] the Tribunal is entitled, by reference to the human rights regime, to develop its own set of human rights standards in light of its context as an international criminal court dealing with crimes committed in times of war. The real issue of concern then is not whether the Tribunal adheres to existing interpretations of universal human rights principles, but whether the standards it is setting are proper international standards so that it could be said the Tribunal does conform to the rule of law.

2. This pattern of judicial activity seems to reflect the enforcement of humanitarian law, a core component of international criminal law. In times of armed conflict (or other state emergencies) international human rights law permits derogation from certain human rights norms.

3. This assumption is contentious and its detailed consideration is beyond the scope of this chapter.

The potential scope of this inquiry is relevant to all aspects of the procedural and substantive operation of the Tribunal and it is not possible to comprehensively cover the topic within this chapter. What will be considered in the following is a sample of procedural rights that are of crucial significance to an accused facing criminal trial proceedings. The human rights selected are those that have been most commonly raised by accused in challenging the legality of the proceedings of the Tribunal. The examination of these rights is also by no means comprehensive. The chapter merely touches upon some of the more obvious issues in relation to them.

Established by Law

The Tribunal considers itself established by law.[4] In its first case, the accused argued that the Tribunal had not been "established by law" as required by article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).[5] He claimed that to be duly established by law the Tribunal should have been created by treaty, the consensual act of nations, or by an amendment to the Charter of the United Nations, not by resolution of the Security Council. The *Tadić* Trial Chamber refused to entertain the challenge on the basis that it was not competent to do so under Rule 72 of the Rules of the Tribunal, characterising the submission as "not truly a matter of jurisdiction but rather the lawfulness of its creation".[6]

The Appeals Chamber rejected this "narrow characterisation" of jurisdiction and found that while a conception of jurisdiction limited to issues of *ratione temporis*, *loci*, *personae* and *materiae* may be applicable to municipal systems, it was not appropriate in international law. It justified this finding on the ground that the international legal system lacks a centralised structure akin to that found in municipal systems.[7] Without such a structure, every tribunal within international law constitutes a "self-contained system". As such, a plea based on the constitutional validity of the Tribunal went to the "very essence of jurisdiction as a power to exercise the judicial function within any ambit".[8] From this standpoint the Appeals Chamber held that as a judicial body, it

4. In the human rights jurisprudence, for a judicial body to be established at law means that not only the establishment but also the organisation and the functioning of the tribunal in question must have a legal basis. *Piersack* v. *Belgium*, Series A, Vol. 53, p.23

5. *Prosecutor* v. *Tadić*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case IT-94-1-AR72, 2 October 1995.

6. *Prosecutor* v. *Tadić*, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, Case No. IT-94-1-PT, 10 August 1995, para. 4.

7. *Prosecutor* v. *Tadić*, *supra* note 5, para.11.

8. *Ibid*., para.12.

shared with other judicial bodies the power to determine its own *compétence de la compétence* and, rejecting arguments that the exercise of Chapter VII power by the Security Council was non-justiciable, proceeded to examine the argument of the accused that it had not been "established by law".[9]

The Appeals Chamber held that the establishment of the Tribunal by the Security Council was a valid exercise of power pursuant to Article 39 of the Charter of the United Nations, constituting a measure within Article 41, and found that the requirement that the Tribunal be established at law, to comply with Article 14(1) of the ICCPR in the context of international law, meant that it must be established in accordance with the rule of law.[10] For it to have been established according to the rule of law it must conform to "proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognised human rights instruments".[11]

The Appeals Chamber was satisfied that the Statute and Rules of the Tribunal, being based upon the internationally recognised standards of Article 14 of the ICCPR, supported a conclusion that it had been established in accordance with the rule of law.[12] In reaching this conclusion the Appeals Chamber made clear that it conceived the rule of law at international law to be firmly established in universal human rights principles, and that its operational legitimacy as a judicial body derived from its adherence to that rule of law.[13]

More recently, Slobodan Milošević brought a "Preliminary Protective Motion" in which he raised a number of arguments challenging the legitimacy of the Tribunal, including the argument made by *Tadić* that the Tribunal had not been "established by law" as required by Article 14(1) of the ICCPR.[14] The *amici curiae* appointed to assist the Trial Chamber in the proceedings[15] urged the Tribunal to reconsider the arguments made in *Tadić*, arguing that there was no doctrine of precedent in international law that prevented the Trial Chamber from doing so.[16] While the Trial Chamber rejected this claim, based

9. *Ibid*., paras. 13-25. Most considerations of the *Tadić* Jurisdiction Decision, *supra* note 5, have focused on the determination made by the Appeals Chamber that the Security Council was empowered to establish the Tribunal.
10. *Ibid*., paras. 28-40.
11. *Ibid*., para. 45.
12. *Ibid*., paras. 46-47.
13. *Ibid*., paras. 45-47.
14. *Prosecutor* v. *Miloševi*ć, Preliminary Protective Motion, Case No. IT-99-37-PT, 9 August 2001. The arguments of the accused were set out in an untitled supporting document filed on 30 August 2001.
15. *Prosecutor* v. *Miloševi*ć, Order Inviting Designation of Amicus Curiae, Case No. IT-99-37-PT, 30 August 2001.
16. Motion Hearing, 29 October 2001, Transcript pp. 33-34.

on the decision of the Appeals Chamber in *Aleksovski* that "a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on the Trial Chambers",[17] it nevertheless decided that it was able to reconsider the argument.[18] The Trial Chamber found, as the *Tadić* Appeals Chamber before it, that the creation of the Tribunal was within the powers conferred on the Security Council and that the Tribunal was established according to law because of its "obligation to guarantee fully the rights of the accused".[19]

Neither the *Tadić* Appeals Chamber nor the *Milošević* Trial Chamber ventured to demonstrate how its "obligation to guarantee fully the rights of the accused" is accommodated by its criminal trial processes. In *Tadić* this is not surprising, given that at the time the decision was rendered there was no pre-existing body of Tribunal decisions upon which the Appeals Chamber could draw to show that this was indeed the effect of the provisions in the Statute and the Rules. However, the *Milošević* Trial Chamber, which did have a body of jurisprudence to draw upon, assumed it unnecessary to support its conclusion by establishing, with reference to the jurisprudence of the Tribunal, how in fact the Tribunal does "guarantee fully the rights of the accused". It relied solely upon the fact that the Statute and the Rules make provision for the protection of internationally recognised rights as *prima facie* evidence that those rights would be protected. However, it is an issue that did warrant further exploration if the Trial Chamber was, as it claimed, venturing to reconsider the challenge to its constitutionality for itself. This is particularly so given that departures from universally established human rights principles by the Tribunal must, according to the reasoning of the *Tadić* Appeals Chamber and that of the *Milošević* Trial Chamber, render the exercise of jurisdiction by the Tribunal illegal, or at least *ultra vires*.[20]

However, determining whether or not the Tribunal is acting within its jurisdictional confines by according full protection to universally recognised rights of an accused at all stages of its criminal proceedings would not

17. *Prosecutor* v. *Aleksovski*, Appeal Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 113.

18. *Prosecutor* v. *Milošević*, Decision on Preliminary Motions, Case No. IT-99-37-PT, 8 November 2001, para. 4. See also, *Prosecutor* v. *Krajišnik*, Decision on Motion Challenging Jurisdiction-With Reasons, Case No. IT-00-39-PT, 22 September 2000, in which the Accused also challenged the jurisdiction of the Tribunal on the basis of the same arguments made as *Tadić* and the Trial Chamber refused to reconsider the issues finding itself bound by the *Tadić* Jurisdiction Decision in accordance with *Prosecutor* v. *Aleksovski*, *supra* note 17, paras. 15-16, 27.

19. *Prosecutor* v. *Milošević*, *ibid.*, para. 7.

20. See *Prosecutor* v. *Krajišnik*, *supra* note 18, in which the accused alleged that the Tribunal was contrary to the fundamental principles of international law and that it violated rights guaranteed under the ICCPR. The Trial Chamber recited the findings in the *Tadić* Jurisdiction Decision, *supra* note 5, and held that the Tribunal met all the requirements of procedural fairness and accorded the accused the full guarantees of a fair trial as set out in Article 14 of the ICCPR.

have been a simple issue for the *Milošević* Trial Chamber to demonstrate by reference to the jurisprudence of the Tribunal. It is complicated by the fact that Trial Chambers have been ambiguous about what those standards are and where, in international law, they are to be found. A perusal of the Report of the Secretary-General implies that the rights to be accorded to an accused are firmly established in international law and easily accessible to the Tribunal. In that Report the Secretary-General stated: "It is axiomatic that the International Tribunal must fully respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognised standards are, in particular, contained in article 14 of the International Covenant on Civil and Political Rights."[21] The reliance by the Secretary-General on Article 14 of the ICCPR suggests the intention that the Tribunal would accord an accused those rights as understood by other judicial bodies charged with the application of them, in particular the interpretation of the ICCPR by the United Nations Human Rights Committee (HRC) and of comparable principles set out by the European Court of Human Rights (ECtHR).

However, in the *Tadić* Protective Measures Decision,[22] which closely followed the *Tadić* Trial Decision on Jurisdiction, the Trial Chamber found that it was not bound by universally established human rights principles as interpreted by the HRC or the ECtHR. In essence, it concluded that it was not bound by interpretations given by any other judicial bodies at all.[23] It held that although the rights accorded to an accused in the Statute were based on Article 14 of the ICCPR, those rights could not be applied as they had been interpreted by the HRC, or as comparable principles had been interpreted by the ECtHR. This was because the Statute of the Tribunal also directed it to take into account the protection of victims and witnesses, and the fact that the Tribunal is operating in the midst of an armed conflict, is without a police force and is "adjudicating crimes which are considered so horrific as to warrant universal jurisdiction".[24] These factors caused the *Tadić* Trial Chamber to characterise the Tribunal as "more akin to a military tribunal which often has limited rights of due process and more lenient rules of evidence".[25]

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21. See "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 106.
22. *Prosecutor* v. *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, 10 August 1995.
23. *Ibid*., paras. 28-30.
24. *Ibid*., para. 28.
25. *Ibid*., paras. 27–28:

> [T]he interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the European Convention on Human Rights is only of limited relevance in applying the provisions of the Statute and Rules of the International Tribunal, as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations. In

In reaching this conclusion, the Trial Chamber noted that although the Report of the Secretary-General emphasised the importance of according an accused protection of those rights established in Article 14 of the ICCPR, and mirrored in Article 21 of the Statute, the Report provided little guidance regarding the applicable sources of law in construing and applying the Statute and the Rules, and it did not indicate the relevance of the interpretation given to those provisions by other judicial bodies.[26]

It is clear, therefore, that the Tribunal has found that its unique structure within the international community, and the unique subject matter with which it deals, justifies its characterisation as a self-contained legal system unbridled by the human rights regimes to the extent that the rights to be accorded to an accused in its criminal trial processes are not to be automatically determined by pre-existing standards. As such, the standard the Tribunal set itself in the *Tadić* Jurisdiction Decision is essentially to be determined by the Trial Chambers on a case by case basis. This approach is inherently problematic for the reasoning underpinning the legality of the Tribunal and perpetuates criticism of it as a "self–validating" body.[27] While applying an international

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> interpreting the provisions which are applicable to the International Tribunal and determining where the balance lies between the accused's rights to a fair and public trial and the protection of victims and witnesses, the Judges of the International Tribunal must do so within the context of its own unique framework […] The fact that the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretation made by other judicial bodies is evident in the different circumstances in which the provisions apply. The interpretations of Article 6 of the European Convention on Human Rights by the European Court of Human Rights are meant to apply to ordinary criminal proceedings and, for Article 6(1) civil adjudications. By contrast the International Tribunal is adjudicating crimes which are considered as so horrific as to warrant universal jurisdiction. The International Tribunal is, in certain respects, comparable to a military tribunal, which often has limited rights of due process and more lenient rules of evidence[…].

26. *Prosecutor* v. *Tadić*, *supra* note 22, para. 19. By contrast to this decision, the Appeals Chamber in the International Criminal Tribunal for Rwanda (ICTR), in *Barayagwiza* v. *Prosecutor*, Decision, Case ICTR-97-19-AR72, 3 Nov 1999, para. 40, stated:

> The Report of the Secretary-General establishes the sources of law for the Tribunal. The ICCPR is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are however authoritative as evidence of international custom.

27. Motion Hearing, 29 October 2001, T 36-37; Mr Wladimiroff on behalf of the *amici curiae* urged the Tribunal to seek an advisory opinion from the International Court of Justice (ICJ) to avoid criticism that it was a self validating body, Transcript, pp. 48-49.

legal regime, the Tribunal itself is not part of an existing international legal regime but is free standing, a self-validating legal regime. This view is difficult to reconcile with the Secretary-General's instruction that "[i]t is axiomatic that the Tribunal must fully respect international standards regarding the rights of the accused at all stages of its proceedings".[28]

But the reasoning of the Tribunal in the *Tadić* Protective Measures Decision is not unpersuasive. Human rights principles relating to criminal trials have been developed by the international community to apply to the municipal criminal trial process. The situation within which the Tribunal operates is opposed to that which interprets the ICCPR and the ECHR. The Tribunal exercises its jurisdiction over individuals, while the human rights regime is concerned with the behaviour of States towards their nationals. The Tribunal is concerned with the most horrific crimes imaginable, the human rights regime is often concerned with much lesser abuses by the State. The Tribunal is a penal regime concerned with punishing individuals, while in the human rights regime the respondent is essentially a sovereign State, who is not subject to a penalty of imprisonment. Moreover, under the human rights regime, States parties are accorded a measure of flexibility in their adherence. Departures from established ideals are permissible where those departures can be justified by the particular circumstances of the State in question. As such, the ECtHR has developed its own form of contextual approach with yardstick concepts such as the "margin of appreciation" by which it defers to the specificities of the national jurisdiction.[29] The types of consideration relevant to these human rights bodies may not be appropriate for the Tribunal, which is free from particular municipal considerations and acting on behalf of the international community as a whole.

The reliance of the Tribunal upon context as governing the interpretation to be accorded to human rights is also not without precedent in the International Court of Justice (ICJ). In the *Nuclear Weapons* case, in response to an argument that the use of nuclear weapons would violate the "right to life" guarantee of Article 6 of the ICCPR, the ICJ reasoned that "whether a particular

28. Secretary-General's Report, para.106.

29. *Handyside* v. *United Kingdom*, Series A, Vol. 24, p. 22:

> The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.... The Convention leaves it to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.

Rasmussen v. *Denmark*, Series A, Vol. 87, p. 15:

> The Court has pointed out in several judgments that the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law.... The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.

loss of life through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life could only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[30] Essentially, as postulated by the Tribunal, both of these judicial bodies also recognise that human rights are not static concepts. They are understood by reference to the particular context in which they are applied.

If it is accepted that the rule of law at international law (defined by the *Tadić* Appeals Chamber as the obligation to adhere fully to universal human rights principles) can only be determined by reference to context, the Tribunal can avoid blanket criticism of its departure from other established judicial regimes. Nevertheless, it must be established that in the context of the Tribunal, there is a standard of protection that does meet "proper international standards". If so, the fact that the standard the Tribunal set itself in the *Tadić* Jurisdiction Decision was one of conformity to existing human rights principles, in accordance with the directive given by the Secretary-General, is rendered less problematic to the operational legality of the Tribunal. The Tribunal would adhere fully to universal human rights principles as understood within the context in which it is operating, an understanding that was not pre-existing at the time the *Tadić* Jurisdiction Decision was rendered.

This is more so because, although it has rejected the proposition that the interpretation of human rights principles as considered in other judicial regimes can be binding upon it, the Tribunal has not failed to consider universal human rights principles as developed by other bodies in determining its own concept of those rights in its criminal trial processes. In the decisions and judgments of the Tribunal, the rights of an accused as interpreted by the HRC, and as understood in the forum of the ECtHR, do have a significant role to play. In particular, the judgments of the ECtHR have become a yardstick from which the Tribunal will often reason its position. In some decisions, the Tribunal has justified its departure from interpretations of the human rights regime because the rights accorded to the accused in the municipal context are of insufficient status in the context in which it is operating. In other decisions, the Tribunal has sought to temper its failure to provide adequate protection for certain rights *vis à vis* the human rights regime by adopting the language and concepts developed specifically by that regime and attempting to apply those concepts within its own framework. This latter technique attempts to give the appearance of adherence to such standards in circumstances where the structure of the Tribunal clearly does not permit this. This approach undermines the legitimacy of the development by the Tribunal of its own set of human rights standards by highlighting the discomfort of the Tribunal in depart-

30. However, this reasoning may also be due to that fact that the prohibition is against an "arbitrary deprivation" and that determination cannot be made in the abstract but must be interpreted by reference to context. See *Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, [1996] ICJ Reports 226, para.25.

ing from the established set of human rights principles as interpreted by the human rights regime. In a sense, the real criticism here is that the Tribunal has failed to fully embrace its own reasoning that its departures from established interpretations of human rights principles are justifiable. However, as will be seen, what also undermines the proposed contextual approach of the Tribunal is the reliance on established interpretations of human rights principles to justify restricting the rights of the accused when the circumstances would seem to warrant a positive increase in those rights.

Two internationally recognised rights will be considered here: the right to be informed at the time of arrest of the nature and cause of the charge alleged, and the right to provisional release. One problem will become apparent in attempting to identify the standard the Tribunal has set for the protection of these rights. There is no doctrine of precedent in international law and different Trial Chambers have different views about how these rights should be accommodated within the structure of the Tribunal. The *ratio decidendi* of Appeals Chamber decisions is binding upon Trial Chambers, and upon the Appeals Chamber itself, which will only depart from previous decisions where there are cogent reasons in the interests of justice for doing so.[31] However, the Appeals Chamber has issued few decisions laying down comprehensive principles as to how particular rights of an accused should be respected within its processes. In the following, the standards set by the Tribunal will by necessity be distilled from the range of positions adopted by different Trial Chambers.

Right to be Informed of the Case Alleged – Challenging the Lawfulness of Arrest

A fundamental universally recognised right of any person accused of a criminal offence is the right to be informed at the time of the arrest of the "nature and cause" of the charges against him or her. This right is enshrined in Article 21(4) of the Statute of the Tribunal, which mirrors Article 14(3)(a) of the ICCPR and Article 5(2) of the ECHR. The content of this right within national jurisdictions is uncontroversial. The HRC has stated that the requirements of Article 14(3)(a) are met "by stating the charge either orally or in writing, provided that the information includes both the law and the alleged facts on which it is based".[32] Similarly, the jurisprudence of the ECtHR interprets

31. *Prosecutor* v. *Aleksovski*, *supra* note 17, para. 113

32. "General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)" UN Doc. CCPR/C/21/Add.3. The jurisprudence of the ECtHR supports the proposition that an accused will have been adequately informed of the nature and cause of the charge against him or her even in circumstances where there is a difference between the legal characterisation of the offence for which he or she is charged and that for which he or she is convicted: See *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form

this right as imposing an obligation to inform an accused of the reasons for the arrest and of any charges made. The accused must "be told, in simple, non-technical language that he can understand, the essential reasons for his arrest, so as to be able, if he sees fit to apply to a court to challenge its lawfulness".[33] It is not necessary that this information be given in writing or that it be worded in a particular way.[34] In the human rights regime this requirement serves two functions. It puts the accused in a position to challenge detention pursuant to that arrest, and provides him or her with the information required in order to prepare a defence.[35]

In the municipal criminal trial process with which the HRC and ECtHR are primarily concerned, the transmission of this information to an accused is a relatively uncomplicated matter and is easily satisfied. Crimes alleged in municipal domestic systems are generally allegations of the commission of relatively precise acts. The standard required is also fairly low because an allegation of criminality within a domestic setting is generally an uncomplicated thing to communicate. The jurisprudence of the human rights regime suggests that this obligation will only be breached if at the time of the arrest the authorities fail to communicate any reasons for that arrest.[36]

Thereof (Vagueness/Lack of Adequate Notice of Charges), IT-95-14-PT, 4 April 1997, para.16; *De Salvador Torres* v. *Spain*, Reports 1996-V, para. 33; *Gea Catalan* v. *Spain* (App. No. 19160/91), Judgment (Merits), 10 February 1995, paras. 28-29.

33. *Fox, Campbell and Hartley* v. *United Kingdom*, Series A, Vol. 182, p. 9.

34. *Lamy* v. *France*, Series A, Vol. 151, p. 17.

35. The human rights regime also imposes the obligation that any process of arrest must be carried out in accordance with a procedure "prescribed by law". This means that the deprivation of liberty itself must be undertaken in conformity with the procedural rules and on grounds which are clearly established in the substantive law of the national law and that law must be "sufficiently accessible and precise" to the individual. The procedure adopted by the national authority must be fair and proper and must be executed by an appropriate authority and not be arbitrary. This last requirement is to be interpreted broadly. Cases of deprivation of liberty provided for by the law must not be manifestly unproportional, unjust or unpredictable, the specific manner in which the arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in the circumstances of the case: See Article 9(3) of the ICCPR: "Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law"; Article 5(1) of the European Convention on Human Rights: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law": *Amuur* v. *France*, Reports 1996-III, para. 50. *Kemmache* v. *France*, Series A, Vol. 296-C, pp. 86-87; *Winterwerp* v. *The Netherlands*, Series A, Vol. 33, pp. 17-18, 19-20; *S.W.* v. *United Kingdom*, Series A, No. 335-B, pp. 41-42; *Halford* v. *United Kingdom*, Reports 1997-III, p. 1017.

36. *Moriana Hernandes Valentini de Bassano* v. *Uruguay* (No. 5/1977), UN Doc. CCPR/C/OP/1, p. 40; *Leopolda Buffo Carballal* v. *Uruguay* (No. 33/1978), UN Doc. CCPR/C/OP/1, p. 63; *Alba Pietraroia* v. *Uruguay* (No. 44/1979), UN Doc. CCPR/

In the context of the Tribunal, the satisfaction of this obligation is not such a simple matter. An accused charged with serious violations of international humanitarian law is typically alleged to have been criminally involved in a multitude of offences, over a period of time, against numerous victims and often in a wide geographic area and with a number of other participants. Because of the complexity and number of crimes alleged it is not possible to inform an accused of the "nature and cause" of the charge with the same level of simplicity as in the municipal criminal context. Accordingly, the Tribunal has adopted a much more elaborate procedure to ensure the fulfilment of this obligation.

Before an accused can be arrested by the Tribunal, the Prosecutor must prepare "an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute"[37] and have that indictment confirmed by a judge of the Tribunal.[38] The confirming judge is required to examine each count of the indictment and supporting material to satisfy himself or herself that each count contains a *prima facie* case against the accused, "in the sense that it pleads a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him on the charge".[39] Only then will a confirming judge authorise the arrest of an accused, signing a warrant of arrest to be issued to the relevant authorities.[40]

Once an arrest warrant is executed, the Prosecutor is required to serve the indictment upon the accused in a language he or she understands. Within thirty days of that service the Prosecutor must provide the accused with the supporting material upon which it relied to confirm the indictment.[41] Once this material has been served upon the accused, he or she is granted a period of

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C/OP/1, p. 76; UN Doc. CCPR/C/OP/2, p. 161; *Glenford Campbell* v. *Jamaica* (No. 248/1987), U.N. Doc. CCPR/11/Add. 1, Vol. II, p. 383.

37. Article 18(4); Rule 47(B).

38. Article 19.

39. *Prosecutor* v. *Krnojelac*, Decision on Prosecutor's Response to Decision of 24 February 1999, Case No. IT-97-25-PT, 20 May 1999, para.11.

40. If an arrest warrant issued by a confirming judge is not executed within a reasonable time, and the judge who confirmed the indictment is satisfied that the Registrar and the prosecution have taken all reasonable steps to secure the arrest of the accused, the confirming judge may then order the Prosecutor to submit the indictment to the Trial Chamber of which he or she is a member. If so ordered, the Prosecutor is required to present the evidence upon which he or she relied before the confirming judge to the Trial Chamber in a public hearing. The Trial Chamber may also request the Prosecutor to call as a witness any person whose statement was submitted to the confirming judge. If the Trial Chamber is satisfied on the evidence presented that there are reasonable grounds for the allegations made against an accused it shall make that determination and this finding justifies the Trial Chamber issuing an international arrest warrant to all States to arrest an accused in order that he or she may stand trial before it. See Rule 61.

41. Rule 66(A)(i).

thirty days in which to challenge the indictment. Challenges to the form of an indictment are matters to be dealt with by the Trial Chamber assigned to the case. It is not the function of a Trial Chamber to consider whether an indictment is defective unless there is some complaint made by the accused.[42]

On its face it would appear that the procedure adopted by the Tribunal to informing an accused of the "nature and cause" of the charge is an inherently fair one. No person will be subject to arrest without a process of confirmation by a Judge. That process should ensure that the "nature and cause" of the case against an accused is clearly and concisely stated and supportable by sufficient evidence to establish a *prima facie* case warranting the accused standing trial.[43]

As stated above, in the human rights regime, the requirement that an accused be informed of the reasons for arrest at the time of the arrest is closely aligned to the right of the accused to challenge the lawfulness of arrest and detention. Once an accused is arrested, he or she has a right to be taken before

42. *Prosecutor* v. *Krnojelac*, *supra* note 39, para. 18.

43. Article 18(4) of the Statute, Rule 47(B) and 61. The approach of the Tribunal is also ostensibly consistent with the requirements of the human rights regime that an arrest be carried out in accordance with a procedure "prescribed by law". The procedure adopted by the Tribunal for the arrest of an accused person is a procedure prescribed by laws as set out in the Statute and Rules of the Tribunal and, as was established in the *Talić* case, this procedure reflects the Tribunal's adherence to Article 9(3) of the ICCPR and Article 5(1) of the ECHR. In the *Talić* case, the accused argued that his arrest had become unlawful because he had been detained pursuant to an order of the Trial Chamber which was founded on the original indictment. This indictment now having been amended, the absence of a new order for his detention meant that his detention was without judicial basis and therefore unlawful. In making this argument, Talić relied upon Article 9(3) of the ICCPR and in particular that "no one shall be deprived of his liberty except upon such grounds and in accordance with such procedures established by law". The Trial Chamber accepted the applicability of Article 9(3) of the ICCPR to the processes of the Tribunal but rejected the argument of the accused that there was "no basis in the Tribunal's 'procedures…established by law' for his present detention". In the context of the Tribunal the procedures established in law are that a judge who confirms an indictment may issue an arrest warrant. That indictment will be served upon the accused when arrested pursuant to the arrest warrant and the accused will then be transferred to the Tribunal. Once transferred he or she "shall be detained" and may not be released except by order of a Trial Chamber. On the basis of these procedures, established at law, "the only actions by the Tribunal which are necessary to justify the detention of the accused are the review and the confirmation of the indictment and the issue of the arrest warrant". This is made clear in Article 19(2) of the Tribunal's Statute. The order made for detention on remand at the initial appearance of the accused was made purely for administrative purposes and it was based upon procedures of the Tribunal established at law and not upon the existence of the original indictment. *Prosecutor* v. *Brđanin & Talić*, Decisions On Motions By Momir Talić (1) To Dismiss The Indictment, (2) For Release, And (3) For Leave to Reply To Response Of Prosecution To Motion For Release, Case No. IT-99-36-PT, 1 February 2000, paras. 11, 19, 21.

a judicial authority to have the lawfulness of that arrest reviewed.[44] A detaining authority is required to provide an individual with recourse to a judicial authority in all circumstances. If the reviewing authority determines that the arrest was unlawful, the individual whose rights have been infringed by that arrest has an enforceable right to compensation.[45] The right of the individual to review by a judicial authority of the grounds of arrest is separate from the issue of whether that initial detention was legally justified.[46] This right stems from the Anglo-American principle of *habeas corpus*.

There is no express provision in the Statute or the Rules conferring upon an accused a right to challenge the lawfulness of arrest *per se*. Once an accused has been arrested and transferred to the Tribunal, Article 20(3) of the Statute provides merely that

> the Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

However, Rule 72 provides that an accused may do so by motion challenging the exercise of jurisdiction by the Tribunal. The scope of the jurisdiction of the Tribunal is stated in Article 1 of the Statute. It grants the Tribunal "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

Rule 72 sets out an exhaustive list of grounds upon which a motion will be considered to be a challenge to its exercise of jurisdiction:

> a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
> (i) any of the persons indicated in Articles 1, 6, 7, and 9 of the Statute;
> (ii) any territories indicated in Articles 1,8 and 9 of the Statute;
> (iii) the period indicated in Articles 1,8 and 9 of the Statute;
> any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

Pursuant to Rule 72, various grounds have been advanced to challenge the Tribunal's jurisdiction. Most have argued that the violations alleged do not breach customary international law, or are not serious violations, or that they

44. Article 5(4) of the ECHR provides that any person deprived of liberty by arrest or detention has the right to take proceedings by which the lawfulness of such deprivation of liberty will be reviewed expeditiously by a court and his release ordered if the latter decides that the detention is unlawful. See *Zamir* v. *United Kingdom*, (1985) D. & R. 42, p. 59.

