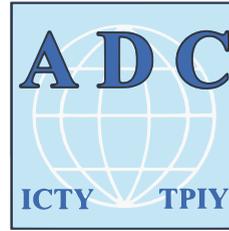




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Research Institute



Manual on International Criminal Defence

ADC-ICTY Developed Practices

Within the framework of the War Crimes Justice Project



Project funded by the European Union

Manual on International Criminal Defence ADC-ICTY Developed Practices

Prepared within the War Crimes Justice Project

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Foreword

This Manual was collaboratively prepared by the United Nations Interregional Crime and Justice Research Institute (UNICRI) and the Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY), within the framework of the War Crimes Justice Project, funded by the European Union and implemented by UNICRI in cooperation with the Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the International Criminal Tribunal for the former Yugoslavia (ICTY).

The UNICRI team was composed of members of its Security Governance/Counter Terrorism Laboratory, including: Massimiliano Montanari (Programme Manager); Judge Robert Bellelli (Scientific Advisor); Alma Pintol (Project Officer); Francesco Miorin and Alexandre Skander Galand (Analysts); and Masha Burina (Internship programme).

The Manual was drafted by members and associates of the ADC-ICTY including Colleen Rohan (focal point for the ADC-ICTY/UNICRI Manual project and chapter author); Gregor Guy-Smith; Slobodan Zečević; Tatjana Savić; Edina Rešidović; Eugene O'Sullivan; Anya Marinkovich; Deirdre Montgomery; Gillian Higgins; Cindy Nesbit; Dominic Kennedy; Alex Paredes-Penades; Asa Solway (chapter authors); and Nina Kisić of Criminal Defence Section of the Sector for Judicial Bodies of the BiH Ministry of Justice (chapter author).

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In addition to the above, Defence counsel Zlatko Knežević, Vasvija Vidović and Petko Budiša contributed to the Manual by providing feedback on its methodology and contents.

One of the ultimate purposes of this Manual is to contribute to the creation of a vibrant community of criminal Defence practitioners, regardless of their disparate cultural and legal backgrounds, who are willing and able to share their skills, knowledge and experiences. The practice of international criminal defence is a challenging and dynamic one. A strong Defence community will be, by definition, a community able to function as a resource for its members both in improving the representation of individual accused and in providing valuable contributions to the continuing development of fair and balanced substantive and procedural jurisprudence which recognizes and protects the rights of victims, the international community and the accused.

Slobodan Zečević
President, ADC-ICTY

Jonathan Lucas
Director, UNICRI

Introduction

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has been in existence for less than twenty years. It is, in comparison to the developed legal systems of domestic jurisdictions, a new institution. Nonetheless, it has amassed an impressive body of law arising from resolution of the factual, procedural and legal issues which have arisen in the cases tried before it; cases which involve allegations of war crimes, crimes against humanity and genocide. It is hoped that this body of jurisprudence will continue to inform and influence the development of international criminal law long after the ICTY has fulfilled its mandate and closed its doors.

The comprehensive description of the operating practices of the Tribunal provided in the ICTY Manual on Developed Practices produced by the Tribunal, in cooperation with the United Nations Interregional Crime and Justice Research Institute (UNICRI) in 2009, has been one of the key tools of its Legacy project. As part of the same pledge to international justice, the War Crimes Justice Project was launched as a follow-up to the report on "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions" conducted jointly by the ICTY, Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and UNICRI. This four million-euro project, funded by the European Union and implemented by the above mentioned institutions, is another remarkable testimony to the international community's commitment to ensure the effective transfer of the Tribunal's institutional knowledge and specialised skills to national judiciaries.

Although a significant number of excellent analyses and commentaries have been published over the years regarding the jurisprudence at the ICTY, the literature has with rare exception overlooked the unique role and experiences of the Defence in international criminal proceedings.

Defence counsel who have represented accused before the ICTY have developed, as a group, a body of written work, practical experience, and courtroom skills which, like the jurisprudence at the ICTY, can be of benefit to counsel in domestic war crimes courts or other international courts.

The Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia (ADC-ICTY) has developed a unique expertise that should be shared with other legal professionals working on war crimes cases. This Manual represents an attempt to capture some of the practical knowledge the ADC-ICTY and its members have acquired.

Since the work at the ICTY is solely concerned with cases from the countries of the former Yugoslavia this Manual necessarily focuses on those jurisdictions. However the Manual has the broader aim of providing useful information to legal practitioners from all national and international jurisdictions, particularly as a vehicle for inspiring creative thought about the role of the Defence in the mixed civil/common law systems which are utilized in many domestic and international criminal courts.

This Manual is a practically oriented work which reflects the considered views of the authors of its various chapters, presented as a resource for Defence counsel new to the profession and in search of guidance on fundamental aspects of legal practice in the international courts as well as for seasoned practitioners seeking new or innovative approaches to the factual and legal issues which will arise in their own domestic or international practice. The Manual also constitutes a contribution to the preservation of the work that has been achieved at the ICTY and the legacy of that unique institution.

Methodology

The ADC-ICTY Manual of Developed Practices was drafted and produced by members and associates of the ADC-ICTY (ADC) who have served either as Defence counsel or in some other capacity on a Defence team in one or more cases tried before the ICTY. The primary aim of this Manual is to provide other practitioners in the criminal Defence community – in particular those faced with the challenge of representing accused in cases involving war crimes, crimes against humanity and/or genocide – with the benefit of the knowledge and experience gained by Defence counsel at the ICTY in the course of representing accused charged with similar crimes.

The opinions and views of the individual authors who wrote chapters for this Manual do not necessarily represent and are not intended to represent the views of the ADC-ICTY as an organization or the views of UNICRI or the United Nations at large. The analyses, legal interpretations and practice tips contained in the individual chapters illustrate commonly held attitudes and concerns of the Defence community at the ICTY. However, not all counsel agree on how to go about presenting particular legal or procedural issues and not all counsel agree on interpretations of the procedural and substantive law. The choice as to the specific contents of the individual chapters, therefore, reflect, in some circumstances, the personal views and experiences of their authors.

This latter point underlines the manner in which this Manual may be used and hopefully will be used as a resource for other criminal defence practitioners. The individual chapters are meant to provide an overview of the subjects covered, including both legal analysis and practical advice when applicable. No claim is made that they constitute exhaustive treatments of their subjects. This Manual is a practice-oriented work. It is intended to be used as a reference work for practitioners interested in learning the practices and experiences of Defence counsel at the ICTY as a means for developing their own approach to similar issues in other international or domestic criminal cases.

The Manual begins with a chapter on the presumption of innocence and burden of proof as these concepts are the most important and pervasive principles, substantively and procedurally, which underlie the entirety of criminal proceedings. This subject is addressed in the first chapter of the Manual since every step taken by Defence counsel from the beginning of a case to its completion, including the analysis of the indictment and disclosure, decisions regarding investigation of the case, the structuring of direct and cross-examination and the nature or purpose of motions and briefs filed throughout the case, must be continuously assessed in light of the principle that the Prosecution always bears the burden of proof; a burden which never shifts to the accused.

That chapter is followed by a discussion of affirmative defences to illustrate and clarify how principles regarding the presumption of innocence and burden of proof apply throughout the trial proceedings and to describe the interplay of these principles with various affirmative defences which may be available in a given case.

The subsequent chapters loosely follow the sequence of various stages of the criminal proceedings at the ICTY from the filing of the indictment and initial disclosure at the beginning of a case through the completion of the appellate process and post-conviction issues. The exception is Chapter IX on Plea Agreements. As that chapter explains, plea agreements may be negotiated at almost any point during the proceedings.

The final two chapters address issues related to Defence counsel and Defence support systems as opposed to subjects regarding the defence of individual accused.

Chapter XIII provides a detailed description of the structure and activities of the ADC-ICTY and highlights the significant improvement in the working conditions for the Defence at the ICTY after this organized Defence association, authorized to speak collectively on behalf of all Defence counsel, came into being. The Defence is not recognized as a pillar of the ICTY, despite its critical role in proceedings there, as is the Prosecution, Chambers and the Registry. The creation of the ADC was a fundamental and necessary step for the development of an effective Defence voice. The ADC has since been successful in achieving some Defence participation in resolution of issues involving Defence resources and other matters which directly impact on the Defence function at the ICTY.

Finally Chapter XIV discusses the need for similar defence institutions in countries from the former Yugoslavia and for this reason, as a relevant existing experience, describes the role and functions of the Criminal Defence Section, organized in Bosnia and Herzegovina and known locally by the acronym OKO. The chapter outlines the various kinds of support available to Defence counsel in the region and proposals for improving on those systems.

The Manual emphasizes practical considerations in a number of ways. Some chapters contain practice tips intended to alert practitioners to various ways in which they can improve or streamline legal skills, for example, in the presentation of written or oral arguments. The Manual also contains case boxes which illustrate points made in the body of a chapter by direct reference to jurisprudence at the Tribunal and/or specific examples from ICTY trials, such as portions of direct or cross-examination.

In addition, the Manual comes with a DVD which contains examples of written motions on a number of different subjects and examples of direct and cross-examinations conducted during trials at the ICTY. Every legal document cited in the footnotes throughout the fourteen chapters of the Manual is also on the DVD, organized by chapter for ease of accessibility and reference. A separate section of this DVD is devoted to expert witnesses and contains the names and CVs of experts who have testified at the ICTY as well as motions challenging such experts, if any, and decisions on those motions. Although significant efforts were made to include every expert who has testified at the ICTY as well as all documents and motions related to each expert, retrieving this information was not always possible. The compilation of experts, therefore, is comprehensive, but not exhaustive. Furthermore only publicly filed documents are contained on the DVD. Confidential documents and examinations or arguments which took place in closed or private sessions are not publicly available and are not included on the DVD.

There are numerous relevant documents which have not been included on this DVD because they are readily available on the ICTY home page at <http://www.icty.org/>. They include all Judgements of the Trial and Appellate Chambers in individual ICTY cases, the Code of Professional Conduct for Counsel Practising Before the ICTY, the ICTY Statue, the ICTY Rules of Procedure and Evidence and the various practice directions related to specific topics such as the preparation of trial briefs, appellate briefs and similar submissions.

Individuals wishing to learn more about ICTY practices which are not the subject of this Defence Manual, such as the role of the Prosecution, Chambers and the Registry, case management tools available at the ICTY, trial management issues, the drafting of trial and appellate judgements, referral of ICTY cases to domestic jurisdictions, judicial support services and the Victims and Witnesses Sections, among other topics, are encouraged to consult the “ICTY Manual on Developed Practices”, ICTY-UNICRI 2009 (UNICRI, Turin, Italy). The ICTY Manual also includes a CD-ROM which contains numerous publications of the ICTY different from those provided with this Defence Manual.

This Manual, in addition to serving as a practical research and reference tool, is also meant to encourage and facilitate communication between members of the Defence community in the international and domestic courts. As this Manual illustrates, there is a wealth of information and practical advice available among counsel in the Defence community. Cases tried in the regional courts of the former Yugoslavia usually arise from the same or similar facts

and circumstances as cases which have already been tried at the ICTY. At times the same witnesses, lay and expert, are called in related cases. Given that overlap counsel are encouraged to directly contact their colleagues in the Defence community when questions arise about upcoming witnesses, difficulties with disclosure or obtaining access to court records including prior testimony.

The ADC-ICTY hopes that this Manual, as part of its legacy, will assist individual practitioners in defending those accused of war crimes, crimes against humanity and genocide and, in doing so, will preserve the internationally recognized rights of individuals accused of criminal charges and facing prosecution.

I. Burden of Proof and Presumption of Innocence

A. The Presumption of Innocence and Burden of Proof.....9	F. The Principle of In Dubio Pro Reo.....15
B. Reasonable Doubt as Defined in the ICTY Decisional Law. 10	G. Motions for Judgement of Acquittal pursuant to Rule 98 bis of the ICTY RPE.....17
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1. The presumption of innocence is a principle acknowledged in all major legal systems* and has been specifically and consistently articulated throughout international documents and their provisions guiding the conduct of international criminal proceedings.¹ Such a presumption impacts many fundamental rights of the accused, including the right to silence and the assumption that an accused is innocent until proven guilty.
2. Section A of this chapter outlines the burden of proof and the presumption of innocence, including its importance as a central component of criminal law and the theory behind the presumption of innocence. Section B sets out the law governing reasonable doubt at the international *ad hoc* Tribunals. Section C sets out the requirements necessary to prove guilt beyond a reasonable doubt. Such a requirement applies not only to the final judgement but also to the underlying facts of the case. Section D describes the analytic process required of the Trial Chamber when determining whether guilt beyond a reasonable doubt has been proven. Section E discusses the role of the burden of proof in relation to predicate facts and circumstantial evidence. Section F analyses a constituent principle, or corollary, to the burden of proof, known as *in dubio pro reo* which requires that ambiguities be resolved in favour of the accused. Finally, Section G describes the different burden of proof placed upon the defence for affirmative defences.

A. The Presumption of Innocence and Burden of Proof

3. In order to fully appreciate the burden of proof required to obtain a conviction against an accused, it is essential to understand and recognize that the presumption of innocence specifically entails that:
 - ◆ the burden to prove that the accused is guilty of the crimes with which he is charged always remains on the Prosecution;
 - ◆ the accused does not have to prove his innocence;
 - ◆ the accused does not have to prove his innocence;
 - ◆ in order to find the accused guilty of the crimes charged, the Court must find that the charges brought by the Prosecution have been proved by the Prosecution beyond a reasonable doubt.

* This chapter was authored by Gregor D. Guy-Smith, co-founder of the (ICLB) International Criminal Law Bureau; former President of the ADC-ICTY; Chair of the ADC- ICTY Disciplinary Council; Member of the ICTY Rules Committee, Chair of the *Ad-Hoc* Post Tribunal Matters Committee. He has practised as defence counsel for over 30 years and served as counsel on the following ICTY cases: *Prosecutor v. Limaj et al.*; *Prosecutor v. Haradinaj et al.* and *Prosecutor v. Perišić*.

1 Article 21(3), ICTY Statute; Article 20(3), ICTR Statute; Article 17(3), Statute of the Special Court for Sierra Leone (SCSL Statute); Article 66, Rome Statute of the International Criminal Court (ICC Statute).

I. Burden of Proof and Presumption of Innocence

4. The foregoing fundamental rights are articulated in all major human rights conventions.²
5. This principle operates as a foundation stone in the context of international criminal proceedings and as such ensures that an accused has the right to remain silent and not to supply incriminatory information, if such exists, from the outset of an investigation.³ The right to silence is seen as a corollary to the presumption of innocence and protects an accused from being required to give a statement in the investigation phase or evidence in the trial phase in court. This is because the burden to prove the guilt of an accused always lies with the Prosecution. That requirement prevents the Prosecution or its agents from forcing an accused to assist in his or her own Prosecution by supplying information to prosecuting authorities at any level. The Prosecution is required to prove its case and the law requires nothing of the accused. An accused has the right to refuse to answer questions. Obviously, if an accused was compelled to do so the presumption of innocence would be a nullity. The accused has no obligation to present any evidence at all during the trial because the burden to prove the charges always remains with the Prosecution. Finally, the accused himself has no obligation to give evidence in court and no adverse inference can be drawn from the decision not to testify.⁴
6. Understanding, in the context of international criminal proceedings, that the accused is covered by this mantle of innocence is the basis for the application of the criminal standard of ‘proof beyond a reasonable doubt’ which guides the Chambers’ deliberations at the conclusion of trial.⁵
7. Proof beyond a reasonable doubt is the highest standard of proof that must be met in any trial. Reasonable doubt has been defined as a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence, or lack of evidence, in a case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that one would be willing to rely and act upon it without hesitation in the most important of one’s own affairs. However, it does not mean an absolute certainty.
8. There are lower standards or burdens of proof that are applied in litigation. It is important to recognize that, for an ultimate finding of guilt, these standards have no place in international criminal proceedings. The burden of proof beyond a reasonable doubt that must be met before a finding of guilt can be made is not proof by a preponderance of the evidence, which simply means that one side has more evidence in its favour than the other, even by the smallest degree. It is not proof by clear and convincing evidence.⁶ It is not proof by a balance of probabilities.

B. Reasonable Doubt as Defined in the ICTY Decisional Law

9. The *Delalić et al.* case (also known as the *Čelebići* case), seminal in certain respects concerning the evolution of international jurisprudence, considered both the English and American formulations of the definition of reasonable doubt used in those jurisdictions. It ultimately adopted the following definition:

2 Article 14(2), ICCPR; Article 6(2), ECHR; Article 8 (2), Inter-American Convention on Human Rights; Article 7 (b), African Convention on human rights; Art 40(2)(b)(i), Convention on the Rights of the Child.

3 Rule 42(A)(iii), ICTY Rules of Procedure and Evidence (ICTY RPE).

4 Article 21(4)(g), ICTY Statute; Rule 85(c), ICTY RPE; *Prosecutor v. Delalić et al.*, IT-96-21, Appeal Judgement, 20 February 2001, para. 783; *Prosecutor v. Halilović*, IT-01-48-T, Trial Judgement, 16 November 2005, para. 13; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgement, 3 April 2008, para. 21; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 22; *Prosecutor v. Milutinović et al.*, IT-04-84-T, Trial Judgement, 26 February 2009, Vol.1, para. 41.

5 Rule 87(A), ICTY RPE.

6 *Prosecutor v. Milutinović et al.*, IT-04-84-T, Trial Judgement, 26 February 2009, Vol.3, para. 284.

“It need not reach a certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, ‘of course it is possible, but not in the least probable’, the case is proved beyond a reasonable doubt, but nothing short of that will suffice.”⁷

10. Additionally, *Delalić et al.* held that “[...]the Prosecution is bound in law to prove the case against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.”⁸
11. These standards have been consistently followed by the *ad hoc* Tribunals without deviation.⁹

C. Requirements Necessary for a Finding of Guilt Beyond a Reasonable Doubt

12. The ICTY RPE,¹⁰ as well as the ICC Statute,¹¹ provide that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt. The ICTY Appeals Chamber has made it clear that this standard of proof beyond a reasonable doubt is not limited solely to the ultimate question of guilt - *it also applies to the underlying facts*.¹² Prosecution arguments that the standard of proof beyond a reasonable doubt applies only to the ultimate question of guilt and not to any of the underlying, predicate facts essential to reaching a finding of guilt, have been consistently rejected.¹³
13. A Trial Chamber must necessarily weigh and analyse the entirety of the evidence presented to it in order to objectively and rationally arrive at a reasonable, fair and proper determination of the liability of the accused, if any. As noted by the Appeals Chamber in *Tadić*:

“[A] tribunal of fact must never look at the evidence of each witness separately, as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear at first to be of poor quality, but it may gain strength from other evidence in the case. The converse also holds true.”¹⁴

7 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 600; citing *Miller v. Minister of Pensions* (1947) 1 All ER 373,373-4.

8 *Ibid.*, para. 601.

9 *See, e.g., Prosecutor v. Halilović*, IT-01-48-T, Trial Judgement, 16 November 2005, [24]: ‘The Trial Chamber interprets the standard ‘beyond a reasonable doubt’ to mean a high degree of probability; it does not mean certainty or proof beyond the shadow of a doubt.’ *Prosecutor v. Halilović*, Appeal Judgement, IT-01-48-A, 16 October 2007, [296], adopting the same interpretation as the Trial Chamber; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 10; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgement, 3 April 2008, para. 7; *Prosecutor v. Ntagerura*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, para.170; *Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 98; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgement, 26 February 2009, paras. 4, 62, 63. *See also* Article 67(1)(i), ICC Statute which provides that the accused is entitled “not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”

10 Rule 87(A), ICTY RPE.

11 Article 66 (3), ICC Statute.

12 *See, e.g., Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 226; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, paras. 111-125.

13 *See, e.g., Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, paras. 169-170; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 125; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeal Judgement, 9 May 2007, para. 226.

14 *Prosecutor v. Tadić*, IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 92; and *see Prosecutor v. Musema*, ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 134; *Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 99 (probative value and weight of evidence is assessed at the end of trial in the context of the entire record).

I. Burden of Proof and Presumption of Innocence

14. In making this observation, however, the *Tadić* Appeals Chamber did not address the standard of proof applicable to any particular underlying fact which, if found to be proved at trial, would support or would undermine the strength of the Prosecution case. To the contrary, the recognized duty of the Trial Chamber to consider all the evidence ‘does not relieve it from the duty to apply the required standard of proof to any particular fact.’¹⁵
15. Therefore a discussion as to which underlying facts must be proved beyond a reasonable doubt before a final evaluation of the totality of the evidence can result in a criminal conviction is necessary.
16. Before a finding of guilt can be made beyond a reasonable doubt the Trial Chamber must find:
- 1) that each element of each of the charged crimes has been proved beyond a reasonable doubt;
 - 2) that each element of any charged mode of liability has been proved beyond a reasonable doubt;¹⁶ and,
 - 3) that any fact which is indispensable to or aimed at obtaining a conviction, must also be proved beyond a reasonable doubt.¹⁷
17. As a general matter, facts falling within categories (1) and (2), dealing with the elements of the charged crimes and the elements of the charged modes of liability for those crimes are usually readily identifiable. Thus, each fact produced at trial which goes directly to proof of the *actus reus* and *mens rea* of each of the charged crimes must itself be established beyond a reasonable doubt before a conviction can be properly returned.
18. Documentary evidence may be tendered to prove both the *actus reus* and *mens rea* relating to the charged activity of an accused. In such instances, the authenticity of such documents may itself constitute a predicate fact, which must be proved beyond a reasonable doubt, before such evidence may form the basis for a criminal conviction.¹⁸



Kupreškić et al. case - Identifying the facts indispensable to a conviction

*The Kupreškić case provides another example of the importance of the application of the same principle applied in an entirely different context. There the accused were charged with the crime of persecution. Evidence was received of an attack on the home of Witness H. The Prosecution claimed it did not have the burden to prove the accused participated in that attack beyond a reasonable doubt. The Prosecution asserted the specific attack on the home of Witness H was ‘nothing more than a constituent in the entire composition of the evidence’ against the accused on the persecution charge.**

The Appeals Chamber rejected that argument:

*“The Prosecution’s argument reflects the misconception that the attack on Witness H’s house was only evidence of persecution, not a material fact integral to the crime of persecution. [...] The persecution conviction of Zoran and Mirjan Kupreškić hinged upon their participation in the attack on Witness H’s house. The Prosecution’s argument that the Trial Chamber was at liberty to employ anything other than the standard of proof beyond a reasonable doubt in assessing Witness H’s evidence implicating Zoran and Mirjan Kupreškić in that attack cannot be sustained.”***

* *Prosecutor v. Kupreškić et al.*, Appeal Judgement, 23 October 2001, para. 226.

** *Ibid.*

¹⁵ *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, para.172.

¹⁶ *See Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, paras. 174-175.

¹⁷ *See Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeal Judgement, 9 May 2007, para. 226; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Appeal Judgement, 7 July 2006, paras. 174-175; *Prosecutor v. Brđanin*, IT-99-36-A, Order to File Table, 24 July 2006; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 125; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgement, 26 February 2009, paras. 62, 63.

¹⁸ *See, e.g., Prosecutor v. Stakić*, IT-97-24-T, Trial Judgement, 31 July 2003, para. 14.

C. Requirements Necessary for a Finding of Guilt Beyond a Reasonable Doubt

19. Identifying those facts ‘which are indispensable to’ or ‘aimed at’ a conviction can be a subject of dispute. Each case depends on its own particular facts. However, a useful illustration of ‘facts indispensable to a conviction’ arises from the *Limaj et al.* case where the issue of the accuracy and reliability of eye witness identification was of critical importance.
20. In *Limaj et al.* the three accused were charged, under various forms of liability, with offences alleged to have taken place in a makeshift prison camp in Kosovo¹⁹ during the armed conflict there in 1998, including the murders of several detainees from the camp.²⁰ A number of trial witnesses during pre-trial interviews with the Prosecution were asked to attempt to identify one or more of the three accused as the perpetrators of the charged crimes from photo-board line-ups shown to them. The *Limaj et al.* Trial Chamber held that the individual eye witness identifications had to be proved beyond a reasonable doubt:

“With particular regard to the evidence of the visual identification of each of the Accused by various witnesses, it is to be emphasized that, like all elements of an offense, the identification of each Accused as a perpetrator as alleged must be proved by the Prosecution beyond a reasonable doubt.”²¹

21. It was not sufficient for the Prosecution in *Limaj et al.* to simply present evidence that the accused had been identified by certain witnesses as the perpetrators of the charged crimes. The Prosecution was required to prove that the identifications were reliable and accurate beyond a reasonable doubt as the identifications themselves were essential to a conviction.²² Since the burden of proof remains with the Prosecution throughout trial, the accused had no burden to affirmatively disprove the accuracy of the identifications (see case box *Kupreškić et al. case - Identifying the facts indispensable to a conviction*).

D. The Analytic Process Required from the Trial Chamber

22. The Appeals Chamber has explained the process through which a Trial Chamber must go in evaluating whether the Prosecution has met its burden of proof; a process which can assist in determining which facts are ‘predicate’ facts,²³ i.e. indispensable to a conviction or aimed at a conviction.
23. At the first stage the Trial Chamber has to assess the credibility of the relevant evidence presented. This cannot be undertaken by a piecemeal approach. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, have to be analysed in the light of the entire body of evidence adduced. Thus, even if there are some doubts as to the reliability of the testimony of a certain witness, that testimony may be corroborated by other pieces of evidence leading the Trial Chamber to conclude that the witness is credible. Or, on the other hand, a seemingly convincing testimony may be called into question by other evidence which shows the original evidence lacks credibility.

19 All references to Kosovo refer to Kosovo under UNSC Resolution 1244/1999. All references to Kosovo institutions refer to the Provisional Institutions of Self Government.

20 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para.1.

21 *Ibid.*, para. 20.

22 In fact, two of the accused in *Limaj et al.* were acquitted based, in significant part, on the finding that the reliability of the eye witness identifications of them as perpetrators of certain of the charged crimes were not proved beyond a reasonable doubt. *Ibid.*, paras. 530-565, 672-688.

23 A ‘predicate fact’ has been defined as a fact from which a presumption arises or from which an inference can be drawn. It is also sometimes termed a ‘foundational’ fact or an ‘evidentiary’ fact. See *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 6 October 2007, para. 112.

24. Only after the analysis of all the relevant evidence can the Trial Chamber determine whether the evidence, upon which the Prosecution relies, should be accepted as establishing the existence of the facts alleged, *notwithstanding the evidence upon which the Defence relies*. At this fact-finding stage, the standard of proof beyond a reasonable doubt is applied to establish the facts forming the elements of the crime or the form of responsibility alleged against the accused as well as with respect to the facts which are indispensable for entering a conviction.

25. At the final stage the Trial Chamber has to decide whether all of the constituent elements of the crime and the form of responsibility alleged against the accused have been proven. Even if some of the material facts pled in the indictment are not established beyond a reasonable doubt, a Trial Chamber might still enter a conviction provided that, having applied the law to those material facts it did accept beyond a reasonable doubt all the elements of the crime charged and of the mode of responsibility are established by those facts.²⁴ Therefore, not every factual finding in a trial judgement must be established beyond reasonable doubt.

26. However, and most importantly, the law at the Tribunal is unequivocal in holding that “[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved



Haradinaj et al. case - Proof requirements of circumstantial evidence

The Trial Chamber in Haradinaj et al. pointed out the inherent danger that can occur when inferences based on circumstantial evidence are drawn if the Prosecution is relieved of its burden to prove all predicate facts beyond a reasonable doubt.

“[T]he alleged murder of [the victim] [...] would likely have impressed upon the Trial Chamber that the murder had been committed ‘while in KLA custody,’ [...] All the elements appear to be present: an arrest by KLA soldiers; the inclusion of [the victim] on what seems to have been a wanted list used by those soldiers, transportation to and interrogation in a KLA headquarters; retrieval of the bodily remains in the Radonjić/Radoniq canal area; and forensic medical evidence of a violent death. At first sight this would make it among the strongest cases for which the Prosecution asks the Trial Chamber to draw the inferences about murders committed ‘in KLA custody.’ However, in this case, where detailed evidence was led about the circumstances under which [the victim] met her death, the apparent conclusion would have been the wrong conclusion.”

*The Trial Chamber held that it could not conclude that this victim was killed as part of the alleged joint criminal enterprise.** In doing so, the Trial Chamber emphasized the need for very careful assessment of the actual proof of the predicate facts from which a circumstantial inference of guilt might be drawn. As the Trial Chamber explained:*

*“As stated above, the Trial Chamber has received less evidence for most of the alleged murders [than that regarding the victim]. The evidence the Trial Chamber has received with regard to the alleged murder of [the victim] calls for a most cautious approach. It shows how deceptive a first impression based on an incomplete story can be.”****

*The analysis undertaken by the Trial Chamber illustrates the common sense proposition that proof that crimes occurred, standing alone, is simply not sufficient to establish a nexus between the particular accused on trial and the charged crimes, nor to sustain a conviction of the accused for those crimes,**** especially in the context of a war crimes prosecution.*

* *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgement, 3 April 2008 para. 161.

** *Ibid.*, para. 359.

*** *Ibid.*, para. 161. In *Haradinaj et al.*, all three accused asserted that the Prosecution evidence failed to constitute proof beyond a reasonable doubt of their culpability for any of the 37 counts charged in the Indictment in that case. No affirmative defence case was presented. Two of the accused were acquitted of all 37 counts. The third was convicted of 3 of the 37 counts, and acquitted on all the rest.

**** And See, e.g., *Prosecutor v. Orić*, IT-03-68-A, Appeal Judgement Summary, 3 July 2008, ‘concluding remarks.’

²⁴ *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 125.

each element of that crime and of the mode of liability, and *any fact which is indispensable for the conviction, beyond reasonable doubt.*"²⁵

E. Predicate Facts and Circumstantial Evidence

27. The issue of determining what constitutes a predicate fact is of particular importance regarding matters which can only be proved by circumstantial evidence; that is evidence of facts surrounding an event or offence from which a secondary fact may be reasonably inferred.²⁶
28. The jurisprudence of the *ad hoc* Tribunals provides that each fact, in a circumstantial evidence analysis, which forms the basis for the ultimate conclusion drawn from the totality of such evidence, must itself be proved beyond a reasonable doubt.²⁷ Such facts clearly constitute predicate or foundational facts in this context. A finding based on circumstantial evidence cannot be proved beyond a reasonable doubt if the facts it rests upon have not themselves been established beyond a reasonable doubt. In addition, when applied to circumstantial evidence determinations, the requirement that the underlying facts themselves have been proved beyond a reasonable doubt is mandatory so as not to violate the principle of *in dubio pro reo*.
29. The Trial Chamber in *Haradinaj et al.* emphasized the importance, in addition, of the fact-finder exercising extreme caution when drawing an inference of guilt beyond a reasonable doubt based upon seemingly persuasive circumstantial evidence theories (see case box *Haradinaj et al. case - Proof requirements of circumstantial evidence*).

F. The Principle of *In Dubio Pro Reo*

30. An important corollary to the presumption of innocence and the requirement of proof beyond a reasonable doubt is that any ambiguity or doubt arising from the trial evidence must be resolved in favour of the accused in accordance with the principle of *in dubio pro reo*.²⁸ The principle of *in dubio pro reo* is essentially one material element required to prove guilt beyond a reasonable doubt.²⁹
31. This principle provides that when it is possible for a Trial Chamber to draw one or more inferences from facts which have been established by either direct or circumstantial evidence, it must consider whether any such inference reasonably open under the facts is inconsistent with the guilt of the accused. If so, the onus and the standard of proof, which always remains with the Prosecution, requires that the inference favourable to the

25 *Ibid.*

26 *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgement, 1 September 2004, para. 35; citing Richard May, *Criminal Evidence* (3rd ed., London: Sweet & Maxwell, 1995).

27 See generally, the analysis in *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 111.

28 *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgement, 27 September 2007, para. 21; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 120 (each element of *mens rea* must be proved beyond a reasonable doubt); *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 601 ('at the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offense has been proved'); *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 319 ('the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected').

29 *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgement, 27 September 2007, para. 21.

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accused must be the inference which is adopted.³⁰ Accordingly a Trial Chamber can return a verdict of guilt only if the finding of guilt was the only reasonable inference available on the evidence³¹ (see case box *Naletilić and Martinović case - Applying the principle of in dubio pro reo*).

32. This approach is consistent with the jurisprudence of the international *ad hoc* Tribunals and is a logical one given that, in the context of issues of fact the principle is simply one aspect of the requirement that guilt cannot be found except upon proof beyond a reasonable doubt.³²

33. As noted by the Appeals Chamber in *Delalić et al.*:

*"[I]t is not sufficient that [a finding by the Trial Chamber] is a reasonable conclusion available from the evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably available on the evidence and which is consistent with the innocence of the Accused, that conclusion must be adopted and the Accused must be acquitted."*³³

34. The principle of *in dubio pro reo* also applies to the evaluation of circumstantial evidence. When the underlying facts are susceptible of more than one interpretation, one of which is objectively and reasonably inconsistent with the guilt of the accused, then the standard of proof beyond a reasonable doubt requires that the interpretation consistent with the innocence of the accused must be adopted and an acquittal returned.³⁴



Naletilić and Martinović case - Applying the principle of *in dubio pro reo*

In the Naletilić and Martinović case the Trial Chamber found insufficient proof of the mens rea for the crime of torture under the principle of in dubio pro reo. The evidence produced at trial established that certain victims had been severely beaten by the accused. However the evidence was too ambiguous to distinguish between beatings which were inflicted with a specific purpose—a requirement to establish the crime of torture—and beatings that may have been inflicted for reasons of pure cruelty, but for no other purpose.

*The Trial Chamber held, based on the principle of in dubio pro reo, that the specific purpose necessary to obtain a conviction for torture had not been proved by the Prosecution evidence beyond a reasonable doubt as the evidence was reasonably open to an alternative inference inconsistent with the mens rea required for that crime.**

* *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Trial Judgement, 31 March 2003, para. 1100; and see *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgement, 30 April 2008, para. 421 (arriving at the same conclusion in absence of reliable evidence as to the purpose of an alleged beating charged as torture).

30 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 10; and see *Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 98.

31 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 458; *Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, paras 98, 101.

32 *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgement, 27 September 2007, para. 21; and see *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 120.

33 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 458.

34 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 10.

G. Motions for Judgement of Acquittal pursuant to Rule 98 bis of the ICTY RPE

35. The question of whether the Prosecution has met its burden of proof is ever constant in proceedings at the *ad hoc* Tribunals. Indeed, at the close of the Prosecution's case-in-chief, the Defence may if it chooses bring a motion for a judgement of acquittal pursuant to ICTY Rule 98 bis. Rule 98 bis provides that "At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction."
36. The standard to be applied at this phase of the proceedings therefore "is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) but whether it could."³⁵ This requires the Trial Chamber "to assume that the prosecution's evidence was entitled to credence unless incapable of belief."³⁶
37. Thus, if the Defence believes that the Trial Chamber upon consideration of all relevant evidence submitted by the Prosecution in its case-in-chief, would conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction, beyond reasonable doubt, the Defence may choose to make a submission for a judgement of acquittal.
38. There are obvious advantages and disadvantages to bringing a motion for judgement of acquittal at the close of the Prosecution's case. If the Trial Chamber agrees that "there is no evidence capable of supporting a conviction" the indictment as a whole or those counts where there is insufficient evidence will be dismissed, thereby ending the case or reducing the remaining charges and focusing the Defence case. On the other hand if the Trial Chamber disagrees and, considering the lower standard of proof necessary to withstand a motion for judgement of acquittal such is usually the case, the Defence may well prematurely telegraph actual Defence analysis, arguments and evidence to its future detriment.
39. Additionally, assuming the Trial Chamber finds that the evidence is insufficient, the Prosecution is entitled to lodge an interlocutory appeal from the Trial Chamber decision granting a judgement of acquittal in whole or in part.³⁷ The additional focus, time and expenditure of resources required to resist an interlocutory appeal from the Prosecution, while preparing for the Defence case are all factors to take into consideration in moving for a judgement of acquittal.
40. Ultimately the decision to pursue or not pursue a judgement of acquittal requires careful consideration and thought in line with the strategic, legal and factual considerations of the specific Defence case.

H. Affirmative Defence Evidence and the Reasonable Doubt Standard

41. The presumption of innocence places the burden of establishing the guilt of the accused upon the Prosecution.³⁸ That burden *never* shifts to the accused. Moreover, if the accused does choose to testify, the

35 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001 para. 434; *Prosecutor v. Kunarac*, IT-96-23-T, IT-23-1-T, Decision on Motion for Acquittal, 3 July 2000, paras. 2,3, 10; *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, paras. 37, 55; *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 bis, 19 March 2004, paras 6-7.

36 *Ibid.*

37 *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Interlocutory Appeal, 19 March 2004.

