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Current Developments at the International Criminal Tribunals

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1. Overview

The year 2006 evidenced several important judgments and decisions on substantive and procedure aspects handed down by the Trial Chambers and the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). This article is not meant to be a comprehensive overview or exhaustive compilation of all judgments and decisions issued by international criminal courts in the last few months.¹ Instead, it spotlights and briefly comments on some recent developments at the international criminal tribunals with regard to substantive and procedural law.

2. Elements of Crimes

2.1. The Crime of Terror against the Civilian Population

The ‘crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population’ (the crime of terror against the civilian population) was first defined by Trial Chamber I of the ICTY in the *Galić* case.² While such a crime is not explicitly mentioned in the ICTY Statute, the Trial Chamber found that acts terrorising the civilian population qualified, *inter alia*, as a crime of terror as set forth in Article 51(2) of the first Additional Protocol to the Geneva Conventions of 1949 and were, accordingly, punishable under Article 3 of the ICTY Statute.³ On 30 November 2006, the Appeals Chamber endorsed this finding.⁴

2.1.1 Prohibition on Terror against the Civilian Population in the Additional Protocols declaratory of Customary International Law

In his appeal, *Galić* argued that the Yugoslavia Tribunal has no jurisdiction over the ‘crime of terror against civilian population’ because “there exists no international crime of terror.”⁵ He also contended that “there is no such ... criminal offence in

¹ The present article digests the most significant developments at the International Criminal Tribunals from 30 June through 12 December 2006.

² *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Judgment, 5 December 2003 (*Galić* Trial Judgment) paras 133, 138. Based on the prohibition enshrined in Article 51(2) of the first Additional Protocol, the *Galić* Trial Chamber defined the objective and subjective elements of the offence of “terror against civilian population” as follows: “(i) acts of violence [*conduct element*] directed against the civilian population or individual civilians not taking direct part in hostilities [*circumstance element*] causing death or serious injury to body or health within the civilian population [*result element*]; (ii) the offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence [*mens rea*]; (iii) the above offence was committed with the primary purpose of spreading terror among the civilian population [*mens rea*].” The Trial Chamber further found that the actual infliction of terror is not a constitutive legal element of the crime of terror.

³ Article 13(2) of the Second Additional Protocol is identical to Article 51(2) of the first Additional Protocol.

⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeals Judgment, 30 November 2006, (*Galić* Appeal Judgment).

⁵ *Galić* Appeal Judgment, para. 79, referring to the Defence Notice of Appeal, para. 25.

customary law”, that “this alleged offence was never criminalized”, and “such an alleged offence could not be based on treaty law.”⁶

The Appeals Chamber rejected the Appellant’s arguments asserting that “while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the International Tribunal’s jurisdiction, in practice the International Tribunal always ascertains that the treaty provision in question is also declaratory of custom.”⁷ The Appeals Chamber found that the prohibition on terror against the civilian population in the Additional Protocols was declaratory of customary international law.⁸

The Appeals Chamber further noted that pursuant to Article 1 of the ICTY Statute, the Tribunal has jurisdiction over ‘serious violations of international humanitarian law’, however, it had difficulties in clarifying what is encompassed by the term ‘international humanitarian law’. In clarifying what is encompassed by the term ‘international humanitarian law’, the Appeals Chamber relied on the Report of the Secretary-General recommending the establishment of the ICTY, in which he explained that humanitarian law is comprised of both conventional law and customary international law: “This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.”⁹

2.1.2. Clarification of *Actus Reus and Mens rea*

As far as the *actus reus* is concerned, the *Galić* Appeals Chamber found that the ‘crime of terror against the civilian population’ can comprise “attacks or *threats of attacks* against the civilian population.”¹⁰ In so doing, the Appeals Chamber has widened the definition given to this crime by the Trial Chamber by including threats of violence or acts of violence not causing death or injury. The Appeals Chamber provides further clarification as to the objective elements of this offence:

“The acts or threats of violence constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian can vary; ... Further, the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is not a case in which an explosive device was planted outside of an ongoing military attack but rather a case of ‘extensive trauma and psychological damage’ being caused by ‘attacks [which] were designed to keep the inhabitants in a constant state of terror.’ Such extensive trauma and psychological damage form part of the acts or threats of violence.”¹¹

Furthermore, the Appeals Chamber agreed with the Trial Chamber that the actual infliction of terror is not a constitutive legal element of the crime.¹²

⁶ Ibid.

⁷ Ibid., para. 85.

⁸ Ibid., para. 98. The Appeals Chamber further relied on (1) its inclusion in the second sentences of both Article 51(2) of the Additional Protocol I and Article 13(2) of Additional Protocol II; Article 122 of the 1923 Hague Rules on Warfare; Article 33 of the fourth Geneva Convention of 1949. See para. 88 of *Galić* Appeal Judgment.

⁹ Report of the Secretary-General (ICTY), para. 33, quoted in *Galić* Appeal Judgment, para. 81.

¹⁰ *Galić* Appeal Judgment, para. 102 (emphasis added).

¹¹ *Galić* Appeal Judgment, para. 102.

¹² *Galić* Appeal Judgment, paras 103-104; *Galić* Trial Judgment, para. 134.

According to the Appeals Chamber, the *mens rea* requisite of the crime of terror is the *specific intent* to spread terror among the civilian population.¹³ Thus, this crime falls into the category of *specific intent* or *primary purpose* crimes. With regard to such category of crimes, the Prosecution must demonstrate that the perpetrator's primary purpose or his conscious objective was to spread terror among civilians. Accordingly, *dolus eventualis* or advertent recklessness is not sufficient to trigger criminal responsibility for this offence.¹⁴

2.2. Rape - Absence of Consent as an Element of the Crime or as an Affirmative Defence?

In the *Gacumbitsi* Appeal Judgment,¹⁵ the Appeals Chamber clarified the law relating to rape as a crime against humanity or as an act of genocide. The Prosecution had argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered as constitutive elements of the offence that must be proved by the Prosecution.¹⁶ According to the Prosecution, the crime of rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, for which absence of consent is not an essential element of the offence.¹⁷ Subject to the limitation of Rule 96 of the ICTR's Rules of Procedure and Evidence, the Prosecution contended that consent should be considered an affirmative defence.¹⁸

The *Gacumbitsi* Appeals Chamber agreed with the Prosecution that the matter should be considered as one of "general significance for the Tribunal's jurisprudence".¹⁹ Based on the definition given to the crime of rape by the *Kunarac* Appeals Chamber,²⁰ the *Gacumbitsi* Appeals Chamber found that (1) non-consent and (2) knowledge thereof are constitutive elements of rape as a crime against humanity, and that the Prosecution bears the burden of proving these elements.²¹

As for the Prosecution's argument that consent should be considered an affirmative defence based on the provision provided for in Rule 96, the Appeals Chamber drew attention to the fact that "[t]he Rules of Procedure and Evidence do not, however, redefine the elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law."²² According to the Appeals Chamber, Rule 96 must be read simply to define circumstances under which evidence

¹³ *Galić* Appeal Judgment, paras 102, 104.

¹⁴ See *Mohamed Elewa Badar*, 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 6 *International Criminal Law Review* (2006) 313, 317-328.