45. Article 5(5) ECHR; Article 9(5) ICCPR.

46. *De Wilde, Ooms* v. *Versijp* v. *Belgium*, Series A, Vol. 12, at para.73; *Van Der Leer* v. *Netherlands*, Series A, Vol. 170-A; *Koendjbiharie* v. *Netherlands*, Series A, Vol. 185-B.

do not give rise to individual criminal responsibility under articles 7(1) or 7(3) of the Statute. Almost all of these have been dismissed and in no case has an indictment been set aside.[47]

One challenge that has yet to be fully considered is based on the alleged illegality of the arrest. The argument here is that the Tribunal should decline the exercise of jurisdiction if the presence of the accused before it is tainted with illegality because to do otherwise would sanction human rights abuses and impugn its integrity. This type of argument has been raised in three cases before the Tribunal, but the point has not been the subject of a reasoned decision.[48]

47. See for example: *Prosecutor* v. *Kvočka* et al., Decision On Preliminary Motions Filed by Mlađo Radić and Mirošlav Kvočka Challenging Jurisdiction, Case No. IT-98-30-PT, 1 April 1999, where the accused alleged the Tribunal lacked jurisdiction because allegations of sexual assault were not "extremely serious" breaches of international humanitarian law as required for the exercise of jurisdiction under Article 1 of the Statute, and because common Article 3 to the Geneva Conventions was not within the scope of Article 3 of the Statute, did not constitute customary law and did not entail individual responsibility. See also, *Prosecutor* v. *Kordić & Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, 2 March 1999; *Prosecutor* v. *Krajišnik*, *supra* note 18, in which the accused alleged that the Tribunal was contrary to fundamental principles of international law and that it violated rights guaranteed under the ICCPR. The accused claimed that Article 7(3) which imposed superior criminal responsibility violated the principle of *nullem crimen sine lege* since criminal responsibility did not attach to superiors under customary international law at the time the crimes charged in the indictment against the accused were committed but only disciplinary action. He also claimed that Articles 2 and 3 of the Statute violated that principle because under customary international law those provisions only applied to international armed conflicts and the conflict in Bosnia and Herzegovina was internal. He further argued that the conflict did not commence until 1992 and some of the crimes alleged against him were said to have been committed in 1991 and that as the Tribunal's jurisdiction was limited to acts committed in an armed conflict it had no jurisdiction to entertain those charges. The Trial Chamber rejected all of these arguments. It held that superior criminal responsibility was customary in nature, that the characterisation of the conflict was a question of fact, but that in any event Article 3 offences at customary international law applied to both internal and international armed conflicts. It also held that when an armed conflict commenced was a question of fact to be determined at trial. With respect to the general claim that the Tribunal violated rights guaranteed under the ICCPR, the Trial Chamber recited the findings in the *Tadić* Jurisdiction Decision and held that the Tribunal met all the requirements of procedural fairness and accorded the accused the full guarantees of a fair trial as set out in Article 14 of the ICCPR.

48. See *Prosecutor* v. *Mrksić, Radić*, *Šljivančanin & Dokmanović*, Decision On The Motion Of Release By the Accused Slavko Dokmanović, Case No. IT-95-13A-PT, 22 October 1997; *Prosecutor* v. *Mrksić, Radić*, *Šljivančanin & Dokmanović*, Decision on Application for Leave to Appeal by the Accused Slavko Dokmanović, Case No. IT-95-13A, 11 November 1997 (leave to appeal refused).

The Tribunal has made it clear that Rule 72 does not encompass a right to challenge the legality of arrest on the ground that there is insufficient evidence to establish the allegations made in the indictment. It will not entertain a challenge to jurisdiction on the basis that there was insufficient evidence to have justified the initial confirmation of the indictment. In the human rights regime, a challenge to an arrest on this basis is akin to a challenge that that arrest as effected was illegal. Indeed, in any judicial system an assertion that there is no evidentiary basis for an arrest is an assertion that that arrest is illegal. However, this is not how the Tribunal has considered the matter.

In the *Brđanin* case the accused bought a motion to dismiss the indictment against him alleging that none of the material presented to the confirming judge in support of the indictment supported the allegations made.[49] The accused submitted two arguments. The first was that the procedure by which an indictment is confirmed is jurisdictional and that where this procedure is not properly followed the Tribunal will not have jurisdiction. The first ground was dismissed by the Trial Chamber because the accused had not shown that the procedure of confirmation had not been properly followed. In reaching this conclusion, the question whether a Trial Chamber would have the power to review the issue, had evidence of procedural irregularity been presented, was left open.[50] However, in making this finding the Trial Chamber rejected the argument that the procedural impropriety was the confirmation of the indictment without sufficient evidentiary basis to justify that confirmation.

The second argument was that there was insufficient material to support the indictment. The Trial Chamber held that this was irrelevant to the question of jurisdiction.[51] The jurisdiction of the Tribunal was founded upon the *indictment itself.* Provided that the indictment pleaded as material facts the fundamental elements of the jurisdiction of the Tribunal established in Article 1 of the Statute of the Tribunal, the indictment was within jurisdiction.[52] It based this interpretation upon the fact that the Statute made no reference to the supporting material, requiring only that the indictment itself disclose a *prima facie* case. The reference to the supporting material was found in the Rules only and the Rules could not alter what was in the Statute.[53] As such, it held that even if it was accepted for the purposes of argument that the supporting material did not establish the *prima facie* case pleaded in the indictment, the

49. *Prosecutor* v. *Brđanin*, Decision On Motion To Dismiss, Case No. IT-99-36-PT, 5 October 1999, para. 5.

50. *Ibid.*, para. 8.

51. *Ibid.*, para. 12.

52. *Ibid.*, para. 9. The indictment must plead as material facts the fundamental elements of its jurisdiction – its competence as to subject matter (*ratione materiae*), persons (*ratione personae*), territory (*ratione loci*) and time (*ratione temporis*) which are identified in Article 1 of the Statute of the Tribunal.

53. *Ibid.*, para.12. Under Article 15 of the Statute, the Rules of Procedure and Evidence are as determined by the judges of the Tribunal.

jurisdiction of the Tribunal still depended solely upon what was pleaded in the indictment.[54] As a corollary, whether there is in fact sufficient evidence to establish the material facts pleaded in the indictment will be a matter for the Trial Chamber to determine at the conclusion of the trial.[55]

A similar approach was taken to a motion for a writ of *habeas corpus* brought by Brđanin seeking release. Brđanin based his application on the decision of the Appeals Chamber in the International Criminal Tribunal for Rwanda (ICTR) case of *Barayagwiza*, in which it had said that although a writ of *habeas corpus* was not expressly provided for in the Rules, the notion that an accused had recourse to a court to challenge the lawfulness of his or her detention was well established by the Statute and the Rules in accordance with universal human rights norms, as was the right to have the lawfulness of detention reviewed by a court.[56] (It is worth noting that in this case the writ of *habeas corpus* had been filed prior to the issuing of the indictment against the accused, the accused having been detained by a request of the prosecution without the indictment having been confirmed.)

In considering the motion, the Trial Chamber rejected the idea that it had any power to issue a writ in the name of any sovereign and proceeded to deal with it as a motion challenging the lawfulness of detention.[57] In doing so the

54. *Ibid*., para. 15.

55. *Ibid*., para. 23. See also *Prosecutor* v. *Brđanin & Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, Case No. IT-99-36-PT, 20 February 2001, para. 15; *Prosecutor* v. *Došen & Kolundžija,* Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000, para. 21; *Prosecutor* v. *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 12; *Prosecutor* v. *Krstić*, Decision on Defendant's Preliminary Motion on the Form of the Amended Indictment, Counts 7-8, 28, Case No. IT-98-33-PT, 28 January 2000.

56. *Prosecutor* v. *Brđanin & Talić*, Decision On Petition For A Writ of Habeas Corpus On Behalf of Radoslav Brđanin, Case No. IT-99-36-PT, 8 December 1999, paras. 1-6.

57. *Ibid*., paras. 6, 14. The accused argued that his detention was unlawful as there was no *prima facie* evidence to support the allegation against him, and he asked the prosecution to produce that material. He also argued that the charges upon which he had been arrested were not the charges against him because the prosecution had made an application to the confirming judge to amend the indictment. This constituted a denial of his right to be informed of the charges upon which he had been arrested: paras. 4-7. The Trial Chamber rejected the motion holding that the existence of *prima facie* evidence was irrelevant to the lawfulness of the detention in accordance with its view expressed above, and that the application to amend the indictment was not a violation of the right of the accused to be informed of the nature and cause of the case against him. Upon his arrest the accused had been informed of the charges that justified his initial detention and the application to amend the indictment did not mean that the charges upon which he had been arrested where no longer the charges against him. However, the Trial Chamber did not exclude the possibility that in some circumstances the failure to comply with the obligation to inform the accused promptly of the charge against him could lead to a dismissal of the indictment.

Trial Chamber claimed that its practices were in full conformity with the requirements of the human rights regime. The accused had been able to challenge the lawfulness of his detention by way of motion, either pursuant to Rule 72, if the challenge was to jurisdiction, or pursuant to Rule 73, if it was not.[58] As a challenge to the lawfulness of detention, the accused's motion was not a challenge to jurisdiction of the Tribunal under the terms of Rule 72, but was made pursuant to the more general provisions of Rule 73. In effect the Trial Chamber interpreted the motion as not being capable of challenging the exercise of jurisdiction by it, even though the challenge being asserted was that there was no evidentiary basis to justify the arrest of the accused by the Tribunal.

As is clear from these decisions, in the context of the Tribunal the process of confirming the indictment prior to the arrest of an accused has been interpreted as subsuming the right to challenge the lawfulness of the arrest on that basis.[59] The process of confirmation is determinative of an accused standing trial before the Tribunal, unless the prosecution seeks a withdrawal of that indictment and the Tribunal permits that withdrawal.[60] As was stated in the *Milošević* case, the purpose of confirming the indictment "is to determine whether there is a fit case to justify the commencement of the proceedings against the accused on the indictment, and to ensure that there is material to support the allegations in it, thus preventing the commencement of proceedings for which there is no support".[61] It was also noted in that decision that the performance of this task has been equated with that "performed by a grand jury or committing magistrate under the common law or a *juge d'instruction* under some civil law systems".[62]

58. *Ibid*., para. 14.

59. In common law systems a preliminary hearing will be held to determine whether an accused should stand trial after arrest at which time an accused will be permitted to challenge the case alleged. Similarly, in most civil law systems whether an accused should be required to stand trial will be determined after arrest upon consideration of the contents of the case file and this will include consideration of any statements given by the accused challenging arrest. *Prosecutor* v. *Kordić* et al., Decision on the Review of the Indictment, Case No. IT-95-14-I, 10 November 1995; *Code de procédure pénale*, Articles 212, 214; *Ley de Enjuiciamiento* Criminal, Article 384; *Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes* in Strafsachen, Vol. 23, p. 306.

60. Rule 51 states:

> (A) The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance an indictment may only be withdrawn by motion before that Trial Chamber pursuant to Rule 73.

61. *Prosecutor* v. *Milošević*, Decision on Review of Indictment, Case No. IT-01-51-I, 22 November 2001, para. 2.

62. *Ibid*.

However, by denying an accused the right to challenge the exercise of jurisdiction by the Tribunal on the ground that he or she is not a person who should have had an indictment confirmed against himself or herself, the Tribunal is effectively denying an accused a fundamental right of challenge to the legality of his or her arrest accorded by the human rights regime. In that regime an accused has a right to challenge arrest on the ground that there was no "reasonable suspicion" justifying the deprivation of liberty and to have that challenge determined by a lawful authority. If there is no reasonable evidential basis to justify that arrest then it is unlawful. However, Rule 72 refers specifically to challenges made on the basis that "an indictment does not relate to", making it clear by the reference to the word "indictment" that it is only what is stated in that document that may be challenged. Accordingly, the Rules have been interpreted as not providing for the setting aside of an indictment on the ground that it was improperly confirmed and there is nothing in the Statute which expressly provides otherwise.[63]

However, despite the reliance of the Tribunal upon the confirmation process as justifying the absence of an avenue of reviewing the confirmation of an indictment, other Trial Chambers have been clearly troubled by a perceived disparity between the approach of the Tribunal to the arrest of an accused and the procedure used by the human rights regime. To diminish this disparity they have attempted to accommodate the procedure of the human rights regime into the structure of the Tribunal, even though it is apparent that the two approaches are, on their face, incompatible.

For example, Article 5(1)(c) of the ECHR provides that an individual may only be detained where there is reasonable suspicion that a criminal offence has been committed, or if it is necessary to prevent a criminal offence or to prevent flight after an offence has been committed. When the reasonable suspicion ceases to exist, that detention becomes unlawful.[64] On the basis of the requirements of this provision, Trial Chambers have occasionally held that the process of confirmation does not erode the right of the accused to challenge the reasonableness of his or her detention on the basis of an absence of sub-

63. In *Prosecutor* v. *Delalić*, Judgment, Case No. IT-96-27-A, 20 February 2001, para. 607, however, the Appeals Chamber considered an argument by the accused Landžo of prosecutorial bias. He argued that he was the subject of a selective prosecution policy conducted by the prosecution and as such the indictment should never have been issued against him. The Appeals Chamber dismissed the challenge finding that Landžo had failed to establish his assertions. In this respect the Appeals Chamber stated:

> The burden of proof rests on Landžo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. Landžo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution has failed to prosecute similarly situated defendants.

64. *Fox, Campbell and Hartley* v. *United Kingdom*, *supra* note 33, p. 16.

sisting reasonable suspicion for that arrest. In contrast to the decisions above, the material behind the indictment is subject to review if the detention of an accused pursuant to that indictment is to remain justified. In these decisions the challenge considered is not to the exercise of jurisdiction by the Tribunal, but to its continued detention of the accused pursuant to that indictment on the ground that the prosecution case is of insufficient strength to warrant that continued detention prior to that exercise of jurisdiction. However, the fact remains that in these decisions the Tribunal has accorded an accused a right of review of the confirming material, a right which the decisions above deny is available to an accused under the Statute and Rules of the Tribunal.

This view was first propounded in a decision in the *Čelebići* case. The Trial Chamber held that "to remain lawful the detention of the accused must be reviewed so that the Trial Chamber can assure itself that the reasons justifying detention remain". It stated that it must review "in a cursory manner" the strength of the case of the prosecution in deciding whether the accused has shown absence of reasonable suspicion, keeping in mind that it was not the time to consider the merits of the case.[65] In this respect the accused was permitted to adduce evidence additional to that which supported the confirmation of the indictment in accordance with the practice of the human rights regime that "the review of the continued necessity to detain [...] be judged according to the circumstances and facts as known at the time of the review".[66]

In adopting this approach the Trial Chamber reasoned that the process of review granted by the human rights regime was applicable to the Tribunal pursuant to Rule 47(A).[67] It requires the Prosecutor to be reasonably satisfied that an accused has committed an offence before submitting an indictment to a reviewing judge for confirmation. The Trial Chamber reasoned that this requirement was akin to the "reasonable suspicion" requirement of the human rights regime and as such the Tribunal was required, as the human rights regime, to satisfy itself that that initial basis justifying confirmation of the indictment and arrest continued throughout the period of detention.[68] In contrast to the human rights regime, however, the burden was placed upon the accused to show absence of reasonable suspicion, this burden being justified by the context in which the Tribunal must operate.[69]

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65. *Prosecutor* v. *Delalić*, Decision on Motion For Provisional Release filed by the Accused Zejnil Delalić, Case No. IT-96-27-T, 25 September 1996. In *Delalić*, the Trial Chamber adopted the interpretation of the human rights regime holding that a reasonable suspicion presupposes "existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".
66. *Ibid*., para. 24.
67. *Ibid*., paras. 21-24.
68. *Ibid*., paras. 23-24.
69. This issue is discussed in the section dealing with undue delay and provisional release, *infra*.

This approach was subsequently followed in *Drljaca.*[70] The accused argued that his continued detention was unjustified because of an absence of reasonable suspicion that he committed the crimes. In examining the cogency of the case of the prosecution, the Trial Chamber found that the accused had failed to discharge his burden of *proving an absence of reasonable suspicion* that he had committed the crimes charged and that the evidence submitted was inadequate to rebut the *presumption of a reasonable suspicion* which exists by virtue of the confirmation of the indictment against the accused.[71]

By this approach the Trial Chambers have attempted to reconcile the actual practice of the Tribunal with the perceived obligations imposed by universal human rights principles by attempting to fit the requirements of the human rights regime within the structure of the Tribunal. In this respect, in contrast to the other decisions, the Trial Chamber did not consider that the absence of an express provision for the review of the confirming material precluded it from accommodating this process within its provisions. The power of the Tribunal to take such an approach inheres in the power of any court to maintain the integrity of its processes and is consistent with the obligation that it respect the rights of the accused at all stages of its proceedings.[72] Even so,

70. He argued that the prosecution had failed to lead any evidence of *mens rea* and that specific intent could not reasonably be inferred from the merely circumstantial facts of the position of the accused on the Municipality of Prijedor Crisis Staff, the body which the prosecution alleged was responsible for the criminal activities alleged against him. He claimed that the confirming judge erred in confirming the indictment without having evidence of any intent on his behalf. The Trial Chamber rejected the argument holding that there was no requirement that the prosecution prove *mens rea* at the pre-trial stage of the proceedings to establish the existence of a reasonable suspicion. Similarly it held that there was no requirement that the prosecution prove *mens rea* or intent to secure the confirmation of an indictment. *Prosecutor* v. *Kovačević*, Decision on Defence Motion for Provisional Release, Case No. IT-97-24-PT, 20 January 1998, para. 16.

71. *Ibid.*, para. 21; *Prosecutor* v. *Kupreškić* et al., Decision on Motion for the Provisional Release of Zoran and Mirjan Kupreškić or Separation of Proceedings, 24 April 2001, Case No. IT-95-16-A, 24 April 2001. In contrast to the *Drljaca* decision, Zoran and Mirjan Kupreškić sought provisional release pending the hearing of their appeal on the basis of material disclosed to them which they alleged to be exculpatory. In effect they were arguing that because of the disclosure of this material there was no longer evidence of reasonable suspicion that would justify their continued detention. The Appeals Chamber rejected the motion without issuing a reasoned decision, but noted that the material relied upon would have to be admitted for consideration on appeal by way of a motion for additional evidence under Rule 115 and such motion had not yet been considered by the Appeals Chamber.

72. The Tribunal has seen fit to take such an approach in other circumstances where it has perceived that its structure does not provide for adequate protection of individual rights. The most controversial is the decision of the Appeals Chamber in *Prosecutor* v. *Tadić*, Appeal Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-AR77, 27 February 2001, in which

this approach cannot detract from the fact that the structure of the Tribunal does not permit the establishment by an accused of an insufficient basis for continued detention to be a means by which the accused can seek to have the indictment set aside. Accordingly, the appearance of consistency intrinsic to this approach is perfunctory.

Further, as the structure of the Tribunal does not provide for other than a perfunctory approach, these decisions actually undermine the legitimacy of the procedures the Tribunal has adopted. The Tribunal does not have to adhere to procedures adopted for the protection of human rights in domestic regimes. What it must do is show how the procedures it has adopted do not derogate from the rights of the accused. As established in *Brđanin,* the right of the accused not to be deprived of liberty arbitrarily is meant to be sufficiently protected by the process of confirmation. Ostensibly the Tribunal accords the same type of protection as the human rights regime by an inversion of the procedures set down by that regime. This process supposedly performs the same function as a review of arrest undertaken after the fact by a judicial authority in a municipal jurisdiction.[73] As such, in the development of its contextual approach to universal human rights principles, the Tribunal should be concerned with showing how the procedure it has adopted is justified by the context in which it must work.[74] The fact that the Tribunal must rely upon the co-operation of other States or other international bodies to effect the arrest of an accused is the foremost justification for the approach it has adopted. Whether this factor is sufficient, however, remains open to question. It may be justified if the process of confirmation legitimately subsumes the right of the accused. This may be established by demonstrating that it is itself beyond dispute on human rights grounds. However, it would seem that by this process the Tribunal in fact encroaches further upon the rights of the accused.

It is to be expected that the absence of a process of review of the grounds of arrest would mean that the importance of an indictment clearly stating the

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a majority determined that the applicant, a prior counsel of the accused *Tadić*, had a right of appeal to another Appeals Chamber from a finding of the first Appeals Chamber that he was guilty of contempt. This finding led to a strong dissent by Judge Wald, who stated that "the goal of providing an appeal from all convictions for criminal contempt is an eminently worthy one. However, it must be accomplished without wrenching all meaning from the constraints on the jurisdiction of the Appeals Chamber as set out in the Statute and the Rules." In her view to do otherwise was in violation of the rule of law. As she observed, "the rule of law also requires that courts acknowledge the statutes and rules that bind them." Separate Opinion of Judge Wald Dissenting From the Finding of Jurisdiction, 27 February 2001, pp. 4-5.

73. See *Prosecutor* v. *Ademi*, Order on Motion for Provisional Release, Case No. IT-01-46-PT, 20 February 2002, para. 26, where the absence of the process of review was explicitly acknowledged.

74. The co-operation of these parties cannot be invoked without the issuing of an arrest warrant directed to them by the Tribunal. The process of confirmation is to ensure that that warrant is issued with good reason.

nature and cause of the case against an accused cannot be overemphasised – indeed the very jurisdiction of the Tribunal over the accused depends upon it. Accordingly, although an accused is not permitted to challenge the lawfulness of initial detention pursuant to a confirmed indictment, he or she is permitted by Rule 72 to challenge the form of the indictment itself. In most cases accused have done so on the basis that it does not inform them of the nature and cause of the charges. However, it was established by the Appeals Chamber in the *Kovačević* case, purportedly in accordance with human rights jurisprudence, that the right of an accused to be informed promptly of the charges will only be violated if there has been a failure to charge him or her with any crime at all at the time of arrest.[75] Following this decision of the Appeals Chamber, the Trial Chamber in the *Talić* case, in which the accused sought the dismissal of the indictment against him because of the long delay between his arrest and the issuing of the indictment in proper form, held that "[a]rguments regarding the form of the indictment are…irrelevant to the question of whether the accused had been promptly informed of the charges against him in accordance with Article 21(4)(a) of the Statute".[76]

By interpreting the level of information to be provided to an accused by the indictment at such a low standard, these decisions have the effect of eroding the protection accorded to an accused by that process of confirmation of the indictment. That process is meant to ensure that the facts stated in the indictment establish, upon the evidence adduced in support of that indictment, the *actual* case against the accused. By requiring such a low standard of information to be provided by the indictment these decisions impinge upon the potential of rights accorded to an accused to challenge the jurisdiction of the Tribunal upon the basis of the facts pleaded in the indictment. As a corollary it begins to appear as if the dominant purpose behind the confirmation of an indictment is to secure the presence of the accused before the Tribunal. All other matters, including the rights of the accused to be properly informed so as to be able to prepare a defence, are secondary to this main purpose. When considered against the absence of a right to challenge the confirmation of an indictment on the basis that it is without evidentiary basis, it appears that the Tribunal does not, as it claims, provide the accused with any effective avenues in which to challenge arrest. In this regard it is perhaps coincidental that the jurisdiction of the Tribunal as expressed in Article 1 of the Statute is over "persons responsible for serious violations of international humanitarian law" and not persons alleged to be responsible for those violations.[77]

Further, however, the reliance of the Tribunal upon the human rights regime to determine the limits of the right of the accused to be informed of

75. *Prosecutor* v. *Kovačević*, Decision Stating Reasons For Appeal Chamber's Order of 29 May 1998, Case No. IT-97-24-PT, 2 May 1998, paras. 35-36.

76. *Prosecutor* v. *Brđanin & Talić*, Decision On "Request For Dismissal" Filed by Momir Talić, Case No. IT-99-36-PT, 29 November 2001, para. 5.

77. Cf. the French text "… les personnes présumées responsables de violations… ".

the "nature and cause" of the case at the time of arrest may be misplaced. The context in which the human rights regime has determined that the right of an accused to be informed of the charges at the time of arrest will only be violated where no reasons are given for that arrest at all, is one in which an individual is arrested within a domestic jurisdiction to answer charges alleged to have been committed within that jurisdiction. This is a very different situation to arrests by the Tribunal. Accused who appear before the Tribunal are arrested in their country of residence and then removed, thousands of miles from that place of arrest, to be prosecuted at The Hague. Comparable circumstances considered by the human rights regime are not cases of simple domestic criminal prosecution but cases of extradition from one jurisdiction to another for criminal prosecution. In most instances extradition cases are governed by bilateral treaty agreements between individual States and, if an accused is extradited in violation of the provisions of agreed instruments, it is the rights of the State that are violated by the infringement, and not the rights of the individuals as such. However, in these types of cases, where it is established that the State authorities have colluded in the circumvention of the requirements of an extradition agreement, it is well established by the human rights regime that it is an egregious violation of the rights of an individual to extradite an accused from one jurisdiction for trial in another without informing that individual of the actual reasons for that arrest. It is also fairly well established in the human rights regime that it is an egregious violation of the rights of an individual to justify an extradition from the place of arrest on the basis of one allegation and then to prosecute in the jurisdiction to which he or she has been extradited for another offence.[78] Where these types of violations have been established courts have considered that they have a discretion to refuse the exercise of jurisdiction over an accused on the basis that to do so would countenance behaviour that threatens basic human rights, or the rule of law, and brings their own proceedings into disrepute.[79] Accordingly, if the Tribunal is to justify its holdings with respect to the right of an accused to be informed of the allegations at the time of arrest by reference to the requirements of the human rights regime, it must be able to do so by reference to the more comparable extradition-type cases, and not those involving purely domestic criminal proceedings. It is clear that it would not easily be able to do so.

However, although relying upon the human rights regime to support its approach the Tribunal also purports to be able to depart from the requirements of that regime because of the different context in which it operates.

78. See generally, J. Paust *et al.*, *International Criminal Law, Cases and Materials*, 1996, Chapter 5, "Obtaining Persons Abroad", pp. 281-498.

79. *R.* v. *Horseferry Magistrates' Court: ex parte Bennett*, [1994] 1 AC 42; *R.* v. *Latif; R.* v. *Shazad*, [1996] 1 All ER 353; *R.* v. *Hartley,* [1978] 2 NZLR 199; *United States* v. *Alvarez-Machain*, 504 US 655 (1992); *United States* v. *Toscanino*, 500 F.2d 267; *United States* v. *Cordero*, 668 F.2d 32 (1981); *United States ex rel Lujan* v. *Gengler*, 510 F.2d 62 (1975); *Beahan* v. *State*, [1992] LRC (Crim) 32; *State* v. *Ebrahim*, [1991] 2 SALR 553.

In the decisions of the Tribunal concerning the form of the indictment, a common theme is that the prosecution cannot be expected to provide an accused with the specificity of information generally provided in domestic criminal proceedings.[80] This is because of the complexity of the subject matter with which the Tribunal is concerned, and the absence of guiding legal precedents. It is for these reasons that the Tribunal has considered that it is justified in placing little emphasis on the need to ensure that an indictment will only be confirmed, and an arrest warrant issued, when that indictment is in proper form. Rather than allowing this complexity to provide a platform for the accused to challenge the exercise of jurisdiction by the Tribunal, it has used this complexity to justify a restriction of the rights of the accused to clarity in the indictment. Moreover, it is by reference to this complexity that the Tribunal has allowed the Prosecutor a large measure of flexibility in the pleading of indictments.

For example, the Prosecutor has not been required to identify the precise basis of criminal responsibility alleged under Articles 7(1) and/or Article 7(3) of the Statute,[81] to plead factual allegations in detail,[82] to identify the requisite

80. Article 6(3)(a) of the ECHR requires that this information be given "in detail". The level of detail actually required is unclear. It need not be "in minute detail" but it must be of sufficient detail so that the accused can adequately prepare a defence. See generally: *Offner* v. *Austria (*Appl. 524/59), (1960) 3 *Yearbook* 322, p. 344); *X.* v. *Austria*, (1981) 22 D. & R. 140, p. 142; *Brozicek* v. *Italy*, Series A, Vol. 167, p. 31; *X.* v. *Federal Republic of Germany* (App. No. 1169/61), (1963) 6 *Yearbook* 520, at p. 584.