38 *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 12. Article 21(3), ICTY and ICTR Statute; Article 66, ICC Statute.

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election to give evidence does not mean that he or she has accepted *any* onus to prove his or her innocence.³⁹ The Rome Statute makes this point very clear. It specifically mandates that an accused may not have ‘imposed on him or her any reversal of the burden of proof or any onus of rebuttal.’⁴⁰

42. Though the accused bears no burden whatever to prove that he or she is not guilty, the accused in the vast majority of cases at the ICTY have presented some form of affirmative defence evidence. The ICTY and ICTR RPE do not specify or define the types of affirmative defences which might be presented. They do require, as to certain defences, that the accused must notify the Prosecution, within a time limit set by the Trial Chamber or the pre-trial judge, of the intent to present those specific defences.⁴¹
43. In the case of the *ad hoc* Tribunals, the *Delalić et al.* Trial Chamber was, again, among the first to seek to describe the burden of proof the Defence must meet to successfully establish an affirmative defence. As described in *Delalić et al.*:

*“Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the accused is required to prove any issues which he might raise on the balance of probabilities. In relation to the charges being laid against him, the accused is only required to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he brings should be enough to suggest a reasonable possibility. In any case, at the conclusion of the proceedings, if there is any doubt that the Prosecution has established the case against the accused; the accused is entitled to the benefit of such doubt and, thus, acquittal.”*⁴²

44. In sum, what burden of proof the accused bears, if any, when he or she chooses to present an affirmative defence, depends on the nature of the Defence evidence which is to be presented. For example, one form of affirmative defence is a plea of diminished responsibility and limited physical capacity.⁴³ In *Delalić et al.*, an accused plead such a special, or affirmative defence claiming a lack of mental capacity.⁴⁴ The Trial Chamber found that the facts proving such diminished responsibility would need to be proved by the Defence and that the accused “is to rebut the presumption of sanity”.⁴⁵ If the accused presents an affirmative defence such as diminished capacity or insanity, the accused need only establish the facts in support of that defence by a simple preponderance of the evidence to be entitled to acquittal; *i.e.* that it is more probable than not that the facts presented in support of the defence are true.⁴⁶ Thus, the requirement placed on the Defence is distinct from the burden of proof imposed upon the Prosecution. The Defence is never required to prove an

39 *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 13. Both the ICC and ICTY provide for a hybrid procedure which allows the accused to make a statement at trial, without offering sworn testimony. At the ICTY, at the discretion of the Trial Chamber and ‘under the control’ of the Trial Chamber, an accused may make an unsworn statement after the opening statement of the parties or, if the Defence defers an opening statement, after the opening statement of the Prosecution. The accused may not be examined about the content of this unsworn statement and the Trial Chamber decides what probative value, if any, the statement should have (Rule 84 *bis*, ICTY RPE). The Rome Statute provides that the accused has the *right* to ‘make an unsworn oral or written statement in his or her defence ...’ (Article 67(1)(h), ICC Statute [emphasis added]). No limitation appears to exist as to when such a statement may be made.

40 Article 67(1)(i), ICC Statute.

41 Rule 67 of both the ICTY and ICTR RPE require such notification regarding the defence of alibi and ‘any special defence’ including that of ‘diminished or lack of mental responsibility.’ The rule does not define what constitutes a ‘special defence’ in addition to diminished or lack of mental responsibility.

42 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, para. 603.

43 See Chapter II “Affirmative Defences”, Section C.2.1. “Insanity/Diminished Responsibility”.

44 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, para. 1157.

45 *Ibid.*, para. 1158.

46 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 581-582.

affirmative defence beyond a reasonable doubt. The Prosecution is always required to prove its case beyond a reasonable doubt.

45. If the Defence evidence is directed towards undermining the credibility, reliability or strength of the Prosecution case, then the Defence need only raise a reasonable doubt as to the credibility or reliability of the Prosecution evidence in order to be entitled to an acquittal because the raising of a reasonable doubt perforce reveals the Prosecution's failure to meet its burden to prove its case.
46. It is important to recognize that not all Defence evidence presented to challenge the Prosecution case places a burden of proof on the accused. The jurisprudence concerning alibi is instructive in this regard.⁴⁷ As the *Delalić* Appeals Chamber explained:

“[I]t is a common misuse of the word to describe an alibi as a ‘defence.’ If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a defence in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.”⁴⁸

47. Similarly, in *Limaj et al.* the Trial Chamber emphasized that: “So long as there is a factual foundation in the evidence for an alibi, the Accused bears no onus to establish that alibi; [...]”⁴⁹ Hence, the accused does no more than require the Prosecution to carry its burden of proof by eliminating, if it can, the reasonable possibility that the accused was not present at the time of the charged crimes.⁵⁰
48. Furthermore, an ultimate finding that alibi evidence is *false* does not establish the opposite—that the accused was, in fact, present at the scene of the charged conduct;⁵¹ an important observation which may well be applicable to other grounds for excluding criminal responsibility or other defences. This is in keeping with the proper allocation of the burden of proof at trial. The Prosecution must not only rebut the validity of an alibi but must also independently establish beyond a reasonable doubt the guilt of the accused as alleged in the indictment.⁵²
49. Ultimately, of course, upon examination of the entire record, the accused is entitled to the benefit of any reasonable doubt raised in the evidence, regardless of whether a specific affirmative defence was successfully established or not.

Conclusion

50. One of the cornerstones of contemporary international criminal justice is the presumption of innocence. Ensuring fair, reasonable, respected and universally understood criminal trials given the seriousness of the allegations and societal effect requires application of the highest standard of proof: that of “proof beyond a reasonable doubt”. A fundamental function of a tribunal concerning itself with criminal charges is to determine the guilt or innocence of individual accused. Given the very important interests at stake in

47 See Chapter II “Affirmative Defences”, Section C.1. “Alibi” for a more detailed discussion.

48 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 581.

49 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11 (emphasis added), citing *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 15; *Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 120. An accused relying on an alibi defence does have the burden to lead evidence on that subject. The final burden of proof, however, remains with the Prosecution. See *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgement, 2 March 2009, para. 502.

50 *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Trial Judgement, 2 March 2009, para. 502.

51 *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, footnote 7; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11.

52 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11; *Prosecutor v. Brima et al.*, SCSL-04-15-T, Trial Judgement, 20 June 2007, para. 120.

I. Burden of Proof and Presumption of Innocence

international criminal trials, the principle of the presumption of innocence and application of the standard of proof beyond a reasonable doubt at trial must remain inviolate. These principles serve as the foundations upon which a system of justice will continue to be built.

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1. There are a number of affirmative defences to the crimes which are tried at the ICTY: war crimes, crimes against humanity and genocide. Those defences will be described in this chapter. Before discussing them, however, two points must be emphasized.
2. The first is that it is extremely important to keep in mind that the Prosecution always bears the burden of proof at trial. The defence has no burden to “disprove” the Prosecution case.⁵³ When the Defence does decide to present an affirmative defence case, the goal, regardless of the nature of the defence, is to raise a reasonable doubt that the Prosecution has met its burden to prove its case.
3. The second point is that this chapter does not discuss all existing ICTY case law related to every possible defence. The existence of or viability of a particular defence always rests on the facts and the evidence presented during trial. Defence counsel must be thoroughly familiar with the facts of the case and the applicable law before making the choice to proceed with a particular affirmative defence. That choice, by definition, will be made on a case by case basis. The rules, principles and law discussed in this chapter are offered as a means to provide Defence counsel with a sound basis from which to begin to consider factual and legal research of potential assistance given the particular circumstances of the case in question.

A. To Present a Defence or Not to Present a Defence

4. In every case counsel must begin any assessment of potential defences by first examining in detail the specific legal and factual allegations which are alleged in the indictment.
5. At the ICTY the crimes over which the Tribunal has jurisdiction are listed in the Statute of the ICTY. Those crimes include conduct which constitutes a grave breach of the Geneva Convention of 1949,⁵⁴ violations of the laws or customs of war,⁵⁵ genocide,⁵⁶ and crimes against humanity.⁵⁷ Each of these crimes is comprised of a

* This chapter was co-authored by Colleen Rohan and Alex Paredes-Penades. Colleen Rohan, J.D., who is a member of the ADC-ICTY Executive Committee, the ICTY Disciplinary Board and co-founder of the International Criminal Law Bureau. She has practised as defence counsel for 30 years and served as counsel on ICTY cases *Popović et al.* (Srebrenica) and *Haradinaj et al.* (Kosovo). She served as legal consultant to defence teams in *Perišić* and *Karadžić*. Ms. Rohan would like to thank ADC-ICTY intern Isabel Düsterhöft for her contributions to this chapter. Alex Paredes-Penades, Licenciado en Derecho, LL.M., Abogado, Standby Defence Legal Assistant, ICTY, on the case of *Karadžić*.

53 See Chapter I “Burden of Proof and Presumption of Innocence”, in which the subject of the burden of proof during ICTY trials is discussed in detail.

54 Article 2, ICTY Statute.

55 Article 3, ICTY Statute.

56 Article 4, ICTY Statute.

57 Article 5, ICTY Statute.

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series of elements and each element of each crime must be proved by the Prosecution beyond a reasonable doubt. If each individual element is not proved beyond a reasonable doubt, the Prosecution has failed to meet its burden of proof and the accused is entitled to an acquittal.⁵⁸

6. Article 7 of the ICTY Statute describes the various forms of individual criminal responsibility which may form the basis for criminal liability for an individual accused. It provides:
 - 1) A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crime referred to in articles 2 and 5 of the present Statute, shall be individually responsible for the crime.⁵⁹
 - 2) The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
 - 3) The fact that any of the acts referred to in articles 2 and 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.⁶⁰
 - 4) The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.
7. As with the crimes defined in the ICTY Statute, each mode of liability codified in Article 7 is comprised of a series of individual elements. Counsel must research and learn all elements of all mode(s) of liability charged in an individual case before determining what factual or legal defences may or may not be available to the accused.
8. Once a trial has begun, counsel must continually assess the actual proof which has been produced in evidence during the Prosecution case-in-chief. If, at the close of the Prosecution case-in-chief, the evidence fails to establish beyond a reasonable doubt any individual element of the crimes alleged or any individual element of the modes of liability alleged, the Prosecution has failed to meet its burden of proof and the accused is entitled to an acquittal. In those cases in which the Prosecution evidence is ambiguous or subject to more than one reasonable interpretation, any ambiguity or doubt must be resolved in favour of the accused in accordance with the principle of *in dubio pro reo*.⁶¹
9. When the Prosecution evidence fails to meet its burden of proof the defence may choose not to present any affirmative defence evidence and to rest on the strength (or lack of strength) of the Prosecution case. This is what happened in the *Haradinaj et al.* case tried at the ICTY in 2007.⁶² The three accused, all charged in a 37 count indictment, presented no affirmative defence case, arguing instead that the Prosecution had failed to meet its burden to prove the charges beyond a reasonable doubt. The Prosecution failure of proof in that case

58 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 5. The ICTY Statute also lists the rights of the accused (See Article 21, ICTY Statute). They include the right to the presumption of innocence which is the foundation for the requirement that the Prosecution bears the burden of proof at trial and that the burden of proof never shifts to the accused.

59 The ICTY determined in the *Tadić* case that the concept of joint criminal enterprise is a form of personal commission under Article 7(1), ICTY Statute. *Prosecutor v. Tadić*, IT-94-1-A, Appeal Judgement, 15 July 1999, paras. 220-227.

60 This section establishes “command responsibility” as a form of criminal liability.

61 *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 120 [each element of *mens rea* must be proved beyond a reasonable doubt]; and *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 319 (“the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected”). See also Chapter I “Burden of proof and presumption of innocence”, Section F. “The principle of *in dubio pro reo*”.

62 See *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Judgement, 21 July 2008.

resulted in two of the accused being acquitted of all charges. One accused was convicted of only three charges.

10. Although the result in the *Haradinaj et al.* case is a rare one in ICTY history, it illustrates a fundamental principle for any counsel considering whether or not to present an affirmative defence case. That principle is the importance of realistically and carefully assessing the substance of the Prosecution evidence as it goes in at trial. That assessment must be done taking into consideration the legal principles which apply to the Trial Chambers determination of the weight to assign to individual items of evidence as well as the relative credibility of the witnesses. These decisions involve difficult judgement calls and, as with any important decision regarding case strategy, should be made in consultation with the accused. When the evidence is deficient, however, it is both reasonably sound and ethically proper to forego presenting an affirmative defence.
11. Counsel in all cases must also determine whether the anticipated affirmative defence case will serve the purpose of raising a reasonable doubt regarding the strength of the Prosecution case. Counsel should be forewarned, particularly in multiple-accused cases where different accused may wish to present different defences, of the danger that affirmative defence evidence may sometimes serve the counter-productive purpose of filling in factual or legal gaps in the Prosecution case. If there is a danger that will occur, counsel, again in consultation with his client, must carefully balance the potential efficacy and/or credibility of the proposed defence against the possibility that facts revealed in the course of presenting that defence may assist the Prosecution in obtaining a conviction.

B. The Principle of *Nullum Crimen Sine Lege*

12. The principle of *nullum crimen sine lege* provides that an individual can be charged with a crime only if the actions which form the basis for the criminal charge were crimes at the time the accused engaged in those actions.⁶³ Although the principle does not require the individual actor was aware of the specific crime at the time he acted, it does require that the crime or mode of liability for the crime was reasonably foreseeable at the time the charged crime was committed.⁶⁴
13. This principle is not properly characterized as an affirmative defence, so much as a jurisdictional challenge to the legality of a prosecution. It is not likely to commonly arise in cases involving war crimes, crimes against humanity or genocide, given the nature of the underlying offences alleged in most such cases. Nonetheless it is mentioned here briefly to emphasize the importance of counsel remaining aware of the principle and keeping it in mind when examining the indictment and considering what defences may be available to his client.
14. The concept of joint criminal enterprise, for example, has become a familiar part of international criminal law since the *Tadić* appeal in 1999. Despite the broad acceptance in international law of the extended form of joint criminal enterprise liability, commonly known as JCE III, the propriety of relying on it as a mode of liability was successfully challenged at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in

63 *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, para. 590.

64 *Ibid.*

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2010.⁶⁵ Given the timing and history of the crimes brought before that court, the Pre-Trial Chamber found it was not able to identify any law, applicable at the relevant time and place, which could have given reasonable notice to the accused that they could be punished under this extended form of JCE. The Pre-Trial Chamber held the principle of legality required that the ECCC could not rely on a JCE III mode of liability in the proceedings before it.⁶⁶

15. Defence counsel, in assessing the complex factual and legal issues which arise in war crimes cases, must never lose sight of their obligation to creatively and continually insist that the Prosecution do its job correctly; that is, to meet *its* burden of proof and to do so according to all applicable legal principles.

C. Affirmative Defences

16. The ICTY Statute does not, with the exception of superior orders, refer to specific defences to crimes falling within the jurisdiction of the ICTY. It has been left to the Trial and Appeals Chambers to apply existing international humanitarian law regarding the acceptance of various kinds of defences.⁶⁷ In fact, the procedural rules and jurisprudence of the ICTY recognize a number of factual and legal defences; most of which will be familiar, at least in part, to legal practitioners around the world.
17. Many of these defences are offered through the presentation of affirmative defence evidence during an affirmative defence case. This is not always required however. The factual basis for an affirmative defence can also be elicited at trial through cross-examination of Prosecution witnesses when such witnesses are in possession of the facts at issue.⁶⁸
18. Regardless of how an affirmative defence is presented, if it exists the accused must raise it during trial. With the exception of newly discovered evidence,⁶⁹ an accused generally cannot raise a defence for the first time on appeal.⁷⁰
19. Though the burden of proof always remains with the Prosecution throughout trial, there are provisions regarding pre-trial disclosure which require the accused to reveal the general nature of his likely defence.⁷¹ The relevant procedural rules at the ICTY provide that after the submission of the Prosecution pre-trial brief, within various time limits set by the Rules, the accused must file a Defence pre-trial brief.⁷² That brief must “in general terms” state the nature of the accused’s defence, the matters with which the accused takes issue in the prosecutor’s pre-trial brief, and the reason why he takes issue with those matters.⁷³ The Defence pre-trial brief may be filed no later than three weeks before the pre-trial conference; a conference which generally takes place within a few days of the beginning of the trial itself.

65 *Prosecutor v. IENG et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 87.

66 *Ibid.*

67 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 13.

68 See Chapter VIII “Direct, Cross-Examination and Re-Examination” for examples of the use of cross-examination to elicit affirmative defence evidence. Rule 90(H)(i), ICTY RPE specifically provides that a witness may be cross-examined “where the witness is able to give evidence relevant to the case for the cross-examining party ...”

69 See Chapter XI “Appeals”, Section E. “New Evidence on Appeal”.

70 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 51.

71 The evidence at trial can, of course, turn out to be quite different from what was anticipated by the Prosecution and/or the Defence prior to trial. An accused may decide to alter or withdraw a defence at trial which was previously alluded to in a defence pre-trial brief.

72 Rules 65 *ter* (F) *et seq.*, ICTY RPE.

73 Rules 65 *ter* (F) *et seq.*, ICTY RPE.

20. These rules establish a pre-trial protocol wherein the accused will first be provided with a detailed Prosecution pre-trial brief; a brief which reflects the Prosecution theory of its case, the names of its expected witnesses, and summaries of their statements and a list of proposed trial exhibits. The Defence pre-trial brief, filed in response, need only reveal any potential defence in “general terms.”
21. There are certain, limited exceptions to this protocol. When the accused intends to rely on an alibi at trial or any “special defence” such as diminished responsibility or lack of mental capacity, the accused must provide more detailed pre-trial disclosure to the Prosecution regarding the nature and factual basis for such defences, beyond that normally required in a Defence pre-trial brief.⁷⁴ The Trial Chamber will set a time limit within which the Defence must notify the Prosecution of its intent to offer such a defence.⁷⁵
22. In the case of alibi, the accused must specify the place or places at which he was present at the time of the alleged crime and the names and addresses of witnesses and any other evidence he intends to rely on to establish the alibi.⁷⁶ If the defence will be one of diminished or lack of mental responsibility, the accused must tell the prosecutor the names and addresses of witnesses and any other evidence he intends to rely on to establish that “special defence”.⁷⁷ The prosecutor, in turn, after notification of such a defence, must tell the accused the names of the witnesses the prosecutor intends to call to rebut this Defence evidence.⁷⁸
23. If the accused does not duly notify the Prosecution of his intent to rely on alibi or a “special defence” his failure to do so does not limit his right to testify to such a defence.⁷⁹ It may, however, limit his right to call any witnesses, other than himself, to present that defence; a problematic choice if the accused’s desire is to exercise his right to remain silent at trial or if the defence at issue requires presentation of medical or other expert opinion.
24. The rules regarding alibi and special defences, however, also provide that if either party discovers additional evidence or material which should have been disclosed earlier under the rules related to these defences, that party must immediately disclose that evidence or material to the other party and the Trial Chamber.⁸⁰
25. This provision appears to constitute an arguable basis for seeking leave to present an alibi or a special defence in cases where the needed evidence only became available after trial began. Given the accused has the fundamental right to prepare and present a defence,⁸¹ no procedural rule, designed to facilitate efficient pre-trial preparation, should have primacy over the fundamental rights of the accused when there is a sound, credible reason for the accused’s prior inability to comply with such procedures.

74 Rule 67(B), ICTY RPE.

75 Rule 67(B)(i), ICTY RPE.

76 Rule 67(B)(i)(a), ICTY RPE.

77 Rule 67(B)(i)(b), ICTY RPE.

78 Rule 67(B)(ii), ICTY RPE.

79 Rule 67(C), ICTY RPE.

80 Rule 67(D), ICTY RPE.

81 Article 14, ICCPR; Article 6, ECHR; Article 21, ICTY Statute.

C.1 Alibi

26. The public at large tends to speak of an alibi—evidence that the accused was not physically present at the time the charged crimes occurred—as a “defence”. In fact it is a common misuse of the word to describe it as a “defence”. Rather an alibi serves the purpose of raising a reasonable doubt that the Prosecution case against the accused has been proved⁸² (see case box *Limaj et al. case - Alibi and burden of proof*).
27. Likewise when an alibi is raised the accused bears no burden to prove the alibi is true. The burden of proof is on the Prosecution, and always remains on the Prosecution, to eliminate any reasonable possibility that the evidence of alibi is true.⁸³ As the *Vasiljević* Trial Chamber emphasized:

“It is not sufficient for the Prosecution merely to establish beyond a reasonable doubt that the alibi is false in order to conclude that his guilt has been established beyond a reasonable doubt. Acceptance by the Trial Chamber of the falsity of an alibi cannot establish the opposite to what it asserts. The Prosecution must also establish that the facts alleged in the Indictment are true beyond a reasonable doubt before a finding of guilt can be made against the accused.”⁸⁴

28. If an accused intends to assert an alibi as to all or part of the charges in the indictment, there must be some evidence in the trial record to support it. However, even if the alibi is rejected that does not change or shift the Prosecution’s burden of proof. The Prosecution must still affirmatively prove the accused’s guilt beyond a reasonable doubt.

C.2 “Special Defences”

29. The phrase “special defence” is not defined in the ICTY RPE. It is best described as a defence which is based on facts that are peculiarly within the accused’s knowledge and, as a result, should be or must be established by the accused.⁸⁵ Although the ICTY RPE place no limit on what might constitute a “special defence” the primary ones which have been raised in ICTY cases involve proof of a condition of mind or body which may serve to negate the *mens rea* element of a criminal charge or serve to mitigate the culpability of the accused.



Limaj et al. case - Alibi and burden of proof

*In the Limaj et al. case, one of the Accused, Haradin Bala, relied in part on an alibi defence which was ultimately not accepted by the Trial Chamber. Limaj pointed out, however, that Bala had no burden to affirmatively establish that alibi, noting that “so long as there is a factual foundation in the evidence, the accused bears no onus to establish that alibi; it is for the Prosecution to eliminate any reasonable possibility that the alibi is true.”** As in *Vasiljević*, the Limaj Trial Chamber explained the context in which alibi evidence must be assessed. It stated:

*“[A] finding that an alibi is false does not itself ‘establish the opposite to what it asserts.’ The Prosecution must not only rebut the validity of the alibi but also establish beyond reasonable doubt the guilt of the Accused as alleged in the Indictment.”***

* *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11.

** *Ibid.*

82 See Chapter I “Burden of Proof and Presumption of Innocence”, Section H. “Affirmative Defence Evidence and the Reasonable Doubt Standard” for a more detailed discussion on alibi and its relevant burden of proof.

83 *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 15; and *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, Trial Judgement, 22 February 2001, para. 625.

84 *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 15, footnote 7.

85 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 1158 “A special defence is one apart from the general defence open to accused persons and is peculiar to the accused in the circumstances of a given case.”

30. The essential point for counsel to bear in mind, depending on the applicable procedural rules, is that the intention to present a “special defence”, at least in the mixed common and civil law systems employed in the international criminal courts, generally requires prior notice to the opposing party of the specifics of that defence.

C.2.1 Insanity/Diminished Responsibility

31. For every criminal act it is presumed that the person alleged to have committed the offence was sane at the time of its commission. Every person charged with an offence is presumed to be of sound mind and to have been of sound mind at all relevant times unless and until the contrary is proven. Hence the burden is on the accused to rebut the presumption of sanity.⁸⁶
32. There are two recognized defences related to this principle; the defence of insanity and the defence of diminished responsibility.⁸⁷ Both require proof that the accused was suffering from an abnormality of the mind at the time of the commission of the charged crime. Thus both defences also require that the accused go forward with affirmative evidence at trial in support of the claimed lack of mental capacity. The accused bears the burden to prove these defences, but only by a preponderance of the evidence.⁸⁸
33. There are differences between the two defences. In the case of a plea of insanity the accused must establish that - more probably than not - at the time of the commission of the charged crime he was labouring under such a defect of reason, due to a disease of the mind that he did not know the nature or quality of his acts or, even if he did know, he was incapable of forming a rational judgement as to whether his actions were right or wrong.⁸⁹ A successful plea of insanity is a complete defence to the charged crime since it negates *mens rea* and, as such, must result in an acquittal.⁹⁰
34. By contrast the plea of diminished responsibility is based on the premise that despite recognizing the wrongful nature of his actions, the accused, due to his abnormality of mind, was unable to control his behaviour.⁹¹ This defence requires affirmative proof that the accused suffered from an abnormality of the mind which substantially impaired his responsibility for his acts or omissions. The abnormality must have arisen from a condition of arrested or retarded development of the mind or an inherent cause, such as disease or injury. It is also an essential element of this defence that the accused’s abnormality of mind substantially impaired his ability to control his actions; a matter which is distinct from the ability to form a rational judgement.⁹² These categories illustrate that proof of this defence is restricted to conditions which can be supported by objective medical evidence.⁹³

86 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1157-1158.

87 The defence of insanity or diminished capacity, which relates to the mental state of the accused at the time of the commission of the charged offence, must not be confused with the issue of whether or not an individual accused is competent to stand trial at the time the trial is scheduled to commence. Incompetence to stand trial is not an affirmative defence to the charges. When an accused, found to be incompetent to stand trial, is treated and returned to competency the accused will still face trial on the original charges.

88 See Chapter I “Burden of Proof and Presumption of Innocence”, Section H. “Affirmative Defence Evidence and the Reasonable Doubt Standard”.

89 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 1156.

90 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 582.

91 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para.1156; but see *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 283 (apparently combining all of these concepts, despite the dichotomy recognized in *Delalić*, by finding that an accused suffers from diminished mental responsibility where there is an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law).

92 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para. 1169.

93 *Ibid.*, paras. 1166, 1170.

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35. Crimes which are motivated by or triggered by strong emotions, such as jealousy, rage, hate, or other forms of provocation, are not subject to the defence of diminished responsibility.⁹⁴
36. The Trial Chamber in the *Delalić et al.* case was of the view that proof of diminished responsibility constituted a complete defence since the provisions of Rule 67(A)(ii)(b) of the ICTY RPE, recognizing “special defences”, are without qualification or limitation.⁹⁵ That view was rejected on appeal.
37. The *Delalić et al.* Appeals Chamber opined that the description of diminished mental responsibility in Rule 67(A)(ii) as a “special defence” was insufficient to establish it as a complete defence. It held that under general principles of law in both common and civil law systems proof of an accused’s diminished mental responsibility is not a complete defence to the charged crime, but rather can serve only to mitigate sentence.⁹⁶ That view is the generally accepted one in ICTY jurisprudence.⁹⁷

C.2.2 Intoxication

38. In general voluntary intoxication is not a defence or a factor in the mitigation of sentence at the ICTY even when the argument is made that the level of intoxication amounted to the accused functioning with a diminished mental capacity.⁹⁸ To the contrary, when a state of intoxication is voluntary, Trial Chambers have considered that fact to be an aggravating circumstance. As pointed out in the *Kvočka et al.* case: “Indeed, the Trial Chamber considers that, particularly in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.”⁹⁹
39. When mental capacity is diminished due to the use of alcohol or drugs, account will be taken, however, as to whether the person voluntarily subjected himself to such a diminished state. A state of intoxication could constitute a mitigating circumstance relevant to sentencing if the intoxication was forced or coerced.¹⁰⁰

C.3 Duress

40. The defence of duress generally requires proof that the accused committed a charged criminal act only because:
 - 1) he was under an immediate threat of severe and irreparable harm to his own life;
 - 2) there was no adequate means of avoiding that threat;
 - 3) the crime the accused committed was not disproportionate to the threat to the accused, and,
 - 4) the situation leading to the duress was not voluntarily brought about by the accused.¹⁰¹
41. The defence was raised for the first time at the ICTY in the *Erdemović* case. Erdemović surrendered to the ICTY and pled guilty to one count of committing a crime against humanity for his participation in the execution of approximately 1,200 unarmed men in the aftermath of the fall of Srebrenica. Erdemović believed that he had personally killed about 70 people. He told the Trial Chamber that he participated in this crime as

94 *Ibid.*, para. 1166.

95 *Ibid.*, para. 1164.

96 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 583, 590.

97 See e.g., *Prosecutor v. Vasiljević*, IT-98-32-T, Trial Judgement, 29 November 2002, para. 282; *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, para. 197; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 93.

98 See, e.g., *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, paras. 73-74; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2002, para. 94, [98] and Sentencing Hearing, 4 May 2001, page 45.

99 *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgement, 2 November 2001, para. 706.

100 *Ibid.*

101 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 16.

a result of his obligation to obey orders from his military superior and the physical and moral duress stemming from his fear for his own life and that of his family, if he disobeyed those orders.¹⁰²

42. The Trial Chamber considered the combination of these factors could not only mitigate penalty but also be regarded as a complete defence to the offence itself. It ultimately concluded, however, that proof of the specific circumstances which would fully exonerate the accused had not been provided. The Defence had not produced any testimony, evaluation or any other evidence to corroborate the accused's version of the events.¹⁰³
43. The question subsequently arose in the Appeals Chamber as to whether proof of duress could be a complete defence to a criminal offence or serve only to mitigate sentence. The majority held it could not be a complete defence at the ICTY, noting that: "duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives."¹⁰⁴ One judge was of the view that duress could be a complete defence except when the crime committed under duress is "a heinous crime, for instance, the killing of innocent civilians or prisoners of war." In that case duress could only be a ground of mitigation of punishment.¹⁰⁵
44. The majority also observed that in refusing to take the circumstance of duress into account in mitigation of Erdemović's sentence the Trial Chamber appeared to require corroboration of Erdemović's testimony as a matter of law. In this regard, two judges pointed out that "[t]here is [...] nothing in the Statute or the Rules which requires corroboration of the exculpatory evidence of an accused person in order for that evidence to be taken into account in mitigation of sentence."¹⁰⁶
45. The minority took the view that duress could operate as a complete defence; noting that the majority had relied on policy considerations based in the common law, while disregarding those of civil law countries and other systems of law.¹⁰⁷ The minority opined that with regard to war crimes and crimes against humanity no special rule of customary international law had evolved on this issue and it therefore followed that duress may amount to a defence provided that its strict requirements are proved.¹⁰⁸ In fact, according to the minority, duress was a recognized defence in the former Yugoslavia where the law allowed that duress may be a total defence for any crime, including murder.¹⁰⁹
46. In a similar vein, dissenting Judge Stephen opined that the aim to protect innocent life in conflicts such as that in the former Yugoslavia is not achieved by the denial of a just defence to one who is in no position to effect, by his own will, the protection of innocent life. As Judge Stephen stated:

"[t]he stringent conditions always surrounding [the] defence [of duress] will have to be met, including the requirement that the harm done is not disproportionate to the harm threatened. The case of an accused,

102 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, 7 October 1997, para. 1; and *Prosecutor v. Erdemović*, IT-96-22-A, Sentencing Judgement, 29 November 1996, paras. 14, 20, 91.

103 *Prosecutor v. Erdemović*, IT-96-22-A, Sentencing Judgement, 29 November 1996, para. 14. Factors other than duress were taken into consideration as mitigation by the sentencing court including Erdemović's remorse, his early surrender to the ICTY, his admission of guilt and his cooperation with the Office of the Prosecutor.

104 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 88.

105 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Separate and Dissenting Opinion of Judge Li, 7 October 1997, paras. 5, 12.

106 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 90.

107 *Prosecutor v. Erdemović*, IT-96-22-A, Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 11.

108 *Ibid.*, para. 12.

109 *Ibid.*, para. 65.

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forced to take innocent lives which he cannot save and who can only add to the toll by the sacrifice of his own life, is entirely consistent with that requirement."¹¹⁰

47. The *Erdemović* case was returned to a different Trial Chamber for re-sentencing after appeal. The new Trial Chamber considered duress as a mitigating factor, among others, in imposing sentence.¹¹¹ Subsequent ICTY judgements have considered proof of duress as a potential factor in mitigation of sentence; not as a complete defence.¹¹²
48. One lesson to be drawn from the *Erdemović* case, for practitioners in domestic war crimes courts, is that domestic legal tradition, particularly regarding the availability of recognized legal defences to criminal acts, should always be raised when suggested by the facts of a case regardless of international law on the subject. Although the ICTY ultimately adopted the view that duress could not operate as a complete defence in international crimes cases, there was a principled and significant split of opinion among the judges as to whether that view was a proper one. In fact, the Rome Statute of the International Criminal Court specifically recognizes duress as a complete defence when all the requirements constituting the defence are met.¹¹³

C.4 Necessity

49. Many legal traditions recognize the defence of necessity—which must be differentiated from the defence of duress. The defence of necessity may be a complete defence to a criminal act if the crime charged was committed by the accused in order to avert an even greater or more serious harm. Unlike duress, it does not require a specific threat to the accused. It can potentially apply to any situation in which the accused knowingly commits one criminal act so as to prevent a greater harm to himself or to others.
50. The defence has not had success in the ICTY jurisprudence and has only been very rarely raised. In the *Aleksovski* case, for example, the accused argued that the fact he detained civilians in Kaonik prison prevented those civilians from suffering serious injury or death in the armed hostilities taking place in the area. He argued his proof was that none of the detained individuals were killed or wounded.¹¹⁴ The idea was that the concept of extreme necessity justifies the accused's unlawful acts (here the detention of several individuals) when those actions are motivated by the intent to avoid a worse violation.¹¹⁵
51. Notwithstanding these arguments the Appeals Chamber viewed *Aleksovski*'s position as "entirely misplaced".¹¹⁶ *Aleksovski* was not charged with the unlawful detention of the prisoners; he was charged with mistreating them. As the Appeals Chamber noted, "the appellant [was] in effect submitting that the mistreatment the

110 *Prosecutor v. Erdemović*, IT-96-22-A, Appeals Judgement, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 67.

111 *Prosecutor v. Erdemović*, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, paras. 17, 20. (The duress in *Erdemović* was severe. The Trial Chamber found there was "a real risk that the accused would have been killed had he disobeyed the order [to kill the unarmed detained men]. He voiced his feelings, but realized that he had no choice in the matter: he had to kill or be killed.") See Chapter XII "Sentencing", Section D.4. "Mitigating Circumstances" regarding duress as a mitigating circumstance.

112 See, e.g. *Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Trial Judgement, 2 November 2001, para. 403; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgement, 2 August 2001, para. 714; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, paras. 111-112; *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, para. 101.

113 Article 31(1)(d), ICC Statute.

114 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 47.

115 *Ibid.*, para. 40.

116 *Ibid.*, para. 52.

detainees suffered [...] should have been interpreted [...] as somehow having been justified by the assertion that they would have suffered even more had they not been treated the way they were while in detention.”¹¹⁷

52. The Appeals Chamber, in light of the facts in *Aleksovski*, declined to decide whether necessity constitutes a defence under international law or whether it is the same as the defence of duress.¹¹⁸
53. The *Aleksovski* case illustrates, however, the importance of defence counsel thoroughly researching the facts and the law, and carefully examining the charges brought in the indictment, before going forward with a particular affirmative defence. Suffice it to say that the necessity defence, based on the public record of the facts in *Aleksovski*, simply did not apply to the case.
54. There is, however, a clear difference between the defence of duress and the defence of necessity and both defences may be available under domestic law. The fact that the ICTY has not had occasion, based on a proper case, to reach that issue does not mean the necessity defence is not available in domestic war crimes courts.

C.5 Superior Orders

55. It is not unusual for an accused to take the position that he would not have engaged in the conduct charged against him in an indictment, but for the fact that he was following orders from a superior officer. Obedience of orders from a superior office is not a defence to the commission of war crimes, crimes against humanity and genocide at the ICTY and does not excuse the accused of criminal responsibility for his actions done in conformance with superior orders. At most proof the accused acted only because he was forced to do so by order of a superior officer may justify a reduced penalty for the crime or crimes that ensued.¹¹⁹
56. Indeed, Article 7(4) of the ICTY Statute provides that “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”
57. There are a number of very important caveats to this general rule. First, the ICTY has tended to show more leniency in cases where the accused had a *low rank* in the military or civilian hierarchy.¹²⁰ Second, a subordinate defending himself on the grounds that he acted only in response to superior orders may be subject to a less severe sentence only in cases *where the order of the superior effectively reduces the degree of [the accused] guilt*. If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.¹²¹ Third, a subordinate may be granted mitigation where he executed an order when the order was not *manifestly illegal*.¹²²
58. The *Mrđa* case is an excellent illustration of the latter two principles. Mrđa plead guilty to killing over 200 unarmed men in August 1992 at Koričanske Stijene.¹²³ He said he did so only in compliance with orders issued by his superiors which were accompanied by a threat of death; a circumstance he asserted as sufficient

117 *Ibid.*, para. 54.

118 *Ibid.*, para. 55.

119 *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 55.

120 *Ibid.*, para. 53.

121 *Ibid.*

122 *Prosecutor v. Mrđa*, IT-02-59-S, Sentencing Judgement, 31 March 2004, para. 65.

123 *Ibid.*, paras. 1, 10.