¹⁵ *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgment, 7 July 2006, (*Gacumbitsi* Appeal Judgment).

¹⁶ *Gacumbitsi* Appeal Judgment, para. 147, quoting the Prosecution Appeal Brief, paras 155, 156.

¹⁷ *Gacumbitsi* Appeal Judgment, para. 149, quoting the Prosecution Appeal Brief, paras 159, 182.

¹⁸ *Gacumbitsi* Appeal Judgment, para. 147, quoting the Prosecution Appeal Brief, para. 160.

¹⁹ *Gacumbitsi* Appeal Judgment, para. 150 (footnotes omitted).

²⁰ See *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23&23/1-A, Appeal Judgment, 12 June 2002 (*Kunarac* Appeal Judgment) para. 127.

²¹ *Gacumbitsi* Appeal Judgment, paras 151-153.

²² *Gacumbitsi* Appeal Judgment, para. 154, quoting *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, *Milan Vujin*, 31 January 2000, para. 25, fn. 26.

of consent will be admissible, rather than changing the definition of the crime by turning an element into a defence.²³

The *Gacumbitsi* Appeals Chamber endorsed the *Kunarac* Trial Chamber's analysis of Rule 96 vis-à-vis the element of consent in the crime of rape:

"The reference in the Rule [96] to consent as a "defence" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood [...] to be *absence of consent* which is an *element* of the crime. The use of the word "defence", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a "defence" in Rule 96 to have been used in this technical way."²⁴

2.3 Crimes against Humanity – Neither the Existence of a Policy or Plan nor Tolerance by the State is an Ingredient Element

In *Gacumbitsi*, the Appeals Chamber rejected the Appellant's submission that "[t]he mental element [of crimes against humanity] must be proved by the existence of a widespread practice, which implies planning and tolerance of such act by the State."²⁵ The Appeals Chamber emphasized that neither proof of a plan or policy nor tolerance of such act by the state is a prerequisite to a conviction for crimes against humanity, though they can be evidentially relevant.²⁶

3. Individual Criminal Responsibility

3.1 Instigation

In the words of the *ad hoc* Tribunals, "instigating" means prompting another to commit an offence.²⁷ It requires some kind of influence over the principal offender by way of inciting, soliciting, or otherwise inducing him to commit the offence at issue.²⁸ In the *Orić* judgment, Trial Chamber II of the ICTY realized that the meaning and contents of the constituent elements of instigation are "partly described in different terms" under the case law of the ICTY and ICTR.²⁹ The Trial Chamber devoted special attention to the nature of the *actus reus*, the causal relationship between the instigation and the crime committed, and the *mens rea* required for this mode of criminal participation.

3.1.1. No Instigation of an 'Omnimodo Facturus'

²³ *Gacumbitsi* Appeals Judgment, para. 154, endorsing the view adopted by the Trial Chamber in *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23/1-T, Trial Judgment, 22 February 2001 (*Kunarac* Trial Judgment) para. 464.

²⁴ *Gacumbitsi* Appeals Judgment, para. 154.

²⁵ *Gacumbitsi* Appeal Judgment, para. 84, quoting the Defence Appeal Brief, para. 314.

²⁶ *Gacumbitsi* Appeal Judgment, para. 84.

²⁷ *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Trial Judgment, 30 June 2006, (*Orić* Trial Judgment) para. 270, referring to several judgments of the ICTY and ICTR (appeal pending).

²⁸ *Orić* Trial Judgment, para. 271.

²⁹ *Orić* Trial Judgment, para. 269.

According to the *Orić* Trial Chamber, it is not necessarily that the original idea or plan to commit the crime was produced by the instigator: “Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator is an ‘*omnimodo facturus*’ meaning that he has definitely decided to commit the crime, further encouragement or moral support may merely, though still, qualify as aiding and abetting.”³⁰

Unlike ‘ordering’ as a form of participation under Article 7(1) of the ICTY’s Statute, the Chamber held that instigation “does not presuppose any kind of superiority” between the instigator and the principal perpetrator.³¹ The *Orić* Trial Chamber ruled that “instigation influence can be generated both *face to face* and by *intermediaries* as well as exerted over a smaller or larger audience, provided that the instigator has the corresponding *mens rea*.”³²

3.1.2. No *condicio sine qua non*

Although a nexus between instigation and the actual commission of the crime is required, it is not to be understood as requiring proof that, in terms of a *condicio sine qua non*, the crime in question would not have occurred without the instigator’s involvement.³³ In *Orić*, the Trial Chamber followed neither the Prosecution theory – the conduct of the Accused was a “clear and contributing factor of the commission of the crime” – nor the Defence’s submission – the conduct of the Accused must have had a “direct and substantial effect” on the perpetration of the crime.³⁴ As for the Prosecution’s contention, the Chamber drew attention to the fact that “not any contributing factor can suffice for instigation, as it must be a substantial one”.³⁵ As for the Defence submission, it held that instigation “needs not necessarily have direct effect, as prompting another to commit a crime can also be procured by means of an *intermediary*.”³⁶

In *Gacumbitsi*, however, the Appeals Chamber agreed with the Prosecution’s contention that in order to trigger criminal responsibility for instigation “it suffices to demonstrate that the accused’s instigation ‘substantially contributed’ to the commission of the crime – that is, that he ‘set in motion a chain of events that were the foreseeable consequence of his instigation of the crime.’”³⁷

3.1.3. *Mens Rea* – Cognitive and Volitional Components

The *Orić* Trial Chamber’s articulation of the instigator’s *mens rea* marks a decisive step on the way to an ever-clearer recognition that individual criminal responsibility for serious crimes over which the ICTY has jurisdiction requires intention.³⁸ The

³⁰ *Orić* Trial Judgment, para. 271 (footnotes omitted).

³¹ *Orić* Trial Judgment, para. 272.

³² *Orić* Trial Judgment, para. 273 (emphasis added), (footnotes omitted).

³³ *Orić* Trial Judgment, para. 274.

³⁴ *Orić* Trial Judgment, paras 275-276.

³⁵ *Orić* Trial Judgment, para. 276.

³⁶ *Ibid.*, (emphasis added).

³⁷ *Gacumbitsi* Appeal Judgment, para. 127, quoting the Prosecution Appeal Brief, paras 120-122.