81. *Prosecutor* v. *Hadžihasanović*, Decision of the Form of the Indictment, Case No. IT-01-47-PT, 7 December 2001, para. 18-19; *Prosecutor* v. *Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 189; *Prosecutor* v. *Kupreškić*, Case No. IT-95-16-T, Judgment, 14 January 2000, para. 746; *Prosecutor* v. *Kunarac*, Judgment, IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 398; *Prosecutor* v. *Krstić*, Judgment, IT-98-33-T, 2 August 2001, para. 602; *Prosecutor* v. *Krajišnik*, Decision on Motion from Momčilo Krajišnik to Compel the Prosecution to Provide Particulars, Case No. IT 00-39 & 40 PT, 8 May 2000; *Prosecutor* v. *Delalić*, Decision On Application for Leave to Appeal by Hazim Delić, Defects in the Form of the Indictment, Case No. IT-96-21-PT, 6 December 1999, paras. 30-31; *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based on Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, 4 April 1997*; Prosecutor* v. *Došen & Kolundžija,* Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000; *Prosecutor* v. *Kordić & Čerkez*, Decision on Joint Motion to Strike Paragraph 20 and 22 and all References to Article 7(3) as Providing a Separate or an Alternative Basis for Imputing Criminal Responsibility, Case No. IT-95-14/2-PT, 2 March 1999; *Prosecutor* v. *Delalić* et al., Judgment, IT-95-21-T, 16 November 1998, para. 343.

82. *Prosecutor* v. *Kvočka* et al., Decision on Defence Preliminary Motions on the Form of the Indictment, Case No. IT-98-30-T, 12 April 1999, para. 17; *Prosecutor* v. *Blaškić*, *ibid.*, 4 April 1997.

mens rea[83] or to specify the legal elements of offences alleged.[84] The Prosecutor has been permitted to plead cumulatively,[85] and to plead ostensibly inconsistent factual allegations between indictments.[86] As a result, indictments appear to have relied upon a form of *à la carte* justice. The Prosecutor has pleaded as broadly as possible and, in some cases, shaped the precise contours of her case during trial depending upon how the evidence turns out.[87] This has led a number of accused to complain on appeal that they were denied the right to be informed of the nature and cause of the case because of the vagueness of the initial indictment.[88] In one case this ground of appeal has been argued successfully.[89]

Although some of the pleading practice of the prosecution may have been justifiable in the initial stages of the history of the Tribunal, when the basis of responsibility and precise legal elements of offences were relatively undefined, these justifications are no longer present. But further, not all of these practices

83. *Prosecutor* v. *Kordić & Čerkez*, Decision on Defence Application for Bill of Particulars, Case No. IT-98-30-T, 2 March 1999; *Prosecutor* v. *Kvočka* et al., *ibid.*, paras. 34-36.

84. *Prosecutor* v. *Krstić*, Decision on Preliminary Motion on the Form of the Amended Indictment, Count 7-8, Case No. IT-98-33-PT, 28 January 2000, p. 5; *Prosecutor* v. *Naletilić*, Decision on Vinko Matinović Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, Case No. IT-98-34-PT, 14 February 2001, p. 10; *Prosecutor* v. *Delalić*, Decision on Application for Leave to Appeal By Hazim Delić, (Defects in the Form of the Indictment), Case No. IT-95-21-PT, 6 December 1996, paras. 25-31; *Prosecutor* v. *Došen & Kolundžija*, Decision on Preliminary Motions, Case No. IT-95-8-PT, 10 February 2000.

85. *Prosecutor* v. *Kupreškić*, *supra* note 81, paras. 721-727; *Prosecutor* v. *Krstić*, *ibid.*, pp. 5-7; *Prosecutor* v. *Naletilić*, *ibid.*, p. 10; *Prosecutor* v. *Brđanin & Talić*, *supra* note 55, paras.37-41; *Prosecutor* v. *Furundžija*, Decision of the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment Lack of Subject Matter Jurisdiction, Case No. IT-95-17/1-PT, 29 May 1998, para. 12.

86. *Prosecutor* v. *Hadžihasanović*, Decision on Form of the Indictment, Case No. IT-01-47-PT, 7 December 2001, paras. 36-38. In this case the Trial Chamber held that it was within the Prosecutor's discretion to plead whatever version of events she wished "within the confines of the Statute and the Rules, even if that version is diametrically opposed to versions it put forward in other cases" (at paras. 36-38).

87. In civil law systems it would appear that the pleading practices of the Prosecutor are not as objectionable as they may be in common law jurisdictions, because of the role of the investigating judge. However, the Tribunal has adopted an adversarial system of trial which requires the parties to be in control of the cases they bring. The issue here is how these practices impact upon the ability of the accused to prepare a defence to the charges alleged.

88. See generally *Prosecutor* v. *Kupreškić*, Judgment, Case No. IT-95-16-A, 23 October 2001. This decision has arguably set new standards for the pleading of indictments at the Tribunal.

89. *Ibid.*

are explicable by reference to the absence of guiding precedents, or the complexity of the subject matter with which the Tribunal must deal. As such, in sanctioning these pleading practices the Tribunal has exhibited a sympathetic approach to the difficulties faced by the prosecution in bringing the first truly international prosecutions for war crimes. No doubt this is partly because of its desire to ensure that it successfully achieves the objects of its mandate. However, it has meant that less than full consideration has been given to the fact that an accused labours under the same type of disadvantages. The concessions made to the prosecution have ultimately been at the expense of the right of the accused to be adequately informed of the case against him or her.

It is noteworthy in this respect that in domestic jurisdictions where proceedings alleged against an accused are of great complexity, particularly those of the common law where jury trials are common, the courts have developed techniques to counter some of these complexities. In doing so they have often reasoned in terms of placing an undue burden upon a jury, but the difficulties faced by an accused in defending the charges have also figured in their considerations. An example relevant to proceedings at the Tribunal is the prohibition against overloading of indictments.[90] To be fair, the Tribunal has developed some techniques aimed at countering the complexity of its proceedings,[91] but

90. See *Prosecutor* v. *Milošević*, Decision on Prosecution's Motion for Joinder, Case No. IT-99-37-PT; IT-01-50-PT; IT-01-51-PT, 13 December 2001. Following the approach of these courts similar considerations were identified as relevant by the Trial Chamber in determining the prosecution's application for the joinder of the three indictments against the accused. The Trial Chamber held that where the prosecution has satisfied the terms of Rule 49, which set out the requirements to be met before crimes can be joined, relevant to its discretion as to whether or not joinder should be permitted was whether the accused's right to a fair hearing would be prejudiced by that joinder (at para. 38). The Trial Chamber formed the view that to require the accused to defend himself "on the contents of three indictments together would be onerous and prejudicial, particularly in the case of the Kosovo indictment and its different circumstances" (para. 50). On appeal by the Prosecutor, the Appeals Chamber overturned the refusal of the Trial Chamber to grant the joinder application on the ground that it erred in its interpretation of Rule 49. It considered that although the effect of the joinder upon the rights of the accused to a fair trial was a relevant fact to the exercise of the discretion that in the circumstances before it such prejudice had not been established; *Prosecutor* v. *Milošević*, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002, paras. 13-18.

91. See, for example, *Prosecutor* v. *Milošević,* Trial Transcript, 10 April 2002, pp. 2782-2784, 3029; *Prosecutor* v. *Galić*, Decision, Case No. IT-98-29-AR73, 16 November 2001. In both of these cases, time limits were imposed on the presentation of the parties' cases and were appealed by the Prosecutor. The imposition of such restrictions is explicitly provided for in Rule 73*bis*. In *Galić* the Appeals Chamber allowed the appeal because the Trial Chamber had erred in imposing restrictions as the issues in the case had not yet been clearly defined (Decision on Application by Prosecution for Leave to Appeal, 14 December 2001). Leave to appeal was refused in *Milošević*. In other cases the Trial Chamber has suggested to the prosecution that it consider reducing the number of counts alleged, or that it

in general it has accepted that complexity as part of its obligation to the international community to provide a historical record of the crimes that occurred in the former Yugoslavia. It is questionable, however, whether this object is more laudable than its obligation to ensure that the rights of the accused are respected at all stages of its criminal proceedings. To place other considerations before those of an accused may cause the historical record of the Tribunal to be judged harshly in the future. Such a possibility should be vigilantly guarded against.

However, there are recent signs that the Tribunal is beginning to appreciate that its pleading practices are not merely manifestations of the complexity of the subject matter and ill-defined offences with which the Tribunal must deal. As the Tribunal has become more comfortable with its jurisdiction, and as the international community has begun to put pressure upon the Tribunal to complete its mandate, it has begun to accept that part of the problem of the vagueness of indictments is due to the fact that the prosecution often does not know what its case is with sufficient clarity.[92] Acknowledging this factor, and by reference to the rights of the accused to be informed of the "nature and cause" of the case, recent decisions have evidenced a shift in the attitude of the Tribunal with regard to the measure of flexibility to be accorded to the Prosecutor in the pleading of the indictment. The Prosecutor has been directed to identify with greater specificity the precise heads of responsibility under the provisions of the Statute upon which she relies, to specify with greater detail the legal elements of the offences she seeks to prove,[93] and to provide greater specificity as to the factual basis of offences charged.[94] In a recent decision[95] the Appeals Chamber emphasised that the prosecution is "expected to know its case before it goes to trial" and held that "[i]t is not acceptable to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds".[96] However, in making these statements the Appeals Chamber was not merely summarising the established jurisprudence of the Tribunal, it was

consider abandoning charges under Article 2 of the Statute when the offences are sufficiently covered by Articles 3 and 5 of the Statute, so as to avoid the necessity of proving that the armed conflict was international in character.

92. *Prosecutor* v. *Brđanin & Talić*, *supra* note 55, para. 11.

93. *Prosecutor* v. *Brđanin & Talić*, Decision on Form of Third Amended Indictment, Case No. IT-99-36-PT, paras. 19-20; *Prosecutor* v. *Ljubicić*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-00-14-PT, 15 March 2002, p. 6.

94. *Prosecutor* v. *Hadžihasanović* et al., Decision on Form of Indictment, Case No. IT-01-46, 7 December 2001, paras. 31-35.

95. The Appeals Chamber in *Kupreškić* acknowledged that "an indictment, as the primary accusatory instrument must plead with sufficient detail the essential aspects of the Prosecution case. If it fails to do so, it suffers from a material defect". *Prosecutor* v. *Kupreškić*, *supra* note 88, para. 114.

96. *Prosecutor* v. *Kupreškić*, *supra* note 88, para. 92.

setting down new guidelines as to what that jurisprudence required from the prosecution.[97] Following this decision a recent judgment of the Tribunal refused to consider the accused's liability under heads of responsibility not specifically pleaded, and the accused's liability for offences not specifically pleaded.[98] In doing so it signalled a clear departure from earlier practices.

Nonetheless, the Tribunal has been slow in recognising that by its initial sanctioning of such broad pleading practices on the part of the prosecution, the right of the accused to be informed of the "nature and cause" of the case, and his or her ability to challenge the exercise of jurisdiction by the Tribunal upon that basis, has been considerably undermined. This is against a backdrop in which the Tribunal relies upon its confirmation process as adequately providing for, and subsuming, the right of an accused to challenge arrest on the ground that it lacks an evidentiary basis. The approach adopted by the Tribunal to the arrest of the accused is made necessary by the fact that it must have the co-operation of other entities in effecting arrests. However, for that approach to accord with a rule of international law, the Tribunal must adhere to its obligation to ensure that the rights of the accused are sufficiently protected by that process if it is to rely upon it as restricting other rights an accused is entitled to under the framework of the human rights regime.

Although there are signs of change the Tribunal has not, as yet, established pleading practices that are commensurate with its interpretation of the requirements of a rule of law on the international plane. These practices do not "provide all the guarantees of fairness, justice and even-handedness" to an accused at the Tribunal. By demanding that the prosecution plead its indictments with greater clarity it is not only the accused that benefits. By forcing the prosecution to have a clear idea of what its case is at the indictment stage the Tribunal is facilitating the task of the prosecution to prove its case. It goes without saying that it is much easier to establish a case when you know what that case is at the outset. Moreover, by requiring a higher standard from the prosecution in the pleading of its indictments the integrity of the practices adopted by the Tribunal will be better protected. If an accused's rights are to be sufficiently protected within those practices it is essential that those procedures be beyond dispute.

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97. In *Brđanin & Talić* the Trial Chamber developed a body of jurisprudence on the form of the indictment. However, the standards set by these decisions were not standards typically adopted by other Trial Chambers. Indeed the prosecution alleged that they were "out of line" with the jurisprudence of the Tribunal. See for example, *Prosecutor* v. *Brđanin & Talić*, *supra* note 55; *Prosecutor* v. *Brđanin & Talić*, *supra* note 93.

98. *Prosecutor* v. *Krnojelac*, Judgment, Case No. IT-97-25-T, 15 March 2002, paras. 84-86, 476. By way of contrast, see *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 602, where the Trial Chamber determined that it was entitled to consider the accused's liability for the crimes alleged pursuant to a joint criminal enterprise where this basis of liability had not been pleaded in the indictment.

Undue Delay and Provisional Release

Another fundamental right of an accused is the right to be tried without undue delay, contained in Article 21(4)(c) of the Statute of the Tribunal, which mirrors Article 14(3)(c) of the ICCPR and Article 5(3) of the ECHR. On the issuing of the judgment in the *Krnojelac* case, the accused informed the Trial Chamber that he considered the day a special one. He had been in custody 1,317 days waiting for the case against him to be determined. *Krnojelac* was not an unusual case. In most instances an accused will wait a number of years before his or her case comes to trial and often a comparable time for any appeal proceedings. However, trials before the Tribunal are extremely complicated matters and the reasons for delays are many. In most cases delays will be caused by preliminary motions alleging defects in the form of the indictment. In the case of *Brđanin & Talić* there were no less than five challenges to the form of the indictment by the accused Talić.[99] In nearly all of those challenges, bar the final one, the Trial Chamber upheld some of the objections of the accused. As such it took the prosecution over two years from the time of his arrest to issue the indictment against the accused in proper form. In response to this delay Talić sought to have the proceedings against him dismissed. In rejecting his motion the Trial Chamber stated that "[f]ar from infringing the rights of the accused, the Trial Chamber has rigorously upheld his right to know and understand the case that he must meet at trial".[100] However, it is not so apparent that the rights of the accused had not also been infringed by the prolonged delay in securing that indictment in proper form.

In most cases delays are also inevitably caused by problems associated with acquiring and preparing the evidence to be heard at the trial. Orders will have to be sought from the Tribunal for the seizure of material relevant to the case, or agreements reached with the relevant authorities to provide access to materials. Most documents sought to be relied upon at the trial will have to be translated, into either English. French or Bosnian/Serbian/Croatian, for the use of the prosecution, accused and the Tribunal. The documentary evidence sought to be relied upon by the prosecution will be voluminous and delays in translations very common.[101] Delays are also caused by applications made for access to material already considered by the Tribunal in other trials. It is not uncommon for witnesses at the Tribunal to testify with protective measures and for all parties to be subject to orders of non-disclosure with respect to witness statements and other evidence tendered at that trial. To gain access to such material orders have to be sought from the Tribunal to vary protective

99. *Prosecutor* v. *Brđanin & Talić*, Decision on "Request For Dismissal" Filed by Momir Talić on 29 November 2001, Case No. IT-99-36-PT, 22 January 2002.

100. *Ibid.*, para. 8.

101. *Ibid.*, para. 13.

measures. Sometimes it is a condition of access that witnesses be contacted and their permission secured for that disclosure to occur.

Delays in the start of the trial are also inevitably caused by the need to allow the accused a reasonable amount of time to prepare the defence. This right is accorded to accused by Article 21(4)(b) of the Statute of the Tribunal, which corresponds to Article 14(3)(b) of the ICCPR and Article 6(3)(b) of the ECHR. The human rights regime has stated that what is "adequate time" must be determined with reference to the circumstances of each case. Defence counsel, unlike the prosecution, generally only become involved in a case on an individual basis and after the accused is in custody. The preparation of the defence, including coming to terms with and investigating the charges made, will take a considerable amount of time. The requirement that an accused be accorded sufficient facilities for the preparation of the defence is considered below when dealing with equality of arms.

An issue that arises out of the delay of trials at the Tribunal is the right of the accused to provisional release while the case is being prepared for trial or appeal. Rule 65 governs this right and provides, *inter alia*, that:

> (B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.
>
> (C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

This Rule was amended in December 1999.[102] Previously, Rule 65(B) required an accused person to show there that were also "exceptional circumstances" warranting provisional release.

In interpreting Rule 65(B), Trial Chambers have consistently held that the onus is placed upon the applicant to establish entitlement to provisional release. In *Blaškić*, the Trial Chamber interpreted the Rules as having "incorporated the principles of preventive detention of an accused because of the extreme gravity of the crimes for which they are being prosecuted by the International Tribunal [...]".[103] Following the amendment, and the removal of the requirement of exceptional circumstances, the burden has not been altered.

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102. Twenty-sixth session of the Plenary. The amendment entered into force on 6 December 1999.

103. *Prosecutor* v. *Blaškić*, Order Denying a Motion For Provisional Release, Case No. IT-95-14-PT, 20 December 1996, followed in *Prosecutor* v. *Djukić*, Decision Rejecting The Application for the Withdrawal of the Indictment and Order For Provisional Release Filed by the Accused Dordje Djukić, Case No. IT-96-20-T, 24 April 1996; *Prosecutor* v. *Delalić* et al., *supra* note 65.

The accused, while not required to establish exceptional circumstances, is still required to satisfy the other two requirements of Rule 65(B), that he or she will appear for trial and will not pose a threat to any witnesses.[104]

In the *Brđanin* case the Trial Chamber dealt with an argument of the accused that the deletion of "exceptional circumstances" from Rule 65(B) meant that provisional release was no longer the exception, and that it was presumed that provisional release would be the usual situation. The Trial Chamber rejected the argument, holding that no such presumption existed. Brđanin also argued that the effect of the amendment was that once he had established that he would appear for trial, and would not pose a danger to any witnesses, the onus of proof passed to the prosecution to demonstrate exceptional circumstances justifying a refusal of the application. The Trial Chamber rejected this argument holding that "[t]he wording of the Rule squarely places the onus at all times on the applicant to establish his entitlement to provisional release".[105] The Trial Chamber also made it clear that if an applicant for provisional release satisfied the requirements of Rule 65(B), the word "may" in the Rule meant that the Trial Chamber still had a discretion whether or not to refuse the grant of provisional release. There is, however, no discretion to order release if an applicant has failed to establish one of the two requirements of Rule 65(B). The accused must satisfy the Chamber that the criterion has been satisfied, and also convince the Chamber that the exercise of its discretion to release is appropriate.[106]

The threshold to be satisfied with respect to both requirements is a high one. In most instances, proof that an accused will appear at trial will necessitate, at a minimum, the accused presenting evidence from the authorities of the place where he or she aims to reside that they will arrest and present him or her to the Tribunal for failure to appear voluntarily.[107] This undertaking on the part of the authorities will be considered in the light of the co-operation of those authorities, if any, with the Tribunal in the past. For this reason, the

104. *Prosecutor* v. *Galić*, Order on Defence Motion for Provisional Release, Case No. IT-98-29-PT, 27 July 2000, p. 4; *Prosecutor* v. *Krajišnik*, Decision On Application For Leave to Appeal, Case No. IT-0039 & 40 AR65, 14 December 2001. The host country and State to which the accused seeks to be released are ostensibly procedural matters, although in cases involving high level accused this provision may become more of an active ingredient in the decision of whether and where to release an accused.

105. *Prosecutor* v. *Brđanin & Talić*, Decision on Motion by Radislav Brđanin for Provisional Release, Case No. IT-99-36-PT, 25 July 2000, paras. 12-13

106. *Ibid*., para. 22. The Trial Chamber held that the inadequacy of an indictment is unlikely ever to be sufficient to warrant a grant of provisional release to an accused. However it stated that "[w]here this inadequacy is of such a nature that it causes the trial to be delayed, that fact may, in the appropriate case, enliven the discretion" to grant provisional release provided that an accused has discharged the burden.

107. *Ibid*., paras. 14-16, 19.

Trial Chamber has invariably rejected as insufficient undertakings made by the authorities of the Republika Srpska.[108]

Although in all cases the Tribunal has required this type of undertaking to be secured by the accused, it is not a pre-requisite to the grant of provisional release. In a decision on an application made for provisional release by the accused Jokić, the Trial Chamber refused the application on the basis that "guarantees have to be provided by the State to which the accused seeks to be released" and as the Republika Srpska was not a State, the accused had not satisfied this requirement.[109] In granting Jokic's application for leave to appeal the Appeals Chamber stated that there is "no obligation upon the accused, as a pre-requisite to obtaining provisional release, to provide guarantees from that State, or from anyone else, that he will appear for trial", although it added that it was advisable that he do so in order to satisfy the Trial Chamber that he will appear for trial.[110]

The onerous burden placed upon the accused to establish that he or she will appear for trial is justified by the absence of any power in the Tribunal to execute its own arrest warrants. It must rely upon the local authorities of the place in which the applicant seeks to be released, or upon international bodies, to effect arrests on its behalf.[111] Reliance upon this factor was challenged by the accused Talić in his application for provisional release. He argued that the role of the Stabilisation Force (SFOR) in the detention and transfer of indicted persons to the Tribunal was like that of a police force in domestic legal systems, a view propounded by Judge Robinson in the *Simić* proceedings.[112]

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108. It claimed that its national constitution prohibited it extraditing its nationals, in defiance of a fundamental principle of international law by which a State cannot rely upon its domestic law to override its international obligations. Quite recently the Serbian authorities passed a law authorising co-operation with the Tribunal and providing for extradition of nationals. See *Prosecutor* v. *Krajišnik & Plavšić*, Decision on Biljana Plavšić's Application for Provisional Release, Case No. IT-00-39-PT, 5 September 2001.

109. *Prosecutor* v. *Blagojević* et al., Decision on Request for Provisional Release of Accused Jokić, Case No. IT-02-53-PT, 28 March 2002, para. 26. The finding of the Trial Chamber that the Republic Sprska is not a State is contrary to the definition of State provided for in Rule 2 of the Tribunal's Rules: "A State Member or non-Member of the United Nations or a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not." It is expected that this error will be corrected by the Appeals Chamber in the appeal.

110. *Prosecutor* v. *Blagojević,* et al., Decision on Application by Dragan Jokić for Leave to Appeal, 18 April 2002, para. 8.

111. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105.

112. *Prosecutor* v. *Simić*, Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, Case No. IT-95-9-PT, 18 October 2000. One of the accused, Todorović, brought a challenge to the legality of his arrest on the basis that it had been effected illegally. To establish this allegation he requested an evidentiary hearing and the assistance of the Tribunal in securing from SFOR evidence relating to his arrest. In a separate opinion on the issue as to whether SFOR was

However, this was not a view shared by the majority of the Trial Chamber.[113] It held that this proposition did not lessen the burden upon him to show that he would appear for trial.[114]

As the Tribunal has no independent means of enforcing its arrest warrants, the fact that a person has voluntarily surrendered to the Tribunal may be accorded considerable weight. It will not by itself justify provisional release. This is because by surrendering to the Tribunal, indictees are merely doing what they are obligated to do.[115] However, in some cases an accused will not have the opportunity to surrender because the indictment is sealed. When someone cannot know of an indictment, failure to surrender cannot be accorded any weight.[116] In *Krajišnik*, the majority of the Trial Chamber held that because the indictment against Krajišnik had been sealed, this was a neutral factor and could not influence the decision on interim release. On the other hand, in the case of his co-accused Plavšić, who did voluntarily surrender, the Tribunal considered this to be a positive factor to be taken into account in the decision to grant provisional release.[117]

In a separate and dissenting opinion, Judge Robinson challenged the logic of the majority. He found that to use the fact of the voluntary surrender of Plavšić as a positive factor nullified the neutrality attached to the failure of

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required to comply with the orders of the Tribunal, Judge Robinson posited that by virtue of the Dayton Peace Agreement, which extended SFOR's functions to provide for the detention and transfer or persons indicted for war crimes, SFOR played "a role comparable to that of a police force in domestic legal systems and creates as between itself and the Tribunal, through the Office of the Prosecutor, a relationship of which the analogue in such systems is the relationship between the police force, the prosecuting authorities and the courts". He also argued that there "is clearly a strong functional, although not organic, relationship between SFOR and the Tribunal, through one of its organs, the Office of the Prosecutor". *Prosecutor* v. *Simić*, Separate Opinion of Judge Robinson, Case No. IT 95-9-PT, 18 October 2000, para. 6.'

113. *Ibid.*, paras. 43-45. In the opinion of the majority, the relationship between the Tribunal and SFOR is one of co-operation only. This view was based upon the interpretation of the requisite agreements authorising IFOR/SFOR to execute arrest warrants.

114. *Prosecutor* v. *Brđanin and Talić*, Decision on Motion by Momir Talić for Provisional Release, Case No. IT-99-36, 28 March 2001, para. 29. It held, in accordance with the majority opinion in *Simić*, that the Dayton Peace Agreement did not impose an obligation upon SFOR to act as the police force of the Tribunal and that although SFOR is permitted to execute arrest warrants on behalf of the Tribunal, it is placed under no obligation to do so.

115. *Prosecutor* v. *Kunarac*, Decision on Request for Provisional Release of Dragoljub Kunarac, Case No. IT-96-23-PT, 11 Nov 1999, para. 4.

116. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105.

117. *Prosecutor* v. *Krajišnik & Plavšić*, Decision on Momčilo Krajišnik's Notice of Motion for Provisional Release, Case No. IT-00-39-PT, 8 October 2001, paras. 20-21.

Krajišnik to surrender voluntarily because of the sealed indictment.[118] It would seem that this is indeed the logical effect of the approach taken by the majority when the applications of each of the accused is compared.

The requirement that an accused establish that he or she will not interfere with witnesses is just as difficult a burden to discharge. The accused will have to offer more than an undertaking not to do so. In most cases, the prosecution will argue that the fact that the accused knows the identity and residence of witnesses, pursuant to the disclosure obligations placed upon the Prosecutor by Rule 66(A)(i), and because the accused intends to return to the locality where the crimes are alleged to have been committed, the ability to exert pressure on those witnesses is enhanced.[119] This proposition was accepted by the Trial Chamber in *Blaškić*,[120] and also by the Trial Chamber in *Drljaca*.[121] It was rejected by the Trial Chamber in decisions on provisional release with respect to both Brđanin and Talić.[122] The Chamber considered that the mere fact that a detainee granted provisional release would be able to more readily interfere with witnesses does not of itself suggest that interference will occur.[123] However, it also rejected as unpersuasive a submission made by the accused Talić that any accused provisionally released would have no interest in contacting witnesses as he knew this would lead to the revocation of his provisional release.[124]

It has also been held that the mere possibility that the provisional release of an accused could impact on the willingness of witnesses to testify in other Tribunal proceedings is also not a basis for refusing provisional release where the Trial Chamber is otherwise satisfied that the accused will not pose a danger to witnesses.[125] The Trial Chamber in the *Brđanin* case considered that it would be manifestly unfair to an accused to deny release because of a possible reaction by witnesses.[126]

On the whole it is unclear how an accused can satisfy the Tribunal that he or she will not pose a danger to witnesses and victims. In those cases in which provisional release has been granted, the predominant feature is that the Trial

118. *Ibid.*, para. 36.

119. *Prosecutor* v. *Brđanin and Talić*, *supra* note 114, para. 33.

120. *Prosecutor* v. *Blaškić*, Decision Rejecting a Request for Provisional Release, Case No. IT-95-14-T, 25 April 1996, p. 5.

121. *Prosecutor* v. *Drljaca & Kovačević*, Decision on Defence Motion For Provisional Release, Case No. IT-97-24-PT, 20 January 1998, para. 28.

122. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105, para. 19; *Prosecutor* v. *Brđanin and Talić*, *supra* note 114, paras. 33-37.

123. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105, para. 19.

124. *Ibid.*, para. 37.

125. *Ibid.*, para. 20

126. *Ibid.*, para. 20.

Chamber has been satisfied that the accused will appear for trial. There is also no evidence to suggest that the accused will interfere with victims and witnesses, but likewise no evidence to show that he or she will not. That the accused does not do so will invariably be a condition attaching to the release if granted. As in most instances where there has been alleged interference of witnesses, that interference has been by family members or supporters of the accused and not the accused personally, the provisional release of an accused will, in most circumstances, have little impact on whether or not such interference occurs.[127]

Once the accused has satisfied the burden with respect to these two requirements, the Trial Chamber has a discretion to grant provisional release. In exercising this discretion, consideration will be given to the time the accused has already spent in detention and the likely time when the case will be ready for trial. In this respect Trial Chambers have considered the jurisprudence of the human rights regime.[128] As stated earlier, Article 14(3) of the ICCPR and Article 5(3) of the ECHR both guarantee the right of an accused to a trial within a reasonable time or to release pending trial. Article 21(4)(c) of the Statute provides that the accused shall be tried without undue delay.