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evidence of duress to serve to mitigate his punishment.¹²⁴ The Trial Chamber did not find any “convincing evidence of any meaningful sign” that the defendant wanted to dissociate himself from the massacre at the time of its commission.¹²⁵ It also found no cause to mitigate Mrđa’s punishment as “the orders were so manifestly unlawful that [he] must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity.”¹²⁶

59. Similar standards have been adopted by the Rome Statute of the ICC, however at the ICC following superior orders may operate not just as a factor in mitigation of sentence, but, depending on the evidence, as a complete defence.
60. Article 33 of the Rome Statute provides that when a crime is committed pursuant to an order of a Government or a superior, whether military or civilian, that fact will not relieve the accused of criminal responsibility unless:
- 1) the person was under a legal obligation to obey orders of the Government or the superior in question;
 - 2) the person did not know that the order was unlawful; and
 - 3) the order was not manifestly unlawful.
61. This article is written in the conjunctive; meaning that all three conditions must be met before an accused can be relieved of criminal responsibility for his actions.¹²⁷ Article 33 of the Rome Statute also provides, however, that orders to commit genocide or crimes against humanity are “manifestly unlawful.”¹²⁸
62. These provisions, taken as a whole, potentially create a basis for arguing that an individual who acts only pursuant to a superior order, which is not on its face “manifestly unlawful” may have a complete defence to certain kinds of war crimes. Obviously, each case will depend upon its facts as well as the reasonableness of the contention that the accused did not, at the time he was acting, believe the superior order was anything other than in conformance with the accepted laws of war.
63. A final word should be added regarding the potential interplay between a claim of duress accompanied by a claim that the accused acted only pursuant to superior orders. The two claims are legally distinct and even though they may arise from the same set of circumstances, there is no necessary connection between the two (see case box *Erdemović case - Superior orders or duress?*).



Erdemović case - Superior orders or duress?

Judge Cassese pointed out in the Erdemović case:

*“Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. Equally duress may be raised entirely independently of superior orders, for example, where the threat issues from a fellow serviceman.”**

* *Prosecutor v. Erdemović*, IT-96-22-A, Appeals Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 15.

124 *Ibid.*, para. 65.

125 *Ibid.*, para. 66.

126 *Ibid.*, para. 67; see also *Prosecutor v. Češić*, IT-95-10/1-S, Sentencing Judgement, 11 March 2004, paras. 97, 109 (where defence of superior orders, combined with duress, was also rejected).

127 Article 33(1)(a)-(c), ICC Statute.

128 Article 33(2), ICC Statute.

C.6 Self-Defence

64. As mentioned early on in this chapter the ICTY Statute does not provide for specific defences, however many defences form part of general principles of criminal law which the ICTY takes into account in deciding the cases before it.¹²⁹ The concept of self-defence falls within that category.¹³⁰ It is an affirmative defence which the accused must demonstrate by a preponderance of the evidence. The absence of self-defence is not an element of a crime which the Prosecution must prove beyond a reasonable doubt.¹³¹
65. The notion of self-defence may be broadly defined as providing a complete defence to a person who commits a criminal act—such as assault or murder—as a means to protect his own life or property or the lives or property of third persons. To constitute self-defence (or defence of others) the acts must be reasonable, necessary and reflect a proportionate response to the initial attack under all the relevant circumstances at the time.¹³²
66. The principle of self-defence is affirmatively codified in Article 31(1)(c) of the Rome Statute. That article provides that a person shall not be criminally responsible if, at the time of the person’s conduct, he acted reasonably to defend himself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.¹³³
67. An important exception is provided in Article 31(1)(c) of the Rome Statute relevant to war crimes. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility. That exception has been applied at the ICTY.¹³⁴ Similarly military operations conducted in self-defence do not provide a justification or defence for the commission of serious violations of international humanitarian law.¹³⁵ In relation to the specific circumstances of war crimes, the provision also takes into consideration the principle of military necessity.¹³⁶
68. The principle of self-defence is a familiar one to criminal defence practitioners. Suffice it to say that any argument raising self-defence must be assessed on its own facts and the specific circumstances relating to each charge.

C.7 Mistake of Fact/Mistake of Law

69. Although not expressly provided in the ICTY Statute, the ICTY jurisprudence seems to suggest that mistake of fact may be considered as a defence in the tribunal’s international criminal trials though the jurisprudence thus far appears to have rejected the defence of mistake of law.
70. In the recent *Hartmann* contempt case the Defence raised mistake of fact and mistake of law to allegations that the accused was in contempt of court for revealing allegedly confidential information in a book written by the accused. It argued that public discussions in the media, prior to the publication of the accused’s book, of the information she was charged with improperly disclosing thereafter, could have reasonably led the

129 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 449.

130 *Ibid.*, para. 451.

131 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 838.

132 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 449.

133 Article 31(1)(c), Rome Statute; See *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 451.

134 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 827.

135 *Ibid.*, para. 452.

136 *Ibid.*, para. 451.

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accused to believe that the information in question was no longer confidential. Hence the Defence argued the accused was not aware that her conduct was illegal.¹³⁷

71. The Trial Chamber rejected the claim of mistake of law as a matter of law. It stated that a person's "misunderstanding of the law does not, in itself, excuse a violation of it"; noting (in reliance on the *Jović* case) that "if mistake of law were a valid defence [...] orders would become suggestions and a Chamber's authority to control its proceedings, from which the power to punish contempt in part derives, would be hobbled."¹³⁸
72. It also rejected the accused's defence of mistake of fact, however it did so on the merits of the case, based on its findings as to the knowledge and intent of the accused in publishing the confidential information in violation of an order.¹³⁹
73. Mistake of fact is, in sum, apparently a viable defence at the ICTY though it is questionable how often such a defence would be relevant and/or effective in cases involving war crimes, crimes against humanity or genocide.
74. A similar view has been taken at the ICC. Article 32(1) of the Rome Statute provides that a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the *mens rea* of the charged crime.¹⁴⁰ Mistake of law, on the other hand, as to whether a particular type of conduct is a crime, is not a ground for excluding criminal responsibility, under Article 32 of the Rome Statute, unless it serves to negate the mental element of the charged crime.

Conclusion

75. All criminal law practitioners know that the substantive merits of each case depend upon its own particular facts and circumstances. Keeping that in mind it is always important for counsel, charged with the responsibility to defend an individual accused of criminal conduct, to remain open not only to interpreting existing domestic and international defences, but to working creatively with both whenever possible; not only as a means of defending individual accused but also to fulfil counsel's duty to assure that the rights of the accused are respected and enforced in the day to day business of our international and domestic courts.

137 *In the Case Against Florence Hartmann*, IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009, para. 63.

138 *Ibid.*, para. 65.

139 *Ibid.*, para. 67.

140 Article 32(1), Rome ICC Statute.

III. Developing a Case Theory and a Defence Strategy

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1. In cases before the ICTY,¹⁴¹ the Defence must ensure that all necessary measures are taken in order to establish the facts, gather evidence that favours the accused, and protects the rights of the accused.¹⁴¹ This includes, primarily, discovery of facts and evidence that dispute the allegations in the indictment and may lead to the acquittal of the accused or that may raise doubts about the allegations. Such facts and evidence include those which relate to both the factual and the legal allegations identified in the indictment.
2. Practice before the ICTY shows that it is important to conduct a detailed analysis of the indictment initially in order to gain an understanding of the Prosecution case and of the forms of responsibility alleged against the accused.
3. As part of this process it is important to develop a “theory of the case”; a concept that is not necessarily a notion with which all lawyers from the former Yugoslavia are familiar. Quite simply, the theory of the case represents all the important elements, both objective and subjective, of the criminal case alleged against the accused, which the Prosecution has to prove in order for the accused to be found guilty. Additionally, the theory of the case represents the Defence response to the Prosecution case.
4. This chapter begins by examining what can be called the theory of the Prosecution case and the theory of the Defence case. This is followed by considerations regarding the elements of a defence strategy, such as: relations with the client, setting up a Defence team, obtaining and analysing relevant information for the case, filing preliminary and other motions, formulating an investigative plan and method as well as other relevant strategic considerations.

* Chapter co-authored by Eugene O'Sullivan and Edina Rešidović. Eugene O'Sullivan, Defence Counsel at the ICTY for Zejnir Delalić (*Čelebići* case), Milojica Kos, Biljana Plavšić, Miodrag Jokić, Milan Milutinović, and legal consultant for Mićo Stanišić. Edina Rešidović is an international criminal lawyer, Partner and Founder of the Law Office Rešidović Edina - Sabrihafizović Džemil - Milanović-Lalić Mirna - Sabrihafizović Dino, based in Sarajevo (Bosnia and Herzegovina). She has a vast experience as a criminal lawyer in both domestic and international jurisdictions, and she represented before the ICTY as a Lead Counsel the following accused: Enver Hadžihasanović, Ljube Bošković and Zejnir Delalić.

141 These obligations, imposed upon defence counsel, are set out in Article 11 of the Code of Professional Conduct for Defence Counsel Appearing before the ICTY.

A. Theory of the Prosecution Case

5. The Prosecution's theory of the case consists of all the important elements which the Prosecution has to prove during the proceedings if the Trial Chamber is to find the accused guilty. This includes all of the elements of the relevant criminal act: the facts that represent the incriminating act, the position of the accused, his alleged liability, and the applicable laws. In cases at the ICTY, the Prosecution is permitted to charge cumulatively, which means, for example, that the same alleged "murder" can be charged a number of different ways: as a "Grave Breach of the Geneva Conventions of 1949" (Article 2, ICTY Statute), as a "Violation of the Laws and Customs of War" (Article 3), as a "Crime Against Humanity" (Article 5(a)), and as "Persecution as a Crime Against Humanity" (Article 5(h)), and as "Genocide"(Article 4).
6. The required elements of murder under Articles 2-5 of the ICTY Statute are the same:
 - 1) the victim is dead;
 - 2) the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
 - 3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.¹⁴²
7. There are however important differences between a charge of murder under each of these provisions of the ICTY Statute, which must be proven before a conviction can be entered:
 - ◆ Under Article 2, it must be proven that the murder occurred during an "international armed conflict" and that the victim was a "protected person";
 - ◆ Under Article 3, it must be proven that the murder occurred during an "armed conflict" and that there is a "nexus" between the murder and the armed conflict;
 - ◆ Under Article 4, it must be proven that the crime of genocide was committed with the specific intent to destroy the targeted group, in whole or in part;
 - ◆ Under Article 5(a), it must be proven that the murder occurred during an "armed conflict", during a widespread or systematic attack directed at a civilian population to convict as a "crime against humanity".
 - ◆ Under Article 5(h), an additional element of persecutorial intent on political, racial, and/or religious grounds must be proven to convict for "persecution, as a crime against humanity".
8. In addition, an accused may be charged cumulatively under Article 7(1) and Article 7(3) which set out the different modes of personal liability. For instance, for the charge of "murder", the accused may be charged with planning, instigating, ordering, committing (as a direct perpetrator or as a participant in a joint criminal enterprise), or aiding and abetting pursuant to Article 7(1) and as a superior authority pursuant to Article 7(3).
9. It is important to understand the theory of the Prosecution case, that is to understand which elements the Prosecution intends to establish in order for the accused to be found guilty, for the following reasons:
 - ◆ without knowing the Prosecution's theory of the case, the Defence cannot develop its own theory, which is vital to effectively respond to the allegations in the indictment or to raise a reasonable doubt regarding the Prosecution's case;

142 *Prosecutor v. Brdanin*, IT-99-36-T, Trial Judgement, 1 September 2004. paras. 381, 689.

- ◆ familiarity with the Prosecution's case theory allows the Defence to identify preliminary and other objections in a timely and efficient manner during the proceedings;
 - ◆ a sound knowledge of the Prosecution's case theory allows the Defence to properly develop a defence case strategy;
 - ◆ a thorough understanding of the Prosecution's case theory and a comprehensive analysis of the indictment is necessary in order for the Defence to present to the Trial Chamber a version of events that raises a reasonable doubt about the accused's responsibility and ultimately may lead to his acquittal.
10. The Prosecution is responsible for articulating the legally relevant or "material" facts in the indictment, *i.e.* those factual allegations which underlie each charge in the indictment. Thorough analysis of the indictment enables the Defence to assess whether the Prosecutor has alleged all the facts which, if proved, would fulfil every element of both the crime and the mode of liability upon which the accused's responsibility is allegedly based.

B. Theory of the Defence Case

11. A correct understanding of the Prosecution's case theory is always necessary for the proper development of the Defence theory. Further, a complete and proper Defence theory identifies the strategy of the Defence. Insufficiently detailed attention to the theory of the Prosecution's case will result in omissions by the Defence that may impact the accused's ability to effectively respond to the charges.
12. The first task for the Defence is to analyse in detail the indictment and the evidence that supports it. The Defence must, in the development of the Defence theory, start its analysis from the most favourable position for the Prosecution. For every factual and legal allegation raised by the Prosecution, the Defence must attempt to provide an alternative answer which suggests the innocence of the accused or undermines the credibility of the Prosecution evidence. In the end, the goal of the Defence's case theory is to convince the court of the correctness of the Defence's version of events. For this reason, the theory of the Defence should be simple, persuasive and credible. It must contain an explanation of why the Prosecution's theory is incorrect.
13. In analysing the Prosecution's theory of the case as set forth in the indictment, the Defence should pay particular attention to the following issues:
- ◆ Has the event specified in the indictment even occurred? One approach for the Defence is to challenge whether the alleged events occurred;
 - ◆ Does the specified event, if it took place, constitute a criminal offence or a crime according to international humanitarian law? The Defence may seek to argue that it does not constitute a criminal offence or a crime according to international humanitarian law (for example, the act is not related to an armed conflict when the element of an armed conflict is a requirement for that offence; victims do not have the status of non-combatants, etc.);
 - ◆ Assuming the act took place and that it constitutes a criminal offence under international humanitarian law, was the accused criminally responsible for the act in question? The accused, for example, is not criminally responsible if he acted in self defence, was not present, has an alibi, did not hold the position alleged in the indictment, had no legal obligation to act as the indictment alleges, had no criminal intent, etc.

III. Developing a Case Theory and a Defence Strategy

- ◆ Was the accused in a position of superiority in relation to the perpetrators of the crime? It may be that the accused is not responsible as he did not hold the alleged position either *de jure* or *de facto*, did not have effective control over the perpetrators, did not have knowledge or notice of the alleged acts, and finally, did not have the material means to investigate and punish those who actually committed the crimes.
- 14. It is crucial to develop a thorough Defence theory of the case by taking all the elements of the crimes (*i.e.*, contextual elements, *actus reus* and *mens rea*) that the Prosecution will have to prove, and assessing them in light of the facts alleged by the Prosecution. For each of these facts, challenges to the admissibility or probative value of certain evidence and witnesses have to be considered and new facts that are exculpatory have to be identified in relation to the relevant elements of the crimes, modes of liability and facts as alleged in the indictment.

C. The Importance of Continual Communication with the Accused

15. Before finalising the theory and the strategy of the Defence's case, counsel must interview the accused. It is important for Defence counsel to obtain the accused's entire understanding of the events and his involvement in those events, if any. In cases dealing with superior responsibility it is important to know what the accused's position, duties, rights, and obligations were at the time of the events of the case. Especially relevant is the accused's *de jure* position; the responsibilities held by the virtue of his rank, his relations with other alleged actors, his actual knowledge, if any, about the charged incident before or after its occurrence, and other questions of importance in accordance with Article 7(3) of the ICTY Statute.
16. It is important to discuss with the accused not only the direct basis for the charges in the indictment, but also all other facts that arise in the evidence presented with the indictment. This is particularly important in relation to an allegation that the accused was a *de facto* superior under Article 7(3) or in relation to an allegation that the accused is guilty by omission (for example, aiding and abetting by omission).
17. There has to be continual communication with the client throughout the proceedings; pre-trial and at trial. It is especially important to examine all material disclosed to the Defence by the Prosecution as well as material obtained through defence investigative work. On the basis of information acquired this way, it may become apparent that other relevant documents and material may be in the possession of the Prosecution, and should be requested.
18. Furthermore, Defence counsel have a duty to discuss the possibility of negotiating a plea agreement as a means to resolve the matter *in lieu* of going to trial. Over time, as the evidence disclosed by the Prosecution and Defence investigation progresses, discussions with the client may move towards the likelihood of mounting a successful defence at trial or the alternative of pursuing a plea agreement for certain charges. This will depend on the relative strengths and weaknesses of the evidence which is likely to be presented at trial. Developing a working relationship of trust between the accused and counsel is fundamental to resolving these issues in a manner which will be acceptable to the accused and consistent with counsel's duty to effectively represent his client.

D. Building up the Defence Strategy

19. The strategy adopted by the Defence is based on the Defence's theory of the case. Experience shows that the defence strategy should include:
- 1) establishing a Defence team;
 - 2) filing of preliminary and other motions;
 - 3) analysing the evidence in support of the indictment and all other evidence disclosed by the Prosecution in accordance with Rule 66;
 - 4) analysing materials disclosed to the Defence in accordance with Rule 68 and Rule 66(B);
 - 5) informing the Prosecutor of special defences in accordance with Rule 67; and,
 - 6) formulating an investigation plan and method.

D.1 Establishing the Defence Team

20. Due to the complexities of criminal acts that constitute violations of international humanitarian law, experience indicates that the defence should not be conducted by just one counsel. The practice before the ICTY has included lead counsel forming a team that can respond to all factual and legal questions which are raised during the proceedings.¹⁴³ It has proven to be a good practice to compose teams of lawyers from common law and continental systems, that is, lawyers from the former Yugoslavia and those that have experience in common law countries or before the ICTY.¹⁴⁴ In courts where there is both a domestic and international component - i.e. judge, prosecutors, defence counsel - and where trials are adversarial in nature (as is true at the ICTY and in some domestic courts) with rules of procedure which incorporate elements of both the continental and adversarial practice, a “mixed” Defence team can be very effective and therefore very important strategically.
21. The Defence team should include investigators and legal assistants, where the law allows. It is important that Defence investigators are familiar with facts related to the events, the region where the acts allegedly took place, and the context of these events. Experience also shows the importance, especially when the investigation takes place in the region of the former Yugoslavia, of the investigators understanding the languages spoken by potential witnesses, so that they do not have linguistic difficulties in locating and examining relevant documents or speaking with witnesses. Legal assistants should analyse the evidence and research the necessary domestic and international legal authorities relevant to the proceedings, especially the established ICTY standards. In case investigators or legal assistants are not familiar with the language, it is important to also hire a translator.
22. The complexity of the criminal cases dealing with violations of international humanitarian law frequently requires the hiring of consultants for various factual or legal questions in the case - members of the military and/or police, constitutional experts, forensic or demographic experts - so that the Defence can intelligently counter the evidence of the Prosecution. These consultants may work as a part of the Defence team or they may be retained to provide expert reports and testimony at trial for the Defence. It is important however not to use the same person both as consultant (team member) and an expert witness. Strategically, the

¹⁴³ See Chapter XIII “The Association of Defence Counsel Practicing Before the ICTY”, Section B. “Setting up a Defence Team”.

¹⁴⁴ For example, for Zejnil Delalić, lead counsel from BiH, co-counsel from Canada; for Enver Hadžihanović, lead counsel from BiH, co-counsel from Canada; for Ljube Bošković, lead counsel from BiH, co-counsel from Switzerland; for Naser Orić, lead counsel from BiH, co-counsel from Great Britain; for Momčilo Perišić, lead counsel from Belgrade, co-counsel from the United States.

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objectivity of the expert who works as a member of the Defence team is potentially compromised and the value of the expert opinion may be accordingly diminished.

D.2 Filing of Preliminary and Other Motions

23. Based on the analysis of the indictment and supporting evidence, the Defence must decide which preliminary motions should be made immediately and which objections should be filed during the proceedings.
24. Considering that preliminary motions are made within a narrow deadline at the outset of the case, and that failure to meet the deadline means loss of the right to file such motions, the Defence must take advantage of that right and file the preliminary objections in a timely manner.
25. One of the essential guarantees of a fair trial is the right of the accused to file preliminary motions to challenge the aspects of Prosecution's allegations against him and the Prosecution's theory of the case. Before the ICTY, the accused must file such motion within 30 days after the Prosecution files the materials in support of the indictment by submitting a written motion to the Pre-Trial Chamber. Pursuant to Rule 72 of the ICTY RPE, the accused may file preliminary motions which:
 - 1) challenge jurisdiction;
 - 2) allege defects in the form of the indictment;
 - 3) seek severance of counts or separate trials, and objections joinder or severance of the proceedings; or,
 - 4) raise objections based on the refusal of a request for assignment of counsel.¹⁴⁵
26. The time frame for filing preliminary motions is triggered by disclosure by the Prosecution to the Defence following the initial appearance of the accused. Pursuant to Rule 66(A)(i), the Prosecution must make available to the Defence in a language which the accused understands, 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 prior statements obtained by the Prosecution from the accused. Pursuant to Rule 72(A), all preliminary motions must be in writing and brought no later than thirty days after disclosure by the Prosecution to the Defence of all material and statements referred to in Rule 66(A)(i). It is important to note that pursuant to Rule 72(B), only motions challenging jurisdiction carry with them the right of appeal. All other preliminary motions under Article 72(A) and other motions under Article 73 may only be appealed, if a Trial Chamber grants a request for certification pursuant to Rule 73(C).



PRACTICE TIP

When filing preliminary motions, the Defence should be wary not to inadvertently accept facts that will be in dispute later in the proceedings. Claiming that the items were taken from the home owned by the accused Delalić, the Defence in *Delalić et al.* (also known as the *Čelebići* case) had to deal with the consequences of disputing that fact later at trial. The Prosecution rightfully showed that the Defence had already accepted the fact regarding the ownership of the home (Rule 66B). These problems can be avoided by stating «allegedly» before the fact that the Defence wishes to rely upon.

D.2.1 Motions Challenging Jurisdiction

27. Jurisdictional challenges can be made under the claim that the Tribunal lacks jurisdiction:

¹⁴⁵ Since at the ICTY there have been no preliminary motions raising objections based on the refusal of a request for assignment of counsel, this type of preliminary motion will not be addressed in further details.

- ◆ *rationae personae* (personal);¹⁴⁶
- ◆ *rationae territoriae* (territorial);¹⁴⁷
- ◆ *rationae temporis* (temporal); or,¹⁴⁸
- ◆ *rationae materiae* (subject matter).¹⁴⁹

28. The legality of the Tribunal can also be subject to a jurisdictional challenge, however it is unlikely to succeed. In 1995, the first decision of the Appeals Chamber dismissed a challenge to jurisdiction.¹⁵⁰ The Appeals Chamber found that the ICTY was duly created as a legal institution, properly established by law by the UN Security Council under Chapter VII of the UN Charter.

D.2.2 Motions Alleging Defects in the Indictment

29. Alleged defects in the form of the indictment is a matter that is often raised as a preliminary motion by the accused. The indictment must:

- 1) describe with sufficient detail the acts, places, and times of the crimes charged;
- 2) identify the acts for which the accused is charged as a direct offender and those charges as a superior authority; and,
- 3) cite the relevant provisions of the ICTY Statute which describe the alleged criminal responsibility of the accused.

30. Factual questions, however, are a matter for determination at trial. A challenge to the form of the indictment cannot be used to argue that an indictment is defective because there is a disagreement between the parties concerning the facts.¹⁵¹ The accused have the right to notice of the nature of the charges which will be brought at trial. The Prosecution, therefore, must give the accused notice in a summary manner of the nature of the crimes charged and the factual basis for the accusations in the indictment so that the accused has sufficient information to enable him to begin to prepare a defence.

31. This means that the indictment must specify:

- 1) the identity of victims;



PRACTICE TIP

Counsel must consider whether it is to the advantage of the accused to file a motion alleging defects in the indictment. For example, it is important to have a clear understanding of the alleged subordinates of the accused when charged with superior authority pursuant to Article 7(3). In particular, in a case with multiple accused where each is charged as a participant in a joint criminal enterprise, an aider and abettor, and a superior authority, the identity of alleged direct perpetrators in specific charges in the indictment is important to understanding the case against each accused. On the other hand, certain “defects” in the indictment are better left alone. It may not be to the advantage of the accused to assist the Prosecution in improving its indictment by pointing out inconsistencies or vagueness in the allegations. These are matters which may be better raised and addressed for the first time at the end of the trial, during final submissions. They may indeed be aspects of the indictment which the Defence considers weak and the filing of a preliminary motion may only serve to alert the Prosecution to remedy that situation at trial.

¹⁴⁶ As indicated in Articles 1, 6, 7 and 9, ICTY Statute.

¹⁴⁷ As indicated in Articles 1, 8 and 9, ICTY Statute.

¹⁴⁸ As indicated in Articles 1, 8 and 9, ICTY Statute.

¹⁴⁹ As indicated in Articles 2, 3, 4, 5 and 7, ICTY Statute.

¹⁵⁰ See *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

¹⁵¹ See *Prosecutor v. Delalić et al.*, IT-96-21-PT, Decision on the Motion by the Accused Zejnil Delalić based on Defects in the Form of the Indictment, 2 October 1996.

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- 2) the places and approximate dates of the alleged crimes; and,
 - 3) the means used to perpetrate the crimes.¹⁵²
32. As noted earlier, the ICTY allows for cumulative charging, which means that an accused may be charged with two different crimes based on one act or omission.

D.2.3 Severance of Trials

33. The ICTY RPE relevant to the issue of separate trials must be interpreted in relation to the definition of “transaction” in Rule 2 and Rule 82(B). Rule 2 defines “transaction” as a “number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan”. The same transaction may be found to exist even where the alleged crimes of the relevant accused are different or are carried out in different geographical areas or over different periods of time, so long as there are other factual allegations in the indictment that are sufficient to support a finding that the alleged acts or omissions form a part of a common scheme, strategy or plan.¹⁵³ When co-accused are jointly charged in one indictment under Rule 48, with acts which are allegedly committed in the same transaction under Rule 2, a Trial Chamber may order the accused to be tried separately if one of two requirements of Rule 82(B) are fulfilled; namely, to avoid a conflict of interest that might cause serious prejudice to an accused at trial or to protect the interests of justice.
34. When deciding whether joinder is warranted, a Trial Chamber should consider and weigh the following factors:¹⁵⁴
- 1) protection of the rights of the accused pursuant to Article 21 of the ICTY Statute;
 - 2) avoidance of any conflict of interests that might cause serious prejudice to an accused;¹⁵⁵
 - 3) protection of the interests of justice.¹⁵⁶
35. In order to assess the interests of justice, a Trial Chamber may consider: avoiding the duplication of evidence, promoting judicial economy, minimizing hardship to witnesses and increasing the likelihood that they will be available to give evidence, and ensuring consistency of verdicts.¹⁵⁷

¹⁵² See *Prosecutor v. Blaškić*, IT-95-14-PT, Decision on the Form of the Indictment, 4 April 1997; and see *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgement, 21 July 2000.

¹⁵³ *Prosecutor v. Pandurević and Trbić*, IT-05-86-AR73.1, Decision on Vinko Pandurević’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 24 January 2006, para. 17.

¹⁵⁴ *Prosecutor v. Gotovina et al.*, IT-01-45-AR73.1; IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17; *Prosecutor v. Mico Stanišić and Stojan Župljanin*, IT-04-79-PT; IT-99-36/2-PT, Decision on Prosecution’s Motion for Joinder and for Leave to Consolidate and Amend Indictments, 23 September 2008, para. 25.

¹⁵⁵ *Prosecutor v. Brđanin and Talić*, IT-99-36-T, Decision on Prosecution’s Oral request for the Separation of Trials, 20 September 2002, citing *Prosecutor v. Simić et al.*, IT-95-9-PT, Decision on Defence Motion to Sever Defendant and Counts, 15 March 1999.

¹⁵⁶ *Prosecutor v. Gotovina et al.*, IT-01-45-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17; *Prosecutor v. Pandurević and Trbić*, IT-05-86-AR73.1, Decision on Vinko Pandurević’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 24 January 2006, para. 8; *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006, para. 8; *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, *Prosecutor v. Karadžić*, IT-08-91-PT, IT-95-5/18-PT, Decision on Stojan Župljanin’s Motion for Joinder, 6 January 2009, para. 7; *Prosecutor v. Stanišić*; *Prosecutor v. Stojan Župljanin*, IT-04-79-PT; IT-99-36/2-PT, Decision on Prosecution’s Motion for Joinder and for Leave to Consolidate and Amend Indictments, 23 September 2008, para. 26.

¹⁵⁷ *Prosecutor v. Gotovina et al.*, IT-03-73-AR73.1; IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 17; *Prosecutor v. Stanišić and Župljanin*; *Prosecutor v. Karadžić*, IT-08-91-PT; IT-95-5/18-PT, Decision on Stojan Župljanin’s Motion for Joinder, 6 January 2009, para. 7; *Prosecutor v. Mejakić et al.*, IT-95-4, Decision on the Prosecution’s Motion to Joint Trials, 14 April 2000; *Prosecutor v. Delalić et al.*, IT-92-21-T, Decision on the Motion by the Defendant Delalić Requesting Procedures for Final Determination of the Charges Against Him, 1 July 1998.

36. In other words, an important factor, with regard to the second prong of the test in Rule 82(B), is whether separate trials would result in multiple trials that would cause considerable delays, especially for the accused who are not tried first. Another factor is that separate trials require the judges to hear the same witnesses giving the same evidence more than once and on each occasion require the judges to try to consider the evidence with minds unaffected by their prior conclusions regarding that same evidence reached on the earlier occasions.¹⁵⁸
37. According to the ICTY jurisprudence, the possibility of “mutually antagonistic defences” among co-accused does not constitute a conflict of interest capable of causing serious prejudice to an accused within the meaning of Rule 82(B).¹⁵⁹ However, in *Kovačević*, the Trial Chamber denied a Prosecution motion for joinder citing this ground. One of the accused was charged with a different crime which would require the introduction of different evidence at trial. The Trial Chamber ruled that concurrent presentation of evidence against all four accused would lead to a conflict of interest in their defence strategies, which would substantially prejudice the accused right to a fair trial.¹⁶⁰ In *Delalić et al.*, a Defence motion for separate trials was denied. In a trial with four accused, one accused was charged with superior authority, while other co-accused were charged with direct perpetration of crimes. The Trial Chamber found that the presentation of evidence against the direct perpetrators would not result in serious prejudice to the accused charged as a superior authority on the basis that “[t]here is no provision in the Rules for separate trial of distinct issues arising in one indictment.”¹⁶¹ Moreover, the fact that one accused is a member of the military forces and his co-accused are members of the civilian authorities, does not constitute a conflict of interest.¹⁶²
38. Finally, in the *Dokmanović* case the accused was indicted together with three co-accused. However, none of the three co-accused was in the custody of the ICTY. The Trial Chamber ordered that *Dokmanović* be tried separately from the three co-accused in order to protect his right to be tried without undue delay.¹⁶³

D.2.4 Other Requests

39. Submission of other requests pursuant to ICTY RPE 54 *bis* allows the Defence, during the pre-trial stage, to investigate other factual issues that are important for the Defence and for trial preparation.

D.2.4.1 Requests for Access to Confidential Material from Other Cases

40. An accused is entitled to seek material from any source to assist in the preparation of his case, provided that the material sought has been identified or described by its general nature and that a legitimate forensic purpose for such access has been shown.¹⁶⁴ The relevance of the material sought by an accused may be determined by showing the existence of a nexus between the accused’s case and the case from which such

158 See *Prosecutor v. Delalić et al.*, IT-96-21-PT, Decision on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 25 September 1996.

159 *Prosecutor v. Simić et al.* IT-95-9-PT, Decision on Defence Motion to Sever Defendants and Counts, 15 March 1999.

160 *Prosecutor v. Kovačević et al.*, IT-97-24-AR73, Decision on the Motion for Joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998, para. 4a.

161 *Prosecutor v. Delalić et al.*, IT-96-21, Decision on Motions for Separate Trial filed by the Accused Zejnil Delalić and the Accused Zdravko Mucić, 25 September 1996, para. 2.

162 *Prosecutor v. Brđanin et al.*, IT-99-36, Decision on Motions by Momir Talić for a Separate Trial and for Leave to File a Reply, 9 March 2000, paras. 23-29.

163 *Prosecutor v. Gotovina et al.* IT-03-73-AR73.1; IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder, 25 October 2006, para. 45; and *Prosecutor v. Dokmanović*, IT-95-13a, Decision of Trial Chamber II Concerning Separation of Trials, 28 November 1997.

164 *Prosecutor v. Blaškić*, IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s request for assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcript Filed in the *Prosecutor v. Tihomir Blaškić* case, 16

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material is sought.¹⁶⁵ The accused must show that the material sought is likely to be of assistance to his case or that there is at least a good chance that it may assist the defence of the accused.¹⁶⁶ The existence of a nexus between the two cases can be shown if the cases arise from the same charges or stem from events alleged to have occurred in the same geographical area and at the same time.¹⁶⁷

D.2.4.2 *Requests to Issue Binding Orders to States, International Organizations or Bodies*

41. Pursuant to Article 29 of the ICTY Statute, States are required to cooperate and provide judicial assistance to the Tribunal. Under Rule 54 *bis*, the Defence may seek an order to direct the States to produce relevant documentation. Such requests, called a request for a binding order, must set out why the requested documents are deemed relevant and necessary for the accused's trial.¹⁶⁸ The relevance and necessity requirements serve the purpose of shielding States from requests which will not result in useful information for the party or the Trial Chamber. Moreover, the party seeking an order that a State produce documents or information must "explain the steps that have been taken by the applicant to secure the State's assistance."¹⁶⁹
42. If a State, an international organization or an NGO objects that legitimate security interests are implicated by the document or information being sought, the Trial Chamber may provide for the document in question to be produced by the State under appropriate conditions to protect its interests.¹⁷⁰ However, States are not allowed to simply claim generalized national security interests to withhold documents and other evidentiary material requested by the Tribunal.¹⁷¹

D.2.4.3 *Provisional Release of the Accused*

43. Another motion that consistently is brought by the Defence during the pre-trial and, less often, during the trial phase is a motion for the provisional release of the accused. The release of the accused during the pre-trial phase in particular is consistent with the presumption of innocence and is important to enable the accused to participate in the proper and adequate defence preparation and case conduct.
44. Article 9 (3) of the International Covenant on Civil and Political Rights (ICCPR) provides that it "shall not be the general rule that persons awaiting trial shall be detained in custody". However, the Rules at the ICTY envisage the detention of the accused as an automatic consequence of his arrest. Pursuant to Rule 65, an accused who is in the custody of the Tribunal, may apply for provisional release, however. In doing so, the accused must show:
 - 1) that he is not a flight risk; and,
 - 2) that he will not pose a danger to any victim, witness or other person.

May 2002, para. 14.

165 *Ibid.*, para. 15.

166 *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, page 3.

167 *Prosecutor v. Vujadin Popović et al.*, IT-05-88-PT, Decision on Applicant's Motion seeking access to confidential material in the Miletić et al. Case No. IT-05-88-PT, page 3.

168 *Prosecutor v. Blaškić*, IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997, 23 March 2006, para. 32; *Prosecutor v. Milutinović et. al.*, IT-05-87-PT, Decision on Second Application by Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54 *bis*, 17 November 2005, para. 19.

169 Rule 54 *bis* (A) (iii), ICTY RPE.

170 Rule 54 *bis* (F) (G) (I), ICTY RPE.

171 See *Prosecutor v. Blaškić*, IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997; and see Chapter IV "Defence Investigations", Section G. for a further discussion on binding orders directed to states, NGOs and international organizations.