³⁸ See *Orić* Trial Judgment, para. 279. See also *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Appeals Judgment, 29 July 2004 (*Blaškić* Appeals Judgment) para. 41: “[T]he knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious

Chamber also agreed with the Defence's submission that 'intent' does not include 'recklessness':³⁹ "intention contains (1) a cognitive element of knowledge and (2) a volitional element of acceptance and that this intention must be present with respect to both the participant's own conduct and the principal crime he is participating in."⁴⁰ Accordingly, mere knowledge on the part of the accused is not sufficient to trigger the criminal liability for principal perpetrators or instigators for serious violations of international humanitarian law. The Tribunal put it more clearly:

"...first, with regard to (1) his own conduct, the instigator *must be aware* [cognitive component] of his influencing effect on the principal perpetrator to commit the crime, as well as the instigator, even if neither aiming at nor wishing so, must at least *accept* [volitional component] that the crime be committed. Second, with regard to (2) the principal perpetrator, the instigator must be both aware of, and agree to, the intentional completion of the principal crime. Third, with regard to the (3) volitional element of intent, the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence. Although the latter does not require the instigator precisely to foresee by whom and under which circumstances the principal crime will be committed nor that it would exclude indirect inducement, the instigator must at least be aware of the type and the essential elements of the crime to be committed."⁴¹

3.2. Joint Criminal Enterprise v. Co-perpetratorship

Although the Statutes of the Yugoslavia and Rwanda Tribunals do not make explicit reference to the theory of 'joint criminal enterprise' (JCE), the Appeals Chamber of these Tribunals held that participating in JCE is a form of liability which exists in customary international law, and which is a form of 'commission' under Articles 7(1) & 6(1) of the ICTY and ICTR Statutes respectively.⁴²

In the *Stakić* Judgment, the Trial Chamber explicitly rejected the application of JCE and applied a mode of liability which it termed 'co-perpetratorship' which in general requires 'joint functional control over a crime'.⁴³ In so doing, the *Stakić* Trial

violations of international humanitarian law [and that, therefore,] an awareness of a higher likelihood of risk and a *volitional element* must be incorporated in the legal standard."

³⁹ *Orić* Trial Judgment, para. 348 fn. 1020.

⁴⁰ *Orić* Trial Judgment, para. 279 (numbers added).

⁴¹ *Orić* Trial Judgment, para. 279 (numbers added).

⁴² See *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 79-80, 99; *Tadić* Appeal Judgment, 15 July 1999, paras 188, 195-226; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR72, Decision in Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, para. 20; *Prosecutor v. Mitar Vasiljević* Case No. IT-98-32-A, Appeal Judgment, 25 February 2004, para. 111 ("The Appeals Chamber recalls that the case-law of the Tribunal stemming from the *Tadić* Appeals Judgment and the *Ojdanić* Decision regards participation in a joint criminal enterprise as a form of commission"); *Prosecutor v. Mitar Vasiljević* Case No. IT-98-32-T, Trial Judgment, 29 November 2002, paras 94-95. For the ICTR see *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A/ 96-17-A, Appeal Judgment, 13 December 2004, para. 462: ("Given the fact that both the ICTY and ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute"); See also *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, Appeals Decision, 12 April 2006 (*Karemera* Appeals Decision) para. 16.

⁴³ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003 (*Stakić* Trial Judgment) paras 438. In his Separate Opinion in *Gacumbitsi* Appeal Judgement, Judge Schomburg encapsulated the general features of co-perpetratorship in the following words: "Co-perpetration in

Chamber applied a combination of two forms of commission known in German criminal law as *Mittäterschaft* (“co-perpetration”) and *mittelbare Täterschaft* (“indirect perpetration”). The main features of co-perpetration is that the “co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and joint control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.”⁴⁴

The *Stakić* Appeals Chamber, however, set aside, *proprio motu*, the finding that the Appellant was responsible as a co-perpetrator and qualified the Appellant’s responsibility as participation in a JCE. It held “that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of “co-perpetratorship”. This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers.”⁴⁵ Since then, the clash between these two concepts intensified.⁴⁶

3.2.1. ‘Indirect perpetration’ – an effective machinery to hold those who acted ‘behind the scenes’ as perpetrators

The notion of ‘indirect perpetration’ and its application in modern criminal law particularly in cases concerning organized crime, terrorism, white collar crime or ‘state induced criminality’ was adequately examined and analyzed by Judge Schomburg in his Separate Opinion in the *Gacumbitsi* Appeal Judgment.⁴⁷ This mode of *indirect perpetration* “requires that the indirect perpetrator uses the direct and physical perpetrator as a mere ‘instrument’ to achieve his goal, *i.e.*, the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.”⁴⁸

general requires “*joint functional* control over a crime”. Co-perpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.”

⁴⁴ *Stakić* Trial Judgment, para. 440.

⁴⁵ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgment, 22 March 2006, (*Stakić* Appeal Judgment) para. 62. For critical analysis of the law of joint criminal enterprise in the jurisprudence of the ICTY see *Attila Bogdan*, ‘Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the *ad hoc* International Tribunal for the Former Yugoslavia’, 6 *International Criminal Law Review* (2006) 63-120 with several references regarding Professor M. Cherif Bassiouni’s critical opinion on the law of JCE as applied by the International Criminal Tribunals.

⁴⁶ *Gacumbitsi* Appeal Judgment, ‘Separate Opinion of Judge Shahabuddeen’ pp. 87-95 and the ‘Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide’ pp. 105-115; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Appeal Judgment, 28 November 2006 (*Simić* Appeal Judgment) ‘Dissenting Opinion of Judge Shahabuddeen’ paras 31-32 and the ‘Dissenting Opinion of Judge Schomburg’ paras 9-23, quoting and citing two Articles which appeared at this Review, namely, *Héctor Olásolo & Ana Pérez Cepeda*, ‘The Notion of Control of the Crime and its Application by the ICTY in the *Stakić* Case’, 4 *International Criminal Law Review* (2004) 475-526; *Mohamed Elewa Badar*, ‘Just Convict Everyone!’ ‘Joint Perpetration: From *Tadić* to *Stakić* and Back Again’, 6 *International Criminal Law Review* (2006) 293-302.

⁴⁷ See *Gacumbitsi* Appeal Judgment, Separate Opinion of Judge Schomburg, paras. 18-21, 26. Reference being made to the Argentinean National Appeals Court, Judgement on Human Rights Violations by the Former Military leaders of 9 December 1985, which was upheld by the Argentinean Supreme Court on 30 December 1986. In this case the Argentinean Courts have entered convictions for crimes committed by members of the of the Junta regime based on indirect perpetration.

⁴⁸ *Gacumbitsi* Appeal Judgment, Separate Opinion of Judge Schomburg, para.18 (footnotes omitted).

This is not to say that the concept of indirect perpetratorship is limited to situations where the physical perpetrator is an ‘innocent agent’, or has defence such as insanity or infancy. In such cases an ‘innocent agent’ is a “mere machine whose movements are regulated by the principal.”⁴⁹ Rather, the notion of ‘indirect perpetration’ applies “even where the direct and physical perpetrator is criminally responsible (“perpetrator behind the perpetrator”).”⁵⁰

Judge Schomburg noted that ‘the notion of indirect perpetratorship’ suits the needs of both international criminal law as national law. He contended that the application of indirect perpetratorship in the sphere of international criminal law will significantly help “to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed.”⁵¹

In support of this position Judge Schomburg quoted the ICC Pre-Trial Chamber decision in *Lubanga* case: “In the Chamber view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and FPLC, *the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime* referred in the Prosecution’s Application, *is provided for in article 25(3) of the Statute*, could be applicable to Mr Thomas Lubanga Dyilo’s alleged role in the commission of the crimes set out in the Prosecution’s Application.”⁵²

He also quoted the relevant passages of the German Federal Supreme Court’s ruling in the *Politbüro* case which illustrates the main feature of the concept of indirect perpetration in addition to the objective and subjective elements required: “[I]n certain groups of cases, however, even though the direct perpetrator has unlimited responsibility for his actions, the contribution by the man behind the scenes almost automatically brings about the constituent elements of the offence intended by that man behind the scene. Such is the case, for example, when the man behind the scenes take advantages of certain basis conditions through certain organisational structures, where his contribution to the event sets in the motion regular procedures. Such basic conditions with regular procedures are found particularly often among organisational structures of the State [...] as well as in hierarchies of command. If the man behind the scenes acts in full awareness of these circumstances, particularly if he exploits the direct perpetrator’s unconditional willingness to bring about the constituent elements of the crime, and if he wills the result as that of his own actions, then he is perpetrator by indirect perpetration. He has control over the action [...]. In such cases, failing to treat the man behind the scenes as a perpetrator would not do justice to the significance of his contribution to the crime, especially since

⁴⁹ *Glanville Williams*, *Criminal Law: The General Part*, 2nd edn., (London: Stevens & Sons, 1961) 349-350.