In *Drljaca*, prior to the amendment of the rule removing the requirement to show exceptional circumstances, the Trial Chamber considered that the length of an accused's detention was a factor to take into account in considering whether the accused had shown exceptional circumstances sufficient to justify his release. The accused argued that a lengthy period of detention breached his human rights and that the Tribunal should not adopt standards regarding the reasonableness of a length of detention that are disparate to those considered reasonable in national systems. The Trial Chamber implicitly rejected this argument, holding that such a determination was to be made by reference to the circumstances of the Tribunal. This required consideration of the seriousness of the crimes for which the accused is charged and the difficulties faced by the Tribunal "in investigating and prosecuting complex cases involving grave crimes committed thousands of kilometres from its seat in the Netherlands and without the assistance of a police force".[129] In these circumstances, six months of detention was considered reasonable.[130]

In *Brđanin*, the Trial Chamber considered that logically the length of detention may be relevant to the exercise of discretion, but that it would be unlikely that provisional release would be granted where an accused had been unable to establish that he or she will appear for trial.[131] Further, what is a rea-

127. See *Prosecutor* v. *Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, 31 January 2000.

128. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105, para. 20.

129. *Prosecutor* v. *Drljaca & Kovačević*, Decision On Defence Motion For Provisional Release, Case No. IT-97-24-PT, 20 January 1998, paras. 22-24.

130. *Ibid*., para. 24.

131. *Prosecutor* v. *Brđanin & Talić*, *supra* note 105, paras. 24-25.

sonable length of pre-trial detention is to be interpreted against the circumstances under which the Tribunal must operate, in particular its inability to execute arrest warrants.[132] It noted that in domestic jurisdictions provisional release would usually be granted in circumstances where the length of the pre-trial detention may exceed the length of any sentence that may be imposed if a conviction is secured. However, it considered that in the context of the Tribunal this consideration bears little relevance. This is because the Tribunal is not in a position to execute its own arrest warrants in the event that an accused does not appear for trial, a situation very different to that of a domestic jurisdiction. Furthermore, the seriousness of the crimes charged before the Tribunal will be unlikely to lead to sentences of short duration.[133] The Trial Chamber also cautioned that care must be taken not to place too much emphasis on decisions rendered by the ECtHR on the reasonable length of pre-trial detention, as those cases were concerned with the context of a domestic legal system and not an international criminal tribunal.[134] In particular, the Trial Chamber noted that when considering issues such as the reasonableness of the length of detention, the ECtHR gave a degree of reverence, or margin of appreciation, to the practices of the national authorities.[135]

However, in many decisions of the Tribunal, the fact that in the jurisprudence of the ECtHR delays of four years and more have been considered reasonable[136] has been relied upon as providing support for a refusal to grant provisional release where an accused has been detained for a substantial period of time.[137]

The burden placed upon an accused by Rule 65(B) to establish that he or she will appear for trial and will not interfere with witnesses is in stark contrast to the approach taken by the human rights regime. In that regime, the burden is placed upon the detaining authorities to justify the continued detention of an accused and pre-trial release is the rule and not the exception. The human rights regime has taken the view that detention on remand will rarely be justifiable. The only instance in which it permits the possibility of this being justifiable in a more general sense is where there are national security concerns.

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132. *Ibid.*, para. 27.

133. *Ibid.*, para. 26.

134. *Ibid.*, paras. 26-27.

135. *Ibid.*, para. 27.

136. For example, *W.* v. *Switzerland*, Series A, Vol. 254.

137. "Interpretation of 'a reasonable time' in Article 5(3) must be made with regard to the fact that a person is deprived of his liberty. The time which in such cases is permissible is shorter than the time which is permissible under Article 6(1), because the aim is to limit the length of a person's detention and not to promote a speedy trial." *Haase* v. *Federal Republic of Germany*, (1978) D. & R. 78. See also *Stogmuller* v. *Austria*, Series A, Vol. 9, p. 40; *Matznetter* v. *Austria*, Series A, Vol. 10, pp. 34-35; *Vallon* v. *Italy*, Series A, Vol. 95, p. 19 and *X.* v. *Federal Republic of Germany* (App. No. 9604).

In the jurisprudence of the ECtHR, a two-pronged approach is taken to whether detention on remand is justified. First, the Court will look at the reasons given by the national authorities and determine whether these reasons are "relevant and sufficient" in light of the circumstance of the national jurisdiction seeking to justify that detention. If this question is answered in the affirmative the Court will then examine whether the authorities have acted with "special diligence" in the conduct of the proceedings. If both questions are answered in the affirmative the continued detention on remand is reasonable. If either of the questions is determined in the negative the continued detention on remand will be considered unreasonable.

Reasons advanced by national authorities in justification of continued detention on remand, and accepted by the ECtHR, include the danger of flight. However, the Court has taken the view that although this may initially justify detention on remand, it may thereafter cease to exist, particularly in light of the possibility of bail. In determining whether the national authorities are justified in relying upon this basis the Court will look at other factors considered relevant to the assessment of this risk, such as the character of the accused and his or her assets and contacts abroad. Other grounds recognised as justifying continued detention are the risk of suppression of evidence, the danger of collusion and the danger of contact with witnesses.[138] Issues of collusion and witnesses are considered to decrease with the passing of time.[139]

In terms of identifying whether the authorities have conducted the proceedings with "special diligence", the ECtHR will consider the complexity of the proceedings, the conduct of the detainee and the conduct of the authorities. If the length of period of detention cannot be attributed to either the complexity of the case or the conduct of the accused, and the authorities have not acted with sufficient promptness, Article 5(3) will be violated.[140] As Article 5(3) allows for release on bail it is incumbent upon the authorities to determine whether they can achieve through that process the same purpose as that sought to be achieved by detention on remand. If there are sufficient indications that the same purpose can be achieved by the offer of bail, the failure to do so will render the continued detention unreasonable.[141] This is of particular importance where the risk relied upon is one of flight.

The disparity between the provisions of the human rights instruments and the "accepted view" of the requirements of Rule 65(B) led Judge Robinson to dissent from the reasoning of the majority in a decision on Momčilo Krajišnik's

138. See, for example, *Wemhoff* v. *Austria*, Series A, Vol. 7, p. 25; *Ringeisen* v. *Austria*, Series A, Vol. 13, pp. 42-43.

139. *Letellier* v. *France*, Series A, Vol. 207, p. 19; *Clooth* v. *Belgium*, Series A, Vol. 225, p. 16; *Tomasi* v. *France*, Series A, Vol. 241-A, p. 37; *W.* v. *Switzerland*, *supra* note 136, p. 17.

140. *Toth* v. *Austria*, Series A, Vol. 224, p. 21; *Tomasi* v. *France*, *ibid.*, p. 39.

141. *Wemhoff* v. *Austria, supra* note 138, p. 25; *Letellier* v. *France*, *supra* note 139, p. 20.

application for provisional release.[142] As already stated above, Rule 65(B) in its original form imposed an obligation upon an accused to establish exceptional circumstances, in addition to other requirements. In *Krajišnik*, Judge Robinson argued that the purpose of the amendment, removing the need to establish "exceptional circumstances", was to bring the Rule in line with other human rights instruments that made provisional release the rule rather than the exception. The effect of this amendment was to place the burden upon the prosecution to establish that continued detention was justified. Judge Robinson referred to the statement in the Secretary-General's Report that the Tribunal "must fully respect internationally recognised standards regarding the rights of the accused at all stage of its proceedings" and Article 9(3) of the ICCPR. Judge Robinson claimed that this provision reflected customary international law[143] and identified the presumption of innocence as the rationale that underpinned this customary norm.[144] The presumption of innocence is enshrined in Article 21(3) of the ICTY Statute, Article 14(2) of the ICCPR[145] and Article 6(2) of the ECHR.[146]

Judge Robinson stated his position as follows:

> I must not be understood to be saying that in such a situation, that is, where detention is not the general rule, the burden can never be on the accused to prove the matters set out in Rule 65(B). There are instances in which the legislation of many countries imposes such a burden on an accused when he is charged with very serious offences. Rather, my contention is much narrower: it is that in the specific context of the history of the amendment to Rule 65(B), it is difficult

142. *Prosecutor* v. *Krajišnik & Plavšic*, *supra* note 117.

143. *Ibid*., para. 6.

144. *Ibid*., para. 6.

145. The HRC considers the presumption to imply a right to be treated in accordance with the principle. The burden of proof is firmly upon the prosecution and no guilt can be presumed until the charge has been proved beyond reasonable doubt. "It is therefore, a duty for all public authorities to refrain from pre-judging the outcome of a trial." With respect to pre-trial detention the HRC has stated that it should be an exception and as short as possible. The only basis upon which the HRC would consider the use of preventive detention justifiable is in circumstances where public security necessitates its use. Where this is the case the detention must not be arbitrary and must be based on grounds and procedures established by law and court control of the detention must be available.

146. Resolution 65(11) of the Committee of Ministers of the Council of Europe on detention on remand. Article 6(2) of the ECHR provides that a person who is charged with an offence must be presumed innocent until proved guilty. Because of the importance of the presumption of innocence, "detention on remand should be an exceptional measure, which is applied only if 'strictly necessary'. In determining whether continued detention on remand is reasonable the interests of the accused person have to be weighed against the public interest with due regard to the resumption of innocence." Recommendations R (80) 11 of the Committee of Ministers, 27 June 1980, concerning detention on remand.

> not to conclude that the proper interpretation of the Rule following the amendment is that there is no general rule of detention and hence no burden on the accused; rather, the onus is on the Prosecution to establish that the accused has not satisfied the criteria for provisional release set out in the Rule".[147]

As is apparent from this passage, the objections of Judge Robinson are based upon what he perceived to be the reasons for the removal of the requirement that the accused establish "exceptional circumstances" before a grant of provisional release would be permitted. His objection was to the continued construction of the Rule as making detention the rule rather than the exception, an approach that he argued was contrary to the obligation of the Tribunal to adhere to universal human rights principles.

Judge Robinson had the advantage of being privy to the reasoning of the judges at the Plenary when the amendment was made. It may well be that this was the intention behind the amendment. But if that is correct it is somewhat bewildering that other judges of the Tribunal have not interpreted the amendment in the same way. In this respect, it is notable that the Appeals Chamber refused an application for leave to appeal a decision of the Trial Chamber not to grant Krajišnik provisional release.[148] In another decision rendered in the same matter, and in relation to an application made for provisional release to a duty judge, the Appeals Chamber held that there had been no miscarriage of justice in denying the application as, "had the duty judge proceeded to consider the requirements of Rule 65(B), he would have rejected the application on the basis that the Appellant *was unable to establish that he would return and appear for trial if he were released*".[149] It is clear that the Appeals Chamber perceived the burden to be placed upon the accused. Considering that Appeals Chamber decisions are binding upon Trial Chambers, the position of Judge Robinson is inconsistent with the established practice of the Tribunal. It is also inconsistent with the clear wording of the Rule and it is to be expected that if the intention of any amendments to the Rule was to place the burden upon the prosecution then the wording of the Rule would itself have been amended to state this clearly.

However, Judge Robinson was correct to emphasise that the approach of the Tribunal to the issue of detention is in contrast to the approach taken by the human rights regime. Whether this approach has the status of a customary norm, as is the case with many human rights principles, is open to argument. It would appear from the General Comment of the HRC that States do not, as a matter of course, abide by this obligation.[150] Nevertheless, they have

147. *Ibid*., para. 18.

148. *Prosecutor* v. *Krajišnik & Plavšić*, Decision On Application For Leave To Appeal, Case No. IT-00-39 & 40-AR65, 14 December 2001.

149. *Prosecutor* v. *Krajišnik & Plavšić*, Decision on Interlocutory Appeal by Momčilo Krajišnik, Case No. IT-00-39 & 40-PT, 26 February 2002, para. 22.

150. "General Comment 8(16)", UN Doc. CCPR/C/21/Add.1.

accepted it in principle. As is generally the case with establishing customary human rights norms, emphasis is placed more upon the obligations that States accept than how they actually abide by them. In the majority opinion in *Krajišnik*, the Trial Chamber noted that neither of the parties had submitted that there was any breach of customary norms in placing the burden upon the accused, in the circumstances in which the Tribunal had to operate and in light of the serious crimes of which the accused were charged.[151]

Although Judge Robinson may have been correct to identify the approach of the Tribunal as being contrary to that of the human rights regime, this does not necessarily mean that an accused should be entitled to provisional release, or would be granted provisional release, any more readily if the burden was not placed upon him. When the ECtHR considers whether pre-trial detention has ceased to be reasonable it makes its assessment with reference to the justifications given by the national authorities. The Tribunal, must, as Judge Robinson himself recognised, take account of the unique circumstances in which it operates. The simple fact of the matter is that accused persons detained by the Tribunal are charged with extremely serious breaches of international humanitarian law. They are detained by an institution that is without the support of a domestic framework. The Tribunal does not have the institutional support to ensure that an accused will appear for trial if released and will not interfere with witnesses. The sentences to be expected if an accused is convicted can be extremely severe. There are authorities which have been prepared to harbour indictees, in particular the Republika Srpska, which has to date refused to execute any of the arrest warrants directed towards it, although it now has given an indication of willingness to co-operate.[152] If all these features were transposed to a domestic jurisdiction and the HRC was asked for an opinion on the legality of the preventive detention, or the ECtHR for a judicial opinion, it is highly unlikely that these bodies would consider preventive detention to be unjustifiable. As such, the actual practice of the Tribunal in the pre-trial detention of accused does not in fact offend against established human rights principles.

The other principle upon which Judge Robinson relied is the presumption of innocence. In his view this principle makes the imposition of any burden upon the accused unjustifiable. However, although the HRC and the ECtHR both consider the presumption of innocence to be applicable to the treatment of an accused prior to trial, they do not prohibit pre-trial detention where necessary:

> Being presumed innocent until proven guilty no person charged with an offence shall be placed in custody pending trial unless the circumstances make it strictly

151. *Prosecutor* v. *Krajišnik & Plavšić*, *supra* note 149, para. 13.

152. *See Prosecutor* v. *Krajišnik & Plavšić*, Supplement to the Motion for an Order of Provisional Release of Ms Biljana Plavšić filed on 29 June 2001, Case No. IT-00-39&40, 22 August 2001.

> necessary. Custody pending trial shall therefore be regarded as an exceptional measure and it shall never be compulsory nor be used for punitive reasons.[153]

The jurisprudence of the human rights regime also emphasises that the greatest importance with respect to the application of the presumption of innocence is within the trial process itself:

> It requires inter alia that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him.[154]

The presumption of innocence will be infringed where, "[w]ithout the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his right of defence, a judicial decision concerning him reflects an opinion that he is guilty".[155]

In effect it would appear that the nub of the objection made by Judge Robinson is not that accused persons are as a rule subject to preventive detention at the Tribunal, but rather that the burden is placed upon them to justify provisional release. The fact of the accused having to prove entitlement to release offends against the idea that until the accused has been fairly tried and convicted he or she is entitled to be treated as an innocent person. The presumption of innocence is, as Judge Robinson emphasised, fundamental to the concept of trial according to the rule of law, whether it be in a domestic or international criminal trial setting.

The exact nature of the burden which is placed upon an accused by Rule 65(B) is unclear. In most criminal proceedings it is generally accepted that an evidentiary burden can be imposed upon an accused to establish any defences. This burden requires the accused to raise sufficient evidence to make the defence an issue at trial. Once this evidence is raised the burden is upon the prosecution to negative that defence beyond a reasonable doubt. Presumably, however, Rule 65(B) places a persuasive burden upon the accused in the sense that the accused not only has the obligation to adduce evidence to meet the requirements of the rule, but must also discharge a persuasive burden by establishing that he or she will appear for trial and not interfere with witnesses. The view that the burden placed upon the accused is of a persuasive, or legal nature, accords with the rejection by the Trial Chamber of the argument made in the *Brđanin* case, discussed above, that once evidence has been submitted show-

153. R. 80 (1) of the Committee of Ministers in the matter of custody on remand of 27 June 1980, Article 1.

154. *Barbera, Messegue and Jabardo* v. *Spain*, Series A, Vol. 146, p. 33.

155. *Minelli* v. *Switzerland*, Series A, Vol. 62, p. 18.

ing that the accused will appear for trial and not interfere with witnesses, the burden shifts to the prosecution to establish the contrary. Assuming that the burden is persuasive it is unclear what the standard of that burden is, whether it requires the accused to establish those facts beyond reasonable doubt, or on the balance of probabilities only. In national jurisdictions, where an accused is required to establish any facts, the standard of proof required is generally that of a balance of probabilities. However, in the decisions of the Tribunal the language used is that the Trial Chamber is not satisfied that an accused will appear for trial, or will not interfere with witnesses, but the standard to which it must be satisfied is not explicitly addressed. These are issues that should be clarified if the approach of the Tribunal and its impact on the rights of an accused are to be properly considered.

In addition to the specific concerns of Judge Robinson about the placing of a burden upon the accused, other judges have also shown that they are troubled by the disparity between the practice of the Tribunal with respect to pre-trial detention and that of the human rights regime. This has resulted in a situation where the approach of the human rights regime has been transferred to the interpretation of Rule 65(B), even though the terms of the rule are in contradiction with that system. What makes these decisions of interest is that one Trial Chamber has imposed upon the interpretation of the Rules general interpretative tools developed by the human rights regime. That is, it has not adopted the specific test of "reasonableness" generally applied to that issue by the human rights regime as discussed above, but a more general rule of interpretation.[156]

For example, in a decision in the *Hadžihasonović* case, the Trial Chamber, in attempting to reconcile the practices of the Tribunal with the obligations imposed by the ICCPR and the approach taken by the ECtHR, reasoned that human rights instruments must play a guiding role in considering an application for provisional release. It identified the underlying rationale of the applicability of these human rights instruments as being the fact that the former States of Yugoslavia are all United Nations Member States and parties to the ICCPR. It went on to state that, as a United Nations body, the Tribunal is committed to the standards of the ICCPR and, with respect to the ECHR, the States of the former Yugoslavia were either members or candidates of the Council of Europe. It also reasoned that as the Tribunal was entrusted with bringing justice to the former Yugoslavia, "no distinction can be drawn between persons facing criminal procedures in their home country or on an international level". Taking all these factors into account, it held that Rule 65 must be read in the light of the ICCPR and the ECHR. Although the Trial Chamber accepted that the lack of enforcement powers of the Tribunal meant that pre-trial detention was the rule, rather than the exception, it considered that this did not hinder the applicability of the relevant human rights prin-

156. Thanks to Andrea Carcona for the use of his research on this issue.

ciples to the situation of the Tribunal. Applying the principles of the human rights regime, the prohibition on a system of mandatory detention required the Trial Chamber to interpret Rule 65 "with regard to the factual basis of the single case and with respect to the concrete situation of the individual human being and not in *abstracto*".[157] Thus the Trial Chamber was not to start with any preconceptions about the fact that detention was the rule and release the exception. Rather it was to assess the circumstances of the individual in light of the evidence presented to the Trial Chamber in support of the application for provisional release.

Applying this principle to the provisional release of the applicant, the Trial Chamber reasoned that the measure (detention) must be suitable and necessary in the circumstances and must remain in a reasonable relationship to the envisaged target (trial of the accused). If a more lenient measure is sufficient, that more lenient measure should be applied.[158] Applying these criteria to the provisional release application of Hadžihasanović, the Trial Chamber considered that it was no longer necessary to detain him on remand pending trial. This decision was made in the light of seventeen guarantees offered by the accused and seven from the government of Bosnia and Herzegovina,[159] the fact of voluntary surrender[160] and his high level of co-operation with the Office of the Prosecutor (OTP) prior to the indictment being issued.[161] The accused was released subject to a number of stringent conditions, which included surrender of his passport; no contact with co-accused or witnesses and victims; no access to documents and archives; no discussion of his case with anyone, including the media but excluding his counsel and immediate family; and his undertaking of future compliance with orders of the Tribunal.[162] The co-accused of Hadihžasanović were also granted provisional release on the basis of the same application of human rights jurisprudence and subject to similar conditions.[163]

In the *Jokić* case the Trial Chamber again adopted this approach. In a more comprehensively reasoned decision, it stated its view that the ICCPR and

157. *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Enver Hadžihasanović, Case No. IT-01-47-PT, 19 December 2001, para. 7.

158. *Ibid.*, para. 8.

159. *Ibid.*, paras. 9-11.

160. *Ibid.*, para. 14.

161. *Ibid.*, para. 15.

162. *Ibid.*, Disposition, p. 6.

163. *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Amir Kubura, Case No. IT-01-47-PT, 19 December 2001; *Prosecutor* v. *Hadžihasanović, Alagić & Kubura*, Decision Granting Provisional Release to Mehmed Alagić, Case No. IT-01-47-PT, 19 December 2001. See also *Prosecutor* v. *Simić* et al., Decision on Milan Simić's Application For Provisional Release, Case No. IT-95-9-PT, 29 May 2000, in which provisional release was also granted.

the ECHR formed part of public international law and as such Rule 65 had to be read in light of their requirements. Again, in applying the provisions of these instruments to the interpretation of Rule 65 the Trial Chamber applied the "general principle of proportionality" stating that it "must be taken into account".[164]

It is difficult to decide what to make of this approach. Use of language and principles of interpretation adopted by the human rights regime gives the impression that the Trial Chamber is doing more than merely applying the terms of the Rule. No doubt this approach has been adopted to accommodate the sense of obligation felt by the Trial Chamber to abide by the interpretations of human rights principles as adopted by the human rights regime. It tends to equate the Rules of the Tribunal with a human rights instrument when it is clearly not one. It also tends to emasculate the idea that human rights are contextual principles and that the Tribunal is entitled to formulate its own way of protecting them consistent with its particular framework. In the end, all this approach achieves is to thinly shroud the discrepancy between the approach of the Tribunal and that of the human rights regime. It does not make them any more consistent. It is doubtful whether this is helpful to the development by the Tribunal of standards of human rights protection commensurate with its particular structure and in accordance with the international rule of law.

The approach taken by the Tribunal to the issue of preventive detention is in contrast to the approach demanded by the human rights regime. This has clearly troubled the Tribunal and various attempts have been made by Trial Chambers to reconcile these issues. However, the real issue is whether the approach to preventive detention is in accordance with the international rule of law. Arguably, the placing of a persuasive burden (if that is indeed the nature of the burden) upon an accused to establish facts is inconsistent with that idea and unnecessarily so. In the context in which the Tribunal operates it would not be too difficult a burden for the prosecution to establish in most cases where the risk of flight or harassment of witnesses was legitimate that an accused should not be granted provisional release. Accordingly, a solution could be achieved by the placing of an evidentiary burden on the accused in much the same way as defences are treated, and as argued in the *Brđanin* decision discussed above.

Conclusion

An assessment of the standards the Tribunal has set itself with respect to the rights of an accused considered in this chapter is a complicated task. A small sample of a large number of decisions have been considered. It is apparent that

164. *Prosecutor* v. *Blagojević* et al., *supra* note 109, paras. 9-18.

the Tribunal is ambiguous about how to define its obligations under universal human rights principles as stipulated in the Secretary-General's Report, and used as a basis in the *Tadić* Jurisdiction Decision to justify a finding that the Tribunal was established by law. However, although asserting in the *Tadić* Protective Measures Decision that it had a right to adopt a contextual approach to the interpretation of universal human rights principles, the jurisprudence of the Tribunal shows that it is uncomfortable about its departures from interpretations of those principles by the human rights regime.

As a consequence, instead of embracing the view that human rights are contextual principles, and reasoning persuasively as to why a different interpretation of human rights is warranted by the context of the Tribunal, the Tribunal often betrays in its jurisprudence an ambivalence to this issue. Claims that it adheres to the interpretation of human rights by the human rights regimes, where its framework is clearly incompatible with their requirements, discredits the legitimate interpretation of human rights. In some circumstances, the Tribunal has interpreted the provisions of its Statute by explicit reference to general interpretative concepts developed by the human rights regime in reference to its instruments. Accordingly, although the departures of the Tribunal from established interpretations of universal human rights are in most instances justifiable by reference to its context as an international criminal court prosecuting individuals for serious violations of international humanitarian law, it has in some respects not reasoned persuasively that this is so. However, the fact that established interpretations of human rights by the human rights regime are insufficient in the context of the Tribunal supports the proposition that human rights are contextual concepts. By taking a contextual approach to the application of human rights principles and setting the parameters for doing so, the Tribunal would make a considerable contribution to establishing how human rights are to be properly established within international criminal trials.

DARYL A. MUNDIS *

Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute

International law provides two primary bases for holding an individual criminally responsible: individual or personal criminal responsibility; and superior or command responsibility.[1] Article 7(1)[2] and Article 7(3)[3] of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) respectively reflect these two modes of criminal responsibility. This chapter will discuss and analyse the jurisprudence of the ICTY relating to superior responsibility under Article 7(3) of the Statute. The doctrine of superior responsibility[4] differs from other forms of criminal liability in that it is a form of liability based on *omission*. Thus, the alleged perpetrator must have affirmatively done a certain act, such as ordering or committing the alleged criminal act, to be responsible under Article 7(1) of the ICTY Statute. Under the doctrine of superior responsibility, the accused may be convicted based on failure to prevent the crime from occurring in the first place, or to punish the

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1. In addition, instruments proscribing genocide often provide for additional modes of liability (which are alternatively considered as inchoate crimes in many jurisdictions), including conspiracy to commit genocide, attempt to commit genocide and complicity in genocide. See, for example, ICTY Statute, Article 4(3), and ICTR Statute Article 2(3),. The basis for these forms of liability may be found in the Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Article III.
2. ICTY Statute, Article 7(1), which is identical to ICTR Statute, Article 6(1), states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."
3. ICTY Statute, Article 7(3), which corresponds with ICTR Statute, Article 6(3), provides: "The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *239-275.*

perpetrator after having learned that the offence was committed. This chapter will analyse the doctrine of superior responsibility and its application in the jurisprudence of the ICTY.

The doctrine of command responsibility, as reflected in Article 7(3) of the ICTY Statute, expresses a well-established rule of customary international law.[5] It will become clear that the development of this theory, particularly with respect to the *mens rea* of the "had reason to know" element, has not been linear over time, however, but rather has varied based on changes in the customary law, as well as in the conventional and statutory instruments dealing with superior responsibility. Consequently, this chapter will also discuss the historical development of the theory, with particular focus on the twentieth century, including the trials at Nuremberg and Tokyo. Moreover, similar provisions from other international instruments as well as national texts and prosecutions in which this theory was advanced are discussed.

It is also possible to charge a military commander with liability under Article 7(1) of the ICTY Statute for ordering offences to be committed or for participation in a joint criminal enterprise. Such liability could be in addition

4. The terms "command responsibility" and "superior responsibility" will be used interchangeably throughout this chapter. Historically, this doctrine was used exclusively to prosecute superior military officers for offences committed by their subordinates. More modern instruments, such as the Statutes of the ICTY, the ICTR and the ICC, refer to "superior responsibility", reflecting the fact that the doctrine incorporates paramilitary or irregular commanders and civilian leaders, in addition to the more traditional military superior. There is a growing literature on the law of command responsibility; the best articles are: William H. Parks, "Command Responsibility for War Crimes", (1973) 62 *Military L.R.* 1; Sonja Boelaert-Suominen, "Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War", (2001) 41 *Va. J. Int'l. L.* 747; Bing Bing Jia, "The Doctrine of Command Responsibility: Current Problems", (2000) 2 *Yearbook Int'l Humanitarian L.* 131, and the sources cited therein.