45. Even if these two criteria are satisfied, a Trial Chamber still retains discretion to deny a request for provisional release. Factors relevant to granting of provisional release include, but are not limited to:
- ◆ the seriousness of the offence;
 - ◆ the likelihood of a long prison term upon conviction;
 - ◆ security guarantees made by the country to which the accused is requesting release;
 - ◆ cooperation, if any, by the accused with the Prosecution;
 - ◆ whether the accused voluntarily surrendered to the Tribunal;
 - ◆ the conduct of the accused while in detention;
 - ◆ the senior position of the accused in government;
 - ◆ the existence of national legislation concerning cooperation with the Tribunal.
46. Even though exceptional circumstances are not necessary to be granted provisional release, humanitarian grounds, such as very serious health conditions or to attend the funeral of a close relative can be a the basis for granting provisional release. However, in cases where the application for provisional release is done at a late stage of proceedings, the jurisprudence at the ICTY indicates that the application will only be granted “when serious and sufficiently humanitarian reason exist.”¹⁷²

D.3 Analysis of the Evidence Related to the Indictment and Other Evidence Provided by the Prosecution

47. The Defence must always keep in mind that the burden of proof lies entirely with the Prosecution. The guilt of the accused must be proven beyond a reasonable doubt by the Prosecution. Indeed, the accused is not required to prove anything. He or she is not required to say anything, ask any question to Prosecution witness, or call any Defence evidence.
48. In addition, pursuant to Rule 98 *bis*,¹⁷³ the accused may, at the close of the Prosecution case, request that the Trial Chamber enter a judgement of acquittal on any count in the indictment, if there is no evidence capable of supporting a conviction. The standard to be applied at this phase of the proceedings is not whether the trier of fact would arrive at a conviction beyond a reasonable doubt based on the Prosecution evidence if accepted, but whether it could do so as a matter of law. This requires the Chamber to give full credence to the evidence presented by the Prosecution unless such evidence is incapable of belief.¹⁷⁴ Although the burden of proof required at the Rule 98 *bis* stage of a trial is lower than the proof beyond a reasonable doubt standard used to determine guilt or innocence at the end of the trial, the Defence must analyse all potential evidence related to the indictment in this light when developing a case theory and defence strategy.
49. Practice indicates that in preparation for the trial the Defence must always be in communication with the Prosecution and request that the Prosecution fulfils its obligation of timely disclosure, translation of

172 *Prosecutor v. Prlić et al.*, IT-04-74-AR-65.7, Decision on “Prosecution Appeal from Décision relative à la demande de remise en liberté provisoire de l’accusé Petkovic dated 31 March 2008”, 21 April 2008, para. 17; but See *Prosecutor v. Prlić et al.*, IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Décision relative à la demande de mise en liberté provisoire de l’accusé Pusić” Issued on 14 April 2008, 23 April 2008, para. 15. See also *Prosecutor v. Stanišić and Župljanin*, Decision on Mico Stanišić’s Appeal against Decision on his Motion for Provisional Release, Separate Opinion of Judge Patrick Robinson, 11 May 2011.

173 See, Chapter I “Burden of Proof and Presumption of Innocence”, Section G. for an explanation of the Motion for Acquittal Pursuant to Rule 98 *bis*.

174 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 434; *Prosecutor v. Kunarac et al.*, IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000 paras. 2,3, 10; *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, paras. 37, 55; *Prosecutor v. Brdanin*, IT-99-36-T, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004, paras. 6, 7.

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- evidentiary documents and provision of all relevant information to the Defence. Of special importance to the Defence is its ability to timely familiarize itself with all the evidence - both inculpatory and exculpatory.
50. Pursuant to Rule 68, the Prosecution has a duty to disclose exculpatory and other material to the accused. Rule 68(i) specifies that the Prosecution must disclose material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. This obligation to disclose is a continuing one, which must be fulfilled in the pre-trial and trial phases and extends to the post-trial stage, including appeals.¹⁷⁵
51. Disclosure from the Prosecution begins within thirty days of the initial appearance of the accused, when the accused enters a plea of guilty or not guilty. Pursuant to Rule 66(A)(i), the accused must receive copies of the “supporting material” which accompanied the indictment when confirmation was sought¹⁷⁶ as well as all statements obtained by the Prosecution from the accused.¹⁷⁷ This is followed by more extensive and ultimately full disclosure pursuant to Rule 66(A)(ii) and Rule 65 *ter*. The Trial Chamber or the Pre-Trial Judge prescribes a deadline by which the Prosecution must disclose all statements and material (*i.e.* exhibits) which the Prosecution intends to rely upon at trial. Additionally, pursuant to Rule 65 *ter* (E), the Prosecution must prepare a pre-trial brief which sets out:
- 1) the Prosecution case in detail;
 - 2) a summary of the evidence the Prosecution intends to present at trial;
 - 3) the name or pseudonym of each witness;
 - 4) a summary of facts on which each witness will testify, and,
 - 5) a list of exhibits.
52. It should be noted that the Chamber or the Pre-Trial Judge may order that a preliminary pre-trial brief be prepared by the Prosecution, with a “final version” required not less than six weeks before the Pre-Trial Conference. It is a matter of discretion and trial management when the Trial Chamber or Pre-Trial Judge issues such orders, but the Defence should request the Prosecution pre-trial brief as early as possible.
53. In addition, pursuant to Rule 66(B), the Defence may request inspections of any books, documents, photographs and tangible objects in the Prosecution’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecution as evidence at trial or were obtained from or belonged to the accused. The Defence must make a sufficiently specific request for this material. Careful drafting of a request under Rule 66(B) is essential and it must specifically identify the items sought, demonstrate *prima facie* that the requested items are material to the preparation of the defence and that the requested items are in the custody and control of the Prosecution.¹⁷⁸ A request under Rule 66(B) is *inter partes* between the Defence and the Prosecution. The Trial Chamber will only become involved under Rule 66(B), if the Defence believes that the Prosecution is failing to comply with a request without justification.¹⁷⁹

175 See *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Appellant’s Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials, 7 December 2004; *Prosecutor v. Kordić and Čerkez*, IT-65-14/2-A, Decision on Appellant’s Notice and Supplemental Notice of Prosecution’s Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 17; *Prosecutor v. Bralo*, IT-95-17-A, Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material 30 August 2006, para. 29.

176 Rule 47, ICTY RPE.

177 See, for example, Rule 42 and Rule 43, ICTY RPE. Although, pursuant to Rule 66(A)(i), the Prosecution must disclose “all” prior statements obtained by the Prosecutor from the accused not just those given by the accused to the Prosecution.

178 *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, para. 10.

54. In addition, pursuant to Rule 68(ii), an Electronic Disclosure System (EDS) was instituted at the ICTY which provides the Defence access via the internet to evidentiary materials in electronic format collected by the Prosecution. This is an important means for the Defence to conduct its own independent research into matters for preparation of the case.
55. Rule 68 *bis* provides that sanctions may be imposed on a party who fails to perform its disclosure obligations pursuant to the rules. These matters are dealt with on a case by case basis. Depending on the severity and frequency of the violations, the remedy may vary from ordering an adjournment to allow the aggrieved party time to review the information to declaring a mistrial in the case of repeated, blatant, and intentional violations of the disclosure rules, though this remedy has never been invoked at the ICTY.
56. The Prosecution's duty to disclose may be limited under Rule 66(C) and Rule 70. Pursuant to Rule 66(C), the Prosecution may apply *in camera* to the Trial Chamber for relief from disclosing to the accused information that:
 - ◆ may prejudice further or ongoing investigations; or
 - ◆ for any other reasons may be contrary to the public interest; or,
 - ◆ affect the security interests of any State.
57. The Prosecution is required to provide this information to the Trial Chamber when making this application. It is important to note that the *in camera* procedure is done *ex parte*, so the accused not only is not present, he is not informed that the Prosecution has made the request. In fact, pursuant to Rule 70, the Prosecution is not required to disclose information to the accused which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence. This information cannot be disclosed to the accused without the prior consent of the provider. This provision overrides the disclosure obligations under Rules 66, 67, and 68. There is no judicial review concerning non-disclosure similar to the procedure under Rule 66(C). Indeed, under the terms of Rule 70, the Prosecution may not inform anyone, including the Trial Chamber, that it has obtained information confidentially. Pursuant to Rule 70(B), this information is to be used "solely for the purpose of generating new evidence". However, if the Prosecution is allowed by the provider to introduce the initial information into evidence, its admission is subject to Rule 70(C)(D)(E)(G). The powers of the Trial Chamber to order additional evidence, to require the attendance of a witness, or to compel a "Rule 70" witness to answer questions are limited.¹⁸⁰ The Trial Chamber always retains the discretion, however, to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.¹⁸¹
58. The Defence may also use the provisions of Rule 70. However, contrary to the Prosecution, the Defence is required to apply under Rule 70(F) for an order in relation to specific information in the possession of the accused, which is decided on a case-by-case basis by a Trial Chamber in the interests of justice.
59. Careful and proper use of the rules governing disclosure can greatly assist the Defence in understanding the theory of the Prosecution case and the development of the Defence theory of its case. With the disclosure of the witness statements from the Prosecution, and other material, serious and methodical defence investigations, and the early filing of the Prosecution Pre-Trial Brief, the Defence can effectively use the EDS,

179 See *Prosecutor v. Boškoski et al.*, IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008.

180 See also the discussion of Rule 70 and limits on the cross-examination of Rule 70 witnesses in Chapter 7, "Witnesses".

181 See, for example, *Prosecutor v. Milutinović et al.*, IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65ter list, 20 April 2007.

III. Developing a Case Theory and a Defence Strategy

Rule 54 *bis* requests, Rule 66(B) requests, and Rule 68 exculpatory material to build a defence. This requires, as described above, a well-organised Defence team and constant supervision and review by counsel.

60. Despite the above-mentioned framework for disclosure and in particular the rules pertaining to time limits for disclosure which are set by the Trial Chambers and the Pre-Trial Judge, disclosure of material under Rule 66(A) (ii) frequently continues on a regular basis during the pre-trial and trial phases of proceedings. It is also often the case that Rule 68 material is disclosed late; just prior to the testimony of a Prosecution witness, or sometimes, just after the witness has finished testifying. In general the only remedy that the Trial Chambers grants the Defence is an adjournment to review the material or to recall a witness for further examination after review of the material disclosed in an untimely matter. The real prejudice for the accused is the number of times the disclosure rules are violated and the cumulative effect of those violations on a fair trial. These violations must be made a part of the record by oral or written application in order to preserve the point for the appeal process.

D.4 Notifying the Prosecution About a Special Defence

61. If the Defence theory of its case is that the accused has an alibi in relation to the crimes concerned, or diminished or lack of mental capacity, the Defence must inform the Prosecution, prior to trial and prior to the presentation of the Prosecution case, of its intention to present such a defence.¹⁸²
62. Pursuant to Rule 67(A), notice of alibi should be provided as soon as practicable so that the Prosecution can investigate the alibi and present relevant evidence in its case-in-chief if need be.¹⁸³ The Notice must provide a certain degree of specificity, *i.e.* the claimed whereabouts of the accused at the relevant time,¹⁸⁴ but it need not include the addresses of alibi witnesses at the time of the event.¹⁸⁵ The Prosecution bears the burden of eliminating any reasonable possibility that the evidence of alibi is true.¹⁸⁶ The finding that an alibi is false does not itself establish the opposite of what it asserts. The Prosecution must not only rebut the validity of the alibi, but also establish beyond reasonable doubt the guilt of the accused.¹⁸⁷

D.5 Formulating the Investigation Plan and Method

63. The Defence should formulate an investigation plan as early as it can, based upon its understanding of the case. Using this plan, the investigation will attempt to answer basic questions relevant to the case by gathering credible and reliable evidence. The investigators should be given clearly formulated investigative areas to pursue, and these should be further clarified as necessary as information is gathered and analysed. The Defence, if it wishes to attain the desired results, must give proper guidance, follow the course of the investigation, analyse the results obtained and if necessary, amend the investigation plan.¹⁸⁸

182 For additional discussion of special defences, see Chapter II “Affirmative Defences in International Criminal Trials”.

183 See *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Prosecution’s Motion Pursuant to Rule 67(A)(1)(a), 16 February 2005.

184 See *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-PT, Decision on the Prosecution’s Motion for an Order Requiring the Accused Sredoje Lukić to Clarify Alibi Notice, 15 May 2008.

185 *Ibid.*, para. 11.

186 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11; and *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgement, 27 September 2007, para. 63.

187 *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 11.

188 A more detailed discussion on investigation plan and method is contained in Chapter IV “Defence investigations”, Section B. “Creating an investigative plan”.

Conclusion

64. Nothing is more important in a criminal case than case preparation. This chapter examined some of the essential steps counsel can take when they begin to develop a case theory and defence strategy when representing an accused charged with war crimes, crimes against humanity and genocide. Preparing a defence to these kinds of criminal cases presents many challenges both legal and logistic. Counsel must understand the large and growing body of law and jurisprudence in the international criminal law courts. In what can be very complex cases, counsel representing individuals charged with international criminal offences must organise a defence team and begin work analysing material relevant to the case with the assistance and input of the accused and members of the Defence team. A crucial part of this work requires counsel to learn about and to use all legal and procedural mechanisms which are available to obtain information relevant to and supportive of the Defence theory of its case.

IV. Defence Investigations

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1. Once the Defence sets up its theory of the case and determines how to present it at trial, it must identify the appropriate means to achieve such a task. This necessarily includes a thorough investigation conducted by the Defence team. Practically speaking the Defence always has relatively limited resources for its investigations compared to the ICTY Office of the Prosecutor (ICTY OTP). Regardless of that limitation, the Defence investigation is an important part of case preparation. This chapter explains the overall process of Defence investigations including: planning, selection of investigators, tasks, methods and resources used for this important part of case preparation.*
2. In adversarial systems the Defence is usually obliged to conduct investigations on its own. Most countries provide for certain mechanisms to assist the Defence in obtaining documents and contacting potential witnesses. Nonetheless, in many cases the Defence will come across various obstacles. The purpose of this chapter is to assist Defence counsel in learning creative ways in which to overcome these obstacles and to discuss ways in which to perform investigations in the most efficient manner.
3. Legal reforms in the countries of the former Yugoslavia have been undertaken with the aim of introducing aspects of the adversarial system into criminal proceedings conducted in the region.¹⁸⁹ They include the Defence conducting its own investigation of the accused's case. One of the most significant aspects of defence preparations during such investigations is obtaining exculpatory evidence and making contact with witnesses who can provide relevant testimony in support of the Defence case. The ICTY has extensive regulations and jurisprudence on the right of the Defence to disclosure and provides for certain assistance to the Defence in contacting witnesses,¹⁹⁰ which will be discussed in further sections of this chapter.

* Chapter co-authored by Slobodan M. Zečević and Tatjana Savić. Slobodan M. Zečević, LL.B, LL.M, Attorney at Law, Belgrade Bar since 1981, Managing partner of Zečević & Lukić Law offices, Belgrade, Serbia, current President of ADC-ICTY, Defence counsel at the ICTY on the cases of Milan Simić (*Šamac* case), Gen. Momir Talić (*Krajina* case), Miroslav Deronjić (*Bratunac* case), Milan Milutinović (*Kosovo* case) and Mićo Stanišić (*Stanišić & Župljanin* case). Tatjana Savić, attorney-at-law practising in Bijeljina, Bosnia and Herzegovina, ICTY Defence assistant in *Miroslav Deronjić* case; ICTY Defence legal assistant and case manager in *Miće Stanišić* case.

189 See, e.g., Article 50(1) of the Criminal Procedure Code of BiH, which reads: "The defence attorney in representing a suspect or an accused must take all necessary steps aimed at establishment of facts and collection of evidence in favour of the suspect or accused as well as protection of his rights."

190 See Rule 54, ICTY RPE, which provides: "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

A. Identifying and Hiring Investigators

4. As mentioned at the beginning of this chapter, Defence resources for investigation purposes are relatively limited. This fact requires thorough planning of the investigation process by the Defence so as to maximize the use of the limited resources which are available.
5. In general, the main elements to be considered when planning an investigation are:
 - ◆ determining the primary focus of the Defence investigation including the gathering of documents and identifying potential witnesses;
 - ◆ ascertaining the territory where the likelihood of finding either documents or witnesses is the greatest;
 - ◆ assessing the means available for gathering of the documents or location of potential witnesses; and,
 - ◆ realistically identifying which investigators are most suitable to achieve the desired result.
6. When the Defence has a clear idea of what needs to be achieved during its investigation, it must then embark on the very sensitive and important task of finding an investigator. The basic requirements for investigators are that he must have a working knowledge of the statutory elements of the crimes and basic investigative techniques.
7. In some countries, investigators have licences to perform this type of work. Where a list of licensed investigators can be obtained, it makes selection of a qualified investigator much easier. Where such a list is not available and Defence counsel has no prior experience in working with investigators, it is advisable to consult with other colleagues who have worked with investigators in order to get their recommendations.
8. The person hiring an investigator must perform certain “investigations” on the investigator himself. It is necessary to check the investigator’s background, professional qualifications and work results, where available. After a short list of candidates is made, it is necessary to interview all potential investigators in order to make the final decision as to whom to hire.
9. There are three main categories of investigators:
 - ◆ *Private investigators* - In a perfect case, the Defence team would be able to hire professional investigators to conduct the investigation on behalf of the Defence. This may often be a problem due to a lack of resources and the fact that private investigators are scarce in the region of the former Yugoslavia. In war crimes cases, the investigator must have at least a basic knowledge of international humanitarian law. Trials for international crimes are rather new to the region, however, and few people have experience in this field. This problem can be overcome by providing the investigator with very specific tasks outlining in detail what the charges in the indictment are and what is expected to be the outcome of the investigation; that is, what kind of documents to search for and the specific facts to pursue when questioning potential witnesses.
 - ◆ *Professionals from the respective field* - If unable to hire private investigators, the Defence can opt for professionals who have substantial knowledge in the field that is to be investigated (former police officers, former members of the military). Experienced private investigators usually have useful connections and have established ways to conduct investigations which are efficient. On the other hand, professionals from their respective fields may have better knowledge on the topic they are asked to investigate and the final result of the investigation may be more useful.
 - ◆ *Member of the Defence team* - In Defence investigations it will often be counsel who must conduct investigations themselves due to a lack of resources. When this is the case counsel should always be

accompanied by a third party, particularly when questioning witnesses, so that, depending on the outcome of the investigation, counsel does not inadvertently put himself in the position of being a witness to the matters investigated at the subsequent trial.

10. A major problem for counsel is obtaining sufficient funds for the remuneration of the investigator for his work. In the case of private investigators, one can be faced with the problem of the investigator's previous obligations for other clients, or new clients appearing in the course of defence investigation, which may undermine the achievement of the results or time line set. Professionals from respective fields are in this respect preferable as usually they are involved in only the case at hand and can devote full time to conduct any requested investigation. At the ICTY money paid for investigative work is set by directives which provide for specific, and often inadequate, remuneration for the work of investigators on ICTY cases.¹⁹¹
11. It is always preferable to assign a member of the defence team to participate in the investigation as they will be informed about the particulars of the case. It is also important to have an experienced member of the team with legal background present during the contacts with potential witnesses to avoid any later allegations of perceived witness intimidation or any other accusation of improprieties.¹⁹²

B. Creating an Investigative Plan

12. The first step in an effective investigation is to develop a plan.¹⁹³ The investigation plan then becomes a framework that can be used throughout the investigation to focus each subsequent step. Although each case has its own particulars and each investigation will be different from any other, the investigation team should engage in basic planning to determine the scope and focus of its investigative effort, to allocate resources effectively, and to obtain useful evidence.
13. The outline of the investigative plan should include:
 - ◆ Allegations: Brief outline of allegations in the indictment for the investigator's reference, such as the scope and gravity of the crime, the number of victims, the length of the attack and the extent of the destruction; the role of the accused, especially his position in the political and military hierarchy, the scope of authority and the accused's alleged involvement in the commission of the criminal act as set out in the indictment. If the accused is a superior (under Article 7(3) of the Statute), the defence must investigate the basis of the crime and the issues relating to the direct perpetrators, because the responsibility of the accused depends on the answers to those questions;
 - ◆ Topics: A list of main topics so as to focus the investigation on certain type of documents (documents from certain authorities/organs; documents with certain topics of interest; specific recipient of the documents; time span etc.). The main topics to be discussed with the potential witnesses (witness's role at the time, status; first hand knowledge/hearsay, etc.);
 - ◆ Background: General background information of the case for the investigators;

191 Defence Counsel - Pre-Trial Legal Aid Policy, available at <http://www.icty.org/sid/169>.

192 *Prosecutor v. Brđanin*, IT-99-36-R77, Milka Maglov contempt case, Decision on Motion by *Amicus Curiae* Prosecutor to Amend Allegations of Contempt of the Tribunal, 6 February 2004 ; *Prosecutor v. Blagoje Simić et al.*, IT-95-9-R77, Avramović and Simić contempt case, Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

193 See also Chapter III "Defence Strategy", Section D.5. "Formulating an investigative plan".

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- ◆ Existing evidence (documents, witnesses): Overview and summary on certain topics/allegations by groups of witnesses and/or groups of documents;
- ◆ Potential evidence list: List of potential witnesses to be located and interviewed. List of potential documents with general outline of expected content to be found in these documents or the authority that issued the document;
- ◆ Contacts: Institutions and agencies that can provide required documents and contact with potential witnesses;
- ◆ Issues to be discussed with each witness: Clear instructions and outline of questions and interview plan;
- ◆ Administrative matters checklist: If necessary, notification of the Prosecution; notification of respective institutions about interviewing their employees, etc.;
- ◆ Travel plan/ itinerary; and,
- ◆ Progress report deadlines: List of dates when progress reports must be submitted. This is essential for counsel control of the investigation process.

C. Considerations Regarding Use of Resources

14. Sufficient resources are necessary in order to conduct a thorough investigation. Since Defence teams generally must function with very limited resources and time constraints detailed planning on how to conduct investigations without putting an unnecessary burden on those scarce resources is crucial for a successful investigation. It is in the interests of all members of the Defence team to work together to focus investigations on the key issues, to examine the evidence pertaining to those issues and to seek early resolutions.
15. In this regard, Defence counsel should:
 - ◆ Identify priorities (focus on charges where the Prosecution's case seems to be the strongest). Prior to starting its own investigation, the Defence needs to thoroughly review the indictment and material supporting the indictment, including all documents and witness statements provided by the Prosecution. In the process of that review, the Defence needs to identify what counts of the indictment seem to be supported by the most credible and probative evidence and to focus on identifying evidence that could sufficiently challenge that Prosecution's evidence;
 - ◆ Identify documents that can be obtained through third parties (disclosure from the Prosecution or through cooperation with state institutions or other means without using manpower to avoid travel costs);
 - ◆ Identify limited information requests that are able to be accomplished without using many resources. Saving time and resources is very important for the Defence. The Defence must evaluate what is the most efficient and cost-effective way of obtaining evidence and conducting investigation. For example, if the Defence is aware of the existence of a certain document and what institution it can be obtained from, a written request to that institution is preferred over sending an investigator to review their archives;
 - ◆ Determine reliable sources of information. Throughout the preparation phase, the Defence must make sure that the most credible evidence is chosen. For example, the Defence will probably be able to find several witnesses that can discuss the same topic. Before spending time and manpower in interviewing all the witnesses, the Defence must determine who are the most credible witnesses that the Trial Chamber is likely to believe and whose credibility is likely not to be diminished during the cross-examination;

- ◆ Consider telephone interviews and interviews via the internet. Video allows the Defence to get the impression of the demeanour of a witness when giving testimony. It can be effectively used for updates from investigators and other members of defence team, which is cost effective as it saves resources for travel.
 - ◆ Put in place an efficient management system of obtained evidence. In cases involving war crimes, crimes against humanity and genocide, it is likely that the amount of evidence provided by the Prosecution and gathered by the Defence will be overwhelming. Efficient management of evidence can significantly reduce the time necessary for preparation of the Defence case. All evidence obtained must be sorted by topic and by the witness the Defence plans to tender it through. Creating a time line of available evidence will be useful in identifying documents at a later stage of the proceedings.
 - ◆ Perform periodic review and discussions. The Defence team must periodically review the progress of investigations and determine future plans and tasks for each of the team members. Defence meetings for review of the progress and analysis of gathered documents are essential for case preparation as well as effective use of resources.
 - ◆ Avoid overlapping. Any overlapping of work is a waste of precious time. Each member of the Defence team must have specific tasks making sure that they do not overlap. In reality, various sources may result in obtaining the same or similar information. Timely coordination and periodic discussion of the investigation progress between team members will diminish the chances of or prevent overlapping.
 - ◆ Make use of technology to conserve resources, mixing innovative and traditional investigative tools.
16. Careful planning, taking into consideration all of the aforementioned priorities, should lead to a successful investigation, resulting in the most probative and relevant documents being collected as well as in the selection of the most credible witnesses. It is crucial that thorough investigation is conducted in the pre-trial phase and that further investigation is limited to new issues that arise during the trial.
17. Properly conducted investigation in the pre-trial phase enables Defence counsel not only to successfully challenge evidence tendered by the Prosecution but also to present the defence case theory, whenever possible, during the Prosecution's phase of the trial.

D. Interviewing Witnesses and Obtaining Statements

18. Preparation is the key to a successful witness interview. Defence counsel have to prepare an interview plan, consider the place of the interview, study the various interview process and seek whether or not it is advisable to interview the Prosecution witnesses.

D.1 Interview Plan

19. The Interview Plan lists the witnesses the Defence team plans to interview, the order of the interviews, the issues to be discussed, and the questions that need to be asked. It is likely that information can be obtained from several witnesses. As a part of the interview plan, the Defence must determine who are the most credible witness that can provide the most accurate account of events. After selection of witnesses is made, an interview plan for each of the witnesses needs to be prepared. Interviewers must consider different interview approaches depending on the type of witness he is to interview. The Interview Plan should include:
- ◆ basic information about the witness: name, address, phone number, occupation;
 - ◆ comments about the witnesses: e.g. friendly, neutral, hostile;

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- ◆ type of witness: victim, eyewitness, character witness;
 - ◆ tentative questions for each witness: generally start with open-ended, general questions leading to more specific inquiries. The interviewer needs to decide whether to write down all specific questions he wants to ask the witness or just a general outline of topics to be discussed with the witness. Writing down specific questions may be desirable if some technical issues are to be discussed with the witness. In all other cases, a general outline is preferred as it prevents the interviewer from focusing on reading the questions instead of on the answers provided by the witness or failing to ask follow-up questions that can clarify given answers;
 - ◆ a list of documents expected to be obtained from the witness;
 - ◆ a list of documents the Defence intends to show to each witness; and,
 - ◆ a list of questions/issues to be covered during the interview.
20. Prior to interviewing a witness, an investigator needs to obtain all relevant information about the witness. If the witness has been interviewed by the police or Prosecution, review of his previous statements is essential in preparation for the interview. The investigator should never assume that the information contained within previous witness statements is completely accurate, especially if the statement is not signed. Very frequently, these statements have been reduced to what the previous interviewer found to be “essential information”.

D.2 Place of Interview

21. The choice of venue may be important for the interview. If necessary and available, the crime scene is the best place to interview witnesses that can provide information about concrete crimes, especially if eyewitnesses are being interviewed. In any case, the investigator should try to interview a witness outside his home or work place, unless the witness insists otherwise.

D.3 Interview Process

22. The interview should start with a full introduction of the investigator to the witness and a short explanation of the purpose of the interview. The information given to the witness should be limited to the minimum necessary in order to avoid influencing the statement. The witness should be asked to introduce himself with basic information (date and place of birth, address, occupation, brief history).
23. Throughout the course of the interview, the investigator must remain professional and treat the witness with respect, no matter what they claim in their statements. The investigator should never give false information to the witness. Special attention is to be paid to interviewing victims of a crime. The investigator should find a proper balance between the need to extract as much information as possible and the need to avoid upsetting the witness by making him or her relive the past trauma. The witness should be given an opportunity to speak freely with as little interruption as possible. A witness should be interrupted with questions only when it is necessary to clarify his statement. Witnesses are often unable to determine what is important and relevant for the investigation. The investigator should politely try to focus the witnesses' statement and let them talk about irrelevant issues only if it seems extremely important to the witness and to further the course of the interview.
24. The investigator should pay attention to non-verbal communication. During the interview, the investigator must assess:
- ◆ bias;
 - ◆ personal interest in the case;

- ◆ frankness, attitude towards the accused; and,
 - ◆ anything else that could potentially impact the credibility of the witness.
25. All observations by the investigator should be entered into a witness evaluation sheet shortly after the interview. The witness' demeanour may influence the legal team's decision about calling the witness to testify before the court.

D.4 Interviewing Technique

26. The investigator may decide to ask a witness to write down a statement and ask follow-up questions later on. This makes the witness more comfortable and saves time for the investigator. However, the investigator is deprived of the ability to control the information entered into the statement and the opportunity to streamline the witness' statement.
27. Defence counsel and investigators should opt for interview over interrogation technique. Interviews are cooperative, informal meetings where the interviewer approaches the witness as an equal and encourages their cooperation, allowing him to talk without interruption or intimidation. By contrast, "interrogation" implies questioning on a formal or authoritative level.
28. Interviews should not be done by more than two interviewers. One-on-one interviews make witnesses more comfortable as it gives an impression of a conversation rather than interrogation. The presence of two interviewers is desirable if the interview is not tape recorded or filmed where one can take notes and intervene only if something is omitted by the main interviewer. Using two interviewers will minimise the likelihood that the investigator and the witness will disagree as to what happened during the interview after it is completed. The investigators may also decide to switch roles as topics change.
29. At the end of the interview the interviewer can ask the witness to sign his statement. This is not an obligation, however, by signing a statement the witness confirms that the information contained therein is truthful and to the best of his knowledge, which may be important in the course of the trial. This is specifically important if the witness changes his testimony, as it permits the witness to be confronted with the previous statement and asked to explain the reasons as to why he changed his testimony.

D.5 Interview of Prosecution Witnesses

30. Interviewing Prosecution witnesses is recommended whenever the witness agrees to be interviewed by the Defence. By conducting such interviews the Defence gets a much better picture of what the witness will testify to in court. In addition and perhaps more importantly, it provides the Defence with the opportunity to analyse the witness, his demeanour and choose the appropriate strategy for approaching the witness during cross-examination.
31. While interviewing Prosecution witnesses, the Defence sometimes happens to find that the witness for the opposing party might reinforce the defence theory of the case. Namely, it is a common situation that the Prosecution follows an interrogatory approach when interviewing witnesses. Due to such approach the witness is concentrated on questions posed by the Prosecution, instead of telling his whole story. This usually creates a significant one-sided approach during the interview and a number of issues may remain unexplored by the Prosecution. When however the witness is given the opportunity to speak in a relaxed manner and explain his views on certain issues, it is often the case that the witness testimony might be beneficial for the Defence theory of the case. It goes without saying that such an opportunity should not be missed.

E. Identifying and Working with Expert Witnesses

32. Defending a case involving international crimes before the ICTY or any other tribunal is a very complex task. One of the major problems that the parties are faced with at the ICTY is the specialized knowledge relevant for the case, tried before international judges. This is the case, for example, with the constitutional and legal system of the former Yugoslavia, its military or police structure is at issue, which requires specialized expert knowledge.
33. The ICTY RPE regulates expert testimony in Rule 94 *bis*.¹⁹⁴ The decision of the Defence team certainly is dependent on the specifics of the case and the Defence theory of the case. Identifying expert witnesses is a very complicated task. Since the subject is also addressed in other parts of this Manual,¹⁹⁵ the most important qualifications and conditions required for an expert witness will be listed here with brief explanation on each of them:
- ◆ Knowledge: An expert must possess relevant specialized knowledge required through education, experience or training in the proposed field of expertise;
 - ◆ Assistance: An expert must be able to “assist the Chamber to understand or determine an issue in dispute and the context in which it took place.”¹⁹⁶
 - ◆ Impartiality: Expert witness must not be regarded as impartial if “he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.”¹⁹⁷ An unfortunate precedent has been created before ICTY in this respect. In a number of cases the Trial Chambers accepted employees or former employees of the ICTY OTP¹⁹⁸ as expert witnesses despite repeated objections by the Defence.¹⁹⁹
34. The background, training, and professional qualifications of an expert witness are the key elements needed to ensure the quality and objectivity of his expert opinion. The expert must be carefully chosen by the Defence after consultations concerning the work, writings and experience both practical and academic in his given field of expertise. This will involve both meeting the expert and reading his publications. If the expert has previously testified, the trial transcripts and expert reports filed in those proceedings must be analysed.
35. The practical benefit for the Defence in calling an expert witness is not only the findings and the conclusions he reached which support the Defence theory of the case, but also a significant number of documents referred to in the footnotes of expert reports which are admitted in the body of evidence in the case, if the report itself is offered and admitted.

194 Rule 94 *bis*, ICTY RPE.

195 See Chapter VII “Witnesses”, Section C. “Expert Witnesses”.

196 See *Prosecutor v. Brima*, SCSL-04-16-T-365, Decision on Prosecution request for leave to call an additional witness (Zainab Hawa Bangura) pursuant to Rule 73 *bis* (E), and on joint Defence notice to inform the Trial Chamber of its position vis-à-vis the proposed expert witness Mrs Bangura) pursuant to Rule 94 *bis*, 5 August 2005.

197 *Prosecutor v. Milutinović et al.*, TC Decision, 13 July 2006; Appeal Denied by TC on 30 August 2006.

198 *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, IT-08-91, Written Reasons for the Trial Chamber’s Oral Decision Accepting Dorothea Hanson as an Expert Witness, 5 November 2009.

199 One of the very few decisions in favour of Defence was rendered in the *Milutinović* case: *Prosecutor v. Milutinović et al.*, Oral Decision. T: 840-844 (13 July 2006). The Trial Chamber held that “he is too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.” Also see “Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report”, 30 August 2006. This case is also discussed in Chapter VII, “Witnesses”.

F. Prosecution Disclosure

36. Disclosure by the Prosecution is a key part of the Defence investigation.²⁰⁰ Disclosed information will provide the Defence with documents it would otherwise have taken a large amount of time and resources to find and also will be a starting point for the Defence investigation itself. However, it is essential for the Defence to check the validity of Prosecution evidence.
37. The Defence investigation is hindered by the fact that, although the Defence can request further disclosure from the Prosecution, there is no mechanism by which it can find out which documents are in the possession of the Prosecution. This makes it difficult for the Defence to be able to request documents that may aid its investigation.
38. The ICTY RPE in its fourth chapter regulates the disclosure obligation by the Prosecution. The essential Rules that govern this issue are Rule 66 (A) and (B) (Disclosure by the Prosecutor) and Rule 68 (Disclosure of Exculpatory and Other Relevant Material).²⁰¹
39. Rule 68 imposes a strict obligation on the Prosecution to disclose to the Defence all exculpatory material. This obligation is undoubtedly a heavy burden for the Prosecution as it requires them to conduct periodic searches of the data base for exculpatory documents. Rule 68(ii) provides that the Defence may have access via the internet to collections of material held by the Prosecution in electronic form, through the Electronic Disclosure System (EDS). The Prosecution may satisfy its Rule 68 obligations by placing material on the EDS in a separate folder and notifying the accused of material posted on the EDS.²⁰² Nevertheless, the existence of the EDS system does not relieve the Prosecution from its duty to disclose exculpatory material to the Defence.²⁰³
40. Probably one of the most contentious issues at the ICTY is related to the Prosecution's disclosure obligation under Rule 66(B) of the ICTY RPE. This issue goes to fundamental rights of the accused guaranteed by the Statute,²⁰⁴ as well as the integrity and fairness of the proceedings against the accused. According to the ICTY jurisprudence,²⁰⁵ in order to meet the criteria set forth in Rule 66(B), to obtain disclosure in the possession of the Prosecution which does not fall under other provisions of Rule 66 or Rule 68, the Defence must:
- 1) demonstrate that the material sought is in the custody or control of the Prosecution;
 - 2) establish *prima facie* the materiality of the documents sought to the preparation of the Defence case; and,
 - 3) specifically identify the requested material.
41. The consequence of this jurisprudence is that it leaves ambiguity as to what level of specificity a Defence request is required to contain. It can put the Defence in the awkward situation between the need to be

200 For further discussions on Prosecutor disclosure, see Chapter III "Defence Strategy".

201 Similar provisions exist in the criminal procedure codes of the countries of the former Yugoslavia (Criminal Procedure Code of BH, Article 47(1), Criminal Procedure Code of BH, Article 14(1), Criminal Procedure Code of Serbia, Article 170(5); Criminal Procedure Code of Montenegro, Article 72; Criminal Procedure Code of Croatia, Article 68).

202 *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Motions for Rule 68 Material and Reconsideration of Decision on Adequate Facilities, 10 March 2009, para. 20.

203 *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness, 13 December 2006, page 4.

204 Article 21, ICTY Statute.

205 See, *i.e.*, *Prosecutor v. Boškoski*, IT-04-82, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material Pursuant to Rule 66(B), 31 January 2008.

IV. Defence Investigations

specific in its request for disclosure and the fact that the Defence does not know what documents in fact exist in the Prosecution's database. These circumstances require very careful drafting of the request for disclosure based on rule 66(B). It is good practice to make the specified request very early on, during the pre-trial phase so as to have ample time to deal with these issues at length. The most common situation is that the Defence request is denied by the Prosecution as too broad and not specific enough for it to identify which documents to look for.

42. The remedies available for the Defence are provided for in Rule 68 *bis* of the ICTY RPE.²⁰⁶ From the Defence perspective one meaningful sanction in case of late disclosure of the Prosecution would be to prohibit the Prosecution from using documents which were not timely disclosed during cross-examination of Defence witness. However, as everything has a flip side to it, in such a case the Defence might risk that the judges will see this as a way to protect the credibility of the witness based on a technicality, which might in turn backfire on the Defence.
43. It is also possible that the Prosecution will resort to Rules 66(C) and Rule 70 of the ICTY RPE claiming that evidence cannot be disclosed because this would:
 - ◆ prejudice further or ongoing investigations;
 - ◆ be contrary to the interest of justice; or,
 - ◆ affect the security interest of a state.²⁰⁷
44. In that case the Defence can request application of Rule 54 *bis*, which is further discussed in the next section of this chapter.