⁵⁰ Being aware that the phrase ‘indirect perpetratorship’ may lead to confusion, Judge Schomburg in footnote 36 of his Separate Opinion in *Gacumbitsi* Appeal Judgment drew attention to the following: “As indirect perpetratorship focuses on the indirect perpetrator’s control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular ‘defect’ on the part of the direct and physical perpetrator which excludes his criminal responsibility.”

⁵¹ *Gacumbitsi* Appeal Judgment, Separate Opinion of Judge Schomburg, para. 21.

⁵² *Gacumbitsi* Appeal Judgment, Separate Opinion of Judge Schomburg, fn. 39, quoting *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Document into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, para. 96 (Judge Schomburg’s emphasis).

responsibility often increase rather than decrease the further one is from the scene of the crime [...].”⁵³

3.2.2. Co-perpetratorship vis-à-vis Customary International Law

In his dissenting opinion in the *Simić* Appeal Judgment, Judge *Schomburg* contended that co-perpetratorship “is firmly entrenched in customary international law”.⁵⁴ In support of this position, Judge *Schomburg* referred to a recent comparative survey of national legal systems conducted by the *Max-Planck-Institute* in Germany,⁵⁵ which illustrates that at least 23 States, including the successor States on the territory of the former Yugoslavia, acknowledge the concept of co-perpetratorship in their criminal codes.⁵⁶ According to Judge *Schomburg*, co-perpetratorship suits the needs of international criminal law particularly well and also refers to the Statute of the International Criminal Court which includes the notion of co-perpetratorship in Article 25(3)(a). He concluded, “[g]iven the ample acknowledgment of co-perpetratorship, the ICC does not create new law in this respect, but reflects existing law at least since the point in time when both *ad-hoc* Tribunals were vested with jurisdiction *ratione temporis* ...”⁵⁷

Judge Shahabuddeen, however, had a different opinion: “[T]he required state practice and *opinio juris* do not exist so as to make either theory part of customary international law. That opens the risk of there being a *non liquet* on matter of substance in international criminal law as applied by the Tribunal. That risk was sensed in *Erdemović*. There too there was a clash between domestic legal systems. The majority in the Appeals Chamber was able to avoid the risk in that case only, *on one view*, by going outside the normal principles of international criminal law. Whether the risk in this case can be avoided by taking a less adventurous course is best left for future inquiry.”⁵⁸

3.2.3. Harmonization between the Two Concepts?

In the *Gacumbitsi* and *Simić* Appeal Judgments, Judge *Schomburg* noted that the notions of JCE and co-perpetratorship “widely overlap and have therefore to be

⁵³ German Federal Supreme Court (Bundesgerichtshof), Judgment of 26 July 1994, *BGHSt* 40, pp. 218-240, p. 236, quoted in *Gacumbitsi* Appeal Judgment, Separate Opinion of Judge Schomburg, para. 20. Judge Schomburg also referred to Article 25(3)(a) of the ICC Statute which includes both the notion of co-perpetration and indirect perpetration.

⁵⁴ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, fn. 20.

⁵⁵ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, referring to a survey entitled “Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks”, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor” undertaken by the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg, Germany.

⁵⁶ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, para. 13; See also *Gacumbitsi* Appeal Judgment, ‘Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide’ para. 22: “It is important to note that neither the law of Rwanda nor the law of the former Yugoslavia employs the theory of joint criminal enterprise.”

⁵⁷ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, para. 16.

⁵⁸ *Gacumbitsi* Appeal Judgment, ‘Separate Opinion of Judge Shahabuddeen’ para. 51 (emphasis in original).

harmonized in the jurisprudence of both *ad hoc* Tribunals.”⁵⁹ According to Judge Schomburg, such harmonization could provide the three categories of JCE “with sharper contours by combining objective and subjective components in an adequate way.”⁶⁰ Furthermore, this “harmonization will lead to greater acceptance of the Tribunal’s jurisprudence by international criminal courts in the future ...”⁶¹

Such harmonization was viewed by Judge Shahabuddeen as impracticable. He pointed out that “the contribution of an accused to a JCE does not have to be a *sine qua non* of the commission of the crime. ... By contrast, under the co-perpetratorship theory, since the non fulfilment by a participant of his promised contribution would ‘ruin’ the accomplishment of the enterprise as visualized, the making of his contribution would appear to be a *sine qua non*. Therefore, though the two theories overlap, they arrive at a point of incompatibility touching guilt or innocence: at that point one theory is wrong, the other right. This would seem to indicate that only one of the two theories can prevail in the same legal system.”⁶²

3.3 Command Responsibility

3.3.1 Conduct of the Subordinate - Not limited to physical perpetration

In the *Orić* judgement, as well as in the *Boškoski* trial,⁶³ Trial Chamber II of the ICTY ruled that superior responsibility is not limited to crimes committed physically by the subordinates (principal perpetrators) but it encompasses situations where the subordinates merely aided and abetted the crime of others (accessories). Adopting a broad interpretation of the word ‘committing’ in Article 7(3) of the ICTY Statute, the *Orić* Trial Chamber held that decisive weight must be given to the purpose of superior criminal responsibility as “it aims at obliging commanders to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty. This enforcement of international humanitarian law would be impaired to an inconceivable degree if a superior had to prevent subordinates only from killing or maltreating in person, while he could look the other way if he observed that subordinates ‘merely’ aided and abetted others in procuring the same evil.”⁶⁴

3.3.2. Conduct of the Subordinate - Commission by Omission – Duty to act

In the *Orić* judgment, Trial Chamber II held that a superior’s criminal responsibility is not limited to subordinate’s active perpetration or participation, but also comprises their committing by *omission*.⁶⁵ The following hypothetical example given by the Trial Chamber is illustrative: “... if for instance the maltreatment of prisoners by guards, and/or by outsiders not prevented from entering the location, is made possible

⁵⁹ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, para. 17; *Gacumbitsi* Appeal Judgment, ‘Separate Opinion of Judge Schomburg’ para. 22.

⁶⁰ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, para. 17.

⁶¹ *Simić* Appeals Judgment, “Dissenting Opinion of Judge Schomburg”, para. 17.

⁶² *Gacumbitsi* Appeal Judgment, ‘Separate Opinion of Judge Shahabuddeen’ para. 50; See also *Simić* Appeal Judgment, ‘Dissenting Opinion of Judge Shahabuddeen’ para. 32.