5. Several important international conventions include reference to the doctrine of command responsibility, reflecting the codification of this principle. See, for example, Articles 86-87 of Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts, (1979) 1125 UNTS 3 ("Additional Protocol I"); Article 28 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998); Article 6 of the International Law Commission's (ILC) Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10 (1996); Article 7(3) of the ICTY Statute; Article 6(3) of the ICTR Statute; and Article 6(3) of the Statute of the Special Court for Sierra Leone. Pursuant to the terms of each of these documents, commanders or superiors have the responsibility to prevent their subordinates from committing violations of international humanitarian law and the responsibility to punish their subordinates if such violations occur. See also *Prosecutor* v. *Delalić* et al., Judgment, Case No. IT-96-21-T, 16 November 1998, para. 343: "The Trial Chamber concludes that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law."

to responsibility pursuant to Article 7(3) of the ICTY Statute.[6] Thus, the law and the Prosecutor's pleadings reflect the numerous ways in which a commander or superior may be involved in criminal activity. For example, in an attack against a village, a commander may be charged with ordering troops to kill all captured enemy combatants. During the attack, some of the commander's troops also decide to kill non-combatants, including women and children. Shortly after the attack, the commander becomes aware of the murders involving the civilians, but decides not to punish the perpetrators. The commander would be liable under Article 7(1) for the order to kill the prisoners of war (POWs) and Article 7(3) with respect to failing to punish the perpetrators of the massacre on civilians. If it could be established that the commander was acting in concert with other superiors of equal rank to engage in a widespread policy of not punishing soldiers who kill non-combatants, the Prosecutor may charge him or her as part of a joint criminal enterprise under Article 7(1), for the common plan or purpose, or acts which might otherwise be chargeable under Article 7(3). This chapter will analyse the interrelationship between these modes of liability, as well as providing a restatement of the law of superior responsibility in the jurisprudence of the ICTY.

History and Background of Superior/Command Responsibility

Prior to the end of World War II, there are few recorded cases involving the imposition of criminal liability on the basis of command responsibility.[7] This is not to say, however, that the doctrine did not exist, but rather that it rarely formed the foundation for criminal prosecution. As Parks has noted, the doctrine of command responsibility historically developed along two inter-related paths:

> The first path dealt with the question of the general responsibility of command; the second with the specific criminal responsibility of the commander. It is alternatively submitted that (a) the natural development of the former would lead to the inevitable inclusion of the latter; and (b) there was in fact an intertwining of the development of the two from the outset.[8]

Although the roots of the modern doctrine of command responsibility may be found in the 1907 Hague Conventions,[9] it was not until immediately after World War I that the concept of prosecuting military commanders before

6. But see discussion of *Prosecutor* v. *Krnojelac*, Judgment, Case No. IT-97-25-T, 15 March 2002, *infra*.
7. See W.H. Parks, *supra* note 4, for an overview.
8. *Ibid*., at p. 2.
9. See, for example, International Convention Concerning the Laws and Customs of War by Land, [1910] BTS 9, Annex, Article 1; Hague Convention (X) for the Adaptation to Naval War of the Principles of the Geneva Convention, Article 19.

international tribunals on the basis of command responsibility was established. Thus, the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report to the 1919 Preliminary Peace Conference recommending that an international tribunal be established to prosecute, *inter alia*, individuals who, "[o]rdered, or with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war".[10] Moreover, Article 227 of the Treaty of Versailles envisioned the trial of the Kaiser by an international tribunal.

Under Article 228 of the Treaty of Versailles, Germany recognised the right of the victors to try persons accused of violating the laws and customs of war.[11] Upon the presentation to the German authorities of a list of 896 alleged war criminals that the Allies wanted to prosecute pursuant to these provisions, Germany strenuously objected, its government warning that the army would resume hostilities if this point were pressed.[12] The Germans then presented a compromise plan, which the Allies accepted, whereby the Supreme Court of the Reich at Leipzig would conduct trials applying international, rather than national law.[13] Of the forty-five individuals that the Allies wanted prosecuted, the Germans tried twelve, acquitting six.[14] Two of these trials involved issues of command responsibility. Major Benno Crusius was convicted of ordering the execution of wounded POWs and sentenced to confinement for two years.[15] The other case where the principle of superior responsibility was recognised concerned the firing on survivors in lifeboats following the torpedoing of the hospital ship, *Llandovery Castle*.[16] In this 1921 case, two German naval officers were convicted and sentenced to four years' imprisonment for their role in the unlawful attack on the survivors. The German Supreme Court in Leipzig noted in its judgment that under the German Military Penal Code, "if the execution of an order in the ordinary course of duty involves a violation of the law as is punishable, the superior officer issuing such order is alone responsible".[17]

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10. Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Versailles, 29 March 1919, reprinted in (1920) 14 *Am. J. Int'l L.* 95, at p. 121.
11. Treaty of Peace Between the Allied and Associated Powers and Germany, 2 Bevans 43 (1919) ("Treaty of Versailles").
12. W.H. Parks, *supra* note 4, pp. 12-13.
13. *Ibid*., p. 13; Gary Jonathan Bass, *Stay the Hand of Justice*, 2000, at pp. 58-105, provides details on the establishment of the post-World War I Leipzig trials.
14. W.H. Parks, *supra* note 4, p. 13.
15. *Ibid*., at p. 13.
16. *Empire* v. *Dithmar and Boldt* (Hospital Ship "Llandovery Castle"), (1921) 21 ILR 437, 16 *Am. J. Int'l L*. 708. See also W.H. Parks, *supra* note 4, p. 13.
17. W.H. Parks, *supra* note 4, p. 13.

Following World War II, several important trials involved Japanese and German war criminals in which the doctrine of command responsibility was invoked as grounds for establishing criminal liability. The Charters establishing the International Military Tribunal (IMT)[18] and the International Military Tribunal for the Far East (IMTFE),[19] governing the Nuremberg and Tokyo trials respectively, were silent as to criminal liability under the doctrine of command responsibility.[20] Similarly, Control Council Law No. 10, governing war crimes trials by the Allies in Germany, did not specifically provide for this form of responsibility.[21] Nevertheless, command responsibility issues were raised in several post-World War II cases, including the *Yamashita* trial[22] and the *High Command* and *Hostages* cases prosecuted under Control Council Law No. 10. The following discussion analyses the most important decisions from these trials.

General Tomoyuki Yamashita, who was tried before a United States Military Commission, had been the commanding general of the Japanese army for the Philippines and the military governor of the islands from 9 October 1944 until his surrender on 3 September 1945.[23] Yamashita was charged with 123 counts

18. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, (1951) 82 UNTS 279, annex.

19. Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 4 Bevans 20, as amended, 4 Bevans 27. Notwithstanding the lack of direct reference to the doctrine of superior responsibility, the IMTFE convicted both military officers and civilians for failing to prevent or punish atrocities.

20. Notwithstanding the lack of specific reference to the doctrine of command responsibility in the IMTFE Charter, several cases tried by the Tokyo Tribunal dealt with this issue, holding, *inter alia*, that it is the duty of superiors to provide proper treatment of prisoners and to prevent their ill-treatment. These findings stem in part from the horrendous treatment of POWs and the systematic extermination of civilians by Japanese forces during World War II. The Tribunal found that the military and governmental authorities had a duty to intervene and suppress the perpetrators. Hence, it was held that individuals at the highest levels of military and political command had a duty not only to comply with the laws of war, but also to effectively ensure that their subordinates comply with the law. See W.H. Parks, *supra* note 4, pp. 64-73, concerning the cases against Dohiharu, Hata, Matsui, Muto, and Toyoda.

21. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, Official Gazette Control Council for Germany, 50-55. Article II(2) of Control Council Law No. 10 was interpreted as providing the basis for command responsibility.

22. (1945) 4 LRTWC 1; *In re Yamashita*, 327 US 1 (1946). See also W.H. Parks, *supra* note 4, pp. 22-38; Bruce D. Landrum, "The Yamashita War Crimes Trial: Command Responsibility Then and Now", (1996) 149 *Military L. Rev.* 293.

23. The United States Supreme Court reviewed the findings of this trial, see *In re Yamashita*, *ibid*. In light of the criticism concerning the length of trials at the ICTY, it is interesting to note that Yamashita surrendered on 3 September 1945 and his trial commenced on 29 October 1945, finishing thirty-nine days later, on

of war crimes, including the murder and mistreatment of more than 36,500 Filipino civilians and American POWs, hundreds of rapes and the arbitrary destruction of private property.[24] Forces under Yamashita's command and control allegedly committed all of these offences. The prosecution argued that Yamashita must have known that these offences had been committed due to the large number of criminal acts and deaths and due to the widespread occurrence of these atrocities. Yamashita denied knowing that these offences had been committed and argued that this was the result of the tactical situation at the time, when his ability to communicate with subordinate commanders in the field was unstable and his army was retreating from the advancing American forces.

The military commission found Yamashita guilty and sentenced him to death by hanging. The findings and the holding of the commission have been misstated and misunderstood.[25] Many commentators have advanced the notion that the military commission in *Yamashita* imposed the legal doctrine of strict liability on military commanders. That is, military superiors may be found guilty if it can be established that they *must have known* offences were being committed and failed to either halt such crimes or punish the perpetrators.[26] Parks, however, correctly identifies the importance of this case to the development of the law of superior responsibility: "*Yamashita* recognised the existence of an affirmative duty on the part of a commander to take such measures as are within his power and appropriate in the circumstances to wage war within the limitations of the laws of war, in particular exercising control over his subordinates; it established that the commander who disregards this duty has committed a violation of the law of war; and it affirmed the *summon jus* of subjecting an offending commander to trial by a properly constituted tribunal of a state other than his own."[27] Thus, for purposes of the present discussion, the *Yamashita* case stands for the proposition that commanders have duties and responsibilities concerning their subordinate troops.

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7 December 1945. During the course of the trial, the military commission heard 286 witnesses and received 423 documents in evidence. The case was argued before the United States Supreme Court on 7 January 1946. On 4 February 1946, the Supreme Court upheld the trial decision. General MacArthur approved the findings of the military commission on 7 February 1946 and Yamashita was hanged on 23 February 1946. W.H. Parks, *supra* note 4, pp. 22, 24, 33, 36-37.

24. W.H. Parks, *supra* note 4, pp. 23-24.

25. *Ibid*., at p. 37.

26. See B.C. Landrum, *supra* note 22, at pp. 297-298 for a brief analysis of these views.

27. W.H. Parks, *supra* note 4, p. 37. Moreover, Parks correctly notes that a higher standard was imposed on Yamashita in light of his additional duties as military governor of the Philippines, a duty that required him to take special care in protecting the civilian population. *Ibid*., p. 38.

The *High Command* and *Hostages* cases refined these concepts. Thirteen senior German officers were tried under Control Council Law No. 10 in *United States v. Wilhelm von Leeb*, also known as the *High Command* case,[28] for a variety of offences, including murder and mistreatment of POWs, refusal of quarter, and other inhumane acts and violations of the laws or customs of war. Relying on the *Yamashita* case, the prosecution advanced a theory of strict liability for the commanders, "even where orders were not obviously criminal or where an order is routinely passed without review by a commander from a superior headquarters to a subordinate."[29] This theory was rejected by the tribunal on the grounds that the accused were soldiers and not lawyers:

> Military commanders in the field with far reaching military responsibilities cannot be charged under international law with criminal participation in issuing orders which are not obviously criminal or which they are not shown to be criminal under international law. Such a commander cannot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before issuance. He cannot be held criminally responsible for a mere error in judgment as to disputable legal questions.[30]

In short, the tribunal held that for a commander to be criminally responsible for the acts of subordinates the commander must breach a rule of international law and such breach must have occurred voluntarily and with the knowledge that the act was criminal under international law.[31]

Other command responsibility issues were raised during the course of the trial, including: the liability of a commander for actions committed by subordinates pursuant to criminal orders passed down independent of his command[32]; the liability of commanders for criminal orders issued by members of their staffs[33]; and the duties and responsibilities of the military commander of an occupied territory whose authority is limited.[34]

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28. *United States* v. *von Leeb* et al., (1949) 11 TWC 1. See also W.H. Parks, *supra* note 4, pp. 38-58.
29. W.H. Parks, *supra* note 4, at p. 40.
30. *Supra* note 28, p. 511.
31. *Ibid.*
32. The tribunal found that such liability attaches, based on its interpretation of Article II (2) of Control Council Law No. 10. *Ibid.*, p. 512.
33. The basis for finding such liability is the military maxim that commanders may delegate authority, but not responsibility. *Ibid.*, pp. 512-515. See, for example, US Navy Regulations, 1990, Article 0802.1 (A commander may delegate some or all of his or her authority, but cannot delegate responsibility for the conduct of the forces that he or she commands.)
34. The tribunal found, *supra* note 28, p. 545. that for the commander to be criminally responsible in such circumstances, the commander must have "knowledge

Like the *High Command* case, the *Hostage* case[35] dealt with multiple accused and was prosecuted by authorities of the United States under Control Council Law No. 10. At the outset of the decision, the judges dismissed the contentions of the accused that reports and orders transmitted to them had not been brought to their attention and addressed the issue of notice to the commander, making several important observations:

> An army commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit. Neither will he ordinarily be permitted to deny knowledge of happenings within the area of his command while he is present therein. It would strain the credulity of the Tribunal to believe that a high ranking military commander would permit himself to get out of touch with current happenings in the area of his command during wartime. No doubt occurrences result occasionally because of unexpected contingencies, but they are unusual.[36]

With respect to information contained in such reports, the tribunal went on to state that "[a]ny failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf".[37]

Considered together, these three cases stand for the proposition that commanders will not be held to a strict liability standard with respect to offences committed by their subordinates, although the law did impose on them a duty to stay informed with respect to the acts of their subordinates. As one commentator has written:

> A superior who is personally derelict in fulfilling this duty could, thus, be held criminally responsible for the illegal acts of subordinates; absence of knowledge is therefore not a defence if the superior was negligent in failing to obtain the information. The standard of *mens rea* arising from this "duty to know" is essentially a "should have known" standard based on negligence; a superior should have known of the acts of his subordinates if he had fulfilled his duties.[38]

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of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal".

35. *United States* v. *List* et. al., (1949) 11 TWC 759. See also W.H. Parks, *supra* note 4, pp. 58-64.
36. *United States* v. *List* et. al., *ibid.*, p. 1260.
37. *Ibid.*, p. 1271.
38. Kirsten M.F. Keith, "The *Mens Rea* of Superior Responsibility as Developed by ICTY Jurisprudence", (2001) 14 *Leiden J. Int'l L.* 617, pp. 622-623. As will be discussed below, the ICTY Appeals Chamber has determined that due to developments in the law since World War II, the current "had reason to know" standard does *not* impose a duty to know on commanders.

In conclusion, the following rules constitute the scope of the international law of superior responsibility as of the end of World War II:

1. There is a presumption that orders are legal, and that commanders may pass orders from higher headquarters to lower-level commands with minimal scrutiny;

2. There is a presumption that commanders will be aware of the contents of reports received at their headquarters;

3. In the event that such reports are inadequate or unclear, commanders have a duty to request that additional reports be prepared;

4. There is a presumption that commanders will be aware of events (including crimes) that occur within the geographic scope of their area of responsibility;

5. To be criminally responsible, commanders must have knowledge that patently criminal acts were committed and acquiesce, participate or criminally neglect to interfere in their commission;

6. Commanders may delegate authority, but responsibility for the conduct of troops remains with the commander; and

7. In examining the alleged criminal conduct, a variety of factors may be relevant for determining whether the commander was on notice, including the scale and the geographic scope of the alleged criminal acts.

Developments between 1945 and 1993

Notwithstanding the World War II jurisprudence concerning command responsibility, the four Geneva Conventions of 1949 were silent as to the doctrine, with the exception of Article 39 of the third Geneva Convention, which requires POW camps to be "under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power".[39] This situation was not rectified until the adoption of Additional Protocol I in 1977.[40]

39. Geneva Convention Relative to the Treatment of Prisoners of War, (1950) 75 UNTS 135.

40. See discussion, *infra*. It is interesting to note that Additional Protocol II, governing internal armed conflict, is also silent as to command responsibility. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609 ("Additional Protocol II"). The applicability of this doctrine to non-international armed conflict is currently at issue in the *Prosecutor* v. *Hadžihasanović* case before Trial Chamber II of the ICTY.

As a result, the primary development of this theory of liability rested on state practice. Both during and in the years immediately after World War II many States incorporated superior responsibility provisions in their national legislation.[41] Moreover, on the basis of these statutory provisions, some States prosecuted individuals, with the cases of Lieutenant Calley[42] and Captain Medina[43] of the United States Army for their role in the My Lai massacre being among the most well-known.

Articles 86 and 87 of Additional Protocol I, adopted in 1977, seek to clarify and codify many issues concerning command responsibility.[44] Paragraphs 86(2)[45] and 87(3)[46] of Protocol I set forth the obligations of a commander to prevent or repress the commission of a crime or to punish those responsible for crimes, and were obviously a source of the specific language used in Article 7(3) of the ICTY Statute. The Socialist Federal Republic of Yugoslavia was a State party to Protocol I, and consequently, under the theory of State succession, the treaty governed the conflicts for which the ICTY has jurisdiction. Consequently, Protocol I, when read in conjunction with Article 7(3), provides the theoretical basis for command responsibility cases before the ICTY.

Command Responsibility in the Jurisprudence of the ICTY

It was clear from the outset that the ICTY would have jurisdiction to prosecute superiors for offences committed by their subordinates, as the following paragraph from the Secretary-General's Report to the Security Council on the establishment of the ICTY indicates:

41. See W.H. Parks, *supra* note 4, pp. 18-19, for national provisions from Luxembourg, the Netherlands, France, China, the United Kingdom and Canada.
42. *United States* v. *Calley*, 22 USCMA 534, 48 CMR 19 (US Court of Military Appeals 1973) and *Calley* v. *Callaway*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 US 911 (1975).
43. *United States* v. *Medina*, 43 CMR 243 (1971).
44. Additional Protocol I, *supra* note 5.
45. This provision reads: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
46. The text of this provision states: "The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the convention or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

> A person in a position of superior authority should, therefore, be held individually responsible for giving the unlawful order to commit a crime under the present statute. But he should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew, or had reason to know, that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.[47]

On the basis of this report, the Security Council established the Tribunal and adopted Article 7(3).

As of 15 April 2002, the doctrine of superior responsibility had been applied by ICTY Trial Chambers in the *Čelebići*,[48] *Aleksovski*,[49] *Blaškić*,[50] *Kunarac* et al.,[51] *Kordić & Čerkez*,[52] *Krstić*,[53] *Kvočka* et al.[54] and *Krnojelac*[55] cases. Superior responsibility was also discussed briefly by the ICTY Appeals Chamber in the *Aleksovksi* Appeal Judgment[56] and more thoroughly in the *Čelebići* Appeal Judgment.[57] In addition, Trial Chambers of the International Criminal Tribunal for Rwanda (ICTR) have pronounced on superior responsibility in several cases.[58]

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47. "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)", UN Doc. S/25704, para. 56. The first sentence of this provision clearly refers to liability under Article 7(1) of the ICTY Statute.
48. *Prosecutor* v. *Delalić* et al., *supra* note 5, paras. 330-810.
49. *Prosecutor* v. *Aleksovski,* Judgment, Case No. IT-95-14/I-T, 25 June 1999, paras. 66-81, 90-210.
50. *Prosecutor* v. *Blaškić*, Judgment, Case No. IT-95-14-T, 3 March 2000, paras. 289-792.
51. *Prosecutor* v. *Kunarac* et al., Judgment, Case No IT-96-23-T & IT-06-23/1-T, 22 February 2001, paras. 394-399.
52. *Prosecutor* v. *Kordić & Čerkez,* Judgment, Case No IT-95-14/2-T, 26 February 2001, paras. 366-371, 401-447.
53. *Prosecutor* v. *Krstić,* Judgment, Case No IT- 98-33-T, 2 August 2001, paras. 647-652.
54. *Prosecutor* v. *Kvočka* et al., Judgment, Case No. IT-98-30/1-T, 2 November 2001, paras. 313-318.
55. *Prosecutor* v. *Krnojelac*, *supra* note 6, paras. 91-95.
56. *Prosecutor* v. *Aleksovski*, Appeal Judgment, Case No. IT-95-14/1-A, 24 March 2000, paras. 69-77.
57. *Prosecutor* v. *Delalić* et al., Judgment, Case No. IT-96-21-A, 20 February 2001, paras. 182-314.
58. See, for example, *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-T, 21 May 1999, paras. 208-231 and *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-A, 1 June 2001, paras. 280-304; *Prosecutor* v. *Musema*, Judgment, Case No. ICTR-96-13-T, 27 June 2000, paras. 127-148; and *Prosecutor* v. *Bagilishema*, Judgment, Case No. ICTR-95-1A-T, 7 June 2001, paras. 37-50.

The Elements

In order to prevail on a command responsibility theory of criminal liability, the prosecution must establish, beyond reasonable doubt, that:

1. an offence was committed;
2. there was a superior-subordinate relationship;
3. the superior knew or had reason to know that the subordinate was about to commit the offence or had done so; and
4. the superior failed to take the necessary and reasonable measures to prevent the offence or to punish the principal offenders thereof.[59]

With the exception of the first,[60] each of these elements will be analysed.

The first requirement under Article 7(3) is the existence of a superior-subordinate relationship between the accused commander and the subordinate perpetrator at the time the offence was committed.[61] This element raises several issues, namely, the test to be used in determining this relationship; whether the commander must have *de jure* or *de facto* control; whether this liability also extends to civilian superiors; and whether more than one superior in the chain of command may be held liable for acts committed by subordinates.

The test: "effective control" or "material ability"

Although all military organisations are highly structured with hierarchies in which orders and directions flow from the top downwards, the term "superior" as used in Article 7(3) is not necessarily restricted to military commanders senior to the actual perpetrator. As long as the superior exercises effective control over the subordinate, superior responsibility may attach.[62] Thus, a commander may incur criminal responsibility for offences committed by persons who are not formally his or her subordinates, provided that he or she exercises effective control over them.

In terms of the jurisprudence of the ICTY, this test was first set forth in the *Čelebići* case, in which the Trial Chamber held that, "[i]n order for the princi-

59. *Prosecutor* v. *Delalić* et al., *supra* note 57, paras. 189-198, 225-226, 238-239, 256, 263; *Prosecutor* v. *Aleksovski*, *supra* note 56, para.72.

60. This element simply requires proof that an offence for which the ICTY has jurisdiction was committed by a certain perpetrator or group(s) of perpetrators. In the context of Article 7(3), this element was discussed in, *inter alia*, *Prosecutor* v. *Aleksovski, supra* note 49, paras. 103-106, 107-111, and *Prosecutor* v. *Blaškić*, *supra* note 50, paras. 394-401. See also *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-T, 21 May 1999, paras. 476-516, 555, 559, 563, 569).

61. "The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status." *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 303.

ple of command responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences".[63] The *Aleksovski* and *Blaškić* Trial Chambers further refined the concept of "material ability":

> Although the Trial Chamber agrees with the Defence that the "actual ability" of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper action to be taken.[64]

In the *Čelebići* Appeal Judgment, the Appeals Chamber adopted the "effective control" standard,[65] and rejected the suggestion that the notion of effective control can be met by proof of "substantial influence" alone.[66] The "effective control" standard has been subsequently followed in the *Kunarac*,[67] *Kordić & Čerkez*,[68] *Krstić*[69] and *Kvočka* et al.[70] This standard has also been applied by

62. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 370; *Prosecutor* v. *Blaškić*, *supra* note 50, paras. 300-301. See also Rome Statute, *supra* note 5, Article 28(1); W.H. Parks, *supra* note 4, at p. 102; Additional Protocol I, Article 86(2).
63. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 378. See also *ibid.*, paras. 364-377 and Article 87 of Additional Protocol I.
64. *Prosecutor* v. *Blaškić*, *supra* note 50, para. 302; *Prosecutor* v. *Aleksovski, supra* note 49, para.78. See also *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 395 ("a superior may only be held criminally responsible for failing to take such measures that are within his powers") and Article 86(2) of Additional Protocol I which limits criminal responsibility of superiors to "feasible measures within their power to prevent or repress".
65. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 196.
66. *Ibid.*, para. 266:

    > It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.

    See also *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, paras. 412-3.
67. *Prosecutor* v. *Kunarac* et. al., *supra* note 51, para. 396.
68. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52,. 405-406.
69. *Prosecutor* v. *Krstić, supra* note 53, paras. 648-649.
70. *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 315.

the Trial Chambers of the ICTR.[71] Moreover, in the *Kunarac* case, the Trial Chamber stated that there is no requirement that the person committing the offence be in a permanent or fixed relationship with the commander, so long as the commander exercised the prerequisite effective control:

> Both those permanently under an individual's command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, at the time when the acts charged in the Indictment were committed, these persons were under the effective control of that particular individual.[72]

Thus, the first factor determining whether a commander may be held responsible for the acts committed by subordinates is the material ability to prevent or punish the commission of violations of international humanitarian law through effective control of those subordinates. The conflicts in both the former Yugoslavia and Rwanda saw instances where offences were committed by paramilitary and irregular militia forces. As one would expect, such groups often lacked formal military chains of command, but rather exercised *de facto* control over the offenders. Nevertheless, under the effective control test, the leaders of such groups may be found criminally responsible for the crimes committed by subordinates, including those who are simply "followers".[73]

De jure *and/or* de facto *control*

There is no *de jure* requirement set out either in the ICTY Statute or its jurisprudence for a legal designation of the commander as the superior of the perpetrator. An accused may be a commander on the basis of either *de jure* or *de facto* authority. Customary international law supports the proposition that command authority may be exercised through a variety of formal (*de jure*) and

71. See, for example, *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, para.217; *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-A, 1 June 2001, para. 294; *Prosecutor* v. *Musema*, *supra* note 58, para. 148; and *Prosecutor* v. *Bagilishema*, *supra* note 58, paras. 39, 43, 150, 151, 152, 160, 163-165, 171, 180, 183, 664. With respect to the *Bagilishema* case, the ICTR Trial Chamber implied that only "military-style" commanders could have superior responsibility under Article 6(3) of the ICTR Statute, a point that the prosecution has appealed.

72. *Prosecutor* v. *Kunarac* et. al., *supra* note 51, para. 399. The Prosecutor failed to prove that Kunarac exercised effective control over the soldiers who were under his command temporarily at the time they committed the offences, however. *Ibid*., para. 628.

73. For example, in the *Serushago* case before the ICTR, the accused entered guilty pleas with respect to his role as a communal leader, to include offences committed by paramilitary and other irregular forces. *Prosecutor* v. *Serushago*, Sentence, Case No. ICTR-98-39-S, 5 February 1999, paras. 28-29.

informal (*de facto*) mechanisms.[74] Moreover, the concept of superior is broader than that of a commander,[75] and the fact that a commander is the *de jure* superior of a perpetrator will not result in the commander being liable for the crimes of the perpetrator solely on the grounds of the *de jure* leadership role. Rather, it must be established that the *de jure* commander exercised effective control in order for criminal responsibility to attach.[76]

It is well-settled in the jurisprudence of the ICTY and ICTR that formal designation as a commander (or a superior) is not a prerequisite for superior responsibility, and that such responsibility may be imposed by virtue of a superior's *de facto*, as well as *de jure*, position of authority.[77] The *Čelebići* Appeals Chamber stated that "[u]nder Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed".[78] In addition, the ICTR Trial Chamber

74. This may be demonstrated by several post-World War II cases, including those cases described above, and *United States* v. *Soemu Toyoda*, Transcript, at pp. 5011, 5012 (a commander's authority may not be divided into different forms of authority, such as operational or administrative authority); *United States* v. *Pohl* et al., (1948) 5 TWC 195, pp. 1051-1056 (the accused, Karl Mummenthey, was convicted for his use of slave labour from camps for which he had no authority in industries under his control, *Ibid.*,); and *United States* v. *Brandt* et al., (1948) 1-2 TWC 1. See also IMTFE Transcript regarding General Akira Muto, at p. 49820-49821 (implying that persons in influential positions, who do not have direct, formal control over the perpetrators, also may have a duty to take certain measures to prevent violations of international humanitarian law); and *Prosecutor* v. *Musema*, *supra* note 58, at paras. 139-144, which cites approvingly to the *Muto* case relating to "influence theory".

75. See Y. Sandoz, C. Swinarski & B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, para. 3544, p. 1013. ("The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.")

76. *Ibid*., para. 3544, p. 1013 (the expression "superior" in Article 86 of Additional Protocol I refers to the superior who "has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, being his subordinate, is under his control"). In addition, Article 87 of Additional Protocol I specifies that the duties of military commanders extends beyond "the armed forces under their command" to "other persons under their control". *Ibid*., para. 3555, p. 1020 and footnote 9 therein.

77. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 192; *Prosecutor* v. *Delalić* et al., *supra* note 5, paras. 353-354, 364-371; *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, paras. 405-406; *Prosecutor* v. *Kunarac* et. al., *supra* note 51, para. 396; *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 315; *Prosecutor* v. *Aleksovski, supra* note 49, paras. 76, 101, 103; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, paras. 218-222, 230, 478, 490-507.

78. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 192.

in the *Kayishema & Ruzindana* case held that the absence of *de jure* authority does not prevent a finding of *de facto* authority.[79]

Military and/or civilian leaders

Under customary international law, the doctrine of command responsibility extends to both civilian and military superiors, as well as to individuals exercising both types of functions.[80] Article 7(3) of the ICTY Statute is consistent with this customary norm, in that it does not qualify the term "superior" by explicitly limiting the theory to military superiors. Moreover, Article 7(2), which provides that the official position of a person "shall not relieve such person of criminal responsibility nor mitigate punishment", supports the proposition that civilian superiors may fall within the ambit of Article 7(3).[81]

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79. *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, paras. 218-222. See also *Prosecutor* v. *Musema*, *supra* note 58, paras. 866-867, in which the Trial Chamber stated that with respect to ICTR Article 6(3), it was necessary to assess both the nature and extent of the authority (whether *de jure* or *de facto*), and the effective control exercised by the accused in the context of the events alleged in the indictment. See also *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-A, 1 June 2001, paras. 297-299. For a discussion of superior responsibility of civilians for the offence of genocide, see Alexander Zahar, "Command Responsibility of Civilian Superiors for Genocide", (2001) 14 *Leiden J. Int'l L.* 591.

80. The ILC Report on the Draft Code of Crimes against the Peace and Security of Mankind, *supra* note 6, noted that the reference to "superiors" is sufficiently broad to cover civilians who are in a position of authority similar to military commanders and who exercise a similar degree of control with respect to their subordinates. See also *Commentary on the Additional Protocols*, *supra* note 75, para. 3537, p. 1010, footnote 16: "Unfortunately history is full of examples of civilian authorities which have been guilty of war crimes; thus not only military authorities are concerned." But see *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 240: "Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law." Several accused before the IMTFE were civilians, including Koki Hiroti, Kuniaki Koiso and Mamoru Shigemitsu. See *United States of America* et al. v. *Araki* et al., in B.V.A. Röling and C.F. Rüter, eds., *The Tokyo Judgment*, Vol. II, 1977, pp. 446-448, 452-453 and 457-458, respectively; as well as the *Ministries* and *Roechling Enterprises* cases pursuant to Control Council Law No. 10. See *United States* v. *von Weizsaecker*, (1948) 12-14 TWC 1 ("*Ministries* case"); *French Government Commissioner* v. *Roechling* et al., (1948) 14 TWC 1061 (*Roechling Enterprises* case). These cases are discussed at paras. 357-361 of *Prosecutor* v. *Delalić* et al., *supra* note 5. With respect to the IMTFE Judgment, it should be borne in mind that, as discussed above, the IMTFE Charter did not make a distinction between direct and indirect criminal responsibility.

81. See also *Prosecutor* v. *Krnojelac*, *supra* note 6, para. 94: "The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders." As noted in the preceding footnote, the Appeals Chamber has not conclusively addressed this issue.

This issue was first addressed by the Appeals Chamber in *Aleksovski*, where the court stated: "The Appeals Chamber takes the view that it does not matter whether he was a civilian or a military superior, if it can be proved that within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3)."[82] The Appeals Chamber in the *Čelebići* case stated that it "does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control".[83] The Trial Chambers of the ICTY and ICTR, when faced with the issue of civilian superiors, have convicted such persons when it has been proven that they exercised effective control. [84]

It should be briefly noted that the Statute of the International Criminal Court (ICC) takes a different approach with respect to the distinctions between civilian and military superiors. Paragraph 28(1) applies to military commanders and those "effectively acting as a military commander", while paragraph 28(2) limits civilian responsibility to those instances where the subordinates were under the "effective authority and control" of the civilian superior and:

1. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
2. The crimes concerned activities that were within the effective responsibility and control of the superior; and
3. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

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82. *Prosecutor* v. *Aleksovski*, *supra* note 56, para. 76.

83. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 196.

84. The applicability of the theory of command responsibility to civilian superiors was addressed in detail in *Delalić*, where the Trial Chamber stated "it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority" (*Prosecutor* v. *Delalić* et al., *supra* note 5, para. 363). One of the accused in *Delalić*, Zdravko Mucić, was a civilian and was convicted on the basis of Article 7(3). In other cases, including *Kordić & Čerkez* and *Kvočka* et al., the Trial Chambers accepted that civilians could be liable under Article 7(3) but did not convict on that theory because the Prosecution failed to prove that the accused exercised effective control over his subordinates. At the ICTR, Kambanda (ex-prime minister of Rwanda), Serushago (a prominent local civilian and paramilitary leader), Musema (director of a tea factory) and Kayishema (a civilian administrator), have all been convicted under ICTR Article 6(3). An appeal by Kayishema against this aspect of his conviction was rejected by the ICTR Appeals Chamber. See also the *Akayesu* and *Bagilishema* cases from the ICTR, in which the Trial Chambers acquitted under ICTR Article 6(3), on grounds other than that the accused were civilians.

Only the passage of time will tell if these provisions constitute new customary law and whether they will result in an extension or contraction of the use of the superior responsibility doctrine.[85]

Multiple commanders in the chain of command

It is firmly established in the military laws of every state that all military members have an obligation to ensure compliance with norms of international humanitarian law. This obligation extends to all superiors, from the commander-in-chief to the platoon leader.[86] Every person in the chain of command who exercises effective control of subordinates is therefore responsible for crimes committed by subordinates, assuming all the elements of Article 7(3) are met. Consequently, more than one superior may be responsible for crimes committed by the same subordinates, as long as each superior in the chain of command exercises effective control.[87]

*The knowledge requirement (*mens rea*)*

The *mens rea* element of Article 7(3) of the ICTY Statute comprises two distinct components: the accused "knew" or "had reason to know" that a subordinate was about to commit a crime or had done so.[88] The latter term is the most controversial aspect of superior responsibility and the standards employed in interpreting this component have fluctuated over time.

The term "knew" entails actual knowledge, which may not be presumed and may be established either through direct evidence of actual knowledge or circumstantial evidence from which it can be inferred that the commander must have had actual knowledge.[89] Establishing direct evidence that the commander was aware that crimes had been or were about to be committed is very difficult. Proof of actual knowledge can come in the form of oral or written reports that the accused commander acknowledged receiving or such reports

85. For a full analysis of Article 28 of the Rome Statute, see William J. Fenrick, "Article 28 Responsibility of Commanders and Other Superiors", in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court—Observers' Notes, Article by Article*, 1999, p. 519.

86. *Commentary on the Additional Protocols*, *supra* note 75, para. 3553, at p. 1019.

87. *Prosecutor* v. *Aleksovski, supra* note 49, para. 106; *Prosecutor* v. *Blaškić*, *supra* note 50, para. 303; and *Prosecutor* v. *Kunarac* et. al., *supra* note 51, para. 398.

88. For an excellent discussion of the *mens rea* of superior responsibility under ICTY Article 7(3), see K.M.F. Keith, *supra* note 38.

89. *Prosecutor* v. *Aleksovski, supra* note 49, para. 80; *Prosecutor* v. *Blaškić*, *supra* note 50, para. 308. These judgments indicate that the position of authority of the superior over the subordinate may in some circumstances of itself be an indicator that the superior must have known of the subordinate's conduct. Also *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, para. 225.

uttered or authored by the commander himself. Moreover, as noted by the *Kordić & Čerkez* Trial Chamber:

> Depending on the position of authority held by a superior, whether military or civilian, *de jure* or *de facto*, and his level of responsibility in the chain of command, the evidence required to demonstrate actual knowledge may be different. For instance, the actual knowledge of a military commander may be easier to prove considering the fact that he will presumably be part of an organised structure with established reporting and monitoring systems. In the case of *de facto* commanders of more informal military structures, or of civilian leaders holding *de facto* positions of authority, the standard of proof will be higher.[90]

In most cases, however, the prosecution will put forward circumstantial evidence from which the Trial Chamber may infer that the superior had actual knowledge. At least three Trial Chambers have approvingly referred to several relevant factors listed in the Final Report of the Commission of Experts from which actual knowledge may be inferred.[91] These include: number of illegal acts; type of illegal acts; scope of illegal acts; time during which the illegal acts occurred; number and type of troops involved; logistics involved, if any; geographical location of the acts; widespread occurrence of the acts; tactical tempo of operations; *modus operandi* of similar illegal acts; officers and staff involved; location of the commander at the time.[92] Other factors which may be relevant include the nature and scope of the particular position held by the superior;[93] the character traits of subordinates;[94] events taking place during any temporary absences of the superior;[95] and the level of training and instruction provided by the commander to the subordinates.[96]

The phrase "had reason to know" has proven more difficult to interpret and apply, with Trial Chambers of the ICTY coming to different conclusions on this issue, compounded by the fact that the ICC Statute has adopted different *mens rea* standards for military and non-military superiors. Until the Appeals Chamber rendered its judgment in the *Čelebići* case, the two leading ICTY

90. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 428.

91. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 386; *Prosecutor* v. *Blaškić*, *supra* note 50, para. 307; *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 427.

92. See para. 58 of the "Final Report of the Commission of Experts", UN Doc. S/1994/674 (1994).

93. *Prosecutor* v. *Aleksovski, supra* note 49, para. 80; *Prosecutor* v. *Blaškić*, *supra* note 50, para. 308.

94. *Commentary on the Additional Protocols*, *supra* note 75, para. 3545, p. 1014 and footnote 37 therein. This factor was cited with approval in *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 238.

95. *Ibid.*

96. *Ibid.*

cases interpreting this phrase, the *Čelebići*[97] and *Blaškić*[98] cases, came to very different conclusions with respect to the meaning of the phrase "had reason to know". Both Trial Chambers concurred that customary international law, as reflected in the post-World War II jurisprudence, imposed on superiors a duty to stay informed as to the acts of subordinates.

Notwithstanding this common starting point, however, the Trial Chambers reached very different conclusions and in order to understand the significance of these varying interpretations, it is necessary to briefly restate the Trial Chambers' positions. The *Čelebići* Trial Chamber interpreted "had reason to know" as meaning that:

> [a] superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.[99]

The *Blaškić* Trial Chamber interpreted the phrase to mean that:

> [i]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.[100]

During the appeal in the *Čelebići* case, the prosecution argued in favour of the approach taken by the *Blaškić* Trial Chamber that a superior should be held accountable for the acts of his or her subordinates when he or she has failed to obtain information which was reasonably available to him or her.[101] In effect, the prosecution was arguing that "had reason to know" equates to "should have known". The Appeals Chamber rejected this argument on the grounds that a "should have known" standard impermissibly would turn the doctrine of superior responsibility into a form of strict liability. "The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine,

97. *Prosecutor* v. *Delalić* et al., *supra* note 5, paras. 387-393.

98. *Prosecutor* v. *Blaškić*, *supra* note 50, paras. 309-332.

99. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 393.

100. *Prosecutor* v. *Blaškić*, *supra* note 50, para. 332.

101. See *Prosecutor* v. *Delalić* et al., *supra* note 57, paras. 215-241, for the prosecution's grounds of appeal relating to the *mens rea* for command responsibility.

insofar as vicarious liability may suggest a form of strict imputed liability."[102] Rather, the Appeals Chamber affirmed the interpretation put forward by the *Čelebići* Trial Chamber:

> Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates [sic] actions will necessarily result in criminal liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised [sic] of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.[103]

The Appeals Chamber elaborated on what must be established to prove that the accused "had reason to know," noting that the prosecution must demonstrate that "information of a general nature was available to the superior that would have put him or her on notice of offences committed by subordinates".[104] This information need not be conclusive that crimes were committed, but rather "[i]t is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates".[105] Thus, there is a duty on commanders to investigate upon being informed of the possibility that such offences were committed.[106]

The *Čelebići* Appeal Judgment also clearly sets forth guidelines for determining what evidence may be considered as putting the superior on notice that subordinates may have committed crimes, thus triggering his duty to investigate. As to the form of the information, it could have come to the attention

102. *Ibid*., para. 239.

103. *Ibid.*, para. 226.

104. *Ibid*., para. 241.

105. *Ibid*., para. 236, citing *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 393.

106. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 239; *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 393

of the commander via a written or oral report and there is no formal requirement that the information came by way of an official or authorised monitoring system.[107] With respect to the contents of the information received, there is no requirement that it explicitly state that a subordinate committed crimes.[108] Of course, this factor is only relevant in the context of an accused who fails to punish a subordinate after a crime has been committed, and would not come into play in the situation of failure to prevent. Moreover, the Trial Chamber will retain considerable discretion in determining what type of information is sufficient to trigger the superior's duty to investigate. Such factual findings are likely to provide material for future appeals. The prosecution, for example, has raised two grounds of appeal from the *Krnojelac* judgment concerning its conclusions that the accused did not have sufficient information to put him on notice that his subordinates were involved in the torture and murder of detainees.[109]

The Appeals Chamber also referred approvingly to the factors set forth in the ICRC Commentary to Additional Protocol I concerning "the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits as potentially constituting the information referred to in Article 86(2) of Additional Protocol I"[110] as being among those allowing inferences to be drawn concerning notice to the commander.[111] Finally, the Appeals Chamber noted there is no requirement that the accused actually was aware of the information contained in any reports received:

> The relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[112]

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107. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 238.

108. *Ibid*., para. 238.

109. *Prosecutor* v. *Krnojelac*, Prosecution's Notice of Appeal, Case No. IT-97-25A, 15 April 2002.

110. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 238. The Appeals Chamber gave the following example: "For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge."

111. As noted above, the Trial Chamber in *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 437, which cited the indicia listed in the United Nations Commission of Experts Report, *supra* note 92, (at para. 58), can also be used to establish notice, although these factors are usually used to prove actual or circumstantial knowledge.

112. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 239.

Following the Appeals Chamber judgment in the *Čelebići* case, there have been three cases in which Trial Chambers have applied the "had reason to know" component. In *Kordić & Čerkez*, the Trial Chamber stated: "It appears clearly from the Appeals Chamber's findings that a superior may be regarded as having 'reason to know' if he is in possession of sufficient information to be on notice of the likelihood of subordinate illegal acts, i.e., if the information available is sufficient to justify further inquiry."[113] The judgment rendered in the *Kvočka* case indicates that "[a]ction is required on the part of the superior from the point at which he 'knew or had reason to know' of the crimes committed or about to be committed by subordinates".[114]

The interpretation of the "had reason to know" standard of the *Blaškić* Trial Chamber is closer to that of customary international law, at least with respect to the jurisprudence of the post-World War II cases. This raises the question as to why the Trial and Appeals Chamber in the *Čelebići* case applied a different standard. The *Čelebići* Trial Chamber considered the World War II case law, but came to the conclusion that it was "bound to apply customary law as it existed at the time of the commission of the alleged offences".[115] The judges went on to conclude that Article 86 of Additional Protocol I reflected an accurate statement of the law as it existed at the time that the offences were committed. After examining the *travaux préparatoires*, the Trial Chamber concluded that the drafters of Article 86 of Additional Protocol I "explicitly rejected the proposed inclusion of a mental standard according to which a superior would be criminally liable for the acts of his subordinates in situations where he should have had knowledge concerning their activities".[116] The Appeals Chamber affirmed this approach.[117]

As noted above, Article 28 of the ICC Statute sets forth different standards for military and civilian superiors, and these differences also include different *mens rea* requirements, which may once again force changes for the development and application of the law with respect to the knowledge requirement concerning superior responsibility. Under Article 28(1) of the ICC Statute, the *mens rea* for military superiors is that the accused "knew or, owing to the cir-

113. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 437.

114. *Prosecutor* v. *Kvočka* et al., *supra* note 54, paras 317-318.

115. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 390.

116. *Ibid*., para. 391. See also *ibid*., paras. 387-393 for the full discussion of this issue by the Trial Chamber. See K.M.F. Keith, *supra* note 38, at pp. 624-626 for a critical analysis of this determination.

117. *Prosecutor* v. *Delalić* et al., *supra* note 57, paras. 231-239 and at para. 241:

> The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard had "reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information is available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

cumstances at the time, *should have known* that the forces were committing or about to commit such crimes".[118] With respect to civilian superiors, there is a stricter standard requiring proof that the civilian superior "knew or *consciously disregarded information that clearly indicated*, that the subordinates were committing or about to commit such crimes".[119]

The approach taken by the ICC Statute *vis-à-vis* military commanders is appealing for three reasons. First it reflects the reality that military leaders have specific duties to gather information as part of their military responsibilities. As one prominent commentator has noted:

> The commander has a duty to have relevant information gathered and to evaluate it. If he or she fails to obtain or wantonly disregards information of a general nature within his or her reasonable access indicating the likelihood of actual or prospective criminal conduct on the part of subordinates, he or she meets the "should have known" standard.[120]

Second, it promotes accountability under the law for such military superiors. Third, because the ICC Statute is a treaty, it may be argued that the ICC standard reflects either customary law or is at least aspirational for those States that did not consider the ICC formulation to be customary.

At any rate, given the large number of States that have signed and ratified the ICC Statute, and the rapid rate with which that treaty has entered into force, the ICC standard will certainly play an important role in the future development of the *mens rea* of superior responsibility. The majority of the crimes for which ICTY indictments have been confirmed occurred prior to the adoption of the ICC Statute. In light of the fact that the Appeals Chamber in the *Čelebići* case focused on the state of the law at the time the offences were committed, it will be interesting to see if the ICTY Trial Chambers considering liability under Article 7(3) for offences committed in Kosovo in 1999 look to the ICC *mens rea* standards as reflecting a change in the customary law.[121]

Necessary and reasonable measures to prevent or punish

The third element of superior responsibility, the requirement that superiors take necessary and reasonable measures to prevent or punish, has significant

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118. Rome Statute, *supra* note 5, Article 28(1) (emphasis added). See also W. Fenrick, *supra* note 85, p. 519.

119. Rome Statute, *supra* note 5, Article 28(2) (emphasis added). The difference between these two standards may reflect customary international law, as recognised by the *Čelebići* Appeal Judgment, para. 240.

120. W. Fenrick, *supra* note 85, p. 519.

121. The Federal Republic of Yugoslavia did not sign the Rome Statute until 19 December 2000, so it would be difficult to argue that the *mens rea* elements applied for events occurring in Kosovo in 1999, unless those elements reflected customary international law when the ICC Statute was adopted in July 1998.

overlap with the first element, since commanders who lack effective control will generally be unable to satisfy this requirement.[122] Nevertheless, this element is extremely important in practice since, as one commentator has noted, this requirement "will serve as a yardstick for the superior's behaviour—the superior's liability and the degree of punishment to be imposed, if any, will turn on this measurement".[123]

Regarding the scope of this obligation, the Appeals Chamber in the *Aleksovski* case stated:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them.[124]

The *Aleksovski* Trial Chamber held that the power of a civilian superior to prevent or punish was necessarily more limited than the power of a military superior in the same position.[125]

There are no definitive standards for evaluating whether a superior has fulfilled the necessary and reasonable measures, since such a determination is highly fact specific, as several Trial Chambers have recognised.[126] In the *Blaškić* case, the Trial Chamber stated that "[i]t is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator".[127] In some circumstances, this obligation

122. With respect to the duties of military commanders, see Articles 86(2) and 87 of Additional Protocol I. In *Kayishema & Ruzindana*, the Appeals Chamber held that a person may be held liable as a superior even if that superior possessed no formal authority to prevent or punish. *Prosecutor* v. *Kayishema & Ruzindana,* Judgment, Case No. ICTR-95-1-A, 1 June 2001, para. 302. See also *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 395; and *Prosecutor* v. *Blaškić*, *supra* note 50, para. 302.

123. See S. Boelaert-Suominen, *supra* note 4, p. 781.

124. *Prosecutor* v. *Aleksovski, supra* note 56, para. 76. See also *Prosecutor* v. *Blaškić*, *supra* note 50, para. 335; *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 376; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, para. 217.

125. *Prosecutor* v. *Aleksovski, supra* note 49, para 78.

126. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 394: "It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful." See also *Prosecutor* v. *Aleksovski, supra* note 49, para. 81; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 60, para. 231.

127. *Prosecutor* v. *Blaškić*, *supra* note 50, para. 335. See also *Prosecutor* v. *Aleksovski, supra* note 49, para. 81; *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 395.

may be met by reporting the matter to the competent authorities, such as the commander's superior officer.[128] In the *Kvočka* case the Trial Chamber took this line of reasoning one step further, holding that the accused superior "does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process".[129]

At the same time, the Trial Chambers have taken a sensible approach in applying this component of superior responsibility. In *Čelebići*, the first case before the ICTY to deal with superior responsibility, the Trial Chamber stated:

> International law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior's powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility.[130]

In making this determination, the Trial Chamber explicitly rejected the approach taken by the International Law Commission (ILC) in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind.[131]

In the *Blaškić* case, the Prosecution made "detailed legal submissions" regarding the "failure to prevent or punish" requirement.[132] The Trial Chamber concluded that the two prongs of this obligation must be considered together: "Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards."[133] The

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128. *Prosecutor* v. *Blaškić*, *supra* note 50, paras. 302, 335; *Prosecutor* v. *Aleksovski, supra* note 49, para. 78.

129. *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 316.

130. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 395.

131. ILC "Draft Code of Crimes Against the Peace and Security of Mankind", UN Doc. A/51/10 (1996). The ILC view, stated at pp. 38-39, was:

> For the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures. Thus, a superior would not incur criminal responsibility for failing to perform an act which was impossible to perform in either respect.

In *Prosecutor* v. *Delalić* et al., *supra* note 5, the Trial Chamber stated, at para. 395: "The Trial Chamber accordingly does not adopt the position taken by the ILC on this point, and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior."

132. S. Boelaert-Suominen, *supra* note 4, elaborates upon these submissions and their legal sources, at pp. 782-783.

133. *Prosecutor* v. *Blaškić*, *supra* note 50, para. 336.

obligation of the superior to act is triggered upon being aware that crimes had been or were about to be committed.[134] Moreover, as recognised by the Trial Chamber in *Kordić & Čerkez*, "[t]he duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned, or when he has reasonable grounds to suspect subordinate crimes".[135] Superiors who assume command following the commission of an offence are under the same duty to punish:

> This duty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under similar obligations depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.[136]

Internal Armed Conflict

There is no international case law specifically supporting the proposition that the doctrine of superior responsibility applies in internal, as opposed to international, armed conflict.[137] Historically, the doctrine has been applied to war crimes in international armed conflicts only, as is clear from a reading of Articles 86 and 87 of Additional Protocol I and by the fact that Additional Protocol II, which deals with internal armed conflict, has no corresponding provisions. Although these texts form part of customary international law, and have been interpreted and applied in many cases, these decisions "did not dwell on the character of the armed conflict".[138] The successful convictions under the doctrine of command responsibility at the ICTR also support the idea that the character of the conflict is irrelevant with respect to holding a superior liable:

> The Prosecution in indictments before the ICTR in Rwanda has used Article 6(3), although the Rwanda Statute seems to pre-judge the armed conflict in Rwanda as a non-international armed conflict of the type referred to in Common Article 3 to the Geneva Conventions and Additional Protocol II. All ICTR judgments in which accused were convicted on the basis of Article 6(3)

134. *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 317.

135. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 445.

136. *Ibid.*, para.446.

137. S. Boelaert-Suominen, *supra* note 4, persuasively argues that Article 7(3) does apply in internal armed conflict.

138. *Ibid.*, p. 773.

> liability confirm implicitly, that the theory of superior responsibility applies to non-international armed conflicts covered by the Rwanda Statute as well.[139]

The first ICTY case in which this issue will be fully litigated is the *Hadžihasanović* case, which is currently pending before Trial Chamber II. In that case, the three accused filed a joint challenge to the jurisdiction of the Tribunal, alleging that international law did not provide for individual criminal responsibility for superiors in non-international armed conflict at the time of the alleged offences.[140] As a result of this challenge, the parties were directed to file briefs on the issue.[141] At least nine pleadings were submitted in addition to an one *amicus curiae* filing supporting the three accused.[142]

The defence argument may be summarised as follows: there was no doctrine of superior responsibility in internal armed conflict under customary international law during the relevant time period and thus to impose such criminal liability would violate the principle *nullum crimen sine lege*. In support of their position, counsel for the accused rely, *inter alia*, on the absence

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139. *Ibid*.

140. *Prosecutor* v. *Hadžihasanović* et al., Joint Challenge to Jurisdiction Arising from the Amended Indictment, Case No. IT-01-47-PT, 21 February 2002. This issue is of great significance to the case since Article 7(3) is the sole ground for alleging the criminal responsibility of the three accused.

141. *Prosecutor* v. *Hadžihasanović* et al., Submissions of Mehmed Alagić on the Challenge to Jurisdiction Based on the Illegality of Applying Article 7(3) to Non-International Armed Conflict, Case No. IT-01-47-PT, 9 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Written Submission of Amir Kubura on Defence Challenges to Jurisdiction, Case No. IT-01-47-PT, 10 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Joint Challenge to Jurisdiction Arising From the Amended Indictment Written Submissions of Enver Hadžihasanović, Case No. IT-01-47-PT, 10 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising From the Amended Indictment", Case No. IT-01-47-PT, 10 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising From the Amended Indictment, Case No. IT-01-47-PT, 24 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Response of Mehmed Alagić on the Challenge to Jurisdiction, Case No. IT-01-47-PT, 24 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Response of Amir Kubura to Prosecution's Brief on Defence Challenges to Jurisdiction, Case No. IT-01-47-PT, 24 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Enver Hadžihasanović's Response to the Prosecution's Brief Regarding Issues in the "Joint Challenge to Jurisdiction Arising from the Amended Indictment", Case No. IT-01-47-PT, 10 May 2002;*Prosecutor* v. *Hadžihasanović* et al., Prosecution's Reply to Defence Responses to the Prosecution's Brief Concerning Issues in the "Joint Challenge to Jurisdiction Arising From the Amended Indictment", Case No. IT-01-47-PT, 31 May 2002; *Prosecutor* v. *Hadžihasanović* et al., Amicus Brief of Ilias Bantekas (Reader, University of Westminster) on the Challenge to Jurisdiction Based on the Application of Article 7(3) to Non-International Armed Conflict, Case No. IT-01-47-PT, 2 April [sic] 2002 (filed 3 May 2002).

142. *Prosecutor* v. *Hadžihasanović* et al., Joint Challenge to Jurisdiction Arising from the Amended Indictment, Case No. IT-01-47-PT, 21 February 2002.

of a specific provision in Additional Protocol II concerning superior responsibility; the fact that the ICTR Statute was adopted in November 1994 *after* the relevant indictment period in the *Hadžihasanović* case[143]; and a survey of national laws that found that only one of sixteen States surveyed (Belgium) had national legislation providing for such criminal liability and in no jurisdiction were there any reported cases in which commanders were held criminally liable for the conduct of their subordinates solely on the basis of their failure to prevent or punish.

In response, the prosecution argues that Article 7(3) reflects the customary principle that all armed forces must be under responsible command; that there are cases in which the doctrine of command responsibility has been applied to rebel commanders during internal armed conflicts; that a number of treaties and other international instruments provide evidence of the customary nature of this principle; and that retroactive declarations of existing custom do not violate the *nullum crimen* principle.

The view taken by the prosecution seems to be the preferable course. The well-established principle that all armed forces must be under a responsible and unified chain of command seems beyond reproach. Moreover, one of the defining factors for the applicability of Additional Protocol II is the necessity that the forces engaged against the armed forces of the state must either be dissident armed forces or organised groups. Both of these categories necessarily entail some degree of command and control structure. This goes to the heart of the notion of superior responsibility.

Relationship between Article 7(1) and Article 7(3)

There is no legal hindrance to charging an accused superior under both Articles 7(1) and 7(3) of the Statute, although the Appeals Chamber has not specifically addressed the issue of whether it is permissible for an accused to be convicted under both theories of liability for the same underlying criminal acts.[144] Nevertheless, in both the *Čelebići* and *Aleksovski* appeals, the Appeals

143. Since the Security Council included a provision for superior responsibility in the context of the undoubtedly internal armed conflict in Rwanda, and in light of the fact that individuals have been convicted under Article 6(3) of the ICTR Statute, the defence seem to concede that after November 1994, its argument loses much of its merit.