G. Obtaining Archival and Other Documents

45. In cases before the ICTY, should a public authority refuse access to information, the Defence investigation may apply directly to the Tribunal for an order that a State produce documents, pursuant to Rule 54 *bis* of the ICTY RPE.
46. This Rule has been applied in a number of ICTY decisions.²⁰⁸ A request is made by the Defence to a State for documents which the State refuses to produce. The Defence then refers the request to the ICTY, which makes a binding order.
47. Under Rule 54 *bis*, the ICTY may order a State to produce evidence if the Defence:
 - 1) identified as far as possible the documents or information to which the application relates; and,
 - 2) indicated how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter.
48. In applying Rule 54, the Tribunal has interpreted the requirements by holding that the requesting party must define the documents with sufficient clarity to enable easy identification by the State. This does not require

²⁰⁶ Rule 68*bis*, ICTY RPE.

²⁰⁷ See, *Prosecutor v. Delalić et al.*, IT-98-5/18-T, Decision on the Accused's Application for Binding Order Pursuant to Rule 70 of the ICTY RPE (Austria), 15 October 2009; Decision on the Accused's Application for Binding Order Pursuant to Rule 54 *bis* (Federal Republic of Germany), 19 May 2010; Decision on the Accused's Binding Order Motion (The French Republic), 30 June 2010; *Prosecutor v. Milan and Sredoje Lukić*, IT-98-32/1-T, Order to Bosnia and Herzegovina Pursuant to Rule 54 *bis*, 11 September 2008.

that the documents be defined by date, title or author.²⁰⁹ It has also held that the requesting party need only make a reasonable effort before the Trial Chamber to demonstrate the existence of the documents.²¹⁰ The requesting party only needs to show that it has exercised due diligence in attempting to find the documents and has been unsuccessful.²¹¹ However, the prerequisite for implementation of these provisions is that the Defence must approach the State institution or other organization with the proper request for disclosure and take all reasonable steps to obtain the document(s) requested.²¹² Further the Defence must establish why certain document(s) are relevant for the proceedings in question.²¹³

49. Usually it suffices that the Trial Chamber issues an invitation for cooperation with the Defence and disclosure of certain materials to the State in question.²¹⁴ The States can claim national security interests or the “originator principle” when such motion is filed and then obtain protective measures or even a refusal to issue a binding order to produce documents in its possession that was shared with it by another State. In such a case the Defence may seek variation of protective measures and request disclosure of that material, which may be subject to certain redactions in the interest of State security. It is important that the Defence explains to the Trial Chamber that it is in the interest of justice that such documents are disclosed to the Defence and that the State security can be preserved by those documents being used only during closed session proceedings.
50. Practice at the ICTY indicates that the Defence must first use all the available means in searching for and attempting to gather documents, and only then should it turn to the court to seek issuance of binding orders. When the Defence has to request a binding order from the Chamber, it usually results in significant delays to the Defence investigations, and frequently the request cannot be fulfilled, in totality or partially, even with the court's support.

Conclusion

51. As discussed above, Defence investigation is the key phase for preparation of the Defence case. The investigation starts as soon as the Defence team is established and lasts throughout the pre-trial and trial phase. It may continue even through the appeals stage of the proceedings.
52. The final outcome of the investigation and subsequently the Defence case largely depend on detailed planning of the investigation process. Well-performed investigations will result in the selection of the most credible witnesses, documents and other material that can support the Defence theory.
53. Defence counsel has to make sure that he selects the most qualified and efficient investigators. The investigators must provide counsel with regular reports on their work so necessary adjustments can be made in a timely fashion.
54. Throughout the investigation phase the Defence is likely to come across various obstacles (difficulties in finding witnesses, documents, obstruction by the Prosecution or State authorities etc.). When that occurs counsel will have to, as discussed in this Chapter, resort to the most efficient way of overcoming these obstacles.

209 *Prosecutor v. Milutinović et al.*, IT-05-87, Appeal Chamber's Decision on Request of the United States of America for Review, para. 15.

210 *Ibid.*, para. 23

211 *Ibid.*, para. 25

212 *Ibid.*, para. 32

213 Rule 54, ICTY RPE; *See Ibid.*, para. 19

214 *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Invitation to the Government of the Republic of Croatia, 10 February 2011.

V. Structuring a Legal Argument

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1. Defence counsel practising before the ICTY play a fundamental role in safeguarding the rights of the accused by ensuring that the accused’s interests are represented at trial; a role that has proven particularly important due to the complex and novel legal theories developed by the ICTY in the area of international criminal law. In fact, it is often the case that Defence counsel is faced with judges and/or opposing counsel who, despite long and distinguished careers in the law, are new to the hybrid system of the *ad hoc* Tribunals and the methodology of developing customary international law.*
2. In this regard, Defence counsel’s ability to craft persuasive legal argument has proven essential not only for the effective representation of the accused, but also for the development of substantive and procedural legal standards that will have a lasting impact on the field of international criminal law. Indeed, when addressing arguments to judges that are trained in a particular domestic legal context, be that civil or common law, counsel must be especially skilled in presenting well-organized arguments that are clear and convincing. While the need for this skill has been especially important in relation to less-developed standards of international criminal law, it remains the essential skill for any Defence counsel looking to best represent his client’s position, regardless of the legal problem at hand.
3. The ultimate goal in persuasive argument is, of course, persuading the Chamber that the legal position taken is the correct one. In order to be persuaded, the Chamber must be able to follow the argument’s logical progression in such a way that at the point a conclusion is reached, it is understood to be the only logical conclusion. As such, the structure and organization of legal argument is essential to convincing the Chamber of the legal position being put forth.
4. This chapter will first give some general notes on researching and preparing a legal argument, introducing the argument to the Chamber, and stating the facts upon which the argument is based. The chapter will then proceed to outline a recommended, basic organizational structure for legal argument, better known as “IRAC” (Issue, Rule, Analysis, Conclusion). Finally, the chapter will show how this basic argument structure has been put into practice at the ICTY, using specific examples from motions, briefs, and various forms of oral argument.

* Chapter authored by Anya Marinkovich, J.D., member of the California State Bar and former ICTY Defence Legal Assistant for Bruno Stojić.

A. Research and Preparation

5. It goes without saying that it is essential to know the law in order to argue a particular interpretation of the law. Conducting in-depth legal research to see how the law has been developed and applied in other cases is not only essential to making sound legal arguments, but also to displaying the confidence and thoroughness that is necessary in order for the Chamber to be persuaded. More importantly, knowing the legal standard, and all its elements, is necessary in order to be able to identify the relevant facts and the legal issues presented by those facts. Thus, the first step in preparing legal argument is to conduct the necessary legal research.
6. After completing the necessary research, the relevant legal standard, whether it be a legal test based on case law or a statutory provision, should be used to give context to drive the organization of the argument. For instance, the law of superior responsibility, codified in Article 7(3) of the ICTY Statute, has three essential elements:
 - ◆ the existence of a superior-subordinate relationship;
 - ◆ knowledge of the superior/accused that his subordinate had committed or was about to commit an act proscribed by the Statute; and,
 - ◆ the failure of the superior/accused to prevent or punish the act.
7. Thus, the main issues that need to be addressed in any argument involving allegations of superior responsibility will be whether there was a superior-subordinate relationship, whether the superior possessed the requisite knowledge, and whether the superior failed to prevent or punish the alleged crime of the subordinate. The most logical organization of this analysis would be to follow the statutory provision. This is true not only because the statutory or jurisprudential construction will likely already be organized in the most logical way, but also because the Chamber will expect counsel to follow the same organization and may get lost if counsel chooses to rearrange the issues.
8. Additionally, each legal element will likely include sub-elements or factors that have been developed in the case law which should similarly dictate the internal organization of the legal argument. Using again the law of superior responsibility as an example, the ICTY jurisprudence has developed a list of factors that indicate the existence of a superior-subordinate relationship; the first element of that mode of liability. While it is often a safe approach to stick with the organization of the factors as laid out in the case law, there may be more flexibility here in terms of the order in which each factor is addressed. In general, the best approach is to organize the factors to put the strongest arguments first, which is where the Chamber will focus most of its attention.
9. Weaker arguments can be addressed thereafter, followed by a reiteration of the stronger arguments and how they relate back to the larger issue and constitute support for the main position. This final step is crucial because the Chamber will need to constantly be reminded of the ultimate legal position and how each section relates to it.

B. Introducing the Argument to the Chamber

10. It is essential in any pleading to first introduce the general issue and structure of the argument to the Chamber. Not only does this serve to prepare the Chamber for what is to follow, but it can also serve as a useful benchmark for counsel that can be revisited in order to ensure that the argument is progressing logically.

11. The two basic components of the introduction should be a thesis statement and a roadmap. The thesis statement is essentially the conclusion to which the legal argument will lead and that the Chamber should draw from the submission. It is necessary to state the thesis clearly at the very outset so that the Chamber hears the argument with this ultimate conclusion Defence Counsel is seeking set forth from the very beginning. This will aid the Chamber in understanding each new issue and analysis in relation to the overall thesis.

12. The roadmap, on the other hand, is merely an organizational tool to aid the Chamber in navigating counsel's legal and/or factual analysis as well as to assist counsel in staying on track. It consists of a brief overview of the organizational breakdown of the argument which will serve as a set of guideposts for the Chamber as the argument progresses.



PRACTICE TIP

An example of an effective thesis statement is one that intertwines the law and the facts into one well-constructed sentence. For instance: "The accused cannot be guilty of murder under the law of command responsibility, as his secretarial duties did not give him effective control of the perpetrators." This is much more effective in articulating the issue than simply stating, "The accused is not guilty under the law of command responsibility." The first example contains more information which will then guide the Chamber's view of the essence of the argument to follow, influencing the Chamber from the start to finally accept the argument's conclusion.



PRACTICE TIP

Keep the roadmap as simple as possible by just stating what will be discussed, for example, "first", "second", and "last" issues.

C. Stating the Facts

13. Including a statement of facts which is crafted in such a way as to begin convincing the Chamber of counsel's ultimate legal position, even before the legal argument itself is laid out, is a crucial step in creating a persuasive argument. Hence, the statement of facts should include those facts that are relevant to the legal argument. It should present the facts in such a way that the reader, be it the Chamber or others, will be convinced of and share counsel's view of the overall factual scenario. In terms of organization, the relevant facts should be presented chronologically. Chronological organization permits the Chamber to understand and follow the facts as a story. However, while telling the story, counsel should craft the language, whenever possible, to subtly reinforce the overall factual scenario that will most strongly support the legal argument to follow. Facts which are relevant to the case but adverse to counsel's position cannot be left out or ignored. Leaving out adverse, yet relevant, facts serves only to highlight their seeming importance to the discerning judge. Counsel also has the ethical obligation not to mislead the Chamber and, to the contrary, has the duty

V. Structuring a Legal Argument

to assist the Chamber in finding the truth. The key to an effective argument is to include relevant, adverse facts, but to present them in such a way as to diminish their importance.

14. There are many ways to craft a persuasive statement of facts. In addition to a careful choice of words, there are structural devices that allow certain facts to be emphasized while others are diminished. Although the statement of facts should always follow a chronological progression, there is also flexibility within this structure. The goal always remains the same: to persuade the Chamber of the legal position being advocated.

15. Many examples can be given to show how the order of sentences and even the internal structure of a sentence can be used to effectively and honestly present a version of the facts most sympathetic to counsel's legal argument. Overall, the goal is to emphasize the facts most helpful to the argument at issue, while also being both frank and thorough. Although adverse facts cannot simply be avoided, a careful choice of wording and syntax can diminish their impact thereby contributing to the persuasiveness of counsel's argument even before the analysis of those facts under the applicable law is presented.



PRACTICE TIP

There are various ways of crafting a persuasive statement of facts. Take, for instance, a case where the client, Mr. X, is alleged to have been involved in a crime and there is indisputable evidence that he was seen at the scene of the crime shortly after its commission. While the fact of his presence at the scene at a certain time is potentially adverse it most certainly cannot be ignored. It can, however, be presented in a way that suggests it is less important to the overall scenario. For example, instead of explaining in a factual statement that, "Gunshots were heard at 12:10pm, and Mr. X was seen at the scene of the crime only minutes later amongst the crowd of passer-bys who had gathered to see what was happening", counsel can create more distance between the criminal act and the identification of Mr. X by making the equally honest statement that, "Gunshots were heard at 12:10pm. The victim was seen collapsing on the sidewalk immediately thereafter. A crowd began to gather as people passing by stopped to see what was happening. Mr. X was one passer-by who also stopped and joined the crowd."

D. Applying the Law to the Facts: IRAC

16. The clearest and most effective way of structuring a legal argument is to follow the "IRAC" organization, which stands for Issue, Rule, Analysis, and Conclusion. This step-by-step organizational scheme will not only help to make sense of the often complex web of law and facts at issue in a case, but will also enable counsel to present his thoughts to the Chamber in a logical progression that can be easily followed. This organization also aids in parsing out the key issues and the relevant facts so that the Chamber can digest large and complex masses of information and see how it all fits together.

D.1 Issue

17. The first element of the IRAC organizational scheme is the identification of the relevant issues to be discussed and the presentation of those issues in a manner which reflects counsel's view of the problem even before the analysis is explained. Thus, the "I" in IRAC can be broken down into two essential steps: identifying the relevant issues (based on the legal standard being addressed) and presenting them in a persuasive manner. The identification of the issues that need to be addressed will depend on the law and as discussed above, conducting thorough legal research is the first step to any analysis. The issues must then be organized

according to the legal elements so that the analysis follows a logical progression that clearly addresses each legal element.

18. The second step is merely a matter of asking the question (presenting the issue) so that it begs the desired answer (the conclusion). A typical example can be seen in the way that the same issue might be presented by the appellant and the respondent in an appeal. Thus, in a situation where the Trial Chamber has ruled favourably for the Prosecution, and the Defence seeks to appeal that decision, the Defence would present the issue as one which reflects that the Trial Chamber erred in deciding the legal issue *outside of its proper exercise of discretion*, whereas the Prosecution, addressing the same issue would likely characterize it as a decision which *rightly* fell within the *broad discretionary powers* of the Trial Chamber. The difference is subtle, but effective.

D.2 Rule

19. The next step in the IRAC organization is presenting the applicable law. Here, again, the key is to present the law in such a way as to support the interpretation of the law that is being advocated as well as its application to the particular facts of the case (which will follow in the Analysis). If the applicable law includes a statutory rule, the rule is most often included in its entirety, using the exact wording of the rule as presented in the Statute. However, rules can also be paraphrased, as long as the essence and true meaning of the rule is not distorted. This has often been seen at the ICTY in motions based upon Article 21 of the ICTY Statute dealing with “Rights of the Accused”. While the rule itself includes four general requirements, with the fourth requirement containing seven specific elaborations, these are often referred to summarily as Article 21 “fair trial rights” and/or “equality of arms”, partly due to the length of the rule - which would take up precious space in a written motion with court-imposed word limits - as well as due to the frequency of its use. Thus, a lengthy or very commonly used rule can, when appropriate and when conducive to the argument at hand, be referred to in short form. In general, the wording of the relevant parts of a rule is usually set forth verbatim.
20. The same can be said for rules derived from case law. It is very important to use the exact wording as much as possible (while, of course, respecting all necessary quotation rules) because the practice of paraphrasing a previous holding can easily open the door to easy refutation by opposing counsel. This highlights again the need for thorough research into the applicable law, so that the best case law supporting the legal position can be identified, correctly cited, and elaborated upon in the analysis.
21. In terms of the optimal internal organization of this section, *i.e.* the order in which to present the relevant statutory provisions and case law, it is usually best to start with the overarching legal standard, and then move into the particularities of the law based on sub-sections of the statute or jurisprudential nuances.



PRACTICE TIP

If there is no case law to support the desired factual or legal conclusion, there is always the option of arguing that the legal position is supported for policy reasons - *i.e.* fairness, reasonableness, efficiency - but care should be used in judging whether the same question has been irrefutably denied in previous case law, in which case the argument may be deemed frivolous.

D.3 Analysis

22. The analysis section of the IRAC organization represents the real substance of the argument. This is where the legal rule expounded in the preceding section is applied to the factual scenario also set forth earlier, in terms most favourable to the legal position which counsel seeks to have the Chamber adopt.
23. One of the main considerations in structuring the analysis section of the argument is how to use examples from the relevant case law to support the desired factual and legal interpretation of the issues in the case at hand. Hence, the analysis section should include examples of how the relevant law has been applied to the facts of other cases similar to the case at hand. Previous cases in which there have been decisions that support the position presently being argued should be likened to the facts of the present case as much as possible. Cases that have unfavourable decisions (in relation to the present argument) should be contrasted with the facts of the present case with an eye towards convincing the Chamber that the unfavourable decisions are factual or legally different or distinguishable from the case at issue.

D.4 Conclusion

24. Finally, each section should end with a conclusion that ties the analysis back into the overall argument and states the remedy which counsel is hoping to obtain for his client. These conclusions should be as clear and precise as possible, and read together they should form the building blocks of the legal position being advocated. Showing how each element of the argument ties back into the overall legal position will not only aid the Chamber in following and understanding the argument, but will also reinforce the legal position presented and help convince the Chamber that the position advocated by counsel is the correct one.
25. The most important part of the conclusion will be the last one or two sentences, which should consist of a very clear statement of the “relief requested”. This informs the judges of the exact action that counsel is asking of them and in formal motions is usually entitled “Relief Requested,” and usually begins with the phrase, “For the reasons stated above, the Defence respectfully requests that the Trial Chamber[...]”. This request should be very carefully crafted to indicate no more and no less than the precise relief sought by counsel and should be included in both oral and written submissions. It is common practice at the ICTY, and good practice generally, to describe the specific relief requested in a separate, short section, which will usually be the final section of the argument.

E. Written Submissions

26. There are any number of written submissions which might be made to a Trial or Appeals Chamber during the course of the litigation of a criminal case.²¹⁵ The content and purpose of such submissions are only limited by the facts of the case, the legal issues raised by those facts, any requests made by the Chamber and the imagination of counsel. The basic types of written submissions commonly filed at the ICTY are explained below.

²¹⁵ The specific kinds of briefs filed on appeal are discussed in Chapter XI, “Appeals”. The structure of the legal arguments contained in appellate briefs should be essentially the same as that discussed here for trial briefs, though the contents of appellate briefs may be different.

E.1 Motions

27. The basic guidelines governing motions at the ICTY can be found in Rules 72 and 73 of the ICTY Rules of Procedure and Evidence. Rule 72 relates to the submission of “Preliminary Motions”, *i.e.* those motions made at the outset of the proceedings that “(i) challenge jurisdiction; (ii) allege defects in the form of the indictment; (iii) seek the severance of counts [...] or seek separate trials; or (iv) raise objections based on the refusal of a request for assignment of counsel.” These motions may be essential tools in Defence counsel’s arsenal, as it is often the outcome of these preliminary motions which will set the parameters of an indictment or decide key issues in dispute prior to trial; issues which may directly affect the eventual outcome of trial.
28. For instance, the result of a successful challenge to the court’s jurisdiction is the dismissal of the case - a rare occurrence, but an issue which must be litigated by means of filing a preliminary motion and, if successful, a monumental victory for the accused. Similarly successful challenges to the indictment can have varied results, including narrowing the scope of the relevant facts (and thus increasing manageability of the information), reformation of the indictment so that the factual and legal allegations are clearer and easier to respond to, and even the dismissal of some counts. In short, the ability of Defence counsel to present clear and convincing arguments in preliminary motions can have a major impact on the outcome of a trial.
29. All other motions are governed by Rule 73, which states that “either party may at any time move [...] for appropriate ruling or relief.” The extremely broad language of this rule demonstrates just how important motion work is to the trial process and to the effective representation of the accused. Motions have been filed under this rule on issues ranging from the language of interpretation in the courtroom, to the existence of certain substantive legal standards in customary international law, to the cutting of funds for a defence team. If it can be argued that the issue is one affecting the fair trial rights of the accused, entrusted to the Trial Chamber under Article 20(1) of the ICTY Statute, then the formal method of seeking relief is by way of written motion. Commonly recurring motions at the ICTY include motions for provisional release, motions to compel disclosure, motion seeking or opposing protective measures and video link testimony, motions for acquittal under Rule 98 *bis*, and motions for the admission of documentary evidence.
30. At the ICTY, the practice has developed to organize written motions into four sections: introduction, applicable law, argument, and conclusion. Although the labels used for these various sections differ from those discussed above, the principles remain the same. For instance, the introduction often contains a thesis statement, a roadmap, and a brief statement of facts (including the relevant procedural history). The “applicable law” section lays out the relevant legal provisions and case law that will be applied to the facts in the next section, which contains the “argument”. The argument section is usually organized using an IRAC structure, with clear headings indicating the movement from one issue to the next, concise reiterations of the legal standard applicable to the issues, and an analysis of the facts under that standard. Finally, the application of the law to the facts leads to a conclusion, often discussed in conjunction with the “relief sought” - a brief and straightforward reiteration of the action requested of the Trial Chamber.²¹⁶

²¹⁶ The DVD which accompanies this Manual contains a number of written motions, all of which are examples of how such arguments might be structured.

E.2 Responses and Replies

31. Responses to motions by opposing counsel are allowed as a matter of right at the ICTY, whereas counsel must seek permission from the Trial Chamber to reply to a response. Typically permission is requested in the Reply itself, at the outset of the submission, however if the ability to file a Reply is critical (for example when opposing counsel has mischaracterized the facts or miscited the applicable law in a material way) counsel is well advised to file a short request seeking permission to file a Reply Brief and briefly listing the reasons a reply is needed to maximize the likelihood permission will be granted. Additionally, the practice regarding filing reply briefs varies from Chamber to Chamber. Some Chambers will permit a reply so long as it is timely filed; others require that counsel seek formal permission, as just described, to file a reply brief.²¹⁷
32. In the broad sense, the IRAC structure is an effective and logical way to organize the legal argument in responses and replies as well. However, these submissions differ from original motions as the arguments contained therein will be directly responding to the arguments put forth in the original motion; hence the organization of the arguments will usually be driven by this notion. Most importantly, the argument being responded to should be clearly identified, followed by a statement of why that argument is not persuasive and should be rejected. This is, in a sense, the “issue” statement in a response.
33. After defining the issue being addressed in the response or reply (*i.e.* that the original motion contains an argument that is unfounded, misinterprets the applicable law, distorts the facts, or is otherwise wrong), the rule-analysis-conclusion structure explained above applies equally to the rest of the legal argument. In order to persuade the Chamber that the original motion’s conclusion is incorrect, it will be necessary to show either that there is alternative applicable law that is more authoritative or to explain why the application of the applicable law in the original motion is incorrect under the present facts or circumstances (*i.e.* bring a challenge to the original analysis).

E.3 Final Briefs

34. The developed practice at the ICTY is for each party to submit, after the close of trial proceedings, a final trial brief that puts forth the party’s overall case theory based on the evidence that has been adduced during trial. It is also accepted practice that both the Prosecution and Defence file their final briefs simultaneously. This presents an interesting challenge for Defence counsel since the Prosecution’s theory of its case may well have shifted from the position put forth in its Pre-Trial Brief based on what the Prosecution actually proved at trial and what evidence, if any, was put forth by the Defence in response. While each party is given the chance to respond to the opposing party’s briefs during closing arguments, the practice of simultaneous filing of the written final briefs has made it more important than ever for Defence counsel to anticipate the arguments that will be made by the Prosecution and include pre-emptive counter-arguments in the Defence final briefs. Counsel must anticipate how the Prosecution’s theory may have changed since the filing of the indictment and highlight the existence of these changes in the Defence brief itself, as they often form the basis for very persuasive argument that the Prosecution has failed to prove its case.
35. For the Defence, the general goal in a final trial brief is to show how the evidence put forth by the Prosecution failed to prove guilt beyond a reasonable doubt of the crimes alleged. The organization of the IRAC argument, therefore, will be based on the legal requirements for each of the alleged crimes (each element of each crime and each element of each mode of liability). The legal arguments will be easier to follow and most effective if they methodically go through each element which the Prosecution must prove and

217 On appeal, as described in Chapter XI, Reply Briefs are permitted as a matter of right.

explain how an element or elements have not been proved based on the facts presented at trial. This, once again, highlights the importance of crafting a persuasive statement of the facts, particularly where the legal analysis which follows it is based primarily on facts which were in dispute at trial as opposed to interpretations of the law in light of undisputed facts.

F. Oral Arguments

36. Oral pleadings are, on a substantive level, no different than written pleadings. The IRAC organizational scheme may be equally effective during oral argument, in particular the need to provide at the beginning of argument an initial thesis statement and (for longer submissions) a brief roadmap of the argument to follow. This alerts the Chamber from the outset of what issues are at stake and will be argued and what issues are not. It is essential that the oral advocate keep in mind the overall organizational scheme to keep the attention of the Chamber focused on the most important aspects of the argument, and to assist counsel as well in the course of presenting the oral submissions. The key is thorough preparation and knowledge of the law. It is usually most helpful for counsel to prepare and organize outline of the argument, which counsel can refer back to as the oral argument progresses in order to remain focused on the points to be made and to avoid overlooking matters counsel wishes to address.
37. Unlike written submissions, oral argument requires a level of mental flexibility because the argument can and most likely will be interrupted by questions from the Bench. That reality strongly advises against simply reading or memorizing the oral submission. The best oral argument is not a speech, but rather a dialogue with the Chamber. When there are questions from the bench, Defence counsel must answer them at the time they are asked or risk annoying the Chamber or losing credibility by putting off the answer and perhaps forgetting to address the question at all at a later point in argument. For this reason oral argument should never be, or appear to be, overly rehearsed. Instead, it is essential to have a very clear outline and a clear understanding of how each fact and issue relates to the overall legal argument.
38. Finally it is always good practice to use transitional phrases that will indicate to the Chamber when counsel is departing from the original organization and/or returning to a previous point. This permits the Chamber to know what issue counsel will be raising next which facilitates the Chamber's ability to follow the argument and therefore enhances counsel's ability to present a coherent and persuasive argument.



PRACTICE TIP

While it is not a good idea to have the oral argument written out in its entirety, as counsel will then be tempted to just read from the written pages and will have a much more difficult time connecting with and persuading the Chamber as a result, having an outline of the argument that includes all the major points to be addressed is essential. Check off each point after it has been discussed. It is good practice to also have on hand the brief roadmap of the argument so as to keep in mind at all times the overall goal of the argument. The exception may be arguments in which counsel will be citing to a specific rule or a specific quotation from the record or from the case law. When that is the case, the rule or quotation should be written out in its entirety, so that counsel can present the matter precisely and accurately.

F.1 Oral Submissions during Trial

39. On occasion issues arise at trial, such as objections to the introduction of evidence by the opposing party, which require counsel to respond immediately with an oral submission in support of counsel's position on the matter. Sometimes counsel can anticipate certain issues will arise at trial and submissions on them can be planned ahead of time. When that is the case the issue should be clearly thought through, the applicable law thoroughly researched, and the argument of how that law applies to the issue at hand meticulously organized so that when the time comes to present argument to the Chamber, the argument is logically and persuasively presented. In many cases, however, in-court submissions arise on the spot and cannot be foreseen - either in response to a submission made by opposing counsel or to a question from the Chamber. Under these circumstances, it is still important to remember the IRAC structure and apply it to the oral submission. This will ensure that the argument is presented in a clear and logical fashion, wherein the applicable rule is explained, and the application of that rule to the situation at hand effectively presented.

F.2 Opening Statements

40. Opening statements by the Defence are sometimes presented at the beginning of trial, right after a similar opening statement has been given by the Prosecution and before the presentation of any evidence. They are more often presented, however, after the Prosecution has completed its case, just before the presentation of the Defence case when affirmative Defence evidence will be offered at trial.
41. Opening statements are the most structured form of oral submission, as the opening statement is not an argument, but rather is intended to provide the Chamber with an outline (or roadmap) of the Defence case that will follow. When an opening statement is presented after the Prosecution's case, it is loosely analogous to a response brief in that it may address the case the Prosecution has put forward by asserting that when all the evidence is heard and assessed, including the Defence case the Prosecution case will fail to meet the burden of establishing proof beyond a reasonable doubt of the crimes charged.
42. The primary purpose of the Defence opening statement, however, is to provide an overview of the Defence evidence: the witnesses who will be called and the nature of the information they are expected to present. In this context, Defence counsel can use the opening statement—which is not meant to be argumentative—as a means of in effect arguing that the Prosecution did not and can not meet its burden of proof at trial.²¹⁸

F.3 Closing Arguments

43. Closing arguments are presented at the end of the case after all the evidence has been produced. At the *ad hoc* Tribunals the Prosecution presents its closing argument first, in which it summarizes the facts of its case and argues that the facts, in light of the law, prove beyond a reasonable doubt that the accused is guilty of the charged crimes. Thereafter the Defence is permitted to present its closing argument to affirmatively rebut legal and factual claims made by the Prosecution. The Prosecution is permitted, as a matter of right, to present a rebuttal argument; which is in keeping with the fact that the Prosecution always bears the burden of proof at trial. With leave of the Trial Chamber, and based upon some showing of good cause, the Defence may be permitted to present a response to that rebuttal; called a sur-rebuttal argument.
44. Of all the forms of oral submissions, the closing argument is where Defence counsel has the most liberty to structure the argument in any form counsel considers to be the most effective, Counsel should address all the important facts of the case, including the adverse evidence, and construct an argument which highlights the

218 Examples of portions of opening statements are included on the DVD which accompanies this Manual.

evidence favourable to the accused while diminishing the importance or relevance, when possible, of the unfavourable evidence. The extent to which procedural or substantive rules and case law are discussed in the closing argument differs widely based on the particularities of a case, but where a specific rule is discussed, it should be followed by an analysis of the facts, in light of that rule, which is supportive of the defence theory of the case.

45. The ultimate goal, in any Defence closing argument, is to focus the Trial Chamber on that evidence which raises a reasonable doubt as to the ultimate persuasive value of the prosecution's evidence and its theory of the case. Much like the opening statement, the IRAC structure can provide a loose organizational tool for closing argument, however the overriding issue in a Defence closing argument, regardless of how it is structured, will always be to thoroughly review the evidence and, in the course of doing so, to focus on whether the prosecution has met its burden to prove its case.

Conclusion

46. The most important thing to remember in structuring a written legal argument is to present it in a logical, organized fashion, such as the IRAC system suggested here. It is an approach which can be used in any pleading, no matter the form, and will always serve to develop the argument in a comprehensible fashion. Effective Defence counsel will also never assume that a particular judge or judges have necessarily yet had the opportunity to become familiar with the detailed facts or law applicable to counsel's case at the time a particular issue arises. Clear, concise, well organized written pleadings and oral submissions can and are often used as a means of educating the Chamber, when necessary and are meant to be of assistance to the Chamber in its final determination of the issues at hand. Finally, preparing thorough, precise, and clear submissions is of paramount importance, not only as a means to assist in persuading the Chamber to rule in court's favour, but also because written and oral submissions form part of the trial record, are a means of preserving any Trial Chamber errors, and will be relied upon in the future by appellate counsel or by others as a means of learning what transpired in a particular case.

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1. This chapter examines the rules, procedure and practice governing the presentation, admission and evaluation of documentary evidence at the ICTY.^{*} The unique and difficult challenges of managing evidence in international criminal trials at an institution that has adopted a “hybrid” procedural system have led to numerous additions and amendments to the ICTY Rules of Procedure and Evidence (ICTY RPE) over the years. Trial Chambers enjoy significant discretion in determining what will be admitted on a case-by-case basis, and the weight to be afforded to evidence at the end of a trial. In recent cases, Trial Chambers have taken to issuing guidelines on the admission of evidence and conduct of counsel for individual trials. This has not, however, assured consistency or harmonisation of approaches between the various chambers. Moreover, the pressure to ensure trials are completed within the time frame envisioned under the “Completion Strategy”²¹⁹ increasingly takes preference over a principled approach to the admission of evidence and the ability of the accused to challenge that evidence.
2. A significant development in recent years is the increased preference for the admission of witness statements over live, in-court, testimony. A corollary to this is the growing practice of wholesale admission of documentary evidence as part of statements and transcripts admitted under Rules 92 *bis*, 92 *ter*, and 92 *quater* and bar table motions. It is now the case that exhibits which may not be admissible when tendered through a witness can easily make it into the trial record through a bar table motion. Similarly, dozens of exhibits which may or may not be relevant to the case at hand are often attached to 92 *bis*, 92 *ter* and 92 *quater* statements and may be admitted in evidence even though they are never shown to the testifying witness or otherwise identified during the current trial proceedings.
3. It is crucially important for practitioners in proceedings where ICTY evidence is used to understand the circumstances in which exhibits are admitted into evidence, so that they themselves can be prepared to challenge such evidence in their own subsequent proceedings.
4. This chapter explains the general principles on the admission and evaluation of evidence. Specific categories of evidence are discussed, including the admission of written statements and transcripts *in lieu* of testimony or cross-examination, the admission of statements of the accused, intercept evidence, and general

^{*} Chapter authored by Deirdre Montgomery, LL.B, LL.M, Attorney-at-Law. Defence Legal Assistant, ICTY, on the cases of Slobodan Milošević, Milorad Trbić, Milan Milutinović, Momčilo Perišić and Mićo Stanišić.
See UNSC Resolutions 1503/2003 and 1534/2003.

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documentary evidence, including the admission of “stand-alone” documents from the “bar table.” Some practical, strategic considerations for challenging evidence are offered, and finally an overview of issues related to judicial notice of adjudicated facts.

A. General Principles on the Admission of Evidence

5. The general admissibility of evidence, whether in oral or written form, is governed by Rule 89 of the ICTY RPE. The core provision on the admission of evidence is Rule 89(C) which provides that a Chamber may admit any relevant evidence which it deems to have probative value. This provision is subject to Rule 89(D), which provides that evidence will not be admitted if its probative value substantially outweighs the need to ensure a fair trial. Under Rule 89(F), evidence may be admitted in written form where the interests of justice allow. The Trial Chambers of the ICTY have tended to favour an inclusive approach, whereby any evidence which is *prima facie* relevant, reliable and probative will be admitted, the weight of which will be determined at a later stage. However, a Trial Chamber has the discretion to restrict or exclude otherwise admissible evidence, so long as such restrictions have a legitimate purpose.²²⁰ In addition to Rule 89(D), evidence may be excluded in two specific instances:
- 1) Rule 95 states that no evidence shall be admissible if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings; and,
 - 2) Rule 96(iv) states that prior sexual conduct of the victim shall not be admitted in evidence. Such evidence may be redacted from the record if such evidence is elicited from or offered by a witness.

A.1 Relevance, Probative Value and Reliability

6. A number of basic requirements must be satisfied for the admission of any evidence. These include relevance, probative value, and reliability. In order to establish that evidence is relevant and of probative value, it must be shown that:
- 1) there is a connection between the evidence sought to be admitted and the proof of allegations sufficiently pleaded in the indictment; and
 - 2) the evidence tends to prove or disprove an issue.²²¹

220 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 11.

221 *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials, 30 October 2007, para. 9; *Prosecutor v. Karemera et al.*, ICTR-98-44-T, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ndirumpatse, 2 November 2007, para. 2; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para 35 (“evidence is admissible only if it is relevant and it is relevant only if it has probative value”); *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para. 32. (Evidence is relevant if there is a connection between it and one or more allegations against an accused).

7. Evidence is relevant if it relates to a material issue at the trial. The material issues are found in the indictment.²²² As the criteria for the admission of evidence are cumulative, evidence may be rejected for admission solely on the grounds of absence of relevance.²²³
8. Reliability is a factor in the assessment of relevance and probative value but is not itself a separate requirement.²²⁴ It is, however, an inherent and implicit component of each element of admissibility. For evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value. Accordingly reliability is the “invisible golden thread” which runs through all the components of admissibility.²²⁵ It is sufficient that a *prima facie* case of authenticity be made out in order for a document to be reliable. An assessment of the *prima facie* reliability of a document could include the provision of such basic *indicia* of reliability as the source or provenance of a document, or the dates of the documents.²²⁶
9. Authenticity relates to whether a document is what it professes to be in terms of origin or authorship, and thus *indicia* of authenticity may be relevant to an inquiry regarding *prima facie* reliability.²²⁷ Absolute proof of authenticity is not required for admissibility.²²⁸ When a challenge has been made to the authenticity or reliability of a document, the Trial Chamber can admit the document and decide what weight to give it during its deliberations.²²⁹
10. The onus of establishing the admissibility of a particular piece of evidence is on the party seeking to tender it.²³⁰ The opposing party does not have to establish that it should not be admitted, although in practice it is often the case that the Trial Chamber will admit a document into evidence unless the other party objects and puts forth a valid basis to exclude its admission. While the ICTY RPE are not explicit on this matter, an exhibit may be admitted during a trial at any convenient time, once it is established that the Trial Chamber can be satisfied that there is sufficient basis for admission under Rule 89(C).²³¹ As a general rule, it will be necessary for the Chamber to receive evidence from one or more witnesses, who can speak about a proposed exhibit, before the Chamber can be satisfied that there is sufficient apparent relevance and reliability to justify the

222 *Prosecutor v. Prlić et al.*, IT-04-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 17. See also *Prosecutor v. Nyiramasuhuko et al.*, No. ICTR-98-42-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RZ and ABZ Inadmissible, 2 July 2004, para. 15 (In order to establish that evidence is relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment).