⁶³ *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion to Amend the Indictment, 26 May 2006 (*Boškoski Decision*), paras 18-48.

⁶⁴ *Orić* Trial Judgment, paras 300-301.

⁶⁵ *Orić* Trial Judgment, para. 302.

because subordinates in charge of the prison fail to ensure the security of the detainees by adequate measures, it does not matter any further by whom else, due to the subordinates' neglect of protection, the protected persons are being injured, nor would it be necessary to establish the identity of the direct perpetrators."⁶⁶ In order to support its proposition the Trial Chamber gave the following reasons:

"(1) this position is supported by the common usage of 'act' and 'committing' as legal umbrella-terms for conduct that consists of actively causing a certain result to occur or in failing to prevent its occurrence."⁶⁷

(2) since commission through culpable omission is not limited to perpetration but, according to the case [law] of this Tribunal, is open to all forms of participation, instigating as well as aiding and abetting can also be carried out by omission."⁶⁸

(3) with regard to the consequence for the superior's responsibility, ... his or her duty to prevent or punish concerns all modes of conduct a subordinate may be criminally responsible for under Article 7(1) of the Statute, be it perpetration by committing the relevant crime (alone or jointly with others) in person or be it participation, as in form of instigation or otherwise aiding and abetting, and further, that any of these modes of liability may be performed by positive action or culpable omission."⁶⁹

Finally and most noteworthy, the Tribunal stressed that in what ever mode of criminal participation, "omission can incur responsibility *only* if there was a duty to act in terms of preventing the prohibited result from occurring."⁷⁰

4. Right of the Accused

4.1 Right to Self-representation – Imposition of Counsel – Warning Requirement

The right to self-representation is highly esteemed in proceedings before international criminal tribunals. The right of an accused to defend himself *in person* or through legal assistance of his own choosing is enshrined in the Statutes of nearly all international and internationalized criminal tribunals.⁷¹ Imposition of Defence counsel against the will of the accused is seen as a severe curtailment of the accused's rights.⁷² International criminal tribunals have therefore been quite reluctant to impose (a) permanent counsel (i.e. *Slobodan Milošević*, during Defence case, *Jean Bosco Barayagwiza*)⁷³ and have instead tested compromises like (b) *amicus curiae* (i.e. *Slobodan Milošević* during Prosecution case), (c) 'stand-by counsel' (i.e. *Hinga*

⁶⁶ *Orić* Trial Judgment, para. 305.

⁶⁷ *Orić* Trial Judgment, para. 302 (footnotes omitted).

⁶⁸ *Orić* Trial Judgment, para. 303 (footnotes omitted).

⁶⁹ *Ibid.*, para. 305 (numbers added).

⁷⁰ *Orić* Trial Judgment, para. 304 (emphasis in original, footnotes omitted). For more details on the concept of 'omission' in international criminal law see *Michael Duttwiller*, 'Liability for Omission in International Criminal Law', 6 *International Criminal Law Review* (2006) 1-61.

⁷¹ Article 21 (4)(d) ICTY-Statute; Article 20 (4)(d) ICTR-Statute; Article 67 (1)(d) ICC-Statute; Article 17 (4)(d) SCSL Statute. Most notably, the Statute of the Iraqi Special Tribunal, however, does not allow self-representation – Saddam Hussein was not allowed to defend himself.

⁷² See critical analysis by *Michael P. Scharf*, *Self-Representation versus Assignment of Defence Counsel before International Tribunals*, 4 *Journal of International Criminal Justice* (2006) 12-30.

⁷³ *Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Assignment of Defence Counsel, 1 November 2004 and Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004 (Oral Order of the Trial Chamber, 2 September 2004, T. 32356-32392).

Norman, Vojislav Šešelj) or (d) ‘duty counsel’ (i.e. *Arsène S. Ntahobali*).⁷⁴ Recent decisions by the Yugoslavia Tribunal reflect great difficulties regarding the imposition of permanent Defence counsel.

On 27 November 2006, the ICTY Trial Chamber I imposed permanent Defence counsel on *Vojislav Šešelj*, an accused whose declared aim is to ‘bring the Tribunal down to its knees’.⁷⁵ This decision is designated “No. 2” as on 21 August 2006, the Trial Chamber had for the first time imposed permanent counsel (“first decision”).⁷⁶ Before that, a “stand-by counsel” had been assigned, who was designated to assist in the preparation and presentation of the case.⁷⁷ The assignment of stand-by counsel, however, did not bring about the desired moderation of Mr. *Šešelj*’s behaviour or the focus on legal issues in the numerous submissions filed by Mr. *Šešelj*.

In its first decision on imposition of permanent counsel, the Trial Chamber held that the behaviour of Mr. *Šešelj* “provided a strong indication that self-representation would substantially and persistently obstruct the proper and expeditious conduct of the proceedings”.⁷⁸ This legal test had previously been applied by the Appeals Chamber in the case against *Slobodan Milošević*, albeit with respect only to *Milošević*’s bad health condition.⁷⁹ The Trial Chamber found that the conduct of Mr. *Šešelj* as a whole, his obstructionist and disruptive behaviour, his deliberate disrespect for the rules, his intimidation of witnesses and slanderous comments as well as his inability or rather unwillingness to defend himself during the pre-trial phase indicated that Mr. *Šešelj* would go on in substantially and persistently obstructing the proper and expeditious conduct of the remainder of the trial. It concluded that imposition of counsel was justified and ordered that Mr. *Šešelj*’s participation in the proceedings will be through counsel, unless the Trial Chamber determines otherwise.⁸⁰

The Trial Chamber heard “otherwise” from the Appeals Chamber. On 20 October 2006, the Appeals Chamber of the ICTY reversed the first decision of the Trial Chamber on imposition of counsel and restored the right of Mr. *Šešelj* to represent himself in the proceedings against him before the Tribunal.⁸¹ The Appeals Chamber

⁷⁴ *Prosecutor v. Pauline Nyiramasuhuko and Arsène S. Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali’s Motion for Withdrawal of Counsel, 22 June 2001; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order Inviting Designation of Amicus Curiae, 30 August 2001; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003 (“*Šešelj* Decision on Assignment of Stand-by Counsel”); *Prosecutor v. Hinga Norman, Fofana and Kondewa*, Case No. SCSL-04-14-PT, Consequential Order on Appointment and Role of Standby-Counsel, 14 June 2004. See also discussion in *Prosecutor v. Momčilo Krajišnik*, IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, 18 August 2005, paras. 22-35.

⁷⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Reasons for Decision (No. 2) on Assignment of Counsel, 27 November 2006. The Trial Chamber had issued an oral order during the pre-trial conference.

⁷⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, 21 August 2006 (“*Šešelj* First Decision on Assignment of Permanent Counsel”).

⁷⁷ *Šešelj* Decision on Assignment of Stand-by Counsel.

⁷⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, 21 August 2006, paras 73-74 (“*Šešelj* Second Decision on Assignment of Permanent Counsel”).

⁷⁹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Assignment of Defence Counsel, 1 November 2004, para. 13.

⁸⁰ *Šešelj* First Decision on Assignment of Permanent Counsel, paras. 27-66, 79.