144. See, for example, *Prosecutor* v. *Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), Case No. IT-95-14-PT, 4 April 1997, para. 32: "Nothing prevents the *Prosecutor* from pleading an alternative responsibility (Article 7(1) or Article 7(3) of the Statute), but the factual allegations supporting either alternative must be sufficiently precise so as to permit the accused to prepare his defence on either or both alternatives." *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 1222: "[I]n practice there are factual situations rendering the charg-

Chamber did not disturb convictions under both forms of liability.[145] The more recent trend has been to convict the accused under only one form of liability, the one that most accurately describes his or her participation. For example, in the *Krnojelac* case, the Trial Chamber stated:

> The Trial Chamber has established the criminal responsibility of the accused pursuant to both Article 7(1) and Article 7(3). However, the Trial Chamber of the view that it is inappropriate to convict under both heads of responsibility for the same count based on the same acts. Where the Prosecutor alleges both heads of responsibility within the one count, and the facts support a finding under both heads of responsibility, the Trial Chamber has a discretion to chose which is the most appropriate head of responsibility under which to attach criminal responsibility to the accused. This discretion has not been affected by the law as to cumulative convictions as stated by the majority of the Appeals Chamber in *Delalić*.[146]

In the *Krnojelac* case, the Trial Chamber went on to hold that in those instances in which an accused could have been convicted under both Article 7(1) and Article 7(3), but the Trial Chamber exercised its discretion to convict under only Article 7(1), the accused's position as a superior could be taken into consideration as a mitigating factor for purposes of sentencing.[147] It is not uncommon for the Prosecutor to allege simultaneously that an accused is liable under both Article 7(1), on a theory of joint criminal enterprise, and under Article 7(3), on the basis that the accused was a superior. However, before turning to an example of this practice, it is necessary to describe briefly what constitutes

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ing and convicting of the same person under both Articles 7(1) and 7(3) perfectly appropriate". *Prosecutor* v. *Blaškić*, *supra* note 50, para. 337: it would be "illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them".

145. *Prosecutor* v. *Delalić* et al., *supra* note 57, paras. 745-746 and *Prosecutor* v. *Aleksovski*, *supra* note 56, para. 183.

146. *Prosecutor* v. *Krnojelac*, *supra* note 6, para. 173 (citing to *Prosecutor* v. *Delalić* et al., *supra* note 57, paras. 400-413). See, also *Prosecutor* v. *Krstić, supra* note 53, para. 652, *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 570, and *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, para. 370:

> The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).

147. *Prosecutor* v. *Krnojelac*, *supra* note 6, paras. 173, 316, 496.

a joint criminal enterprise in the ICTY practice and how it has developed in the jurisprudence of the ICTY.

The "notion of common purpose" as a basis for criminal liability under international law was fully discussed by the Appeals Chamber in the *Tadić* appeal.[148] In that case, the Appeals Chamber held that under international law, there were three categories of cases in which courts and tribunals had accepted a joint criminal enterprise theory. In the first category of cases involving co-perpetration, "all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)".[149] Cases involving World War II concentration camps, "where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment", constitute the second category of cases.[150] In the third category of cases, "it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the forseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose".[151] The Appeals Chamber summed up the requisite *mens rea* for these forms of liability as follows:

> With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which…is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[152]

148. *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, paras. 185-229.

149. *Ibid*., para. 220.

150. *Ibid*.

151. *Ibid*.

152. *Ibid*., para. 228. With respect to the *actus reus*, the Appeals Chamber stated:

> The objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

Although joint criminal enterprise may appear simply as a form of aiding and abetting liability, the Appeals Chamber set forth four factors distinguishing between these forms of liability.[153]

In the *Krnojelac* case, the Trial Chamber conducted a lengthy discussion of joint criminal enterprise and stated it exists where there is an "understanding or arrangement amounting to an agreement between two or more persons that thy will commit a crime".[154] This agreement need not be express, may be inferred from the circumstances and does not have to be reached at any time

> i. *A plurality of persons.* They need not be organised in a military, political or administrative structure … .
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

153. *Ibid.*, para. 229:

> It is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.
>
> (i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.
>
> (ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
>
> (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.
>
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

154. *Prosecutor* v. *Krnojelac*, *supra* note 6, paras. 78-87. The Prosecution intends to appeal against these findings, on the ground that the Trial Chamber "erred in law in its determination of the elements of common purpose (or joint criminal enterprise)" See *Prosecutor* v. *Krnojelac*, *supra* note 109.

prior to the commission of the offence.[155] Moreover, the Trial Chamber set forth three examples of how an accused could be found to have participated in a joint criminal enterprise:

> (i) by participating directly in the commission of the agreed crime itself (as a principal offender);
> (ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or
> (iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of that system and intent to further that system.[156]

Perhaps the best recent example of pleading involving joint criminal enterprise and Article 7(3) is the *Milošević* et al. indictment, charging five individuals with violations of international humanitarian law in Kosovo in 1999.[157] Paragraph 16 of the indictment, as amended, sets forth the Prosecutor's theory of liability under Article 7(1):

> Each of the accused is individually responsible for the crimes alleged against him in this indictment under Articles 3, 5 and 7(1) of the Statute of the Tribunal. The accused planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of these crimes. By using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the accused physically perpetrated any of the crimes charged, personally. "Committing" in this indictment refers to participation in a joint criminal enterprise as a co-perpetrator. The purpose of this joint criminal enterprise was, *inter alia,* the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province. To fulfil this criminal purpose, each of the accused, acting individually or in concert with each other and with others known and unknown, significantly contributed to the joint criminal enterprise using the *de jure* and *de facto* powers available to him.[158]

155. *Prosecutor* v. *Krnojelac*, *supra* note 6, para. 80.

156. *Ibid*., para. 81.

157. *Prosecutor* v. *Milutinović* et al., Indictment, Case No. IT-99-37, 29 October 2001. One of the accused, Vlajko Stojilković, committed suicide on 11 April 2002. Two of the other accused, Ojdanić and Šainović, surrendered to the ICTY on 25 April and 2 May 2002 respectively. Slobodan Milošević was originally indicted with these co-perpetrators, but was effectively severed from this indictment once the indictments covering Bosnia and Croatia were joined for purposes of his trial.

158. *Ibid*. Paragraph 18 of the indictment sets forth greater particulars regarding the joint criminal enterprise theory of the case:

> The crimes enumerated in Counts 1 to 5 of this Indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated

By comparison, paragraph 19 describes the Prosecutor's theory of the superior responsibility of each of the accused:

> Slobodan *MILOŠEVIĆ*, Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ, Dragoljub OJDANIĆ and Vlajko STOJILJKOVIĆ, while holding positions of superior authority, are also individually criminally responsible for the acts or omissions of their subordinates, pursuant to Article 7(3) of the Statute of the Tribunal. A superior is responsible for the criminal acts of his subordinates if he knew or had reason to know that his subordinates were about to commit such acts or had done so, and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[159]

In terms of style and terminology, the excerpted paragraphs are typical of recent indictments and particularly those submitted for confirmation by the current Prosecutor, Carla Del Ponte.[160] A brief analysis of these paragraphs reveals several interesting points. First, it is clear that the language used in the indictment tracks the exact language set forth in the ICTY Statute. Second, given the structure and language of this indictment, Article 7(3) liability is pleaded alternatively. Third, with respect to joint criminal enterprise, the indictment sets forth both the purpose of the common plan and how it was allegedly carried out. Fourth, the third and fourth sentences of paragraph 16 of the indictment define the term "commit" for purposes of joint criminal enterprise liability, that is, the Prosecutor is not alleging that any of the accused actually committed the crimes, such as murder, that are set forth in the indictment. Rather, they "committed" the crimes alleged through their participation in the common plan or purpose as co-perpetrators. Fifth, paragraph 18 of the indictment, in conformity with the *Tadić* Appeals Judgment, alleges that crimes committed "were natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome of the joint criminal enterprise".

> in Counts 3 to 5 were natural and foreseeable consequences of the joint criminal enterprise and the accused were aware that such crimes were the likely outcome of the joint criminal enterprise. Despite their awareness of the foreseeable consequences, Slobodan MILOŠEVIĆ, Milan MILUTINOVIĆ, Nikola ŠAINOVIĆ, Dragoljub OJDANIĆ, Vlajko STOJILJKOVIĆ and others known and unknown, knowingly and wilfully participated in the joint criminal enterprise. Each of the accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in counts 1 to 5. On this basis, under Article 7(1) of the Statute, each of the accused and other participants in the joint criminal enterprise bear individual criminal responsibility for the crimes alleged in counts 1 to 5.

159. *Ibid.*

160. For a discussion of the history of the indictment drafting process at the ICTY, see Michael J. Keegan and Daryl A. Mundis, "Legal Requirements for Indictments", in Richard May *et. al.*, *Essays on ICTY Procedure and Evidence In Honour of Gabrielle Kirk McDonald*, 2001, pp. 123-136.

Taken together, these forms of liability provide the Prosecutor with a variety of theories upon which to charge an accused who possesses command or superior authority over the perpetrators of serious violations of international humanitarian law. Moreover, joint criminal enterprise – especially when combined with Article 7(3) – permits the attachment of criminal liability for crimes committed rather remotely from the accused.

Perhaps the best example of this practice occurred in the *Krstić* case.[161] General Krstić was charged under both Article 7(1), including joint criminal enterprise, and Article 7(3) for his role in the genocide at Srebrenica. The Trial Chamber concluded that a joint criminal enterprise existed in the Srebrenica enclave and that the object of this common plan was, *inter alia*, the forcible transfer of the Muslim civilian population out of Srebrenica and the killing of "military-aged Bosnian Muslim men of Srebrenica with the awareness that such killings would lead to the annihilation of the entire Bosnian Muslim community at Srebrenica".[162]

Many of the Bosnian Muslim civilians of Srebrenica had fled to Potočari, a few miles from the town of Srebrenica, but within the "Srebrenica enclave". Many refugees who fled to Potočari were the victims of murder, rape, beatings and other abuse. For purposes of the present discussion, it is interesting to note the following findings of the judges:

> The Trial Chamber is not, however, convinced beyond reasonable doubt that the murders, rapes, beatings and abuses committed against the refugees at Potočari were also an agreed upon objective among the members of the joint criminal enterprise. However, there is no doubt that these crimes were natural and foreseeable consequences of the ethnic cleansing campaign.[163]

Thus, even though the crimes committed at Potočari were outside the scope of the joint criminal enterprise "as agreed upon" by the members of that group, and even though General Krstić did not personally commit these crimes, he was convicted for the "incidental murders, rapes, beatings and abuses committed in the execution of this criminal enterprise at Potočari".[164]

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161. See also *Prosecutor* v. *Kvočka* et al., *supra* note 54, paras. 242-341, and particularly paras. 287-289, where the Trial Chamber concluded that in determining the relevant category (*i.e.*, co-perpetrator in a joint criminal enterprise or accomplice in the form of an aider and abettor), the greater the level of participation of the accused, the safer it is to draw an inference that the particular accused shared the intent of the joint criminal enterprise.

162. *Prosecutor* v. *Krstić, supra* note 53, para. 644. See paras. 607-645 for the Trial Chamber's conclusions *in toto* regarding joint criminal enterprise and para. 615 concerning the forcible transfer of the civilian population as one component of this common plan.

163. *Ibid.*, para. 616.

164. *Ibid.*, para. 617.

What makes this example interesting as compared with the knowledge requirement under Article 7(3) is the following statement by the Trial Chamber in support of the conclusions that the judges reached: "Given the circumstances at the time the plan was formed, General Krstić must have been aware that an outbreak of these crimes would be inevitable given the lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection."[165] The "must have been aware" *mens rea* standard stands in marked distinction to the interpretation rendered of the "had reason to know" standard of Article 7(3) in the *Čelebići* appeal. Thus, if it can be established that the superior was part of a joint criminal enterprise with either other commanders of similar rank, or even subordinates in his or her chain of command, it may be easier to convict that superior under Article 7(1) than Article 7(3). This realisation, combined with the fact that offences alleged under Article 7(1) should result in a harsher penalty upon conviction than similar crimes alleged under Article 7(3),[166] clearly illustrates the importance of the joint criminal enterprise theory in terms of charging policy.

In the *Krnojelac* case, however, a different Trial Chamber faced with different facts, focused on the inter-relationship between joint criminal enterprise liability and aiding and abetting liability under Article 7(1), on the one hand, and criminal liability as a superior under Article 7(3), on the other hand.[167] In that case, it was established that the accused was aware both of the illegality of the detention of non-Serbs in a camp in which he was the warden and that his "acts and omissions were contributing to the maintenance of that unlawful system by the principal offenders".[168] Nonetheless, the Trial Chamber concluded that it was possible that the accused was "merely carrying out the orders given to him by those who appointed him to the position of [the camp] without sharing their intent".[169] The Trial Chamber held that in these circumstances:

165. *Ibid*., para. 616.

166. This should follow from the fact that Article 7(1) covers commission of offences, while Article 7(3) deals with omissions.

167. The *Krnojelac* Trial Chamber specifically rejected the approach taken in *Krstić* in drawing a distinction was drawn between an accomplice (as a secondary form of participation) and a co-perpetrator (as a direct and principal form of participation, but falling short of that of the principal offender). See *Prosecutor* v. *Krnojelac*, *supra* note 6, para. 76. The *Krnojelac* Trial Chamber also rejected the approach taken by the *Kvočka* Trial Chamber concerning the distinction between a co-perpetrator (who shares the intent of the joint criminal enterprise) and an aider and abettor (who merely has knowledge of the principal offender's intent). *Prosecutor* v. *Krnojelac*, *supra* note 6, para. 76. Both *Krstić* and *Kvočka* were decided by Trial Chamber I.

168. *Ibid*., para. 127.

169. *Ibid*.

> [T]he criminal conduct of the accused is most appropriately characterised as that of an aider and abettor to the principal offenders of the joint criminal enterprise to illegally imprison the non-Serb detainees pursuant to Article 7(1) of the Statute. As to the accused's superior responsibility for illegal imprisonment of non-Serb detainees pursuant to Article 7(3), the most which could have been done by the accused as a superior would have been to report the illegal conduct to the very persons who had ordered it. Accordingly, the Trial Chamber considers that it would not be appropriate to find him responsible as a superior.[170]

Conclusion

Several conclusions regarding the scope of this theory of liability are apparent.[171] First, only those commanders who exercise effective control over their subordinates may be found criminally responsible. Second, all superiors, whether military or civilian, may be subject to prosecution under this theory. Third, formal characterisation of the authority relationship is not required and both *de jure* and *de facto* superiors may be found liable. Fourth, actual knowledge will rarely be proven, but there are numerous indicators from which inferences may be drawn that a commander had knowledge. Fifth, the *mens rea* requirement of either "knew" or "had reason to know" has fluctuated over time and will most likely continue to do so under Article 28 of the ICC Statute. Finally, commanders are under an obligation to act when confronted with information that tends to suggest a subordinate may have committed a violation of humanitarian law.

The doctrine of superior responsibility is a well-established principle of customary international law, which has developed and been refined through both convention and through Security Council resolutions, as well as through domestic and international case law. As is clear from the foregoing, this theory of liability has played an important role in the jurisprudence of the ICTY, and provides the Prosecutor with the ability to charge superiors for both acts of commission and omission when certain factors are present. It may be used in conjunction with Article 7(1) and joint criminal enterprise to close any gaps and ensure that the greatest possible number of perpetrators may be held accountable. Although the ICTY Appeals Chamber has arguably adopted a more restrictive test for *mens rea* than will be the case under the ICC Statute, there can be no doubt that the ICTY jurisprudence has played, and will continue to play, an important role in the development of the doctrine of command responsibility.

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170. *Ibid* (footnote excluded). See also *ibid.*, para. 173.

171. S. Boelaert-Suominen, *supra* note 4, pp. 784-785, identifies fourteen propositions concerning the customary status of the superior responsibility doctrine.

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ANDRÉ NOLLKAEMPER*

Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY

The International Criminal Tribunal for the former Yugoslavia (ICTY) has made extensive use of national case law in interpreting and applying its Statute and Rules of Procedure and Evidence and in determining points of general international law. It has done so in heterogeneous ways. Sometimes it has used national case law to identify the contents of customary international law. On other occasions, it has referred to national case law in its analysis of general principles of (international) law. And on yet other occasions it has endowed national decisions with an apparent quasi-independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law.

The practice of the Tribunal reflects the situation in other areas of international law. Illustrative is the weight that has been attached to the judgment of the House of Lords in the *Pinochet* case.[1] This decision has been extensively cited in pleadings before the International Court of Justice (ICJ)[2] and national courts,[3] and by legal scholars.[4] While some have referred to it to support a rule of customary law, others have considered it as precedent in a way that cannot be explained in terms of the formation of customary law. It appears

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1. *R.* v. *Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)*, [1999] 2 WLR 827, [1999] 2 All ER 97 (HL)
2. For instance, the case was relied in by Belgium in its oral pleadings in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, No. 121, ICJ, Judgment, 14 February 2002.
3. The case was discussed in the decisions on the prosecution of Bouterse in the Netherlands by the Court of Appeals of Amsterdam, 3 March 2000 (*Nederlandse Jurisprudentie* 2000, 266) and the Supreme Court of the Netherlands, 18 September 2001 (not yet reproduced).
4. At the time of writing the catalogue of the Peace Palace listed over forty articles on the case.

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, *277-296.*

that national court decisions can be used in a variety of ways in the process of law-making and the determination of the law.

Except for a notable 1929 article by Hersch Lauterpacht[5] and a few more recent scholarly discussions,[6] the question of how decisions of national courts can be construed in terms of the sources of international law has received only limited scholarly attention. The proliferation of national court decisions on matters of international law, and the increasing accessibility of these decisions, makes it important to study more closely the role of national court decisions in international law-making.

This chapter offers a contribution to that objective by examining how the Tribunal has used decisions of national courts in its construction of rules of international law. It explores first how the Tribunal has used national decisions as elements in the construction of – respectively – treaties, customary law and general principles of (international) law. It then reviews the use by the Tribunal of national case law as independent authority in the determination of international law.

Two qualifications concerning the scope of the chapter are in order. First, it is concerned with the use of national case law in the determination of rules of international law. It does not discuss legal determinations that are exclusively relevant to the individual case in which they are applied.[7] Second, the units of analysis of the article are judicial decisions. However, it must be taken into account that in several cases no sharp boundaries can be drawn between judicial decisions and the underlying national legislation. Indeed, the Tribunal itself has not always clearly differentiated between national case law and national law.[8]

5. Hersch Lauterpacht, "Decisions of National Courts as a Source of International Law", (1929) 10 *British Yearbook Int'l L.* 65.

6. In particular R.Y. Jennings, "The Judiciary, International and National, and the Development of International Law", (1996) 45 *Int'l Comp. L.Q.* 1.

7. For example, case law pertaining to sentencing practice in the Federal Republic of Yugoslavia may be taken into account under Article 24 of the Statute (providing that in determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia). In *Prosecutor* v. *Krnojelac*, Judgment, Case No. IT-97-25-T, 15 March 2002, para. 505, the Tribunal stated that what is required in considering sentencing practice as an aid in determining the sentence to be imposed must go beyond merely reciting the relevant criminal code provisions of the former Yugoslavia and that the general sentencing practice of the former Yugoslavia must be considered, including consideration of case law. This type of practice is not considered in this article.

8. In *Prosecutor* v. *Kupreškić* et al., Judgment, Case No. IT-95-16-A, 23 October 2001, para. 46, the Appeals Chamber considered a mix of case law and national law in determining the rule on admissibility of new evidence in appeal cases. In *Prosecutor* v. *Erdemović*, Judgment, Case No. IT-96-22-A, 7 October 1997, in their joint separate opinion Judge McDonald and Judge Vohrah considered a mix of national law and national case law in determining general principles of law pertaining to the defence of duress.

Decisions of National Courts in the Interpretation of Treaties

The first way to construe the relevance of national case law in the international legal order is to use case law in the interpretation of treaties. The Tribunal has held that in order to avoid violating the principle of *nullum crimen sine lege*, it should either apply rules of customary law or rules from treaties binding on the parties.[9] When the Tribunal resorts to the second option, and has to engage in treaty interpretation, it may consider national case law.

In the *Jelisić* case, the Tribunal interpreted the Genocide Convention. It stated:

> It interprets the Convention's terms in accordance with the general rules of interpretation of treaties set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In addition to the normal meaning of its provisions, the Trial Chamber also considered the object and purpose of the Convention and could also refer to the preparatory work and circumstances associated with the Convention's coming into being. The Trial Chamber also took account of subsequent practice grounded upon the Convention. Special significance was attached to the Judgments rendered by the Tribunal for Rwanda, in particular to the *Akayesu* and *Kayishema* cases which constitute to date the only existing international case law on the issue. The practice of States, *notably through their national courts*, and the work of international authorities in this field have also been taken into account.[10]

9. *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 143:

   > Before both the Trial Chamber and the Appeals Chamber, Defence and Prosecution have argued the application of certain agreements entered into by the conflicting parties. It is therefore fitting for this Chamber to pronounce on this. It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (Report of the Secretary-General, para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, UN Doc. S/PV.3217 (25 May 1993).).

10. *Prosecutor* v. *Jelisić*, Judgment, Case No. IT-95-10-T, 14 December 1999, para. 61 (emphasis added).

Similarly, in the *Krstić* case, the Tribunal interpreted the Genocide Convention pursuant to the rules of interpretation laid down in Articles 31 and 32 of the Vienna Convention. In addition to the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work and the circumstances which gave rise to the Convention, as well as recent international practice, the Trial Chamber "also looked for national guidance in the legislation and practice of States, *especially their judicial interpretations and decisions*".[11]

This analysis is somewhat awkward, as in both cases the Tribunal indicated that it used the Genocide Convention as customary law, rather than as treaty law. Therefore, it is not clear why it had to resort to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Nonetheless, the cases are relevant since, given the fact that the Tribunal *assumed* it had to apply the Vienna Convention, it considered national case law to be relevant in the interpretation of treaties.

The Tribunal apparently used national case law as "subsequent practice in the application of the treaty which establishes the agreement of the parties of its provisions", as provided for in Article 31(3)(b) of the Vienna Convention. This construction is not entirely unproblematic. Article 31(3)(b) only allows for use of subsequent practice which "establishes the agreement of the parties of its provisions". In exceptional cases, widespread and uniform unilateral practices of States may be interpreted as an agreement pertaining to the interpretation of a particular provision of a treaty. While it appears uncommon, there is no *a priori* reason to exclude the practice of national courts from this category. However, in the case of a multilateral convention such as the Genocide Convention, the threshold in terms of the number of States that engage in any subsequent practice, as well as the uniformity of that practice, should be high. At present, there does not exist sufficiently widespread national judicial practice on the application of the Genocide Convention to come close to what would be required in order to establish agreement of the parties. In the *Krstić* case, the Tribunal cited six national cases: three decisions of a German court, two of the Polish Supreme Court and one of the United States Military Tribunal at Nuremberg.[12] This clearly is not enough practice to identify agreement as to the interpretation of the Convention.

The Tribunal appeared to recognise that six cases in themselves cannot determine the interpretation of the treaty. It used the judicial decisions to supplement other sources, such as the ordinary meaning of the terms, the object and purpose of the Convention, the preparatory work, and reports of the International Law Commission, General Assembly resolutions and international legal practice. Utilisation of national case law in this manner is not necessarily objectionable, even though technically this is not consistent with the terms of Article 31(3)(b) of the Vienna Convention.

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11. *Prosecutor* v. *Krstić*, Judgment, Case No. IT-98-33-T, 2 August 2001, para. 541 (emphasis added).

Decisions of National Courts as Elements in the Formation of Customary International Law

A second way to construe the legal relevance of decisions of national courts is to qualify them in terms of customary international law. As noted above, the drafters of the ICTY Statute intended that the Tribunal should apply, in addition to treaties binding on the parties, rules of customary law, in order to avoid violating the principle *nullum crimen sine lege*.[13] On many occasions the Tribunal has had to determine and interpret customary law and, as part of that exercise, has referred to national case law.

In its judgment in the *Erdemović* case, the Appeals Chamber extensively discussed to what extent national case law provided support for a rule of customary law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. The Appeals Chamber found that insufficient evidence existed for such a rule.[14] However, it did not dispute the view that had the case law been more uniform and consistent, a rule of customary law could have been based on that case law.

This use of national case law as an element in the identification of customary law is in line with the general understanding of the formation of customary international law. The Permanent Court of International Justice (PCIJ) considered national judicial acts as "facts which express the will and constitute the activities of States".[15] In the *Lotus* case, it expressly considered national case law in terms of its contribution to customary law.[16] In modern interna-

12. *Ibid*., paras. 575, 579 and 589.

13. *Prosecutor* v. *Tadić, supra* note 9, para. 143. Also: *Prosecutor* v. *Jelisić*, *supra* note 10 (stating that, in accordance with the principle *nullum crimen sine lege*, the Trial Chamber means to examine the legal ingredients of the crime of genocide taking into account only those which beyond all doubt form part of customary international law).

14. *Prosecutor* v. *Erdemović*, *supra* note 8, para. 55.

15. *German Interests in Polish Upper Silesia*, PCIJ Rep., Series A, No 7 (1926), p. 19: "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures", *Prosecutor* v. *Delalić* et al., Judgment, Case No. IT-96-21-A, 20 February 2001, para. 76.

16. *The Steamship Lotus (France/Turkey)*, PCIJ Rep., Series A, No 10 (1927), pp. 23, 26, 28-29. The ICJ considered national case law in terms of customary law in *Congo-Belgium*, *supra* note 2, para. 58 ("The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity"). See also the separate opinion of Judges Higgins, Kooijmans and Buergenthal, paras. 22-24 (considering case law as part of State practice with respect to universal jurisdiction).

tional law scholarship there exists no doubt that national case law can be an element in the formation of customary international law.[17] Large parts of customary law, in particular in the field of jurisdiction and immunities, have been developed in accordance with the practice of national courts.

In principle, national case law can qualify as both State practice or *opinio juris*.[18] Although the Tribunal has on occasion taken a cautious position,[19] there is no doubt that case law, as acts of the State, can be a form of State practice.[20] As such, it will need to conform to the normal requirements for the formation of customary law. Under established principles of international law, State practice can only lead to the formation of customary international law if it is sufficiently consistent.[21] This requirement also may affect the assessment of the relevance of national case law for the formation of customary international law. In the *Lotus* case, the PCIJ noted that judgments of municipal courts pertaining to the alleged rule of international law regarding the exclusive competence of a flag State over its ships were in conflict. In view of this, the Court observed that it was hardly possible to see in the national case law an indication of the existence of a rule of international law, as had been contended by the French government.[22] A similarly cautious approach was taken by the Appeals Chamber in the *Erdemović* case. After reviewing national case law on the question of whether duress is a defence to murder, the Appeals Chamber concluded that State practice (consisting mostly of national case

17. R.Y. Jennings & A. Watts, eds., *Oppenheim's International Law*, 9th ed., 1992, p. 41; International Law Association (ILA), Statement of Principles Applicable to the Formation of General Customary International Law, principle 9, reproduced in International Law Association, *Report of the Sixty-Ninth Conference* (2000). Older ideas to the effect that State practice consists only of the practice of those organs capable of entering into binding relations on behalf of the State (related to the view that that customary law was tacit treaty law) now are generally rejected. The same holds for the view that municipal court cases were only evidence of custom, not a force creating custom.

18. These are the necessary conditions for customary law; *North Sea Continental Shelf Cases*, (*F.R.G.* v. *Denmark and* v. *Netherlands*), [1969] ICJ Reports 3, paras. 72-74.

19. Joint Separate Opinion of Judge McDonald and Judge Vohrah in *Prosecutor* v. *Erdomović*, *supra* note 8, considering that "*to the extent* that state practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals" (para. 50, emphasis added).

20. ILA, Statement of Principles, *supra* note 17, principle 9; H. Lauterpacht, *supra* note 5, pp. 84 ff.

21. *Fisheries Case*, [1951] ICJ Reports 116, p. 131; *Asylum Case (Columbia* v. *Peru),* [1951] ICJ Reports 266, p. 277.

22. *The Steamship Lotus*, *supra* note 16, p. 29; see also Georg Schwarzenberger, *International Law, I, International Law as Applied by International Courts and Tribunals*, 1945, p. 18.

law) was far from consistent and that no rule of customary law could be based on that practice.[23]

The Tribunal has indicated on several occasions that it considers practice of national courts to be particularly relevant if the courts are applying international law, rather than national law. In the *Tadić* case, the Trial Chamber considered the legal relevance of the *Barbie* case and held that, while instructive, "it should be noted that the court in the *Barbie* case was applying national legislation that declared crimes against humanity not subject to statutory limitation".[24] In *Furundžija*, the Trial Chamber held that "the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on this issue".[25] Whatever the validity of these statements in the specific context in which they were made, they should not be taken as evidence that application of national law cannot lead to the development of customary law.[26] There are several examples of the application of rules of national law that eventually have led to a formation of a rule of customary law, including national practice with respect on human rights.[27]

National case law can also be qualified in terms of *opinio juris*.[28] Here the distinction between the application of rules of international law and the application of rules of national law is more relevant. Identification of *opinio juris* may be relatively easy when national courts apply what they consider to be rules of international law. It is to be presumed that a national court applying rules on the subject, for instance, of jurisdiction or immunities, will consider that it applies them in a way that is required or permitted by international law. In circumstances where a national court applies rules of national law, qualification in terms of *opinio juris* may be less evident. The court cannot be presumed to apply that law with a preconceived notion that the rules that it is applying are either required or authorised by customary international law. This

23. *Prosecutor* v. *Erdomović*, *supra* note 8 , para. 50.