223 *Prosecutor v. Prlić et al.*, IT-04-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 17.

224 *Prosecutor v. Prlić et al.*, IT-04-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence, 3 November 2009, para. 33.

225 *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Prosecutions Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to compel the Accused, Zdravko Mucić, to Provide a Handwriting Sample, 19 January 1998, para. 32.

226 *Prosecutor v. Prlić et al.*, IT-04-AR73.16, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence, 3 November 2009, para. 27.

227 *Ibid.*, para. 34.

228 *Ibid.*

229 *Prosecutor v. Halilović*, IT-01-48-T, Decision on Defence Motion for Exclusion of Exhibits, 29 June 2005.

230 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, paras. 18-19, 37-38.

231 See Rule 85, ICTY RPE for the general order of presentation of evidence. For Bar Table submissions, the practice is that these are done during the case of the tendering party. For issues related to the tendering of Prosecution evidence through Defence witnesses, see *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in

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admission of an exhibit. Evidence can be received by way of written statement admitted pursuant to Rules 89(F), 92 bis, 92 ter, 92 quater, 92 quinques, tendered through live witnesses, or from the “bar table”.²³²

A.2 Hearsay Evidence

11. In trials at the ICTY hearsay evidence may be deemed admissible pursuant to Rule 89(C).²³³ Hearsay evidence is “the statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what that person says.”²³⁴ A hearsay statement can be in the form of oral testimony or a document. For example, a witness may give an account of information provided to him by another person (“first hand hearsay”) or an account of information that has passed between two or more persons, before being conveyed to the witness who appears in court (“second hand hearsay or more remote”). A wide variety of documents which contain statements or information which are *prima facie* relevant to live issues at trial are hearsay, if no witness testifies to the authenticity of the document or the truth of its contents.²³⁵
12. In determining whether to admit hearsay evidence, the Trial Chamber may consider the content of the statement and the circumstances under which the evidence arose.²³⁶ The Chamber must be satisfied that the evidence is reliable “in the sense of being voluntary, truthful and trustworthy, as appropriate.”²³⁷ The probative value of hearsay evidence also depends on the context and character of the evidence itself and its source.²³⁸ By definition, hearsay cannot be tested by cross-examination since the declarant of the statement does not appear in court to face questioning. However, the lack of opportunity to cross-examine the hearsay declarant and the fact that the hearsay is “first-hand” or more remote²³⁹ are all factors going to the weight and probative value of the evidence. In most circumstances, hearsay evidence will receive less weight than testimony given under oath and tested by cross-examination.²⁴⁰ Media reports are a most notorious form of hearsay. One purpose for which media reports are used by the Prosecution in war crimes trials is to establish proof of notice of events, where, for example, the accused is alleged to have had a duty to prevent and punish the commission of crimes. In these circumstances, the media report of alleged crimes may provide

Cross-Examination of Defence Witnesses, 26 February 2009, paras 24, 28 and infra Section D.1.

232 *Prosecutor v. Bošković and Tarčulovski*, No. IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, 14 May 2007, para 10.

233 *See, Prosecutor v. Tadić*, IT-94-1-T, *Decision on the Defence Motion on Hearsay*, 5 August 1996; *Prosecutor v. Delalić et al.*, IT-96-21-T, *Decision on the Motion for the Prosecution for the Admissibility of Evidence*, 19 January 1998, paras. 15-16; see also *Prosecutor v. Blaškić*, IT-95-14-T, *Decision on Standing Objection of the Defence to the Admission of Hearsay with no Inquiry as to its Reliability*, 26 January 1998.

234 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor’s Appeal on Admissibility of Evidence Appeals Chamber, 16 February 1999, para. 14.

235 *See*, for example, documents admitted by way of the bar table submission where the document may be admitted as a free standing document.

236 *Prosecutor v. Aleksovski*, IT- 95-14/1-AR73, Decision on Prosecutor’s Appeal on Admission of Evidence, 16 February 1999, para. 15; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution’s Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 17. *Prosecutor v. Natelić & Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, para. 516; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 52.

237 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor’s Appeal on Admissibility of Evidence Appeals Chamber, 16 February 1999, para. 15.

238 *Prosecutor v. Tadić*, IT-94-1-T, Separate opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, page 3.

239 An example of “first hand” hearsay would be A testifying about something B told A he had seen. More removed hearsay would be A testifying about something B said C had told him about D.

240 *Prosecutor v. Tadić*, IT-94-1-T, Separate opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, pages 2-3; *See also, Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial judgement, 26 February 2009, Vol.1, para.38, holding that it treated hearsay evidence of unavailable witnesses with a “greater level of circumspection than percipient evidence.”; *Prosecutor v. Aleksovski*, IT- 95-14/1-AR73, Decision on Prosecutor’s Appeal on Admission of Evidence, 16 February 1999, para. 15; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 bis, 13 September 2006, para. 5.

evidence to show the accused had notice of those crimes and should have acted to initiate an investigation rather than as proof of the actual commission of the crimes themselves.

13. No binding determination is made at the stage of admission of hearsay evidence as to the genuineness, authorship or credibility of evidence.²⁴¹ The issue of the reliability of hearsay evidence is only fully considered during final deliberations, when the weight to be attributed to this evidence is evaluated.²⁴² The weight and probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given evidence under oath and who has been cross-examined.²⁴³ Additionally, in assessing the weight, if any, to assign hearsay evidence, the Trial Chamber must consider that “the source has not been the subject of a



Gotovina et al. case - Ascribing Weight to Evidence

In its final Trial Judgement, the Gotovina Trial Chamber set out some general principles relating to the assessment of evidence in light of the trial record as a whole, and provided a number of examples of how it applied these principles in practice:

“In assessing documentary evidence, the Trial Chamber considered the origin of the document, the author and his or her role in the relevant events, the chain of custody of the document to the extent that it was known, the source of the information contained in the document, and whether that information was corroborated by witnesses or other documents. The Trial Chamber did not consider unsigned, undated, or unstamped documents a priori to be devoid of authenticity. When the Trial Chamber was satisfied with the authenticity of a particular document, it did not automatically accept the statements contained therein to be an accurate portrayal of the facts. As a general rule, the less the Trial Chamber knew about a document, the circumstances of its creation and usage, the less weight it gave to it. For example, the Trial Chamber admitted a documentary film proffered by the Prosecution, Storm Over Krajina, but emphasised when admitting it that since it largely depicted persons, events, and locations with no identifying information, the film contained little probative value overall.

[...]

In evaluating the probative value of hearsay evidence, the Trial Chamber carefully considered all indicia of its reliability, including whether the evidence stemmed from a source that gave it voluntarily, whether it was first-hand or further removed, the absence of an opportunity to cross-examine the person who made the statement, and the circumstances under which the hearsay evidence arose. The Trial Chamber clarified that its primary interest in hearing a witness’s testimony was to establish facts which were observed by the witness, and that hearsay evidence which is obscure, in the context of all the evidence, may be given no weight. It further clarified that hearsay evidence may also be used as corroborative evidence. The Trial Chamber used as a standard that it would not enter a conviction where the evidence supporting that conviction was based solely on hearsay evidence. Similarly, with regard to written, non-cross-examined evidence such as Rule 92 bis or 92 quater statements, the Trial Chamber required corroboration by other evidence before entering a conviction

[...]

*Exhibit P689 is an inter-agency human rights violations report which cites as sources only the agency from which the information originated. As the report only contains summarized information and lacks clearly indicated sources, the Trial Chamber decided not to rely on it in relation to information described therein if uncorroborated by other evidence.” **

* *Prosecutor v. Gotovina et al.*, IT-06-90-T, Trial judgement, 15 April 2011, Vol. 1, paras. 38,43,49-59.

241 *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, paras. 18-20.

242 *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, 19 January 1998, para. 31.

243 *Prosecutor v. Tadić*, IT-94-1-A, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 93; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Decision on Prosecutor’s Appeal on Admissibility of Evidence Appeals Chamber, 16 February 1999, paras. 15-16.

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solemn declaration and that its reliability may be affected by a potential compounding of errors of perception and memory.”²⁴⁴

14. In assessing the weight and probative value of documentary evidence, an important factor is whether the author of the document, or a person with personal knowledge of its contents, appears as a witness. Otherwise, the contents of a document remain unauthenticated and not subject to the kind of scrutiny which comes with the cross-examination of a witness. A Trial Chamber may consider a hearsay document unreliable and attach no weight to it.

A.3 Evaluation of Evidence

15. The criteria for admissibility of evidence must not be confused with the Chamber’s ultimate determination of the weight to assign any particular item of evidence. Weight refers to the qualitative assessment of probative value that a Chamber will give a piece of evidence in relation to the facts at issue in a case. Weight can be determined by numerous factors, and evidence can be given whatever weight the Trial Chamber deems appropriate.²⁴⁵ Moreover, a Chamber has discretion, if the circumstances merit it, to give no weight to evidence which it had initially deemed to be admissible, in light of the record as a whole²⁴⁶(see case box *Gotovina et al. case - Ascribing Weight to Evidence*).

B. Specific Categories of Evidence

16. Below is an overview of the different categories of evidence that have been admitted in trials before the ICTY, as well as certain issues counsel should be alert to when dealing with these categories of evidence.

B.1 Written Statements and Transcripts *in lieu* of Oral Testimony

17. Rule 92 *bis* governs the admission of written evidence in the form of written statements and transcripts *in lieu* of oral evidence, and provides a general test for their admission.²⁴⁷ The test to be applied is whether the written statement or transcript sought to be admitted goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment. The two leading Appeals Chamber decisions concerning Rule 92 *bis* were rendered in *Galić* and *Milošević*.²⁴⁸ Both these decisions examined the purpose of this provision and the circumstances in which it is appropriate for a written statement to be admitted into evidence *in lieu* of oral testimony. In *Galić*, the Chamber noted that the intention of Rule 92 *bis* was to qualify the previous preference in the Rules for “live, in court” testimony. It was interpreted to mean that if its provisions were satisfied, and the material had probative value within the meaning of the case law interpreting Rule 89(C), it was in principle in the interests of justice under Rule 89(F) to admit the evidence in written form.²⁴⁹ Its general aim was to make trials more expeditious. While not preventing examination and

244 *Prosecutor v. Simić et al.*, IT-95-9-T, Trial judgement, 17 October 2003, para. 23; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 11; *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 70.

245 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial judgement, Vol. 1, para. 36.

246 *Ibid.*, paras. 36, 56-61.

247 See Chapter VIII “Direct, Cross-Examination and Re-Examination”, Section E.1. for further discussion on Rule 92 *bis*, ICTY RPE.

248 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002 and *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution’s Investigator’s Evidence, 30 September 2002.

249 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, para. 11.

cross-examination of the witness as such, Rule 92 *bis*(A) states that a Trial Chamber “may dispense” with the attendance of a witness in person.²⁵⁰

18. “Acts and conduct of the accused” is understood as a “plain expression” that “should be given its ordinary meaning: deeds and behaviour of the accused.”²⁵¹ Rule 92 *bis* excludes a written statement that goes to proof of any act or conduct of an accused upon which the Prosecution relies to establish that the accused:
 - ◆ committed any of the crimes charged;
 - ◆ planned, instigated or ordered the crimes;
 - ◆ otherwise aided and abetted the alleged perpetrators;
 - ◆ was the superior of the perpetrators;
 - ◆ knew or had reason to know those crimes had been committed or were about to be committed by his subordinates; or,
 - ◆ failed to take reasonable steps to prevent such acts or punish those who carried out these acts.²⁵²
19. The *Galić* decision further found that where the Prosecution charges the accused with participation in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92 *bis*(A) excludes also any written statement which goes to proof of any act or conduct of the accused upon which the Prosecution relies to establish:
 - ◆ that he had participated in that joint criminal enterprise, or
 - ◆ that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.
20. Those are the “acts and conduct of the accused as charged in the indictment”, not the acts and conduct of others for which the accused is charged in the indictment with responsibility.²⁵³
21. Rule 92 *bis*(A)(i) provides a non-exhaustive list of factors in favour of the admission of written evidence in the form of written transcripts or statements while Rule 92 *bis*(A)(ii) gives a non-exhaustive list of factors which militate against their admission. Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:
 - ◆ is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
 - ◆ relates to relevant historical, political or military background;
 - ◆ consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
 - ◆ concerns the impact of crimes upon victims;
 - ◆ relates to issues of the character of the accused; or,
 - ◆ relates to factors to be taken into account in determining sentence.

250 *Prosecutor v. Prlić*, IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcripts of Jadranko Prlić’s Questioning into Evidence, 23 November 2007, para. 43.

251 *Prosecutor v. Milošević*, IT-02-54-T, Decision on Prosecutions Request to have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 22.

252 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 10

253 *Ibid.*

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22. Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:
- ◆ here is an overriding public interest in the evidence in question being presented orally;
 - ◆ a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or,
 - ◆ there are any other factors which make it appropriate for the witness to attend for cross-examination.
23. Further, while a written statement or transcript which goes to proof of a matter other than the acts and conduct of the accused is not inadmissible *per se*, pursuant to Rule 92 bis the Chamber must determine, as a matter of discretion, whether or not it will admit the proposed written statement or transcript. Where the evidence is pivotal to the Prosecution case, or where the person whose acts and conduct the written statement describes is closely proximate to the accused, the Chamber may be persuaded that it would not be fair to the accused to permit the evidence to be given in written form.²⁵⁴
24. Nevertheless, according to Rule 92 bis(C) the Chamber also has discretion to require a witness, whose written statement or transcript is admitted, to appear in court for cross-examination. This discretion is to be exercised bearing in mind the overriding obligation of the Chamber to ensure a fair trial under Articles 20 and 21 of the ICTY Statute.²⁵⁵ An important consideration in this regard is whether the evidence in question relates to a "critical element of the Prosecution's case, or to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue."²⁵⁶ A Trial Chamber may also consider the cumulative nature of the evidence;²⁵⁷ whether the evidence is "crime-base" evidence or whether it relates to the acts and conduct of subordinates for which the accused is allegedly responsible;²⁵⁸ the proximity of the accused to



Popović et al. case - Application of criteria for admission of 92 bis statements

In the Popović Case, the Prosecution moved for the admission of a number of witness statements pursuant to Rule 92 bis. In relation to one group of the tendered statements the Chamber held the following:

"With one exception, the Trial Chamber observes that the evidence of these fourteen witnesses does not go to the acts or conduct of the Accused. Witness No. 56 testified in both Krstić and Blagojević, and was subjected to extensive cross-examination on both occasions. Among other things, this witness testimony describes the conditions in Potočari at the time the Srebrenica enclave fell and the state of the refugees there. What is of concern to the Trial Chamber, however, is that the witness...also describes his participation in two meetings at the Hotel Fontana with General Mladić and other officers, occurring on 11 and 12 July 1995. Although the witness does not name any of the Accused, the Trial Chamber observes that the Prosecution alleges Popović was present at the second of these meetings. Thus, without naming him, the witness describes an event in which Popović participated. These meetings appear to play a prominent role in the Prosecution's theory of this case. This surely implicates the acts or conduct of one of the Accused. Accordingly, the witness's testimony is not appropriate for admission pursuant to Rule 92 bis.

*The remaining thirteen Bosnian Muslim Witnesses do not mention any of the Accused by name. Nor do any of them describe acts or conduct of unidentified persons that could be the Accused. Nor do they appear to describe specific individual events at which the Prosecution alleges any of the Accused was personally present at the time described. Accordingly, the evidence of all thirteen is admissible pursuant to Rule 92 bis." **

* *Prosecutor v. Popović*, IT-05-88-T, Decision on Prosecution's Confidential Motion for the Admission of Written Evidence in lieu of Oral Testimony pursuant to Rule 92 bis, 12 September 2006, paras. 75-76.

254 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis (C), 7 June 2002, para. 13.

the acts and conduct described in the evidence²⁵⁹ (see case box *Popović et al. case - Application of criteria for admission of 92 bis statements*).

25. Regarding the admission of written statements *in lieu* of attendance in person by a witness, Rule 92 *bis* (B) requires the author of the written statement to make a declaration that "the contents of the statement are true and correct", that such a declaration is attached to the statement, and that this declaration be verified "in writing" by "an authorized person".
26. In addition, ICTY jurisprudence has noted that Rule 92 *bis* is directed to written statements prepared for the purposes of legal proceedings which are proposed to be admitted into evidence for the truth of their contents.²⁶⁰ The limitation on the nature and scope of the evidence admissible under Rule 92 *bis* reflects a concern for the reliability of the material prepared by a party for the purposes of trial proceedings, instead of oral evidence from the makers of the statements. The Appeals Chamber observed that any documents made in relation to pending or anticipated legal proceedings, involving a dispute as to any fact which the documents might tend to establish, must be approached with caution. This concern recognized the potential for fabrication and misrepresentation by the makers of such documents and for them to be carefully devised by lawyers or others to ensure that they contain only the most favourable version of the facts stated.²⁶¹

B.2 Written Statements and Transcripts *in lieu* of Examination in Chief

27. Under Rule 92 *ter* of the ICTY RPE,²⁶² a statement or transcript that goes to proof of the acts and conduct of the accused may be admitted into evidence. This stands in contrast to Rule 92 *bis*, where matters concerning the "acts and conduct of the accused" that are contained in a prior written statement or transcript are not admissible. However, Rule 92 *ter* requires the witness to appear in court, adopt his statement or prior testimony as being accurate, and be prepared to answer questions under cross-examination or from the Chamber.
28. This Rule is intended to foster "judicial economy" meaning that evidence the witness would give during "examination-in-chief" orally may be admitted either in whole or in part in written form, thus saving time in court. The witness must simply attest to the accuracy of his previous statement and acknowledge the same answers would be given, if asked the same questions. In addition, the Prosecution may be permitted to ask limited number of questions in direct examination, to clarify matters contained in the tendered 92 *ter* evidence, or to give additional evidence on matters which are not contained in those statements or transcripts.
29. This procedure will shorten the time used in court to hear the evidence of the witness, but it may nonetheless result in substantial amount of evidence being admitted through the witness. For example, the witness may have provided numerous prior statements or may have testified at trial on numerous occasions in the past, or both. The previous declarations which may be admitted under Rule 92 *ter* could very well be

255 *Prosecutor v. Sikirica et al.*, IT-95-08-T, Decision on Prosecutions Application to Admit Transcripts Under Rule 92 *bis*, 23 May 2001, para. 4; *Prosecutor v. Strugar*, IT-01-42-T, Decision on Prosecution Request to Admit Written Statements pursuant to Rule 92 *bis*, 22 January 2004, para. 9.

256 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecutions Request to have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, paras. 24-25.

257 *Ibid.*, para. 23.

258 *Ibid.*

259 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 15.

260 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, para. 28.

261 *Ibid.*, para. 28. See also *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.2, Decision on Admissibility of Prosecution's Investigator's Evidence, Appeals Chamber, 30 September 2002, para. 18(3).

262 See also Chapter VIII "Direct, Cross-Examination and Re-Examination", Section E.2. for further discussion on Rule 92 *ter*, ICTY RPE.

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hundreds of pages long, if the witness testified extensively in one or more previous trials. In addition, if the witness has testified in previous proceedings, there may be hundreds of exhibits associated to this testimony which will be tendered along with the transcript. It should also be noted that some Trial Chambers have now adopted a practice of admitting “amalgamated statements” under Rule 92*ter*. This is essentially a consolidated version of all a witness’s prior statements on which the Prosecution intends to rely on in the current trial.²⁶³ Counsel should be wary of amalgamated statements as they are yet another level removed from the words actually spoken by a witness, and are close to being a witness summary prepared by the Prosecution. While this may be a more concise manner of dealing with the evidence in court, counsel must still thoroughly review all the prior statements and transcripts in preparation for cross-examination.

30. Chamber nonetheless has discretion whether to allow a witness to testify pursuant to Rule 92*ter*. “Judicial economy” is not necessarily the only parameter which will guide a Chamber in determining the mode of testimony for a witness. Factors, such as the number of previous statements - perhaps not given under oath and which may be inconsistent - may be relevant in making such a determination. These matters will arise on a case-by-case basis. However, relying on the “best evidence rule” and the need to ensure a fair and expeditious trial, a Chamber may decide that it is the interests of justice to hear a witness’s testimony firsthand.²⁶⁴

B.3 Evidence of Unavailable Witnesses

31. Rule 92 *quater* of the ICTY RPE allows for the admission in writing form of the evidence of “unavailable persons”.²⁶⁵ According to the jurisprudence of the ICTY, for a statement to be admitted pursuant to Rule 92 *quater*, the Trial Chamber must satisfy itself that:
- 1) the witness is unavailable;
 - 2) the statement is reliable;
 - 3) the statement is relevant and of probative value; and
 - 4) whether the statement goes to the acts and conduct of the accused or involves critical evidence.²⁶⁶
32. A Trial Chamber must first determine if the witness is unavailable, meaning that on a balance of probabilities that a witness is dead or can no longer be traced with reasonable diligence.²⁶⁷ Then, the Chamber must decide whether the evidence is reliable, whether to admit the evidence in the exercise of its discretion, including whether the information goes to the acts and conduct of the accused, goes to a core issue in the case, and whether the cross-examination in the prior proceeding adequately addressed interests relative to the accused in current case.²⁶⁸ For example, the first trial may relate entirely to the responsibility of military officials for the alleged crimes, and the second trial may relate to the responsibility of police officials or political figures for those crimes. Additionally, it should be borne in mind that defendants in other cases would have had

263 *Prosecutor v. Karadžić*, IT-95-5/18-T, Order on the procedure for the conduct of trial, 8 October 2009, Appendix A.

264 *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, IT-08-91-T, Decision Denying Prosecution’s Motion for Admission of Evidence of Pregrad Radulović Pursuant to Rule 92 *ter*, 1 April 2010.

265 See also Chapter 8 “Direct, Cross-Examination and Re-Examination”, Section E.1. for further discussion on Rule 92 *quater*, ICTY RPE.

266 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvić), 14 January 2008, paras. 10-13; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, paras. 3, 6; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007, para. 6.

267 *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motions for Admission of Written Evidence Pursuant to Rule 92 *bis* of the Rules, 16 January 2006, para. 12.

268 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 27 October 2006, paras. 9-12.

significantly less incentive to contest certain elements of the evidence than they would for facts related to their own actions and, in some cases, such defendants might affirmatively choose to allow blame to fall on others.

33. In addition, the general requirements of admissibility of evidence under Rule 89 must be satisfied, namely that the evidence is relevant and has probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial.²⁶⁹
34. The following factors are relevant to the assessment of the reliability of the statement:
 - 1) whether the statement was made under oath;
 - 2) whether it was signed with an acknowledgement that it was true;
 - 3) whether it was taken with the assistance of an interpreter qualified by the Registry;
 - 4) whether the statement was subject to cross-examination;
 - 5) whether there is other evidence relating to the same events; and,
 - 6) other factors such as manifest inconsistencies in the statement.²⁷⁰
35. A statement or transcript admitted without cross-examination cannot support a conviction by itself, unless the statement is otherwise corroborated.²⁷¹ The Trial Chamber will also consider the absence of cross-examination when determining how much weight to give to the statement.²⁷²
36. In the exercise of their discretion to admit testimony under Rule 92*quater*, ICTY Trial Chambers have ruled as follows:
 - ◆ Testimony of a witness in a previous trial was admitted where it was reliable and where other live witnesses had addressed the same topics.²⁷³
 - ◆ Testimony of a witness in a previous trial and statements given to Prosecutor were admitted where they did not go to fundamental issues of the case.²⁷⁴
 - ◆ Testimony about a critical issue in the Prosecution's case was not admitted.²⁷⁵
 - ◆ Direct examination of witness who fell ill before being cross examined was not admitted where the testimony was not sufficiently reliable or corroborated by other witnesses.²⁷⁶
 - ◆ A deceased witness who had signed his statement with an "X" in the presence of a representative of the Registry was sufficient proof of the reliability of the method under which the statement was taken²⁷⁷

269 *Prosecutor v. Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 9 July 2007, page 4.

270 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007, para. 7; *Prosecutor v. Rasim Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 9 July 2007, page 4; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 8.

271 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 *quater* of the Rules (Hasan Rizvić), 14 January 2008, paras. 22-23.

272 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007, para. 13.

273 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 5 March 2007.

274 *Prosecutor v. Rasim Delić*, IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 9 July 2007, page 6.

275 *Prosecutor v. Slobodan Milošević*, IT-98-29/1-T, Decision on Prosecution's Motion for Admission of Witness Statements Pursuant to Rule 92 *quater*, 19 April 2007, paras. 16-17.

276 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and to Deny His Testimony Pursuant to Rule 92 *quater*, 14 December 2007, para. 16.

277 *Prosecutor v. Haradinaj et al.*, No. IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 9.

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- ◆ Although a statement of a deceased witness went to the acts and conduct of the accused, it was cumulative to other testimony which had been subject to cross-examination and could be admitted²⁷⁸
37. Rule 92*quinqüies* is the latest rule permitting written witness statements to be admitted into evidence without any testing by cross-examination.²⁷⁹ It provides, in essence, that a prior written statement of a witness may be admitted *in lieu* of that witness's oral testimony if the failure to testify has been, *inter alia*, "materially influenced by improper interference including threats, intimidation, injury, bribery, or coercion."²⁸⁰ Rule 92*quinqüies* specifically provides that written statements admitted under the Rule "may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment."²⁸¹ However, the Rule does provide that in determining whether to admit a written statement "the interests of justice" include an assessment of the reliability of the statement or transcript of the witness having regard to:
- ◆ the circumstances in which it was made and recorded;²⁸²
 - ◆ the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference;²⁸³ and,
 - ◆ whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.²⁸⁴
38. An important point to note regarding the admission of Prosecution witness statements introduced in evidence during ICTY trials is that they are gathered, usually prior to trial and sometimes many years prior to trial, by Prosecution investigators or Prosecution counsel as part of the Prosecution's investigation of its own case. The ICTY has not adopted the system, familiar in many civil law jurisdictions, of creating a dossier of the case prepared by a judicial officer before trial who is required to seek out exculpatory and inculpatory evidence with equal determination, and who is expected not to favour either the Prosecution or the Defence.²⁸⁵ With extremely rare exception, no one representing the interests of the accused is present at the time such statements are obtained.

B.4 Statements of the Accused

39. Statements or interviews of an accused with the ICTY Prosecution have also been held to be admissible. The test for admissibility is two-pronged:
- 1) whether the procedural safeguards set forth in Rules 42 and 43 are satisfied;²⁸⁶ and,
 - 2) whether the admissibility test laid down in Rules 89(C) and 89(D) is met.²⁸⁷

278 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *quater* and 13th Motion for Trial-Related Protective Measures, 7 September 2007, para. 10.

279 This rule was enacted in late 2009. There are no rulings interpreting or applying its provisions as of the date this chapter was sent to press.

280 Rule 92*quinqüies*, ICTY RPE, enacted 10 December 2009.

281 Rule 92*quinqüies*(B)(iii), ICTY RPE.

282 Rule 92*quinqüies*(B)(ii)(a), ICTY RPE.

283 *Ibid.* at (B)(ii)(b).

284 *Ibid.* at (B)(ii)(c). In this sense the fact a statement goes to the acts and conduct of the accused might be a factor weighing against admission of the statement but it is not cause to prevent its admission.

285 See *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, 21 October 2003, para. 6.

286 ICTY RPE rules 42 and 43 deal with the rights of suspects and the recording of suspect interviews during investigations.

287 *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on the Admissibility of the Borovcanin Interview, 25 October 2007, paras. 28, 29-39.

40. Statements made by the accused in the presence of counsel are presumed to be made with the awareness of the right to remain silent.²⁸⁸ The Prosecution bears the burden of establishing all factors of the reliability of a statement of the accused which it offers in evidence.²⁸⁹ At the ICTY, the testimony of an accused in another trial at the ICTY has been deemed admissible in the accused's own trial, where he had been advised of his rights prior to giving the testimony and waived them.²⁹⁰ An accused cannot invoke his right against self incrimination to block admission of a statement freely given after being advised of his right to remain silent.²⁹¹
41. In 2007, in the *Prlić et al.* case²⁹² and the *Popović et al.* case,²⁹³ the Appeals Chamber ruled that suspect interviews between an accused and the Prosecution are also admissible for use against the co-accused, including as evidence of the acts and conduct of those co-accused. With respect to the rights of the accused in multi-defendant trials, this break with past jurisprudence is yet another unfortunate move away from the right of the accused to confront the evidence offered against them at trial. Prior to *Prlić et al.*, this issue was governed by jurisprudence emanating from the *Blagojević case*, where the Trial Chamber held, pursuant to Rule 89, that a Prosecution interview of one accused could not be admitted against the co-accused because it violated the co-accused's right to cross-examination.²⁹⁴ This takes into account factors such as the ultimate truthfulness of such an interview when a suspect being interviewed in these circumstances by the Prosecution may attempt to minimize his role in any criminal activities while highlighting or even exaggerating the role of others. This risk was noted by the Chambers in *Prlić et al.* and *Popović et al.*,²⁹⁵ however, the Appeals Chamber has held that the transcripts of such interviews may be introduced into evidence even if the co-accused are not able to cross-examine the maker of that statement, since as a matter of principle nothing bars the admission of evidence that is not tested or might not be tested through cross-examination.²⁹⁶
42. It is difficult to see how the fundamental problems with using statements of an accused against a co-accused can be reconciled with the threshold requirements for the admissibility of hearsay evidence; namely, when sought to be admitted to prove the truth of its contents there must be "indicia of reliability" that the out-of-court statement was voluntary, truthful, and trustworthy.
43. Nevertheless, untested evidence relating to the acts and conduct of the accused which is admitted into the trial record, must be corroborated by other evidence in order to form a basis for a conviction of an accused.²⁹⁷

288 *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15.

289 *Prosecutor v. Orić*, IT-03-68-T, Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95, 7 February 2006, para. 22.

290 *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Prosecution's Motion to Admit into Evidence Transcripts of Vojislav Šešelj's Testimony in the Milošević Case, 30 October 2007.

291 *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para. 15.

292 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, Appeals Chamber, 23 November 2007.

293 *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin's Questioning Appeals Chamber, 14 December 2007.

294 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Transcript, 22 May 2003, T: 735-736.

295 See *Prosecutor v. Popović et al.*, IT-05-88-T, Public Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 *Ter* Exhibit List, 25 October 2007, para 65, and Partially Dissenting Opinion of Judge Kimberly Prost, Public Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 *Ter* Exhibit List, 25 October 2007 para. 20.

296 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, Appeals Chamber, 23 November 2007, paras. 53, 55-57 and *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin's Questioning Appeals Chamber, 14 December 2007, para. 48.

297 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, Appeals Chamber, 23 November 2007, paras. 53, 55-57 and *Prosecutor v. Popović et al.*, IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovcanin's Questioning Appeals Chamber, 14 December 2007, para. 48.

B.5 Intercept Evidence

44. The position under existing case law at the ICTY is that evidence obtained illegally in breach of domestic law is not *per se* subject to being excluded from evidence at trial.²⁹⁸ This has meant that intercepts taken in violation of domestic laws, or documents seized in violation of local procedural requirements are routinely admitted in evidence at the ICTY.²⁹⁹

45. The *Brđanin* Trial Chamber, in response to Defence objections that there should be a universal exclusion from evidence of information obtained illegally or unlawfully, held:

*“It is clear from the review of national laws and international law, and the Rules and practice of this International tribunal, that before this Tribunal evidence obtained illegally is not, a priori, inadmissible, but rather that the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effects on the integrity of the proceedings, will determine its admissibility. Illegally obtained evidence may, therefore, be admitted under Rule 95 since the jurisprudence of the International Tribunal has never endorsed the exclusionary rule as a matter of principle.”*³⁰⁰

46. The Chamber went on to say that admitting illegally obtained intercepts into evidence does

not, in and of itself, necessarily amount to seriously damaging the integrity of the proceedings.³⁰¹ Rather, such intelligence may actually prove to be essential in uncovering the truth, particularly in situations of armed conflict.³⁰² As such, the ICTY will only exclude evidence if the integrity of the proceedings would indeed be seriously damaged.³⁰³ Ultimately, the *Brđanin* Trial Chamber held that in light of the “gravity of the charges brought against the accused and the jurisdiction that this Tribunal has to adjudicate serious violations of international law, intercepted evidence, even where obtained in a pre-armed conflict period in violation of

	PRACTICE TIP
<p><i>Possible Considerations for Defence Challenges to Intercept Evidence</i></p> <p>Verification of Authenticity: Has the authenticity of the intercepts been established? Has there been any evidence about the mechanical or technical process used to make the recordings? Has the intercept operator, or any person involved in the intercept recording process testified? What procedures were followed to make the recordings and/or transcriptions of the intercepted communications?</p> <p>Reliability: Has there been any evidence which would show that the recordings are complete and accurate, and that they have not been tampered with in any way? How were the recordings stored? What is the chain of custody of the recordings? Are there original recordings to compare to intercepts that are tendered as transcripts only?</p> <p>Contents of the intercepted communications: Are the contents relevant to the indictment? Have the voices been authenticated? Do the conversations relate to the acts and conduct of the accused? How does this impact your ability to confront the evidence against the accused? Are the contents of the intercepts corroborated by other evidence?</p> <p>It should be noted that while these arguments have often failed at the ICTY at the admissibility stage, they are also relevant to final arguments relating to intercept evidence and the ultimate weight a Chamber may ascribe to such evidence in its final determinations.</p>	

298 See e.g. *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Defence ‘Objection to Intercept Evidence’, 3 October 2003, para. 53.

299 See e.g. *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Defence ‘Objection to Intercept Evidence’, 3 October 2003; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-T, Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts, 16 December 2009; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Conversations, 7 December 2007; *Prosecutor v. Karadžić*, Decision on the Accused’s motion to Exclude Intercepted Communications, 30 September 2010.

300 *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Defence Objection to Intercept Evidence, 3 October 2003, para. 55.

301 *Ibid.*

302 *Ibid.*

303 *Ibid.*

the applicable domestic law, should be admitted into evidence.”³⁰⁴ As with any other evidence, intercept evidence will be analysed and granted its appropriate weight in the context of the entire trial, and will be subject to the same interrogation as every other piece of evidence, such that evidence not proved to be authentic beyond a reasonable doubt will be granted no weight at the end of a trial.³⁰⁵

B.6 Evidence Tendered from the Bar Table

47. As a general rule, documents are not admitted except in connection with the testimony of witnesses. However, in some circumstances, the relevance and reliability of a document is sufficiently apparent to justify its admission without the need for any evidence relating to the document. Under this standard, some documents have been admitted from the “bar table”.³⁰⁶ A document may be admitted without an authenticating witness, but the party seeking the admission of a document without using a witness runs the risk that the probative value will be lessened or the document will be excluded.³⁰⁷
48. It is not necessary that a document be authenticated by a witness for it to be admitted. However, an exhibit which has not been presented to a witness has less probative value than one which has.³⁰⁸ When documents are sought to be admitted from the bar table, the offering party must be able to demonstrate with clarity and specificity when and how each document fits into its case.³⁰⁹ This method of tendering evidence is now commonly used by both the Prosecution and the Defence at the ICTY.

B.7 Other Documentary Evidence

49. The following, non-exhaustive, observations emanate from the practice and jurisprudence of the ICTY concerning the admissibility of documentary evidence, whether through a witness or from the bar table:
- ◆ Documents that have not been translated into a working language of the ICTY, but which have been dealt with during the examination of a witness may either be marked for identification pending translation or be deemed inadmissible.³¹⁰
 - ◆ Documents that have not been dealt with during the testimony of the witness through whom they are sought to be tendered are generally inadmissible.³¹¹ However, exceptions may be made for documents whose reliability and relevance have been demonstrated in another manner.³¹²
 - ◆ Generally, entire books and other similarly lengthy documents should not be admitted into evidence. Rather, only relevant portions of those materials should be tendered.³¹³ However, when only part of a

304 *Ibid.*, para. 63(8).

305 *Ibid.*, para. 68; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Admissibility of Intercepted Conversations, 7 December 2007, paras 76-77

306 *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-T, Decision on Prosecution’s Motion for Admission of Exhibits from the Bar Table, 14 May 2007, paras. 10,13.