⁸¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006.

fully endorsed the legal test applied by the Trial Chamber and confirmed that self-representation may also be restricted as early as during the pre-trial stage.⁸²

The Appeals Chamber quashed the first decision of the Trial Chamber on the basis that Mr. *Šešelj* had not been *specifically* warned that his right to self-representation was at risk. It compared the right to self-representation to the right of the accused to be present in the courtroom. Since the presence of the accused in the courtroom could only be terminated after a warning (Rule 80(B) of the ICTY's Rules of Procedure and Evidence). Such a warning was also required if the right of the accused to represent himself was about to be curtailed. The Appeals Chamber held that a *general* warning that persisting with disruptive behaviour could lead to sanctions was insufficient, and that a *specific* warning was required which Mr. *Šešelj* did not receive.⁸³ Interestingly, the Appeals Chamber itself then took the opportunity to issue such a specific warning to Mr. *Šešelj*, namely via the disposition of the decision.⁸⁴

The Trial Chamber's second decision of 27 November therefore seemed to be the last executive step in the imposition of counsel. Mr. *Šešelj* had continued to deliberately disregard decisions by the Trial Chamber and had repeatedly disrupted court hearings, most recently by going on a hunger strike and refusing to appear in court. After immediate re-imposition of stand-by counsel on 25 October 2006⁸⁵ and additional specific warnings,⁸⁶ Trial Chamber I revoked his status as a *pro se* defendant.

On 8 December 2006, the Appeals Chamber, however, again reversed the decision of the Trial Chamber on the ground that it had not, prior to the decision to re-impose stand-by counsel, established any persistent or obstructionist behaviour.⁸⁷ Moreover, the Appeals Chamber nullified the opening of the proceedings and ordered a restart of the trial.⁸⁸

The imposition of permanent counsel in the *Šešelj* case, albeit eventually unsuccessful, demonstrates once more that the right to self-representation is not absolute and has to be balanced with the interests of justice and fair trial in the framework of adversarial proceedings. The Trial Chamber of the ICTR had already expressed in the case *Prosecutor v. Jean Bosco Barayagwiza* that the assigned counsel also "represents the interest of the Tribunal to ensure that the Accused receives a fair trial and that the aim is to obtain efficient representation and adversarial proceedings."⁸⁹

4.2. Provisional Release – Engagement in Political Activities

⁸² *Ibid.*, para. 28.

⁸³ *Ibid.*, paras. 23-25.

⁸⁴ The Appeals Chamber "hereby explicitly warns *Šešelj* that, should his self-representation subsequent to this Decision substantially obstruct the proper and expeditious proceedings in this case, the Trial Chamber will be justified in promptly assigning him counsel after allowing *Šešelj* the right to be heard with respect to his subsequent behaviour."

⁸⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Concerning Appointment of Standby Counsel and Delayed Commencement of Trial, 25 October 2006.

⁸⁶ Trial Chamber had warned *Šešelj* orally during the Status Conference on 8 November and in writing in an "Invitation to Accused to Make Submissions", 22 November 2006.

⁸⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006, paras 26-27.

⁸⁸ *Ibid.*, para. 29.

⁸⁹ *Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw, 2 November 2000, para. 21.

Decisions granting provisional release of an accused usually impose a number of terms and conditions, among them that the accused is not allowed to contact the media or discuss his case with anybody. Recent case law witnessed the difficulties the ICTY had faced in finding a position as to whether an accused should be permitted to engage in political activities during provisional release and as to the conditions under which such political activity should be permitted.

In *Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber II had first ruled that *Ramush Haradinaj*, former Prime Minister of Kosovo and President of the Alliance for the Future of Kosovo, would “not be allowed to make any public appearance or in any way get involved in any public political activity” for 90 days.⁹⁰ It then re-assessed its position and had allowed *Haradinaj* to appear in public and engage in public political activities, but tasked the United Nations Interim Administration Mission in Kosovo (“UNMIK”) to assess whether *Haradinaj*’s engagement would be “important for a positive development of the political and security situation in Kosovo”, and to give approval of requests by the Accused regarding each individual activity concerned.⁹¹ The Appeals Chamber upheld the decision by majority, but added to it a number of conditions that must be fulfilled for the proper exercise of UNMIK’s delegated authority.⁹²

On 17 October 2006, the approach set forth in these ICTY decisions was put to the test.⁹³ The UNMIK authorised *Haradinaj* to give a televised interview to be broadcast in Kosovo, but prohibited *Haradinaj* from making any statements during the interview relevant to his case in ICTY and listed subjects on which *Haradinaj* was allowed to provide his views. One day later, the Trial Chamber suspended the UNMIK decision upon request of the Prosecution alleging potential for witness intimidation and ordered UNMIK, the Prosecution, and *Haradinaj* to make further submissions.⁹⁴ Eventually, after having reviewed the submissions, the Trial Chamber denied the Prosecution request to annul the UNMIK decision and lifted the suspension in a decision of 27 October 2006.⁹⁵

It has been questioned whether the decisions in the *Haradinaj* case provide a legally valid regime for regulating the political activity of provisionally released accused. Political activities of a provisionally released accused can be banned or restricted in accordance with Rule 65 (B) of the ICTY’s Rules of Procedure and Evidence, if the Trial Chamber is not convinced that the accused will not pose a danger to any victim, witness, or other person. Doubts arise as to what role

⁹⁰ *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005.

⁹¹ *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-PT, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005”, issued on 12 October 2005, p. 6.

⁹² *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj’s Modified Provisional Release”, 10 March 2006. *Inter alia*, the Appeals Chamber ruled that any request from the Accused to UNMIK must also be sent to the Prosecution and be made at least 48 hours before the proposed activity. Moreover, any grant of permission by UNMIK and UNMIK’s reports to the Trial Chamber must contain a reasoned explanation.

⁹³ UNMIK had, however, already granted authorisation for political activities in 29 out of 40 requests by *Haradinaj*.

⁹⁴ *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-PT, Order Suspending UNMIK Decision, 18 October 2006, p. 2.

⁹⁵ *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-PT, Order Lifting Suspension on UNMIK Decision, 27 October 2006. It, however, admonished that in future decisions authorising public appearances or political activities for *Haradinaj*, UNMIK shall include in the decision the reasoned explanation as required by the Appeals Chamber.

organisations like UNMIK could play within this judicial assessment. Judge Schomburg and Judge Shahabuddeen dissented from the majority of the Appeals Chamber and declared the delegation of authority to the UNMIK under extremely broad terms to be *ultra vires* and they argued that such judicial authority could not be delegated to a non-judicial body like the UNMIK.⁹⁶

Unlike the delegation of the authority to permit political activity, it appears, however, that organisations like UNMIK could be requested to monitor the political activities of the accused and report back to the Tribunal so that it could revoke a decision allowing political activity of an accused.