24. *Prosecutor* v. *Tadić* case, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997, para. 642.

25. *Prosecutor* v. *Furundžija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para. 196. Also, *Prosecutor* v. *Erdemović*, *supra* note 8, paras. 52-55.

26. This appears less relevant for procedural issues pertaining to the Tribunal; see *e.g.*, *Prosecutor* v. *Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108*bis*, 29 October 1997.

27. See *e.g.*, "The Status of the Universal Declaration of Human Rights in International Law", International Law Association, *Report of the Sixty-Ninth* Conference, 1994, p. 142. Note also that in a number of cases national law or case law in itself is influenced or determined by international law, cf. *Prosecutor* v. *Furundžija*, *supra* note 25, para. 183 (stating that the interpretation by national legal systems of the requirement of impartiality and in particular the application of an appearance of bias test, generally corresponds to the interpretation under the European Convention).

was recognised in the joint separate opinion of Judge McDonald and Judge Vohrah in the *Erdemović* case:

> Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by *opinio juris*. Again to the extent that State practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they "feel that they are conforming to what amounts to a legal obligation" at an international level.[29]

In particular cases, considering case law for the purpose of analysing the formation of customary law may raise problems. Courts may take a position that conflicts with that of other State organs. A decision of a court may reject or adjust a prior act by the executive or, more rarely, the legislature. The court may also take a position that differs from the arguments advanced by the State in the case concerned. The question then may arise whether it is the act of the executive or the act of the court that is relevant to the formation of custom – either in terms of State practice or *opinio juris*.[30] The International Law Association has taken a position with respect to this matter: "In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight that conflicting positions of the … national courts."[31] It would appear, though, that this conclusion will not apply in all circumstances. If, for instance, the executive takes the view that a State official of a foreign country enjoys immunity and the highest courts deny such immunity, it would appear that the judicial practice qualifies as the final legal position of that State.

The Tribunal has not expressly addressed these issues, and its analysis does not make clear whether, in the national case law that it has cited, courts have taken a different position than those of other organs. This may be explained by the fact that most national case law used by the Tribunal has involved criminal cases without a foreign element, in which no prior act of the government was at issue.

A critical question in the assessment of the use of national case law in the identification of customary law is whether the selection of the case law that

28. Hersch Lauterpacht, *The Development of International Law by the International Court*, 1996, p. 20 (noting that decisions of national courts within any particular state, when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio juris* of that state).

29. *Prosecutor* v. *Erdemović supra* note 8, para. 50.

30. This also raises the issue of internal consistency; see International Law Association 2000, pp. 733-734.

31. *Ibid.*, p. 729.

has been used by the Tribunal conforms to the requirements of consistency and generality. In some cases the choice of case law strikes the reader as arbitrary and haphazard. In the *Tadić* case, the Tribunal discussed whether individuals can be responsible for breaches of common article 3 of the 1949 Geneva Conventions. The Appeals Chamber argued that, despite the fact that article 3 itself is silent on the matter, under certain conditions breaches of common article 3 do entail individual criminal responsibility. As far as judicial practice is concerned, the Appeals Chamber supported this conclusion with reference to prosecutions before Nigerian courts.[32] No other judicial practice was considered. Was there none or was it simply not known to the Tribunal?

In the absence of access to world-wide sources on national case law, it is not possible to assess how representative the case law is that has been used by the Tribunal. However, given the amount of armed conflicts, and the number of (potential) transgressions of international humanitarian law, it is implausible that no other evidence of prosecution or, more likely, non-prosecution is available. While the difficulties in obtaining world-wide case law on the matter must be recognised, it would strengthen the persuasiveness of judgments if, in a case like *Tadić*, the Tribunal would at least make clear what case law it has considered and why it only refers to prosecutions before one or a few courts.

As in the case of treaty interpretation, any shortcomings in the number of available cases may be compensated by other sources. In most cases, national case law is only one source used to determine the content of customary international law. Indeed, in the *Tadić* case, the Appeals Chamber referred, in addition to the reference to the Nigerian prosecutions, to "many elements of international practice [which] show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts",[33] including national military manuals, and national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence).[34] As long as alternative sources are available, the lack of representative case law need not be an insurmountable hurdle.

However, in other cases, the determination of a point of customary law has hinged entirely on a review of limited national case law. A noteworthy example is the discussion by the Appeals Chamber in *Tadić* as to whether crimes against humanity can be committed for purely private reasons. The Appeals Chamber examined this as a matter of customary international law exclusively by examining case law. It cited and discussed three decisions by the Supreme Court for the British Zone, several decisions of German courts, some decisions of United States military tribunals under Control Council No. 10, and one case of the Canadian Supreme Court, while it considered the decision in

32. *Prosecutor* v. *Tadić*, *supra* note 9, para. 130.

33. *Ibid.*, para. 130.

34. *Ibid.*, paras. 131-132.

the *Eichmann* case to be irrelevant.[35] After briefly considering the "spirit of international criminal law", it then concluded that "the relevant case law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated".[36]

It must be acknowledged that case law on crimes against humanity is scarce. However, it seems doubtful whether cases from so few countries can suffice to constitute uniform and sufficiently widespread State practice. Was other practice considered irrelevant? Or did the Tribunal find that on this point no other judicial practice existed? Without it being necessary for the Tribunal to conduct a truly world-wide assessment of the case law, it would have enhanced the weight of the analysis and the persuasiveness of the conclusion if the Tribunal had indicated why it believed that practice from so few countries and so few courts could constitute the basis for the identification of a rule of customary international law. The absence of such analysis might lead one to conclude that the Tribunal did not use case law as an element in the formation of customary law, but rather as persuasive authority to adopt a particular interpretation that in itself was based on other considerations.

Decisions of National Courts as Elements in the Identification of General Principles

A third way in which the Tribunal has construed the international legal relevance of national case law is in identifying general principles of law. These are formed on the basis of principles that are common to all or most legal systems. The Tribunal has made extensive use of this source of international law.[37]

In *Kupreškić*, the Trial Chamber stated that

> any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice.

35. *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, paras. 256-267.
36. *Ibid.*, para. 270.
37. See generally A. Cassese, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to the ascertainment of general principles of law recognized by the community of nations", in Sienho Yee & Wang Tieya, eds. *International Law in the Post-Cold War World. Essays in Memory of Li Haopei*, 2001, p. 43.

> It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.[38]

In the *Furundžija* case, the Tribunal noted, in discussing the definition of rape under international law, that

> no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.[39]

The Tribunal has indicated that only with due caution will it apply concepts from national law in the international legal order.[40] For instance, in the *Kupreškić* case, the Appeals Chamber relied on general principles to determine the standard of review of factual findings of the Trial Chamber. However, it decided against relying on national concepts in determining under what tests additional evidence reveals an error of fact of such magnitude as to occasion a miscarriage of justice.[41]

Where it is decided to import principles of national law, it has been generally accepted that practice of national courts can be relevant in the identification of principles of national law. For instance, the PCIJ referred to the "principle generally accepted in the jurisprudence in international arbitration as well as by national courts" to the effect that a party is estopped from relying on its own non-fulfilment of an international obligation.[42] The ICTY has accepted, for instance, that national case law can serve to support the notion of common purpose complicity in international criminal law.[43]

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38. *Prosecutor* v. *Kupreškić*, Judgment, Case No. IT-95-16-T, 14 January 2000, para. 591.
39. *Prosecutor* v. *Furundžija*, *supra* note 25, para. 177. Also *Prosecutor* v. *Kupreškić*, *supra* note 38, para 677.
40. Already recognized by the ICJ; see the separate opinion of Judge McNair in *International Status of South West Africa Case*, Advisory Opinion, [1950] ICJ Reports 148-149; A. Cassese, *supra* note 37, p. 46.
41. *Prosecutor* v. *Kupreškić, supra* note 8, para. 75. For other cases, see A. Cassese, *supra* note 37, pp. 50 ff.
42. *Jurisdiction of the Courts of Danzig*, Advisory Opinion, PCIJ Rep., Series B, No. 15 (1928), p. 27; H. Lauterpacht, *supra* note 28, p. 168; Georg Schwarzenberger, *A Manual of International Law*, 6th ed., 1976, pp. 27-28.
43. *Prosecutor* v. *Tadić*, *supra* note 35, para. 225; *Prosecutor* v. *Kupreškić*, *supra* note 8, para. 680.

A particularly elaborate discussion of national case law as evidence of general principles can be found in the decision of the Appeals Chamber in the *Kupreškić* case. It discussed the standard that applies with respect to the reconsideration of factual findings by the Trial Chamber. It proceeded to examine the degree of caution that is required by a court before proceeding to convict an accused person based upon eyewitness identification made under difficult circumstances.[44] That part of the analysis rests entirely on analysis of domestic criminal law systems and is included in the judgment under the heading "General Principles". The Appeals Chamber cited cases from common law countries: the United Kingdom, Canada, Australia, Malaya, and the United States. It then noted that most civil law countries allow judges considerable scope in assessing the evidence before them, but that in a number of cases courts have emphasised that trial judges must exercise great caution in evaluating eyewitness identification, in particular when the identification of the accused rests on the credibility of a single witness. The Appeals Chamber cited cases from Germany, Austria and Sweden.[45] As to the standard it would apply when considering challenges against factual findings, the Appeals Chamber concluded that where it is "satisfied that the Trial Chamber has returned a conviction on the basis of evidence that could not have been accepted by any reasonable tribunal or where the evaluation of the evidence was 'wholly erroneous' it will overturn the conviction since, under such circumstances, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that the accused had participated in the criminal conduct".[46]

The Tribunal has made clear that the threshold for identification of general principles of law is high, in the sense that it needs to be shown that the principle is part of most, if not all, national legal systems. In the *Tadić* case, the Appeals Chamber noted:

> It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.[47]

44. *Prosecutor* v. *Kupreškić*, *supra* note 8, para. 34.
45. *Ibid*., para. 38.
46. *Ibid*., para. 41.
47. *Prosecutor* v. *Tadić*, *supra* note 35, para. 225.

Also in several other cases the Tribunal took a hard look and concluded that, in view of differences between legal systems, no general principle could be identified.[48]

Sometimes, though, the analysis is too thin. In *Erdemović*, the Trial Chamber stated, in discussing the defence of duress, that it relied, *inter alia*, on general principles of law as expressed in "numerous national laws and case law".[49] However, the supporting footnote referred exclusively to French legislation and case law.[50]

In the *Kupreškić* case, the Trial Chamber set out to analyse the problem of cumulative offences. It noted:

> Certain criteria for deciding whether there has been a violation of one or more provisions consistently emerge from national legislation and the case law of national courts and international human rights bodies. In other words, it is possible to deduce from a survey of national law and jurisprudence some principles of criminal law common to the major legal systems of the world. These principles have to some extent been restated by a number of international courts.[51]

However, the analysis appears unbalanced. The Trial Chamber immediately adopted the test of United States courts (the so-called *Blockburger* test) as the guiding principle,[52] and considered principles from other jurisdictions as qualifications or exceptions. Why the *Blockburger* test is adopted up front as the leading test is not clear. While it may indeed best represent principles drawn from all major legal systems, the text of the *Kupreškić* judgment does not make this clear. As in the case of customary law, the persuasiveness of conclusions based on a relatively narrow set of data would be much enhanced if the Tribunal would explain why it proceeds in the way it does and why, in this case, the *Blockburger* test was considered more authoritative then tests from other legal systems. In the absence thereof, the conclusion is open to the traditional critique of resort to general principles that there has been insufficient investigation of the legal systems of the members of the international community.[53] The conclusion does not only rest on a neutral analysis of case law or other national practice, but also on other, more substantive considerations.[54]

48. Cases mentioned in A. Cassese, *supra* note 37, p. 49.
49. *Prosecutor* v. *Erdemović*, Sentencing Judgment, Case No. IT-96-22-S, 29 November 1996, para. 19.
50. *Supra* note 48. The case is also noted in A. Cassese, *supra* note 37, p. 47.
51. *Prosecutor* v. *Kupreškić*, *supra* note 38, para. 680.
52. *Ibid*., para. 681.
53. A. Cassese, *supra* note 37, p. 45
54. Cf. *Prosecutor* v. *Delalić* et al., *supra* note 15, para. 412, where the rule is put in context of "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions".

Decisions of National Courts as Independent Authorities

In some cases, the weight attached to decisions of national courts appears to go beyond their role in the interpretation of treaties or the identification or interpretation of rules of customary law or general principles of law. In his separate and dissenting opinion in the *Erdemović* case, on the question whether duress can be a complete defence to the massacre of innocent civilians, Judge Li determined that there was no applicable conventional or customary international law, and that national laws and practices of various States were so divergent that no general principle of law recognised by civilised nations could be deduced from them.[55] For that reason, "recourse is to be had to the decisions of Military Tribunals, both international and national, which apply international law".[56] After noting that the test put forward by the International Military Tribunal at Nuremberg was never applied, and moreover was vague and had been differently interpreted by academic writers, Judge Li then noted that the decisions of the United States military courts at Nuremberg set up under Control Council Law No. 10 and those of military tribunals and courts set up by other allied countries for the same purpose must be consulted.[57] He considered three judgments of the United States military courts, one of a Canadian military court and two of British military courts. From a study of these decisions, Judge Li identified a number of principles to indicate when duress can be a complete defence.[58] He considered that these principles were "reasonable and sound" and should be applied by the Tribunal.[59]

It thus appears that Judge Li took the position that legal norms might be inferred from case law, including national case law, and that the criteria for doing so were distinct from the identification of rules of customary law or general principles of law.[60] In his analysis of the opinion of Judge Li, Bing Bing Jia noted that it can be said "with certainty" that the legal rules derived from decisions of national military tribunals "are precedents unless a treaty or a principle of law has emerged … stating otherwise".[61]

This conclusion can be put in perspective by considering the sources of general international law. Article 38(1)(d) of the Statute of the International

55. Separate and Dissenting Opinion Judge Li in *Prosecutor* v. *Erdemović*, *supra* note 8, paras. 2–3.
56. *Ibid.*, para. 4.
57. *Ibid.*
58. *Ibid.*, para. 5.
59. *Ibid.*, para. 8.
60. Similarly: Bing Bing Jia, "Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict", in Sienho Yee & Wang Tieya, *supra* note 37, p. 77, at p. 78.
61. *Ibid.*, p. 85.

Court of Justice provides that judicial decisions are subsidiary means for the determination of rules of law. It is generally accepted that the term "judicial decisions" includes decisions of national courts.[62] That judicial decisions are only subsidiary means, reflects the fact that no formal system of precedents exists, let alone a principle of *stare decisis*. This holds for international courts,[63] and of course certainly for national courts. As an additional reason for the qualification "subsidiary", it has been said that courts do not in principle make law but apply existing law that has an antecedent source.[64]

As to international courts, it is now generally accepted that the rigid distinction between sources in paragraphs 38(1)(b) and 38(1)(c), on the one hand, and subsidiary means in paragraph 38(1)(d) is overstated. In the interests of certainty and stability, the ICJ as well as other international courts tend to follow what in previous cases they have considered good law, unless there are cogent reasons to do otherwise.[65] More generally, the distinctions between the application, interpretation and development of law are thin. In some respects, application often will involve interpretation and in that respect development.[66] For these reasons the qualification of "subsidiary" is, at least as far as international courts are concerned, an understatement.[67]

It is not immediately obvious that this also holds for decisions of national courts. While there are good reasons why international courts should in principle follow their own previous judgments, these reasons are not applicable to the weight international courts give to previous decisions of national courts. Similarly, although it can be accepted that international courts may develop the law, in the course of application and interpretation, it would not fit the decentralised and horizontal international legal system – in which one State cannot create law binding on another State – to accept that decisions of individual national courts can in themselves develop international law. Also, in other respects the differences between the position of international and

62. *Problems and Process: International Law and How We Use It*, 1994, p. 218, *Oppenheim's International Law*, *supra* note 17, pp. 41-42, R.Y. Jennings, "What is International Law and How Do We Tell It When We See It?", (1981) 38 *Schweizerisches Jahrbuch für internationales Recht* 59, at p. 77. Menzel & Ipsen, *Völkerrecht: ein Studienbuch*, 2nd ed., 1979, pp. 87-88.

63. Cf. Statute of the International Court of Justice, Article 59.

64. *Oppenheim's International Law*, *supra* note 17, p. 41; G. Schwarzenberger, *supra* note 42, referring to "law-determining agencies", in contrast to law-creating processes; Menzel & Ipsen, *supra* note 62, p. 87; H. Lauterpacht, *supra* note 28, p. 21.

65. See in general: Mohamed Shahabuddeen, *Precedent in the World Court,* 1996, p. 128; Hersch Lauterpacht, *supra* note 28. The Tribunal discussed the matter in *Prosecutor* v. *Aleksovski*, Appeal Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 97.

66. R.Y. Jennings, *supra* note 6, p. 3; H. Lauterpacht, *supra* note 28, p. 21.

67. Gerald Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", in, *Symbolae Verzijl*, 1958, p. 175; R.Y. Jennings, *supra* note 6, p. 4.

national courts in the international legal system are significant. The fact that national courts generally will be tied to the national legal system,[68] have an outlook that is at least partly national rather than international[69] and generally lack expertise in applying international law[70] makes it implausible to consider precedents of national courts in the same way as decisions of international courts.

Nonetheless, decisions of national courts can be considered as an impartial expression of what these courts believe to be the state of the law. In that respect they may be of practical importance of determining what is the correct rule of international law. National courts have a widespread practice of reference to decisions of courts of other States.[71] This is not because of an interest in other legal systems, but because courts may consider it relevant to "to consult other experience regarding points of detail and applications of international law".[72] In particular when there is a certain convergence between decisions of national courts,[73] decisions may then obtain a certain authority as to the determination of the interpretation of the law that need not be explained in terms of customary law or general principles of law. It appears that it is in this manner that Judge Li considered the weight of decisions of national courts.

Also, practice of the ICTY suggests that in some cases decisions of national courts were indeed considered as authoritative expressions of the state of the law. As noted above, the interpretation or identification of particular rules of international law, whether as treaty law, customary law or general principles, often hinges largely on a few decisions that cannot be explained as either "subsequent practice establishing the agreement between the parties" as evidence of customary law or as indicators of all major legal systems. The few national cases on which the analysis of the Appeals Chamber in *Tadić* rests, pertaining to whether crimes against humanity can be committed for purely private reasons, cannot possibly provide a basis for customary law. Rather, they are used as independent means to determine the content of a particular rule of international law.[74]

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68. *Oppenheim's International Law*, *supra* note 17, p. 42; G. Schwarzenberger, *supra* note 42, p. 30.
69. Antonio Cassese, "Remarks on Scelle's Theory of 'role splitting' (dédoublement fonctionnel) in International Law" , (1990) 1 *Eur. J. Int'l L.* 210.
70. R. Higgins, *supra* note 62, p. 218; G. Schwarzenberger, *supra* note 42, p. 30.
71. Anne-Marie Slaughter, "A typology of transjudicial communication", (1994) 29 *U. Richmond L. Rev. 99*.
72. R.Y. Jennings, *supra* note 62, p. 77.
73. G. Schwarzenberger, *supra* note 42, p. 31.
74. Also *Prosecutor* v. *Krstić*, *supra* note 11, par 514: The Chamber noted it was "fully satisfied that the wounds and trauma suffered by those few individuals who managed to survive the mass executions do constitute serious bodily and mental harm within the meaning of Article 4 of the Statute". As the only support, it referred to the *Eichmann* District Court Judgment, para. 199, that stated that "there is

In the *Krstić* case the Tribunal interpreted the term "military reasons", contained in the fourth Geneva Convention and Additional Protocol II, as part of its analysis in what circumstances evacuations of the population are allowed. It noted that:

> In terms of military necessity, two World War II cases are relevant. General Lothar Rendulic was accused of violating Article 23(g) of the 1907 Hague Regulations, which prohibits the destruction or seizure of the enemy's property, "unless such destruction or seizure [is] imperatively demanded by the necessities of war". Retreating forces under his command engaged in scorched earth tactics, destroying all facilities that they thought might aid the opposing army. In addition, Rendulic ordered the evacuation of civilians in the area. Rendulic raised the defence of "military necessity", since his troops were being pursued by what appeared to be overwhelming Soviet forces. The U.S. Military Tribunal at Nuremberg concluded that, even though Rendulic may have erred in his judgment as to the military necessity for evacuating the civilians, his decisions were still justified by "urgent military necessity" based on the information in his hands at the time. By contrast, Field Marshall Erich von Manstein was convicted by a British military tribunal of "the mass deportation and evacuation of civilian inhabitants" of the Ukraine. Von Manstein argued that the evacuation was warranted by the military necessity of preventing espionage and depriving the enemy of manpower. This was not found to be a legitimate reason for the evacuation of the population or the destruction of their property. In addition, the judge advocate noted that the Prosecution's evidence showed that "far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused had in fact been prepared to carry out on two previous occasions and now was carrying out in its entirety and carrying out irrespective of any question of military necessity".[75]

In the *Tadić* case, the Trial Chamber considered how closely an accused must have been connected to a crime before he or she can be held responsible. The Trial Chamber stated that "the most relevant sources for such a determination are the Nuremberg war crimes trials"[76] and proceeded to identify patterns that emerged from the relevant cases. In particular, it considered cases from military courts of the United Kingdom, the United States, Germany and France, and proceeded to derive general principles from this practice.[77] Elsewhere in the same judgment, the Trial Chamber had to determine the

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no doubt that causing serious bodily harm to Jews was a direct and unavoidable result of the activities which were carried out with the intention of exterminating those Jews who remained alive".

75. *Ibid.*, para. 526.

76. *Prosecutor* v. *Tadić*, *supra* note 24, para. 674.

77. *Ibid.*, para. 688-690.

definition of persecution under customary international law. Again it relied heavily on national case law:

> This is also the approach followed by the Nürnberg Tribunal. Indictment Number 1 contained charges of both war crimes and crimes against humanity and included the statement that "[t]he prosecution will rely upon the facts pleaded under Count Three [war crimes] as also constituting Crimes Against Humanity". Subsequently, in its ruling on individual defendants, the Nürnberg Tribunal grouped war crimes and crimes against humanity together. Similar statements occur in other cases tried on the basis of Control Council Law No. 10, for example, the *Trial of Otto Ohlendorf and Others* ("*Einsatzgruppen* case") and the *Pohl case*. In the *Pohl* case the court found that for his actions as administrative head of the concentration camps, Pohl was guilty of direct participation in a war crime and a crime against humanity, and that Heinz Karl Fanslau, Hans Loerner, and Erwin Tschentscher had committed war crimes and crimes against humanity because of their association with the slavery and slave labour programme operating in the concentration camps. National cases also support this finding, such as *Quinn v. Robinson*, both the District Court and the Supreme Court decisions in *Eichmann*, and the *Barbie* case. As such, acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution.[78]

This reasoning cannot easily be explained in terms of customary law. The Tribunal did not even purport to make an attempt to determine world-wide practice and *opinio* juris. Rather, national case law was used as authority for the interpretation of rules of international law. The national cases were not used as exclusive and independent sources. Rather, use was made of the experience of national courts in the application and interpretation of the law to determine the meaning of the relevant provisions.

In that respect, no sharp distinction between national and international cases need be drawn, as illustrated by the *Jelisić case*:

> From this point of view, genocide is closely related to the crime of persecution, one of the forms of crimes against humanity set forth in Article 5 of the Statute. The analyses of the Appeals Chamber and the Trial Chamber in the *Tadić* case point out that the perpetrator of a crime of persecution, which covers bodily harm including murder, also chooses his victims because they belong to a specific human group. As previously recognised by an Israeli District Court in the *Eichmann* case and the Criminal Tribunal for Rwanda in the *Kayishema* case, a crime characterised as genocide constitutes, of itself, crimes against humanity within the meaning of persecution.[79]

78. *Ibid*., para. 701.

79. *Prosecutor* v. *Jelisić*, *supra* note 10, para. 68.

Here decisions of national and international courts mutually influence each other without having formal binding authority.[80]

Conclusions

National case law significantly influences the development and interpretation of international law. Now that more and more national courts consider international legal matters, and seek to interpret and determine international law objectively, the relative influence of such case law can be expected to increase. This overview shows that case law may in a variety of ways influence the interpretation and identification of rules of international law. It can serve as elements in the identification of subsequent agreement as to the interpretation of treaties, in the identification of either state practice or *opinio juris* required for customary law, as building blocks for the identification of general principles, or as more independent authority for the construction of rules of international law. The Tribunal is free to use the practice of courts in any of these ways and, indeed, to use one and the same case in different ways.

In particular because of the use of national case law as independent authority for the determination and interpretation of international law, the reference to case law in terms of the formal sources of international law can, at times, appear to be routine with limited legal effect. After all, in many cases the Tribunal can, if analysis of the formal sources does not yield anything, still resort to national case law as more autonomous authority. The formal sources of international law do not provide a full account of the methods of judicial determination and interpretation of the law as evidenced in the practice of the Tribunal.

Is the selection of the case law that has been used by the Tribunal truly representative? The Tribunal has relied heavily on a limited range of cases from a relatively small number of States. The requirements for identification of subsequent practice (for treaty interpretation), State practice (for customary law) and commonality between legal systems (for general principles) to some extent guarantee that this is representative. However, as noted above, in several instances the number of cases is limited and the choice of case law by the Tribunal strikes the reader as arbitrary. That problem increases when case law is resorted to as independent persuasive authority and only one or a few cases support a particular interpretation. How are those cases selected and why are they preferred over cases that may point in a different (or the same) direction? The point is illustrated by the discussion on the relevance of national case law in the *Congo–Belgium* case before the ICJ. Belgium relied on a few cases, but chose not to rely on a case from a Belgrade court in which Western politicians were convicted. Congo noted:

80. Anne-Marie Slaughter, *supra* note 71; Karen Knop, "Here and There: International Law in Domestic Courts", (2000) 32 *N.Y.U.J. Int'l L. & Politics* 501.

> The only case which comes close to the legal position adopted by Belgium is one before a Belgrade court as a result of the conflict in Kosovo, one in which the presidents, prime ministers, foreign ministers and chiefs of staff of the member countries of NATO, together with the Secretary-General of the Organization, were sentenced in their absence for the crime of aggression and war crimes. It is understandable that Belgium was at pains not to mention this precedent, a surprising one to say the least![81]

It may be that the selection of cases is based on the intrinsic merit of the decisions or the quality of the courts at issue. But in the absence of explicit reasoning on this point, it is difficult to assess the quality of the judgments of the Tribunal on this point. It would increase their persuasiveness if the Tribunal would better indicate why it chooses the cases that it bases its analysis upon and why such cases provide the basis for the determination and interpretation of rules of international law.

Access to national case law is too incomplete and unbalanced to make proper assessments of the relevant cases and the legal weight thereof. Whatever the merits of the relatively few cases on which the Tribunal relies, they may not provide the basis for a balanced development and interpretation of the law. This points to the importance of an improved access to national case law. The International Law Reports, still the most notable source, contain too few cases to cover world-wide practice in the various fields of international law. The cases reported in the Yearbook of International Humanitarian Law have improved the situation, but also cover only part of the cases relevant to the Tribunal and the International Criminal Court. More work therefore needs to be done to disclose practice across the world, to provide the conditions for a balanced assessment of the relevance of national cases and thereby promote a more balanced development of international law that takes into account the positions of all, or in any case most, States throughout the world.

81. Oral pleadings of Congo in *Congo-Belgium*, *supra* note 2. From a legal point of view, and unless the intrinsic merit of decisions requires otherwise, in principle no distinction between cases may be made based on political colour. This was rightly noted by Antonio Cassese in his separate and dissenting opinion in *Prosecutor* v. *Erdemović*, *supra* note 8, para. 39 (noting that the German case law reviewed by him shows beyond any doubt that a number of courts did indeed admit duress as a defence to war crimes and crimes against humanity whose underlying offence was the killing, or the participation in the killing, of innocent persons but that "taking account of the *legal* significance of this case law does not entail that one should be blind to the flaws of such case law from an *historical* viewpoint; in other words, whilst one is warranted in taking into account the legal weight of those cases, one may just as legitimately entertain serious misgivings about the veracity of the *factual* presuppositions or underpinning of most of those cases"). The political basis for selection of case law is also discussed by K. Knop, *ibid*.

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