307 *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, 22 June 2005, paras. 33-35.

308 *Prosecutor v. Orić*, IT-03-68-T, Trial judgement, 30 June 2006, para. 29; *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion to Admit Exhibits from Bar Table, 28 April 2009, para. 5.

309 *Prosecutor v. Rasim Delić*, IT-04-83-T, Decision on Prosecution Submission on the Admission of Documentary Evidence, 16 January 2008, para. 9; *Prosecutor v. Rasim Delić*, IT-04-83-T, Decision on Defence Motion for the Admission of Documentary Evidence, 5 March 2008, para. 5; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution’s motion to admit documentary evidence, 10 Oct 2006, para. 18.

310 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Order on admission of documents (including exhibits of witnesses Kosta Mihajlović and Čedomir Popov) and Decision on Prosecution motion regarding exhibits and other practicalities during the defence case, 7 February 2005, p. 3.

311 *Ibid.*

312 *Ibid.*

313 *Ibid.*, page 7; *Prosecutor v. Perišić*, IT-04-81-T, Order for Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel in Court, 29 October, 2008 paras. 24-25.

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document is tendered, the opposing party has the right to see the entire document and make use of sections relevant to its case.³¹⁴

- ◆ Letters written contemporaneously to the events they describe may provide valuable evidence.³¹⁵
- ◆ Videos³¹⁶, photographs, and tape-recordings³¹⁷ may be admissible, assuming they meet the standards of relevance and reliability.
- ◆ Contemporaneous diaries may be admitted. For example, the *Kordić* Trial Chamber admitted a war diary into evidence, stating that it carried “its own authenticity, being written in several hands and, having every sign of being what it purports to be”.³¹⁸
- ◆ Military orders and reports are also generally admissible, as “[t]hey speak for themselves”, particularly when accompanied by a signature and stamp or seal.³¹⁹

C. Strategic Considerations on Tendering and Challenging Evidence

50. The decision whether to admit a document as an exhibit, or the weight given to an exhibit in final deliberations, may be influenced by any objections made to its admission. It is essential that counsel are prepared to challenge any evidence that is prejudicial to the accused or detrimental to the defence case theory. This will require counsel to be well prepared ahead of time for challenges to the admissibility of certain proposed exhibits, or alternatively to challenge the relevance and reliability of exhibits in cross-examination of prosecution witnesses or through defence witnesses who testify during the defence case. Being prepared for such challenges will require counsel to review all proposed prosecution exhibits with the defence case theory in mind; identify problematic documents; determine whether there are any valid bases to challenge admissibility; conduct any necessary preparation (investigation, forensic examination, etc.); research any relevant legal issues, and prepare both legal and factual arguments for written motions or oral objections.
51. Counsel should consider the purpose of challenging the admission of evidence, how to prepare, and the timing of evidentiary objections. Objections must be timely, and can be done either orally or in writing. Reasons for challenging the admission of evidence include:
- ◆ seeking to exclude a prejudicial piece of evidence;
 - ◆ obtaining information pertaining to a document, such as provenance, or the purpose for which it is being tendered;

314 May, Richard and Marieke Wierda, *International Criminal Evidence* (2002), page 244.

315 May, Richard and Marieke Wierda, *International Criminal Evidence* (2002), pages 246-247; For instance, in the *Bagilishema* case, the defence tendered a letter written by the accused, contemporaneous to the time of the alleged offences, into evidence. One of the judges wrote in a separate opinion that “the accused certainly could not have envisaged facing a trial of this nature at the time he wrote the letter. Hence it enhances the credibility of the matters urged therein.” *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, Separate Opinion of Judge Asoka de A. Gunawardana, 7 June 2001, para. 19.

316 See, for example, the *Kovačević* case, where a video showing the first visit from Western journalists to concentration camps in Prijedor was admitted, *Prosecutor v. Kovačević*, IT-97-24.

317 See, for example, *Krstić*, where the Prosecution admitted a tape-recording of a telephone conversation between one of the accused and a military commander, *Prosecutor v. Krstić*, IT 98-33.

318 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on Prosecutor’s submissions concerning “Zagreb exhibits” and presidential transcripts, 1 December 2000, para. 44.

319 *Ibid.*, para. 43.

- ◆ to preserve on the trial record issues related to the document. Even if these objections are not sufficient to have a document excluded, they may be relevant to the weight given to the document at the end of trial; and,
 - ◆ to prevent claims of waiver on appeal.
52. Objections to groups of documents (such as intercepts), bar table motions, and proposed adjudicated facts, and other situations involving numerous or voluminous documents, are typically done by motion in response to prosecution motions to admit those documents or facts. Responding by written motion allows for full ventilation of all the relevant objections and supporting jurisprudence. Objections to individual documents can be done either in writing or orally, and usually depends on the circumstances surrounding the tendering of the document. It is important that counsel think strategically about the timing of their objections. In some situations, objecting too early may put the prosecution on notice of potential problems with the admissibility of a document and give them time to remedy such problems. Objecting too late to admission, when a party has long been on notice of issues relating to documents, may result in the Chamber overruling any objections as being untimely raised. Commonly, objections to individual documents that are being tendered in court through a witness will be done orally. For example, an objection based on the fact that a party is tendering a document through a witness who has no knowledge of or connection to the contents of the document would usually be made at the moment the prosecution seeks to tender the document. The Chamber may need to evaluate in each case whether it is necessary or preferable to hear some or all of the anticipated evidence relevant to a document, which is the subject of an objection, before admitting it as an exhibit.³²⁰
53. Ultimately, in order to effectively defend a case and protect the rights of the accused during trial, counsel must master the applicable rules of procedure and evidence and remain alert to any potential issues related to proposed evidence. These issues often arise on a case-by-case basis, and the following are only some of the potential grounds on which proposed evidence may be challenged:
- ◆ effect on the rights of the accused,³²¹ probative value is outweighed by need to ensure a fair trial;
 - ◆ effect on the integrity of the proceedings;
 - ◆ manner in which the evidence was obtained and by whom;
 - ◆ violation of relevant safeguards and procedural protections;³²²
 - ◆ violation of Rules or Procedural Guidelines on the timing of disclosure of proposed exhibits;
 - ◆ involvement of the Prosecution in the process of gathering evidence;
 - ◆ illegally obtained evidence (as noted above, this may not be a sufficient basis to exclude, but may be relevant to the issue of reliability of the evidence in question), or a violation of the accused or someone else's fundamental rights in the process of gathering or obtaining that evidence;
 - ◆ ability of the Defence to test the evidence;
 - ◆ testifying witness's lack of knowledge of the contents of the document;
 - ◆ proposed evidence is outside the scope of the indictment and therefore irrelevant; and,

320 *Prosecutor v. Bošković and Tarčulovski*, IT-04-82-T, Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table, 14 May 2007, para. 12.

321 See, for example, *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 43 (exclusion of accused statement due to the absence of counsel during the interview).

322 See for example, *Prosecutor v. Halilović*, IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, 8 July 2005, para. 18; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 533; *Prosecutor v. Kvočka*, IT-98-30/1-T, Trial Judgement, 28 February 2005, para. 128.

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- ◆ document is so devoid of any *indicia* of reliability that it does not meet threshold for admissibility³²³
- 54. It is desirable that a witness speaks to the origins and/or contents of a document being offered into evidence, to enable the Chamber to properly assess the relevance, authenticity, and reliability of that document in a meaningful way in its overall consideration of the evidence.³²⁴ Counsel must also bear this in mind when they are seeking to tender documents through their own defence witnesses.
- 55. Where a document has no basis for exclusion, cross-examination can be used to undermine the reliability or relevance of a document. Documents which challenge a witness' credibility may be admitted even where the witness states that he or she has no knowledge of the document or rejects its contents. In such a case, the fact that a document goes to the witness' credibility may constitute sufficient nexus between the witness and the document to make it admissible, assuming it is otherwise authentic and reliable.³²⁵ However, documents used to impeach a witness are normally admitted for the limited purpose of credibility, and not for the truth of their contents.

C.1 The Use of “Fresh evidence” by the Prosecution during the Defence Case

56. As a general rule, the Prosecution must present evidence in support of its case during its case-in-chief.³²⁶ Defence counsel should be alert to issues related to the tendering of Prosecution evidence during the Defence case. The Prosecution may seek to use what is known as “fresh evidence” in its cross-examination of defence witnesses, namely:
 - ◆ material that was not included on the Prosecution *65 ter* list;
 - ◆ material not admitted during Prosecution case-in-chief;
 - ◆ material tendered by the Prosecution when cross-examining a Defence witness; and,
 - ◆ material not limited to the material that was not available to the Prosecution during its case-in-chief.³²⁷
57. In other words, “fresh evidence” includes both material available to the Prosecution during its case-in-chief and material obtained by the Prosecution after the close of its case-in-chief.
58. A Trial Chamber has the discretion to decide whether to allow “fresh evidence” on a case by case basis, taking into account the probative value of that evidence, and the need to ensure a fair trial.³²⁸ The factors that the Trial Chamber must consider when exercising its discretion are the following:
 - ◆ when and by which means the Prosecution obtained these documents;
 - ◆ when it disclosed the documents to the Defence;
 - ◆ the time elapsed between disclosure and examination of the witness;

323 See, for example, *Prosecutor v. Milutinović et al.*, Decision on Prosecutions Third Request for Admission of Documents from the Bar Table, 23 March 2007, para. 6: Chamber denied admission from the bar table of a Report of the Humanitarian Law Centre in Belgrade. The Chamber was not satisfied of the authenticity and reliability of the report for several reasons (1) the report does not provide a list of sources used by the Humanitarian Law Centre to compile the information nor does it footnote such sources when referring to specific cases of violations of rights; (2) it does not explain the methods by which the collection of data was achieved nor does it address the manner in which this data was analysed (3) the very first page of the report provides that it is to be used for internal purposes of the organisation only, implying that it is not an official publication. Accordingly, the Chamber was unable to assess the reliability of the document and was therefore of the view that the report lacked probative value.

324 *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, para. 11.

325 *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Guidelines for the Admission of Evidence through Witnesses, 19 May 2010, para. 11.

326 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 23.

327 *Ibid.*, para. 15.

328 *Ibid.*, paras. 23-24.

- ◆ the mode of disclosure of the documents in question;
- ◆ why the documents are being offered only after the conclusion of its case;
- ◆ the purpose of the documents admission;³²⁹
- ◆ the languages known to Counsel and the accused;³³⁰ and,
- ◆ other relevant factual considerations.³³¹

59. The Prosecution must specifically justify a request for the admission of ‘fresh evidence’.³³² Where “fresh evidence” introduced by the Prosecution during the Defence case is aimed at establishing the guilt of the accused, the Prosecution must explain to the Chamber on a case-by-case basis when and by which means it obtained the documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of the Prosecution case.³³³ A Trial Chamber may be more lenient with respect to admission of fresh evidence for the sole purpose of impeaching a witness’s credibility or refreshing his or her memory, but still must decide on admission on a case-by-case basis in conformity with Rule 89.³³⁴ The Trial Chamber has the discretion to limit the purpose for which any admitted pieces of evidence may be used³³⁵ (see case box *Prlić et al. case - Application of Threshold for Admission*).
60. When objecting to the admission of fresh evidence, counsel must demonstrate the prejudice that would be caused by the



Prlić et al. case - Application of Threshold for Admission

*In order to clarify the circumstances under which it would allow admission of fresh evidence after the closure of the Prosecution case-in-chief, the Trial Chamber emphasized that it would do so only in exceptional circumstances where the interests of justice so require, such as “the importance of the ‘new document’”. It went on to specify that, with respect to material aimed at establishing the guilt of an accused, the Prosecution must also “explain to the Chamber when and by which means it obtained these documents, when it disclosed them to the Defence and why they are being offered only after the conclusion of its case”. Finally, the Trial Chamber stated that it would proceed with the assessment of such requests on a case-by-case basis, after having permitted the Defence to challenge the evidence, particularly bearing in mind the potential infringement on the rights of the accused caused by the sought admission. The Appeals Chamber is satisfied that this careful approach establishing a high threshold for the admission of fresh evidence duly mindful of Rule 89(C) and (D) of the Rules may be justified, depending on the specific circumstances of the case. **

* *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Appeals Chamber’s Decision on the Interlocutory Appeal Against the Trial Chamber’s Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para 24.

329 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, 26 February 2009, para. 25. *See also Prosecutor v. Rasim Delić*, IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.

330 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, paras. 24- 25, 28- 29; *Prosecutor v. Rasim Delić*, IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.

331 *Ibid.*, para. 25.

332 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, para 23; *See also Prosecutor v. Rasim Delić*, IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal against Trial Chamber’s Oral Decision on Admission of Exhibits 1316 and 1317, 15 April 2008, paras. 22-23.

333 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber’s decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, paras. 24, 28.

334 *Ibid.*

335 *Ibid.*, para. 29.

admission of such evidence.³³⁶ The Trial Chamber may then exclude the evidence, or it may go on to grant relief other than the exclusion of the evidence, such as:

- ◆ providing more time for re-examination;
- ◆ adjourning the session to provide the defence with more time to prepare; and,
- ◆ granting the possibility of recalling the witness.³³⁷

C.2 Rebuttal, Rejoinder and Re-opening

61. Rules 85(A)(iii) and (iv) provide for the admission of evidence in rebuttal and rejoinder during the trial phase. The reopening of a party's case, while not provided for in the Rules, has been permitted since the early days of the ICTY. There are specific standards and thresholds for the admission of evidence in each of these circumstances.

C.2.1 Rebuttal

62. The Prosecution may present evidence in rebuttal of evidence brought by the Defence during its case-in-chief, but only if it relates to a significant new issue arising directly from Defence evidence, which could not have been reasonably foreseen.³³⁸ Rebuttal evidence has been denied in cases where the Prosecution should have anticipated the issue and led the evidence in its own case-in-chief.³³⁹ Only highly probative evidence may be led as rebuttal evidence.³⁴⁰ The Prosecution is under a duty to adduce all evidence critical to proving the guilt of an accused by the close of its own case.³⁴¹ Rebuttal evidence will not be admissible where:

- 1) the evidence is itself evidence probative of the guilt of the accused, and it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it;³⁴²
- 2) merely because the relevant party's case has been met by certain evidence to contradict it;³⁴³ or,
- 3) it could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time.³⁴⁴

336 The Defence should be able to show real prejudice, not general prejudice. The Appeals Chamber in *Kordić and Čerkez* emphasized that "[t]he mere fact that [the admitted evidence] was probative of the Prosecution's case does not mean that the [a]ccused were prejudiced" (*Prosecutor v. Kordić and Čerkez*, Appeal Judgement, para. 224).

337 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the interlocutory appeal against the Trial Chamber's decision on presentation of documents by the Prosecution in cross-examination of defence witnesses, para. 25.

338 *Prosecutor v. Delalić*, IT-96-21-A, Trial Judgement, 20 February 2001, para. 273; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005, para. 6.

339 *Prosecutor v. Halilović*, IT-01-48-T, Decision on Prosecution Motion to Call Rebuttal Evidence, 21 July 2005; *Prosecutor v. Orić*, IT-03-68-T, Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii), 9 February 2006.

340 *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis, 7 July 2005, para. 6.

341 *Prosecutor v. Halilović*, IT-01-48-T, Decision on Prosecution Motion to call Rebuttal Evidence, 21 July 2005, page 3; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal and Incorporated Motion to Admit Evidence under Rule 92 bis in Its Case on Rebuttal and to Re-open Its Case for a Limited Purpose, 13 Sept 2004, para. 6.

342 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 275.

343 *Ibid.*

344 *Ibid.*, para. 276.

C.2.2 Rejoinder

63. The Defence may respond to Prosecution rebuttal evidence through the presentation of rejoinder evidence. This evidence may be brought only with respect to what directly arises out of rebuttal evidence and could not be expected to have been addressed during the Defence case.³⁴⁵

C.2.3 Re-opening of the Case

64. Either the Prosecution or the Defence can apply to re-open their case-in-chief. A party will only be allowed to reopen its case to offer fresh evidence when it is shown that the evidence could not have, with reasonable diligence, been identified and presented in the case in chief.³⁴⁶ In this context, the Appeals Chamber has specified that “fresh evidence” is:

- 1) evidence which was not in the possession of a party at the conclusion of its case, and by which the exercise of all diligence could not have been obtained by the party at the close of its case; or evidence the party had in its prior possession, the importance of which only became apparent in light of other fresh evidence.³⁴⁷

65. To establish whether the evidence is “fresh evidence” meeting the threshold for re-opening, the Chamber must assess the diligence shown by the requesting party in obtaining the exhibits sought for admission. To this end, the Chamber must take into account the existence of any *indicia* which might have allowed the discovery of these exhibits or signalled their importance at an earlier stage of the proceedings.³⁴⁸ This analysis is done on a case-by-case basis.³⁴⁹ Even if the Trial Chamber is satisfied that the moving party has shown due diligence, it may still refuse to open the case pursuant to Rule 89(D), when the probative value is outweighed by the need to ensure a fair trial.³⁵⁰ The Trial Chamber must therefore “exercise its discretion as to whether to admit the fresh evidence by weighing the probative value of that evidence against any prejudice to the accused in admitting the evidence late in the proceedings.”³⁵¹ The Chamber must, in particular, examine the following factors:

- ◆ the stage of the trial;
- ◆ the delay likely to be caused by the re-opening;
- ◆ the consequences that the presenting of fresh evidence against an Accused might have on the fairness of the trial against his co-accused; and,
- ◆ the probative value of the evidence to be presented.³⁵²

345 *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Joint Defence Motion to Admit Rejoinder Statement via Rule 92 bis, 18 July 2005, para. 3

346 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 283; *Prosecutor v. Kordić and Čerkez*, IT-65-14/2-A, Appeal Judgement, 17 December 2004, para. 222.

347 *Prosecutor v. Popović et al.*, IT-05-88-AR73.5, Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Re-open its Case-in-Chief, 24 September 2008, para. 11; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 282-283.

348 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution’s Motion to Re-open its Case, 6 October 2010, para. 38.

349 *Prosecutor v. Popović et al.*, IT-05-88-AR73.5 Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Re-open its Case-in-Chief, 24 September 2008, para. 10.

350 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 283.

351 *Ibid.*; *Prosecutor v. Kordić & Čerkez*, No. IT-65-14/2-A, Appeal Judgement, 17 December 2004, para. 222.

352 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on the Prosecution’s Motion to Re-open its Case, 6 October 2010, para. 33; *Prosecutor v. Popović et al.*, IT-05-88-AR73.5 Decision on Vujadin Popović’s Interlocutory Appeal against the Decision on the Prosecution’s Motion to Re-open its Case-in-Chief, 24 September 2008, para. 27; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal judgement, 20 February 2001, paras. 280,290.

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66. Any motion by counsel to oppose re-opening should be based on an analysis of whether the proposed evidence meets all the criteria necessary for re-opening, as well as the prejudice to the accused, and any possible remedies to such prejudice, such as the exclusion of evidence, or the opportunity to re-call witnesses.

C.3 Judicial Notice of Adjudicated Facts

67. Rule 94(B) of the ICTY RPE gives a Trial Chamber discretion to take judicial notice of relevant facts adjudicated in trial or appeal judgements of the ICTY after having heard the parties, even if one party objects to the taking of judicial notice of a particular fact.³⁵³ The aims of Rule 94(B) are to achieve judicial economy and to harmonise the judgements of the Tribunal.³⁵⁴ In applying Rule 94(B), the Trial Chamber must achieve a balance between promoting these aims and safeguarding the fundamental right of the accused to a fair trial.³⁵⁵ This involves a two-step process. First, the Trial Chamber must determine whether the facts fulfil a number of admissibility requirements which have been set out in the jurisprudence, most recently in the *Popović et al.* case.³⁵⁶ Secondly, for each fact that fulfils the requirements, the Trial Chamber must determine whether it should, in the exercise of its discretion, withhold judicial notice on the ground that taking judicial notice of the fact in question would not serve the interests of justice.³⁵⁷ The *Popović et al.* requirements are the following:³⁵⁸

- 1) the fact must have some relevance to an issue in the current proceedings;
- 2) the fact must be distinct, concrete, and identifiable;
- 3) the fact as formulated by the moving party must not differ in any substantial way from the formulation of the original judgement;
- 4) the fact must not be unclear or misleading in the context in which it is placed in the moving party's motion;
- 5) the fact must be identified with adequate precision by the moving party;
- 6) the fact must not contain characterisations of an essentially legal nature;
- 7) the fact must not be based on an agreement between the parties to the original proceedings; and,
- 8) the fact must not relate to the acts, conduct, or mental state of the accused; and

353 *Prosecutor v. Popović et al.*, IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 September 2006, para. 3; *Prosecutor v. Karamera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2006, para. 41; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Decision on the motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to admit additional evidence pursuant to Rule 115 and for judicial notice to be taken pursuant to Rule 94 (B), 8 May 2001, para. 6; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Decision on Prosecution's motion for judicial notice of adjudicated facts and documentary evidence, 19 December 2003, para. 15; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Prosecution's motion for judicial notice of adjudicated facts and Prosecution's catalogue of agreed facts with dissenting opinion of Judge Harhoff, 10 April 2007, para. 23; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on motion for judicial notice of adjudicated facts pursuant to Rule 94 (B), 14 March 2006, para. 9.

354 *Prosecutor v. Tolimir*, IT-05-88-2/PT, Decision on Prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94 (B), 17 December 2009, para. 6.

355 *Prosecutor v. Popović et al.*, IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 September 2006, para. 3; *Prosecutor v. Karamera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's interlocutory appeal of decision on judicial notice, 16 June 2006, para. 41; *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's interlocutory appeal against the Trial Chamber's 10 April 2003 decision on Prosecution motion for judicial notice of adjudicated facts, 28 October 2003, pages. 3-4.

356 The Trial Chamber highlights the fact that the *Popović et al* Decision replaces the earlier *Prlić et al* Decision referred to by the Stanišić Defence in its responses to the First and Second Motions.

357 *Prosecutor v. Popović et al.*, IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 September 2006, para. 4; *Prosecutor v. Tolimir*, IT-05-88-2/PT, Decision on Prosecution motion for judicial notice of adjudicated facts pursuant to Rule 94 (B), 17 December 2009, para. 7; *Prosecutor v. Nikolić*, IT-02-60/1-A, Decision on appellant's motion for judicial notice, 1 April 2005, para. 12.

358 *Prosecutor v. Popović et al.*, IT-05-88-T, Decision of Prosecution motion of judicial notice of adjudicated facts with annex, 26 September 2006, paras 5-14.

9) the fact must clearly not be subject to pending appeal or review.

68. The Trial Chamber has considered that “Rule 94 is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted”.³⁵⁹ By taking judicial notice of an adjudicated fact, a Trial Chamber “establishes a well-founded presumption for the accuracy of the fact which, therefore, does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial”.³⁶⁰ Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution.³⁶¹ The legal effect of taking judicial notice of an adjudicated fact is only to relieve the Prosecution of its initial burden to produce evidence on a particular point (see case box *Karemera et al. case - Re-assessment of previously adjudicated facts*). The Defence may put the issue into question by introducing reliable and credible evidence to the contrary.³⁶²

69. Despite making the admission of adjudicated facts under Rule 94(B) subject to competing interests, including the right of the accused to receive a fair trial pursuant to Article 20 and Article 21 of the Statute, a review of the guiding principles and reasoning set out in the case law raises serious questions about whether the rights of the accused are fully and properly protected. The Appeals Chamber acknowledged judicial notice under Rule 94(B) shifts the burden of production to the accused and has significant implications on the presumption of innocence guaranteed by Article 21(3) of the Statute, by requiring him to introduce evidence to rebut the adjudicated fact. The Appeals Chamber nonetheless reasoned that judicial notice does not shift the ultimate burden of *persuasion*, which remains with the Prosecution. It determined that the effect of Rule 94(B) was only to relieve the Prosecution of its initial burden to *produce* evidence on the point. The ultimate burden of proof beyond a reasonable



Karemera et al. Case - Re-assessment of previously adjudicated facts

In Karemera et al. the Prosecution sought to tender Ntakirutimana’s testimony from his own trial, in which the Trial Chamber had rejected the testimony on the basis of limited reliability.

For this reason, the Trial Chamber in Karemera rejected the testimony and declared that “evidence which has already been considered and rejected by another Trial Chamber in making a finding of fact should not be admissible in a later proceeding to rebut that same finding of fact. However, the Karemera Appeals Chamber overturned the Trial Chamber’s decision, ruling that:

*“the final assessment of the weight of a piece of evidence is based on the totality of the evidence in a given case. Naturally, the same piece of evidence can be assessed differently in different cases because of other evidence on the record therein. (...) In this respect, the Appeals Chamber stresses that adjudicated facts that are judicially noticed by way of Rule 94(B) of the Rules remain to be assessed by the Trial Chamber to determine what conclusions, if any, can be drawn from them when considered together with all the evidence brought at trial. The Rule 94(B) mechanism does not allow a Chamber to simply defer to the assessment of the evidence by another Chamber on the ground that this mechanism was fashioned to favour consistency and uniformity in the Tribunal’s case-law.”**

* *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73.17, Decision on Joseph Nzirorera’s appeal of decision on admission of evidence rebutting adjudicated facts, 29 May 2009, paras. 19, 21.

359 *Prosecutor v. Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para. 189; *Prosecutor v. Nikolić*, IT-02-60/1-A, Decision on appellant’s motion for judicial notice, 1 April 2005, para. 52; *Prosecutor v. Krajišnik*, IT-00-39-T, Decision on third and fourth Prosecution motions for judicial notice of adjudicated facts, 24 March 2005, page 10.

360 *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution’s interlocutory appeal against the Trial Chamber’s 10 April 2003 decision on Prosecution motion for judicial notice of adjudicated facts, 28 Oct 2003, page 4.

361 *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor’s interlocutory appeal of decision on judicial notice, 16 June 2006, para. 42.

362 *Ibid.*.

doubt remains with the Prosecution.³⁶³ The practical effect of this means that counsel must assess how to use their usually limited time and resources to prepare for rebuttal of these facts, in the knowledge that if any of these facts go unchallenged, they will be accepted as accurate and reliable by the Trial Chamber.³⁶⁴

Conclusion

70. The evidentiary regime of the ICTY is a broad and permissive one, and the practice is in favour of admissibility. Trial Chambers are under no obligation to give a detailed assessment of the ultimate weight and probative value accorded to any piece of evidence in their final deliberations. This regime is not free from criticism. It has been said that the indiscriminate admission of any and all materials the parties claim to be evidence, far from being the only means of promoting a successful search for the truth, buries the genuinely probative evidence in a vast accumulation of evidential debris, frustrating rather than facilitating the task of the judges trying to establish the truth.³⁶⁵
71. This permissive regime applies even when the right to cross-examine is severely curtailed by the admission of evidence in documentary rather than oral form. It is by no means settled that this manner of proceeding is appropriate for international criminal trials. The Rome Statute of the ICC, by comparison, reflects a welcome return to the principle and preference for the principle that witnesses should testify in person, in court.³⁶⁶ The admission of prior written testimony or statements of a witness at the ICC, at least to date, is permitted only under limited circumstances, far more proscribed than the regime at the ICTY.³⁶⁷
72. It is important for practitioners to have an understanding of the unique circumstances and procedural rules that apply to the admissibility of evidence at the ICTY. This is critical to a determination of whether that evidence can be held to be reliable in trials in the region of the former Yugoslavia. More than anything else, knowledge of the applicable procedural rules at any court is indispensable for a strong and effective defence. This is true not only for countering prosecution evidence, but also to ensure that all the necessary admissibility requirements are met when tendering defence evidence. At the end of the day, a case is won or lost on the facts. The only facts before the Chamber will be the ones admitted into evidence and which are given weight by the Chamber as being relevant and probative. Counsel must remain alert and prepared to counter prejudicial evidence, whether by attempting to exclude such evidence, by cross-examining to undermine such evidence, or through testimony and documentary evidence tendered during the defence case.

363 *Ibid.*, paras. 49-51 and *Prosecutor v. Dragomir Milošević*, IT-98-29/1-AR73.1, Decision on Interlocutory Appeal Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, paras. 15-18.

364 For further discussion, see G. Boas, J. Bischoff, N. Reid and B. Don Taylor, *International Criminal Law Practitioner Library - Volume III: International Criminal Procedure* (2011), pages 361-366; O'Sullivan, E & Montgomery, D "*The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*", *Journal of International Criminal Justice* 8 (2010), pages 511-538.

365 Murphy, P. "No Free Lunch, No Free Proof: The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Trials" 8 *JICJ* (2010), pages 539-573; see also Skilbeck, R. "Frankenstein's Monster: Creating a New International Procedure" 8 *JICJ* (2010), pages 451-462.

366 Article 69(2), ICC Statute states that: "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in Article 68 or in the Rules of Procedure and Evidence".

367 See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the prosecution's application for the admission of prior recorded statements of two witnesses, 15 January 2009; and *Prosecutor v. Bemba*, ICC-01/05-01/08, Judgement on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011.

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1. The ICTY employs a *sui generis* mix of Rules of Procedure and Evidence (ICTY RPE) which do not constitute a transposition of any particular national legal system,³⁶⁸ be it of common or civil law origin.³⁶⁸ The ICTY procedures provide, for example, for an adversarial-type system of pre-trial investigation and subsequent examination of witnesses at trial.³⁶⁹ Though the trials are party driven, there is no jury. Trials are heard and decided by a panel of three judges. As in most civil law systems, the judges can and do take an active role in questioning witnesses when they deem it appropriate.³⁷⁰ Judges also have the authority, unusual in common law jurisdictions, to call witnesses on behalf of the Trial Chamber.³⁷¹
2. The trials at the ICTY are comprised of the *viva voce* testimony of witnesses who appear in person to testify in court during the trial, witnesses who testify *viva voce* by video link, and evidence offered by means of various forms of written witness statements prepared prior to or during trial.³⁷²
3. One of the most fundamental challenges facing Defence counsel who have been called upon to defend accused at the ICTY has been to master those aspects of this system which are unfamiliar to them based on their previous experiences in their domestic jurisdictions. Many counsel from civil law systems, for example, have had to acquire different courtroom skills, such as learning the rules for direct and cross-examination of witnesses during trial as practised in adversarial legal systems.³⁷³ Similarly, counsel from common law traditions have had to learn and incorporate aspects of the civil law system, such as the admission of hearsay evidence, the admission in evidence of written witness statements which preclude cross-examination of those witnesses, and judicial intervention in the trial process in the form of questions and/or witnesses called by the Trial Chamber.

* This chapter was authored by Colleen Rohan, J.D., who is a member of the ADC-ICTY Executive Committee, the ICTY Disciplinary Board, and a co-founder of the International Criminal Law Bureau. She has practised as Defence counsel for 30 years and served as counsel on ICTY cases *Popović et al.* (Srebrenica) and *Haradinaj et al.* (Kosovo). She served as legal consultant to Defence teams on *Prosecutor v. Perišić* and *Prosecutor v. Karadžić*.

368 *Prosecutor v. Blaškić*, IT-95-14-T, Decision on the Standing Objection of the Defence to the Admission of Hearsay With No Inquiry as to its Reliability, 21 January 1998, para. 5. And see C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures* (T.M.C. Asser Press, The Hague 2010) comparing the RPE at the ICTY with national jurisdictions and the Rules of Procedure and Evidence at the International Criminal Court (ICC).

369 Rule 85, ICTY RPE (regarding the order of examination of witnesses at trial).

370 Rule 85(B), ICTY RPE. providing that “a Judge may at any stage put any question to the witness”). Judges at the ICTY are also routinely provided with witness statements obtained prior to trial and lists of the parties intended trial exhibits prior to trial. See Rule 65 *ter et seq.*, ICTY RPE.

371 Rule 98, ICTY RPE. (“A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.”); *Prosecutor v. Krajišnik*, IT-00-39-T, Finalized Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters, 24 April 2006, para. 3 (describing process Trial Chamber and the parties would use in examining witnesses called under Rule 98).

372 See Chapter VI “Evidentiary Issues at Trial” and Chapter VIII “Direct, Cross-Examination and Re-Examination”, Section E., which provide an in-depth discussion of the procedures and rules governing admission of written witness statements.

373 See Chapter VIII “Direct, Cross-Examination and Re-Examination”, discussing direct and cross-examination under the procedures employed at the ICTY.

VII. Witnesses

4. This chapter will discuss the ICTY RPE related to *viva voce* witness testimony presented at trial. It will also touch upon certain recurring issues related to the status of some witnesses, such as protected witnesses, experts, testimony from the accused and similar issues which often arise at trial.

A. Video-link Testimony

5. As a general rule, a witness' physical presence in the courtroom comports with the principle articulated in Article 21(4)(e) of the ICTY Statute that persons accused of criminal conduct "shall have the right to confront and cross-examine their accusers."
6. Rule 81 *bis* at the ICTY, however, provides that "At the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video conference link".
7. Testimony presented by way of video-link is an exception to Article 21(4)(e) and is allowed only upon a showing of good cause as to why such an exception should be granted.³⁷⁴ Specifically, certain criteria, designed to protect and promote the interests of justice, must be met before testimony by video link will be allowed. They include:
 - 1) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal;
 - 2) the testimony of the witness must be sufficiently important to make it unfair to the requesting party to proceed without it;³⁷⁵ and,
 - 3) the accused must not be prejudiced in the exercise of his right to confront the witness if the video link testimony is permitted.³⁷⁶
8. Despite these restrictions there are a number of grounds on which video-link applications may be based and are commonly granted, such as the poor health of the witness (conditioned on provision of a medical attestation), the safety of the witness (conditioned on provision of an attestation as to the basis for that claim), the witness's age, or economic or other hardship to the witnesses which will occur if he is required to travel to the seat of the ICTY (such as individuals who are the sole caretakers of other family members).³⁷⁷
9. When video-link testimony occurs the witness is ordinarily brought to a regional ICTY or United Nations office or a courthouse or other local government facility and testifies from that location. A member of the Registry of the ICTY will be present in the room to assist with the witness taking the solemn declaration to tell the

374 *Prosecutor v. Strugar*, IT-01-41-T, Decision on the Prosecution Motion to Admit Evidence via Video-Conference Link, 20 January 2004, page 2, third paragraph.

375 Unless there is a showing that the witness is important to the party's ability to present its case, video-link testimony will likely not be granted. *Prosecution v. Zigranyiraro*, ICTR-2001-73-T, Decision on Defence and Prosecution Motions Related to Witness ADE, 31 January 2006, para. 3.

376 *Prosecutor v. Haradinaj et al.*, Decision on Prosecution's Confidential Motion for Testimony to be Heard via Video-Conference Link, 21 March 2007, para. 3; see also *Prosecutor v. Bagosora, et al.*, ICTR-98-41-T, Decision on Prosecution request for testimony of witness BT via Video-Link, 8 October 2004, para. 6.

377 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Trial Chamber's Oral Ruling, 27 March, T. 2078:3 - T.2079:6, to 'Prosecution's Second Motion for Testimony to be Heard via Video-Conference Link', 23 March 2007 (oral ruling granted the Prosecution motion because Witness No. 24 was the sole caretaker of his seriously ill, elderly wife); *Prosecutor v. Simić et al.*, IT-95-9-T, Order to Receive Testimony via Video-Conference Link Pursuant to Rule 71 *bis*, 14 Feb 2003 (video link applications granted for a number of witnesses, one of whom was sole caretaker of his seriously ill wife); *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link, 22 July 2010, para. 6; *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Decision on Prosecution Motions to Hear Witnesses by Video-Conference Link, 24 February 2010; *Prosecutor v. Gotovina et al.*, IT-06-90-T, Proposed Rule 92 *bis* Witnesses and Reasons for Decision to Hear the Evidence of Those witnesses via Video-Conference Link, 3 November 2009.

- truth, mandated under ICTY RPE Rule 90, and to provide any other technical assistance for the witness and the Trial Chamber, such as providing the witness with documents or other materials to be used during the testimony.
10. The witness' testimony will be taken down by a court reporter and the transcript of that testimony will be duly added to the trial record with the notation that the witness testified via video-link. Witnesses who testify in this manner are subject to the same rules of procedure and evidence as other witnesses appearing in person to give *viva voce* testimony in court.
 11. Although video-link conferencing arguably protects the right of the accused to cross-examine the witness and provides the Trial Chamber with the ability to observe the demeanour of the witness as a means of assessing his credibility and/or reliability, that is not necessarily a guarantee that allowing video-link testimony will never prejudice the accused's exercise of his right to confront the witness. When a witness gives entirely unanticipated testimony and the accused cannot confront the witness with documentary or other evidence, for example, because the witness is not physically present, the right to effective cross-examination may be implicated. Similarly, practitioners should remain vigilant, when video-link proceedings are conducted, as to who is in the room with the witness at the time of his testimony and/or has access to the witness during any breaks in his testimony.
 12. A witness testifying by video-link also does not have a clear view of the courtroom and will only see the face of the person who is actually putting questions to him or speaking to him. This final point is a factor which may or may not affect the quality or reliability of the testimony.