5. Primacy/ Complementarity of International and National Tribunals

5.1 Rule 11bis Referrals – Referral of Cases against Persons not fit to Stand Trial

The ICTY has already referred six cases involving nine accused to Bosnia and Herzegovina and one case involving two accused to Croatia.⁹⁷ On 17 November 2006, the ICTY for the first time referred a case back to Serbia.⁹⁸ This last referral is noteworthy in so far as the mental condition of the accused, who did not even enter a plea, was not seen as an obstacle to referral of the case. The Referral Bench held that Serbian law disallows the trial of mentally ill persons, but at the same time provided for the resumption of the proceedings, once the accused becomes fit to stand trial. In addition, the welfare of the accused was ensured.⁹⁹ The ICTR has not yet referred any cases to national jurisdictions.

5.2 Rule 11bis Referrals – No Referral to States not Adequately Incriminating Genocide

On 30 August 2006, the ICTR Appeals Chamber dismissed the Prosecution's appeal against the Trial Chamber's decision not to refer the case against *Michel Bagaragaza* to Norway. The Trial Chamber had denied the Prosecution request on the basis that Norwegian criminal law had no special genocide provision and that the acts with which *Bagaragaza* is charged in the indictment were only punishable under general provisions like homicide.¹⁰⁰ The Appeals Chamber upheld the decision stating that it cannot authorize the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law (particularly when the accused is charged with genocide). The Appeals Chamber expressed its concerns that any acquittal or conviction and sentence would only reflect conduct legally characterized as the 'ordinary crime' of homicide.

It is worthwhile to point out that pursuant to Article 9 (2) of the ICTR-Statute, the Tribunal may still try a person who has been tried before a national court for acts

⁹⁶ *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release", 10 March 2006, Joint Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg.

⁹⁷ Following the ICTY Appeals Chamber's dismissal of the appeal by Savo Todović against the referral of his case to Bosnia and Herzegovina (4 September 2006), the Accused Savo Todović and Mitar Rašević were transferred to Bosnia and Herzegovina on 3 October 2006.

⁹⁸ *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case under Rule 11 bis, 17 November 2006 (appeal pending).

⁹⁹ *Ibid.*, paras. 50, 55-56, 63.

¹⁰⁰ *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-R11bis, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, 19 May 2006, paras 9, 16.

constituting serious violations of international humanitarian law if the acts for which he or she was tried were categorized as an “ordinary crime”. Furthermore, the Appeals Chamber held that the protected legal values were different, since the penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.¹⁰¹

The Appeals Chamber decision should not be interpreted as creating an exclusive competency of international criminal tribunals to prosecute and try charges of genocide. It sets, however, a higher standard for the legal framework criminalizing the accused’s conduct in the State of referral.

6. Procedure

6.1 Enlarged Power of ICTY Chambers to Reduce the Scope of the Indictment

The powers of Trial Chambers of the Yugoslavia Tribunal to reduce the scope of an indictment at the pre-trial stage have recently been enlarged. The amended Rule 73 *bis*(D) of the ICTY’s Rules of Procedure and Evidence (in force since 13 June 2006) allows Trial Chambers to invite or direct the Prosecutor to select counts in the indictment on which to proceed.

Only recently, ICTY Trial Chambers have made use of this remarkable power, although Rule 73 *bis* in its previous version (amended 17 July 2003) had allowed Trial Chambers to “fix the number of crime sites or incidents” in an indictment.

Prompted by the high number of witnesses and the estimated time for their examination-in-chief as well as by a Defence Request, the Chamber in the multi-accused case *Prosecutor v. Milan Milutinović et al.* excluded three killing sites.¹⁰² The Prosecution had identified these three crime sites as suitable candidates for a reduction at the Pre-Trial Conference. The Chamber held that “it is possible for the Chamber to determine the charges on which evidence should be led at trial by identifying those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, and ordering the Prosecution to lead evidence relating to the other sites or incidents that fall squarely within that nature or theme.”¹⁰³ It rejected the argument of the Defence that the Prosecution was in the best position to identify the particular incidents which are representative in the case, and held that it had the power to identify itself the sites or incidents and determine their representativeness as required by Rule 73 *bis* (D).¹⁰⁴

On 31 August 2006, the Trial Chamber in the case *Prosecutor v. Šešelj* also invited the Prosecution to propose means of reducing the scope of the indictment by at least one-third by reducing the number of counts charged in the indictment and/or crime sites or incidents comprised in one or more charges in the indictment.¹⁰⁵ Likewise, on 23 November 2006, the Trial Chamber in the case *Prosecutor v. Dragomir Milošević*

¹⁰¹ *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-AR11bis, 30 August 2006, para 17.

¹⁰² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Application of Rule 73 bis, 11 July 2006. The Chamber found the three killing sites located in Kosovo (among them Račak) were associated with single alleged attacks or discrete sets of events that could easily be disentangled from the other alleged incidents and crime sites and did not form part of the core case. Request for certification to appeal was dismissed by the Trial Chamber on 30 August 2006.

¹⁰³ *Ibid.*, para. 10.

¹⁰⁴ Rule 73 *bis* requires that the selected crime sites or incidents in respect of which evidence may be presented by the Prosecution must be “reasonably representative of the crimes charged”.

¹⁰⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 31 August 2006.

invited the Prosecution to reduce the scope of the indictment by at least one-third.¹⁰⁶ The Prosecution in the *Šešelj* case first “declined” the Chamber’s invitation claiming that a reduction of the indictment would result in a case which is not reasonably representative of the crimes charged, but eventually made a proposal of dropping counts and certain crime sites.

Upon request by the Prosecution, the Trial Chamber also granted the admission of so-called “non-crime based evidence” that “contributes to proving charges beyond the limited scope of proving the occurrence of a crime or crimes within the geographically defined areas, even if it relates to a crime site for which no evidence relating to specific alleged crimes is to be presented”.¹⁰⁷ Such evidence seems not only difficult to determine, but could also have the potential of undermining the strict reduction of the scope of the indictment.

7. Evidence

7.1 Witness proofing – Banned under International Criminal Law ?

In a remarkable decision of 8 November 2006, the ICC Pre-Trial Chamber appears to have outlawed the practice commonly referred to as witness proofing. The Pre-Trial Chamber ordered the Prosecution in the case *Prosecutor v. Lubanga Dyilo* not to undertake the practice of witness proofing and to refrain from any contact with the witness outside the courtroom from the moment the witness takes the stand and makes a solemn undertaking.¹⁰⁸

‘Witness proofing’ is a term used for a meeting between a party and its witness before giving testimony in court, during which the party familiarises its witness with the court proceedings and also refreshes the witness’ recollection as to the subject-matter of the testimony in court by going through the witness statement(s) with the witness and also by comparing the witness statement(s) with the actual recollection of the witness and discussing possible discrepancies.

The ICC Pre-Trial Chamber held that the first component of a witness proofing – the familiarisation of the witness with the Trial lawyers and with the premises of the court and the court proceedings in general, the reassurance of the witness’ role in the court proceedings and of the legal obligations attached to it, as well as the inquiry whether protective measures are needed – was an admissible practice in proceedings before international criminal courts.¹⁰⁹

Unlike this more technical part of witness proofing, for which, according to the Pre-Trial Chamber, the Victims and Witnesses Section rather than the Party is responsible,¹¹⁰ witness proofing in the sense of a refreshment of the witness’ recollection, rehearsal, practise or coaching of witnesses is inadmissible. The Pre-Trial Chamber held that such an interference with witnesses was not covered by any legal provisions applicable before the ICC. In particular, it observed that such a practice was unethical or unlawful in many national legal systems belonging to the

¹⁰⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Scheduling Order Varying Time-Limits with Regard to the Commencement of Trials and Request to Prosecution to Reduce the Scope of its Case, 23 November 2006.

¹⁰⁷ *Ibid.*, para. 28.

¹⁰⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Case. No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, Disposition, pp. 21-22.

¹⁰⁹ *Ibid.*, paras. 18-27.

¹¹⁰ *Ibid.*, para. 24.

civil/continental law tradition. As far as common law countries are concerned, the Pre-Trial Chamber referred to the Code of Conduct of the Bar Council of England and Wales prohibiting rehearse practice and witness coaching.¹¹¹

The ICTY had the chance to take a position with regard to the ICC decision.¹¹² On 15 November 2006, the Defence for General *Ojdanić*, relying on the ICC decision, requested to ban witness proofing in the case *Prosecutor v. Milutinović et al.*¹¹³ In its response, the Prosecution strictly rejected the ICC decision and criticized the Pre-Trial Chamber for not having undertaken a careful and exhaustive review of the common law practices.¹¹⁴ Although not specifically regulated, the international tribunals have not only tacitly accepted such practice, but the ICTY also approved it in a decision in *Prosecutor v. Fatmir Limaj et al.*¹¹⁵

It was no surprise that, in its decision of 12 December 2006, the ICTY Trial Chamber denied the Defence motion and held that witness proofing is an acceptable and useful practice and does not *per se* prejudice the rights of the Accused as long as it does not cross into the territory of witness rehearsal and coaching.¹¹⁶ It also rejected the ICC finding that “witness familiarisation” should be limited to the Victims and Witnesses Section.¹¹⁷

The Chamber held that the ICC decision is not a binding authority for the ICTY since it is not based on a “general renunciation of the practice of witness proofing”, but deals with a “radically different situation” of a pre-trial confirmation hearing.¹¹⁸ It also noted that the sources of law the ICC and ICTY have resort to are different in that the ICTY is “not bound by national law” in “the present circumstances”.¹¹⁹

The Chamber, however, acknowledged problems of late disclosure arising from a late witness proofing and requested the Prosecution to conduct proofing sessions at the earliest possible date.¹²⁰

8. Sentencing

8.1. Maximum Sentence handed down by ICTY

On 30 November 2006, the ICTY Appeals Chamber for the first time applied the maximum penalty pursuant to Rule 101 (A) of the ICTY’s Rules of Procedure and Evidence. It sentenced *Stanislav Galić*, a former Bosnian-Serb Army Commander, to life imprisonment for his participation in the campaign of sniping and shelling of

¹¹¹ *Ibid.*, paras. 28-42.

¹¹² *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić’s Motion to Prohibit Witness Proofing, 12 December 2006 (“Ojdanić Witness Proofing Decision”).

¹¹³ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, General Ojdanić’s Motion to Prohibit Witness Proofing, 15 November 2006.

¹¹⁴ *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Prosecution Response to General Ojdanić’s Motion to Prohibit Witness Proofing, 29 November 2006, paras. 11-13.

¹¹⁵ *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004. The ICC rejected this decision as, “despite authorising the practice of witness proofing, does not regulate in detail the content of such practice” (para. 32). See also Ojdanić Witness Proofing Decision, paras 18-21.

¹¹⁶ Ojdanić Witness Proofing Decision, paras. 10, 16, 20, 22, 24. As regards the Code of Conduct of the Bar Council of England and Wales, the Chamber notes that the ICTY Prosecution, unlike the ICC Prosecution, has not expressly undertaken to comply with, para. 14.

¹¹⁷ *Ibid.*, para. 10.

¹¹⁸ *Ibid.*, para. 15. The confirmation hearing was the first to be conducted before the ICC.

¹¹⁹ *Ibid.*, paras. 12-13.

¹²⁰ *Ibid.*, para. 23.

Sarajevo between September 1992 and August 1994. The Appeals Chamber found that the primary purpose of these acts was to spread terror among the civilian population.¹²¹

Unlike the ICTR,¹²² the ICTY had not sentenced any accused to life imprisonment before. The ICTY Trial Chamber in *Prosecutor v. Stakić* was an exception in this respect, but the life sentence was later reduced to imprisonment for a term of 40 years by the Appeals Chamber in the Appeal Judgment.¹²³

In the *Galić* Judgment, the Appeals Chamber increased the sentence the Trial Chamber had imposed on the Accused (20 years). The Trial Chamber had considered that *Galić* was only found guilty of crimes which formed part of a single campaign committed in a geographically limited territory over an uninterrupted period of time.¹²⁴

With respect to the single sentence, the Appeals Chamber found that, although the Trial Chamber did not err in its factual findings and correctly noted the principles governing sentencing, it failed to exercise its discretion properly because “the sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of *Galić*'s criminal conduct.”¹²⁵

8.2. Lowest Sentence handed down for Serious Violations of Humanitarian Law by the ICTY

The *Orić* Trial Chamber II sentenced the accused Naser Orić, a former senior commander of Bosnian-Muslim forces in and around Srebrenica, to no more than two years imprisonment.¹²⁶ This appears to be the lowest sentence ever handed down for serious violations of international humanitarian law by the ICTY. Orić was held responsible for not having prevented murder and cruel treatment of a number of Serb prisoners in 1992 and 1993 (superior responsibility).

The Trial Chamber did not consider the superior position of the accused as an aggravating circumstance because it did “not reflect the real situation on the ground”.¹²⁷ Only the vulnerability of the victims who were all kept in detention was considered to be an aggravating circumstance.¹²⁸ On the other side, the Trial Chamber relied on a number of mitigating circumstances.¹²⁹ The predominant mitigating factor, however, was the ‘abysmal conditions’ in Srebrenica. The Chamber considered, *inter alia*, that the escalating offensive by militarily superior Serb forces, an unmanageable influx of refugees, the general chaos and collapse of law and order did not make it impossible for the accused to fulfil his duties, but “should have a strong mitigating effect”.¹³⁰

¹²¹ *Galić* Appeal Judgment.

¹²² Most recently, Gacumbitsi was sentenced to life imprisonment. See *Gacumbitsi* Appeal Judgment.

¹²³ *Stakić* Appeal Judgment, 22 March 2006. In particular, the Appeals Chamber rejected the approach of the Trial Chamber to impose a life imprisonment in connection with the obligation of the host country to review the sentence after 20 years.

¹²⁴ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Trial Judgment, 5 December 2003, para. 768.

¹²⁵ *Galić* Appeal Judgment, para. 455.

¹²⁶ *Orić* Trial Judgment, para. 783 (appeal pending).

¹²⁷ *Ibid.*, para. 744.

¹²⁸ *Ibid.*, paras 733 ff.

¹²⁹ The cooperation both with the Prosecution and the SFOR, the accused's expression of remorse on some occasions, the accused's readiness to surrender to the Tribunal, his young age and family circumstances, acts of considerations towards prisoners and his general attitude towards the proceedings were considered to be mitigating circumstances. *Ibid.*, paras 748-766.

¹³⁰ *Ibid.*, paras 771, 772.