B. Witness "Proofing"

13. The term "witness proofing" generally refers to a meeting held between a party to the proceedings and a witness shortly before the witness is to testify in court, for the purpose of preparing and familiarising the witness with courtroom procedures and, at the ICTY, for reviewing the witness' prior statements.³⁷⁸ The practice, considered essential to competent representation in some common law jurisdictions,³⁷⁹ is controversial in international courts.³⁸⁰ It is thus far not allowed at the International Criminal Court (ICC).³⁸¹

378 See "Trial Management—Proofing of Witnesses" in *ICTY Manual on Developed Practices* (Turin, UNICRI 2009) pages 83-84; *Prosecutor v. Haradinaj et al.*, IT-04-84-T Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007.

379 It is also prohibited in some common law jurisdictions. For example, Article 705 of the Code of Conduct of the Bar Council of England and Wales provides, in relevant part, that a barrister must not rehearse, practice, or coach a witness in relation to his evidence.

380 See Wayne Jordash "The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice" (2009) 22 *Leiden J of International Law* 501-523.

381 *Prosecutor v. Lubanga*, ICC-01/04-01/06, Trial Chamber 1, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007.

14. In essence a “proofing session” with a witness will involve presenting that witness with his prior written statements, given as part of the Prosecution’s pre-trial investigation, and asked to review those statements. The witness may simply affirm the prior statements. Often, however, the witness will make corrections and additions to the statements due to claimed translation errors, faulty memory or for other reasons. In some instances the corrections may be minor; in others a witness may fundamentally change important aspects of the pre-trial statements which were previously disclosed to the accused to enable the Defence to prepare for trial.
15. When new information is produced as a result of witness proofing, the Prosecution will provide that information to the Defence in disclosure; though not always in the form of a formal written submission and only rarely in the form of a newly signed statement from the witness. These “proofing notes” may or may not be commented upon at trial and may or may not be made part of the trial record in some other fashion.
16. The ICTY allows proofing, despite objections from the Defence.³⁸² The major bone of contention, even though the process itself has been allowed, is the Prosecution practice to proof witnesses right before they are scheduled to testify (usually upon their arrival in The Hague for purposes of testifying). When, as is often the case, the witness changes aspects of his or her prior statements or, on occasion, entirely recants the prior statements or portions of them, late “proofing” automatically results in the late disclosure of that new material, precluding the Defence from having the requisite time to investigate the new information before the witness is called to



Milutinović et al. case - Concern over late witness proofing

Judge Bonomy:

*“I’ve said it before, I’ll say it again it seems to me a crazy system this proofing days before a witness is supposed to give evidence when there has been a lengthy pre-trial phase in the case. I cannot, still cannot understand why the Prosecution don’t have lawyers go over statements with witnesses much earlier so that the final statements are available well before the witness is due to testify. I can see that this will be an ongoing problem in the trial as long as that practice persists.”**

*“But you see, I ask again the question: Why are these witnesses being proofed at this stage? It seems utterly ridiculous to me to wait until they’re at the door of the court before a lawyer sits down with them and addresses their evidence; that a lawyer with an understanding of the case as a whole. Because all that’s going to happen is we’re going to limp from witness to witness, unsure of what that witness’s evidence is going to be until they come to court. Now that’s not—that’s not a good enough way to present an international case which is constantly in the public limelight [...] What’s the problem about lawyers going to Kosovo and actually investigating the case properly in the pre-trial phase at the latest? What’s the problem there? Is it not cheaper for a lawyer to go there than to bring witnesses and all their accompanying personnel to The Hague?”***

*“There’s going to come a time when pressure will be such—that’s the pressure of the clock will be such—that we won’t be able to allow this sort of thing. We’ll have to do something which we find distasteful, which is take an otherwise unrealistic approach to a witness’s evidence and exclude things in fairness because time will not allow us the luxury of re-call or delay of cross-examination. So we urge you again to think about how you are carrying out these proofing exercises and how much time or notice you’re giving the Defence as a result of doing so at the very last minute.” ****

* *Prosecutor v. Milutinović et al.*, T: 1435 (10 August 2006).

** *Prosecutor v. Milutinović et al.*, T:2674-2675 (31 August 2006).

*** *Prosecutor v. Milutinović et al.*, T: 5791 (2 November 2006).

³⁸² See, e.g., *Prosecutor v. Sikirica et al.*, IT-95-8-PT, T: 446, 8 February 2001 (informally approving the practice); *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, 10 December 2004 (approving the practice); *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006, paras. 22-23 (approving the practice but strongly criticizing the late production of notes or statements produced after proofing sessions).

testify. The practice of late proofing has been permitted at the ICTY, despite strong statements from some Trial Chambers; suggesting either a disorganized prosecutorial approach to this practice or a sense of impunity in continuing to conduct late proofing despite criticism from the bench³⁸³ (see case box *Milutinović et al. case - Concern over late witness proofing*).

17. Oftentimes the new material produced as a result of a proofing session is not significant or amounts merely to small corrections to a pre-trial statement. The problems arise when witnesses significantly change their pre-trial statements - for example the dates and times of certain events, the names of those present and similar fundamentally important matters - and offer, at the last minute, new information which the Defence is powerless to investigate in any meaningful way before the witness enters the courtroom. When this is permitted to occur, the accused’s right to the time and facilities to prepare a defence may be directly implicated as well as his counsel’s ability to effectively cross-examine the witness.
18. As noted earlier, challenges to permitting Prosecution proofing have been consistently rebuffed at the ICTY. Practitioners who are defending regional cases with the same testimony and/or witnesses from a prior ICTY trial are well advised, if the testimony or witness is of importance to their case, to carefully review the ICTY trial records or to contact the defence counsel on the ICTY case to ascertain whether or not there were any significant issues or objections regarding proofing of the witness at issue and, if so, whether counsel is of the view that the problem effected the reliability of the trial record ultimately produced at to that witness.

C. Expert Witnesses

19. An expert witness is defined in ICTY jurisprudence as an individual who, “by virtue of some specialized knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute” which is beyond the knowledge of a lay person.³⁸⁴ In determining whether a particular witness meets these criteria the Trial Chamber should take into account the witness’s former and present positions and professional experience through reference to the witness’s CV as well as the witness’ scholarly articles, other publications or any other pertinent information about the witness.³⁸⁵
20. There are many number of forensic disciplines which are likely to be of relevance in international or national criminal cases such as ballistics, pathology, DNA, military history, anthropology, psychiatry, psychology, eye-witness identification, intelligence analyses and similar disciplines. This list, needless to say, is not exhaustive and the need for expert testimony may be idiosyncratic to the particular circumstances in any given case.
21. An expert, unlike a lay witness, may testify to his or her expert opinions and conclusions based upon evidence and information which is not within the expert’s personal knowledge including hearsay and multiple hearsay evidence. A lay witness, on the other hand, may testify to his or her personal opinions or conclusions, if they are relevant, but based only on information which is within the witness’s personal knowledge.³⁸⁶
22. The jurisprudence at the ICTY has established a number of requirements which must be met before an expert statement or report is admissible in evidence. They include:

383 It is not suggested here that every prosecutorial team always engages in late proofing of its witnesses. That is not the case. The problem has been widespread enough, however, to have resulted in criticism from some Trial Chambers.

384 *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps, 3 July 2002, page 2.

385 *Prosecutor v. Šešelj*, IT-03-67-T, Decision on Expert Status of Reynaud Theunens, 12 February 2008, para. 28; *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 11.

386 *Prosecutor v. Krajišnik*, IT-00-39-T, Trial Judgement, 27 September 2006, para. 438.

VII. Witnesses

- 1) the proposed witness is classified as an expert;
 - 2) the expert statements or reports meet the minimum standard of reliability;³⁸⁷
 - 3) the expert statements or reports are relevant and of probative value; and,
 - 4) the content of the expert statement or report falls within the accepted area of expertise of the witness.³⁸⁸
23. Rule 94 *bis* sets forth certain time limits for disclosing experts reports and delineates the bases upon which an opposing party might object to them.³⁸⁹
24. This rule is straightforward and has been straightforwardly applied. A party seeking to present an expert statement or report at trial must file a motion, under Rule 94 *bis* notifying the Trial Chamber and the opposing party or parties of its intention to do so. The motion should include a copy of the expert statement or report itself as well as the expert's CV.³⁹⁰
25. If the opposing party does not challenge admission of the expert statement or report, within the time limits set by the Trial Chamber, the expert report will be admitted in evidence and the expert will not need to appear at trial to answer any questions about it. The expert report will be assigned an exhibit number and become part of the trial record. Anyone wishing to read that expert report or find out its contents must obtain it by going to the archives of the ICTY trials where it will be maintained as part of the trial record in the case in question.
26. If a party objects to admission of the expert statement or report on the basis that the expert is not qualified as an expert in the particular discipline for which the expert is offered, or on the basis that all or part of the expert report is irrelevant, then the objecting party must file a written submission to that effect in response to the Rule 94 *bis* motion, explaining the basis for the objections. The Trial Chamber will then rule on that submission.³⁹¹
27. Even if the opposing party agrees the expert is qualified to testify as an expert and that the report is relevant, the opposing party retains the right to cross-examine the expert at trial. When that is the case, the opposing party must file a submission in response to the Rule 94 *bis* motion stating that there is no objection to the qualifications of the expert or the relevance of the report, but that the opposing party does require the expert to appear for cross-examination.

387 The phrase "minimum standards of reliability" means that the expert report must contain sufficient information as to the sources used in support of it and/or the conclusions contained in it. This information must be clearly set forth and accessible in order to allow the opposing party and the Trial Chamber a basis upon which to test or assess the information the expert relied upon when reaching the opinions in the report. See e.g., *Prosecutor v. Galić*, IT-98-29-T, Decision on the Prosecution Motion for Reconsideration of the Admission of the Expert Report of Professor Radinajoj, para. 9.

388 *Prosecutor v. Milan Lukić and Sredoje Lukić*, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92 *bis* (Two Expert Witnesses), 23 July 2008, para. 15.

389 The complete Rule provides: "(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limits prescribed by the Trial Chamber or by the pre-trial judge. (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether: (i) It accepts the expert witness statements and/or report; or (ii) It wishes to cross-examine the expert witness; and (iii) It challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts. (C) If the opposing party accepts the statements and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person."

390 The DVD which accompanies this Manual contains a list of experts who have testified at the ICTY including, when possible, the expert's CV, report or statement and any motions filed challenging that expert under RPE Rule 94 *bis*. The list is not necessarily exhaustive though every effort was made to include all the experts who have testified at ICTY trials.

391 A practitioner looking for information in the ICTY case library or other database may wish to begin any search by looking up Rule 94 *bis* motions as, in theory, a motion under that rule should have been filed for any expert proposed by either party as a witness at trial.

28. It is rare for a Trial Chamber at the ICTY to exclude an expert's report entirely. As with all other evidence, a Trial Chamber is far more likely to admit the report in evidence and, depending on the cross-examination of the expert and the relative success or lack of success in challenging the reliability of the expert's report, the validity of its conclusions, or the qualifications of the expert, assign the report and its conclusions what weight it deems appropriate.³⁹²
29. An expert witness is expected to make statements and draw conclusions independently and impartially. Nonetheless:
- “The fact that the witness has been involved in the investigation and preparation of the Prosecution or Defence case or is employed or paid by one party does not disqualify him or her as an expert witness or make the expert statement unreliable. Concerns relating to the witness’s independence or impartiality do not necessarily affect the admissibility of the witness’ statement or report pursuant to Rule 94 bis of the Rules, but may affect the weight to be given to the witness’s evidence.”³⁹³*
30. Although it has been very rare, expert reports have been excluded from evidence at the ICTY.
31. In the *Milutinović et al.* case the report of a proposed Prosecution expert was excluded as an expert report on the grounds the expert was “too close to the team, in other words to the Prosecution presenting the case, to be regarded as an expert.”³⁹⁴ The evidence in *Milutinović et al.* established the proposed expert had worked for several years with the Prosecution office and in the course of that employment was present for and participated in the interviews of a number of Prosecution witnesses. The Trial Chamber ruled that under these circumstances, although the mere fact of the proposed expert's employment in the Office of the Prosecutor did not disqualify him from testifying,³⁹⁵ his intimate involvement in the actual investigation of the Prosecution's factual case pre-trial did not permit him to do so as an expert witness. He did not possess the objectivity and independence required of an expert witness.³⁹⁶
32. In the *Đorđević* case, however, a Prosecution expert who was an employee with the Office of the Prosecutor had interviewed several Prosecution witnesses as well as some of the alleged members of the Joint Criminal Enterprise (JCE) charged in that case. That expert was not permitted to testify as an expert and his proposed expert report was excluded from evidence based on the Trial Chamber's finding that his involvement in the investigation of the Prosecution case “may have affected the reliability of the opinion to such an extent that the Chamber would be unable to rely on them in making its findings on the issues in the case.”³⁹⁷
33. Recently in the *Jovica Stanišić and Franko Simatović* case the expert report and testimony from the expert was withdrawn by the Prosecution when it learned that portions of the report had been authored by individuals other than that expert.³⁹⁸ This has not prevented the same expert from being offered as an expert in subsequent cases, however.

392 See, e.g. *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008.

393 *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 12, citing *Prosecutor v. Galić*, IT-98-29-T, Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Phillips, 3 July 2002, pages 2-3.

394 *Prosecutor v. Milutinović et al.*, T: 840-844 (13 July 2006) and see Decision on Ojdanić Motion to Preclude Parties from Calling Expert Witnesses, 16 November 2006.

395 At the ICTY it has been the general practice to admit the reports and testimony of qualified experts who are Prosecution employees and to take their employment into consideration when determining what weight to give their “expert” evidence.

396 See, e.g. *Prosecutor v. Milutinović et al.*, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report, 30 August 2006, para 1.

397 *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Defence Notice Under Rules 94 bis, 5 March 2009, para. 19.

398 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Notice of Withdrawal of Expert Report of Christian Nielsen and Nena Tromp, 30 November 2009.

34. In sum, when an expert crosses the threshold of possessing sufficient knowledge, training and experience to qualify as an expert, and his or her report is relevant to the issues in dispute at trial, it has been very rare for the expert report and testimony to be excluded from evidence due to other alleged deficiencies—such as bias or lack of appropriate scientific methodology. Those issues are seen as appropriate areas for cross-examination of the expert at trial, leaving it open to the Trial Chamber to assign what weight it chooses, in light of that cross-examination, to the ultimate conclusions drawn in the report (see case box *Perišić case - Expert methodology*).

35. The expert’s report, opinions and conclusions must be within the particular expert’s area of expertise in order to be of “expert” assistance to the Trial Chamber.³⁹⁹ This requirement ensures that the statements or reports of an expert witness will only be treated as expert evidence, insofar as they are based on the expert’s specialized knowledge, skills or training. Statements that fall outside the area of expertise will be treated as personal opinions of the witness and be weighed accordingly.⁴⁰⁰

36. Experts can and do express their opinions within the confines of their expertise on the facts established in evidence when that opinion is relevant to issues in dispute at trial.⁴⁰¹ However an expert witness should not be permitted to offer his or her opinion on the ultimate issue of whether or not the accused is guilty for the charged crimes; however that opinion might be phrased. That is a question which is solely within the powers and competence of the Trial Chamber.⁴⁰²

37. In light of this jurisprudence there are a number of tactical considerations Defence counsel may take into account when determining whether or not to challenge a Prosecution expert and/or in preparing to cross examine a Prosecution expert.

Perišić case - Expert methodology

In the Perišić case the report of a Prosecution historian called as an expert witness was challenged by the Accused on the grounds that it was not based on reliable scientific methodology. The expert worked with the Office of the Prosecutor for several years and in the course of that employment reviewed thousands of documents from a wide variety of sources, all made available to him by the OTP. His report was based on a selection of those documents. The Defence challenged the report, inter alia, on the basis that it was not clear what methodology the expert used or what criteria he followed in relying on some documents and rejecting others.

The Trial Chamber held that:

*“in the absence of an indication in the First Report of a clear methodology and criteria which were used by Mr. Treanor to select those documents, the “fairness” of this reviewing and selection cannot be determined. However this deficiency does not invalidate the Report and can be cured by calling Mr. Treanor for questioning by the Defence and possibly, the Trial Chamber.”**

* *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 23.

399 *Prosecutor v. Milan Martić*, IT-95-11-T, Decision on Defence’s Submission of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis, 9 November 2006, para. 12; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on the Admissibility of the Expert Testimony of Dr. Binafair Nowrojee, 8 July 2005, para. 11.

400 *Prosecutor v. Perišić*, IT-04-81-T, Decision on Defence Motions to Exclude the Expert Reports of Mr. Patrick J. Treanor, 27 October 2008, para. 13.

401 *Prosecutor v. Milan Martić*, IT-95-11-T, Decision on Defence Submissions of the Expert Report of Professor Smilja Avramov Pursuant to Rule 94 bis, 9 November 2006, para. 10.

402 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-PT, Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen pursuant to Rule 94 bis, 18 March 2008, para. 12. *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu’s Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyinkebe (Rule 89(C)), 2 September 2005, para. 13 (determination of ultimate issue of fact is sole province of Trial Chamber).

38. The first and most obvious is for counsel to study the expert's CV as well as his report to determine if he is qualified to render the opinions contained in the report. If the report is based on underlying data (such as DNA or ballistics tests) counsel should ask for the underlying test results themselves, not only as a means to potentially challenge the opinions of the Prosecution expert but to have the underlying data available for review by counsel's own experts.
39. Very often forensic experts have testified in prior cases; sometimes in numerous prior cases. If possible, and assuming time and resources permit it, counsel should become familiar with that prior testimony if its subject matter is relevant to counsel's own case. Counsel may also wish to consider whether the Prosecution expert may be of use to the Defence case. If so, a strategic decision should be made as to whether it is better to let the Prosecution expert testify, even if he or she is subject to some form of challenge. In that regard, if the Defence has its own expert in the same area as a Prosecution expert, counsel must realistically determine who is the more credible, reliable and qualified and whether the Defence expert is in a position to persuasively undermine the opposing expert.
40. It is also good practice to research the background of experts offered by the Prosecution. Most qualified experts can be found on the internet which may be a rich source of background material. When it is possible, read articles, books and other materials published by the Prosecution expert which the Prosecution has chosen not to offer in evidence through that expert's testimony, if any such materials exist. These materials can sometimes provide a source for impeachment of the expert which is not readily recognisable from the expert's CV or the Prosecution's selection of documents for disclosure. It is also useful to contact counsel in cases in which the expert has testified previously to get a sense of that counsel's experience in dealing with the expert.
41. An increasing cause for concern in the area of some forensic sciences is the continued reliance on "expert" methodologies which may, despite their earlier acceptance by the courts, be unreliable. A comprehensive study commissioned by the United States government, for example, reflected an increasing concern that fingerprint experts, handwriting experts, tool mark experts, voiceprint and hair comparison experts and a number of others employ methodology which may be subject to serious challenge on the grounds that it is not based on proper or consistent scientific technique.⁴⁰³ Moreover, a "science" is only as good as the individual who practises it. Seemingly impregnable evidence, such as DNA identification and blood typing may, in fact, be subject to challenge if the individuals performing the tests were not properly trained, made mistakes in the course of performing the tests or worked in circumstances conducive to contamination.
42. Finally, counsel called upon to cross-examine an expert witness should educate himself as much as possible—hopefully with the assistance of a Defence expert—on the expert subject at hand so that counsel is prepared to focus on those portions of the expert testimony which are most subject to challenge and/or most crucial to the factual or legal issues at stake in counsel's case.

⁴⁰³ See "Strengthening Forensic Science in the United States: A Path Forward", Committee on Identifying the Needs of the Forensic Science Community, Committee on Science, Technology, and Law Policy and Global Affairs, Committee on Applied and Theoretical Statistics Division on Engineering and Physical Sciences, published by the National Research Council of the National Academies, Washington, D.C., 2009. This very comprehensive study is available on the internet.

D. Protected Witnesses

43. The trials at the ICTY are broadcasted on the internet and, in many countries, broadcasted in whole or part by other media outlets including television and radio. Many witnesses who are called to testify at the ICTY are, for various reasons, concerned that their identities will become known to the public at large. Some, such as intelligence officers and agents, policemen, diplomats and members of the military believe their effectiveness in their jobs will be compromised if they become readily recognizable due to the broadcasting of their image around the world. Other witnesses fear for their safety either because they have been threatened or approached regarding their upcoming testimony or because they are testifying “for” or “against” a particular individual.
44. The ICTY has put in place a number of rules providing for the protection of witnesses. It also has a Victims and Witnesses Section (VWS) which is in charge of seeing to the needs of witnesses called to testify at the ICTY before, during and after their testimony.⁴⁰⁴
45. Rule 75 of the ICTY RPE explains the measures utilized at the ICTY for the protection of victims and witnesses. It provides generally that a judge *proprio motu* or at the request of either party, or at the request of the victim or witness concerned or the VWS, may order measures for the protection and/or privacy of victims and witnesses, though such measures must be consistent with the rights of the accused.⁴⁰⁵
46. In order to make an informed decision on such issues, Rule 75(B) provides that a Chamber may hold an *in camera* proceeding to determine whether to order measures to prevent disclosure of the identity of the individual in question or of persons related to or associated with them. Those measures can include expunging names or other identifying information from the ICTY’s public record of its trials, providing image distortion or voice distortion during the witness’s testimony, providing the witness with a pseudonym, and/or ordering that testimony take place during closed sessions or on one-way closed circuit television.⁴⁰⁶
47. Although these measures may be provided for in one trial, this does not mean that the witness’ identity will never be known beyond those present in the courtroom at the time the individual testifies. If the testimony of a witness is relevant in a subsequent case and/or if the witness is to be called to testify in a subsequent case, his or her identity may be disclosed in that subsequent case.⁴⁰⁷ Indeed, the VWS section, pursuant to Rule 75(C) is required to inform protected witnesses of that fact.
48. On the other hand, once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (known as the “first proceedings”) those protective measures:
- 1) Shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out in [Rule 75]; but,

404 See Chapter XIV (E) ‘Victims and Witnesses Section’ in *ICTY Manual on Developed Practices* (Turin, UNICRI, 2009) 195-205 (describing in detail the services provided by this office).

405 Rule 75(A), ICTY RPE.

406 Rule 75(B), ICTY RPE. And see Rule 79 which states that a Trial Chamber may order that the public and press be excluded from all or part of the trial proceedings for reasons of (i) public order or morality; (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (iii) in the interests of justice. The Trial Chamber is required to make public the reasons for moving into “closed” or “private” session.

407 It is common at the ICTY for counsel in one case to file a motion to obtain confidential information from other cases which are factually related to counsel’s case. Such motions are routinely granted when the appropriate showing for access to such information has been made.

- 2) Shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings
49. If a party to the “second proceeding” wants to vary, rescind or augment the protective measures ordered in the first proceedings, that party must apply (1) to any Chamber, however constituted, remaining seized of the first proceedings, or (2) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.⁴⁰⁸
50. The fact that protective measures remain in force during a second or third or fourth trial proceeding can be a challenge for counsel or others researching ICTY trial records. Counsel who is questioning a witness in one trial, for example, about issues relating to a protected witness from another trial, must abide by whatever protective measures were originally imposed for that protected witness, including using only the pseudonym for that witness. This process, albeit a necessary one, can make researching a trial somewhat complicated, particularly when, as is usually the case, a protected witness who testifies more than once is given a new pseudonym for each new trial.
51. Rule 75 of the ICTY RPE sets forth additional detailed requirements for the variation of protective measures and the place to go in order to obtain those variations. For the purposes of this chapter, however, the point is that Rule 75 is the foundation for the protective measures which are provided at the ICTY.
52. A party seeking protective measures for a witness must do so by filing a written motion supported by sufficient information to justify the granting of the motion.⁴⁰⁹ The general policy at the ICTY has been that the Trial Chamber, in determining the appropriateness of permitting protective measures in any given case, must balance the rights of the accused with the extent of the need to protect the victim or witness at issue.⁴¹⁰ Trial counsel who believe the requested protective measures are unnecessary can oppose them by filing an opposition to the motion requesting them and asking for an order from the Trial Chamber.
53. The standard applied when protective measures are sought by an individual who is fearful for his or her own safety, should they testify, is that protective measures will be justified only if the witness has a genuine fear for his or her own safety or that of his or her family members. The fear must be objective; that is, have a basis in fact which can be assessed objectively.⁴¹¹
54. The Trial Chamber can take various factors into account in deciding whether or not to grant protective measures including the nationality or ethnicity of the witness, the position or role of the witness during the conflict, or the nature and contents of the expected evidence to be given by the witness.⁴¹² Protective measures have also been granted when the Trial Chamber determined that a witness’s evidence could antagonise people who lived in the region where the witness resided or worked or owned property.⁴¹³

408 Rule 75(G), ICTY RPE.

409 Given the purpose and nature of such motions they are often filed confidentially in whole or in part.

410 *Prosecutor v. Šešelj*, IT-03-67-PT, Decision on Prosecution’s Fifth Motion for Protective Measures for Witnesses During the Pre-Trial and Trial Phases, 6 July 2005, page 3; *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Defence Motion to Compel the Discovery of identity and Location of Witnesses, 18 March 1997, para. 15.

411 *Prosecutor v. Mrkšić et al.*, IT-95-13/1-PT, Decision on Prosecution’s Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, para. 11.

412 *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution’s Motion for Delayed Disclosure for [various witnesses] and Variation of Protective Measures for KDZ489, 5 June 2009, para. 14; *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution’s Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002, para. 9.

VII. Witnesses

55. In “exceptional circumstances” the Prosecutor may ask for 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 ICTY.⁴¹⁴ In deciding on such an application the Pre-Trial or Trial Chamber is free to consult with the VWS.⁴¹⁵ Subject to Rule 75, the identity of the victim or witness must be disclosed to the Defence in sufficient time prior to the trial to allow adequate time for investigation and preparation of the defence.⁴¹⁶
56. There is an array of protective measures which may be granted, within the discretion of the Pre-Trial or Trial Chamber. The Chamber can provide for face or voice altering devices to be used when a protected witness testifies or to order the use of only closed circuit television for such testimony, assign a pseudonym for the witness or impose any or all of these protections.⁴¹⁷ The Prosecution and trial counsel must honour these protections at the risk of being held in contempt of the Trial Chamber.⁴¹⁸ The Trial Chamber may expunge the name and any identifying information of a protected witness from the public record of a trial if it is inadvertently revealed during trial and order that all records identifying a protected witness remain confidential.
57. If the content of a protected witness’s testimony will itself reveal the identity of the witness (as can be the case with military officers, diplomats, politicians and, on occasion, individuals describing their particular role in well known events) the Trial Chamber can order that the trial go into closed or private session. The public has no access to these sessions; which are not broadcast as are regular trial proceedings and which are not contained in the printed trial transcripts made available on the ICTY website.⁴¹⁹ This can pose a problem for practitioners, as well as academics and others, interested in the contents of the trials at the ICTY as crucial testimony often takes place outside of the public eye and will remain confidential despite the publication of the remainder of the trial record.⁴²⁰
58. For legal practitioners these circumstances potentially raise a number of practical problems, however, there are ways of resolving them if there is good cause to obtain access to such information. A motion can be filed with the ICTY explaining what information counsel needs access to and the reason why that access is necessary in order for counsel to adequately and effectively defend his client.

E. Rule 70 Witnesses

59. There is a universe of background information obtained by the Prosecution during the course of its investigation of a case which is not subject to disclosure to the accused at the ICTY under the general

413 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Decision on Prosecution’s Motion for Protective Measures for Witness 35 in the Tentative Order of Testimony, 26 November 2007, paras. 2, 4.

414 Rule 69(A), ICTY RPE.

415 Rule 69(B), ICTY RPE.

416 Rule 69(C), ICTY RPE.

417 Rule 75(B), ICTY RPE.

418 Rule 77(A)(ii), ICTY RPE (providing that anyone who knowingly and wilfully discloses information relating to proceedings before the ICTY in violation of an order of a Chamber may be held in contempt).

419 There are no statutory or procedural provisions for anonymous witnesses at the ICTY. The accused and his counsel are entitled to know the identity of protected witnesses and the contents of their statements. These statements, however, are most often disclosed to counsel only in heavily redacted form to protect the identity of the witness. Unredacted statements are provided to counsel within 30 days of trial or, at times, within 30 days of the date of the witness’s testimony, though Trial Chambers have the discretion to order other time limits.

420 The practice also arguably implicates the accused right to a public trial and, to the extent that the practice is increasing, should be of concern to the community at large as also constituting an infringement on the public’s right to know what evidence is being presented in support of the verdicts returned in the *ad hoc* tribunals and other international criminal courts.

disclosure regime. The rule governing this category of information, and the conditions under which it might be disclosed to the accused, is Rule 70 of the ICTY RPE.

60. Rule 70 provides that when the Prosecution obtains information on condition that it remain confidential and when that information is used by the Prosecution only for the purpose of seeking new evidence, the original information and its source “shall not be disclosed” without the consent of the person or entity who provided it and “shall not” be presented in evidence at trial without prior disclosure to the accused.⁴²¹
61. Rule 70 incorporates safeguards for the protection of certain state interests as one means of encouraging states to fulfil their cooperation obligations with the ICTY.⁴²² The rule allows for an individual person, a state or any another entity (such as an non-governmental organization) to provide information to the Prosecution or the Defence on a confidential basis and does not require that the person, state or other entity justify its reasons for seeking confidentiality on national security or other grounds.⁴²³
62. A party who receives Rule 70 information during investigation of its case may later decide that it wishes to present that information in evidence at trial. It cannot do so unless it first obtains the consent of the source of the information. That consent may be given, of course, and it may be unqualified. Usually it is given only if certain conditions or restrictions are met regarding the presentation and/or examination of the information during trial.
63. Rule 70 provides, for example, that the Trial Chamber may not order the production of additional or related evidence from the person or entity which provided the initial Rule 70 information beyond that presented at trial. Despite the provisions of ICTY RPE Rule 98, the Trial Chamber may not call its own witnesses or require the disclosure of additional documents related to the Rule 70 subject matter.⁴²⁴ If the Prosecution calls a witness to testify to information originally provided under Rule 70 the Trial Chamber cannot compel that witness, unlike other witnesses, to answer relevant questions if the witness declines to answer them on the grounds of confidentiality.⁴²⁵
64. An accused has the right to confront and cross-examine a Rule 70 witness, the same as any other witness, but that cross-examination is subject to the same limitations as those imposed on the Trial Chamber outlined in Rule 70(C) and (D).⁴²⁶ Specifically, and contrary to the otherwise applicable provisions of Rule 90(H) related to the parameters of cross-examination,⁴²⁷ a “Rule 70 witness” may not be cross-examined on any subject not specifically addressed during the witness’s direct examination.

421 Rule 70(B), ICTY RPE.

422 See, e.g. *Prosecutor v. Slobodan Milošević*, IT-02-54-AR108bis.2, Decision on Serbia and Montenegro’s Request for Review, 20 September 2005, para. 11.

423 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Adopting Guidelines on the Admission and Presentation of Evidence and Conduct of Counsel, 24 July 2007, para. 5; and see discussion of the rule in C. Rohan, “Rules Governing the Presentation of Testimonial Evidence” in K. Kahn, C. Buisman, C. Gosnell, *Principles of Evidence in International Criminal Justice* (New York, Oxford Press, 2010), Chapter 10, pages 534-536.

424 Rule 70(C), ICTY RPE provides: “If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.”

425 Rule 70 (D), ICTY RPE provides: “ If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question in relation to the information or its origin, if the witness declines to answer on grounds of confidentiality.”

426 Rule 70(E), ICTY RPE. “The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).”

427 See Chapter VIII “Direct, Cross-Examination and Re-Examination” on the rules governing direct and cross-examination.

VII. Witnesses

65. These Rules may result in imposing very serious restrictions on the accused's right to confront and cross-examine a crucial Prosecution trial witness. As such, once the decision has been made to present Rule 70 information at trial, the rules restricting the extent to which the Trial Chamber or a party may effectively challenge that information appear to be directly contrary to the truth seeking function of the Trial Chamber.
66. In the *Slobodan Milošević* case, for example, the Prosecution called General Wesley Clark as a trial witness pursuant to Rule 70 and proposed that his testimony be received subject to a series of restrictions, all of which were permitted by the Trial Chamber. Those restrictions included that (a) two representatives of the United States government be present in court during his testimony; (b) his testimony would be given in open session subject to certain protective measures; (c) certain areas of his testimony would be given only in private session to protect the national interests of the United States and "request may be made for additional evidence to be so given on the same ground"; (d) the public gallery of the Trial Chamber be closed during his testimony; (e) the broadcast of his testimony would be delayed by 48 hours to "enable the US Government to review the transcript and make representations as to whether evidence given in open session should be redacted in order to protect the national interests of the US, and shall be delayed for a period thereafter to enable the Trial Chamber to consider and determine any redactions requested, and if ordered, for the redactions to be made to the tape of the testimony prior to its release; (f) the scope of examination-in-chief and cross-examination of the witness be limited to the summary of information provided by the Prosecution to the Trial Chamber in its application to present this witness under the provisions of Rule 70; and (g) the accused or *amici curiae* may seek to have the scope of cross-examination expanded only by prior agreement of the US government, which had to be obtained directly from that government or through the OTP once the summary of the proposed evidence-in-chief was disclosed to them.⁴²⁸
67. It goes without saying that this list of restrictions placed significant constraints on the ability of the accused to cross-examine General Clark, not to mention the ability of the Trial Chamber to pose its own questions to this witness.
68. A different result was reached, however, in the *Milutinović et al.* case when the Prosecution elected to call the same witness, with the same restrictions as those permitted in the *Slobodan Milošević* case. In *Milutinović et al.* the Prosecution also asked for the additional restrictions that the scope of the examination-in-chief and the cross-examination of this witness be curtailed to address only matters contained in a limited summary of his anticipated testimony prepared pre-trial and that his evidence be limited solely to issues related to Kosovo.⁴²⁹
69. The *Milutinović et al.* Trial Chamber noted that considerations related to whether or not to permit these restrictions included not only consideration of the concerns of the Rule 70 provider but also the determination of whether allowing the restrictions would render the trial unfair for the accused.⁴³⁰ It stated:

"To restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence. It would prevent them from challenging the honesty and reliability of the witness by looking at inconsistencies in what he may have said on matters outwith the permitted territory of the examination. It would also prevent the Defence from cross-examining on relevant matters favourable to the Defence that are excluded by the

428 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Confidential Decision on Prosecution's Application for a Witness Pursuant to Rule 70(B), 30 October 2003, page 3; and Order on the Testimony of General Wesley Clark, 17 November 2003 (ordering that the 30 October 2003 Confidential Decision related to this witness's testimony be made public).

429 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007, para. 4.

430 *Ibid.*, para 26.

*restriction. There is no obligation on the Defence to indicate in advance the line of cross-examination to be pursued.⁴³¹ To require them to seek permission for examination on a particular subject would oblige them to make disclosure not required by the Rules.*⁴³²

70. The Trial Chamber also observed that the result of the application of the conditions proposed by the Prosecution, at the behest of the Rule 70 provider, would “wrest a measure of control of the proceedings from the Chamber and hand it to the Rule 70 provider.”⁴³³ It emphasized that:

“The Trial Chamber, with its knowledge of the issues in this trial, is best placed to exercise proper control over the presentation of General Clark’s testimony. It is particularly conscious of the need to protect the sensitive interests of the parties affected by trials such as this, including the current Rule 70 provider. However, it is uniquely placed to judge what questions should be permitted in cross-examination in the interest of a fair trial.”⁴³⁴

71. The Trial Chamber accepted that given the role and prominence of the witness at issue, it would be appropriate for two legally qualified representatives of the government in question to be present in court during the testimony of the witness to intervene on behalf of the government if necessary. It found that the interests of the Rule 70 provider would thus be protected while the Chamber would retain control over the protection of the accused right to a fair trial.⁴³⁵ It denied the Prosecution motion to add General Clark to its witness list, due to its concern regarding the then proposed restrictions on cross-examination of his testimony.⁴³⁶

72. In doing so it made an important observation regarding all trials held on the international stage; that is:

“It is [...] essential that the trial should not only be fair but be seen to be fair. Justice must be seen to be done [...] Any neutral interested bystander would be bound to view as unfair a trial in which one of the parties to the conflict insisted upon controlling the cross-examination of its citizen who commanded one force in the trial of accused from the other, thus depriving them of their full right to confront the witnesses against them.”⁴³⁷

73. Most of the trials at the ICTY have involved presentation of evidence, to some extent, under the provisions of Rule 70. The record of the trial itself will usually reflect which witnesses and/or documentary evidence fell within this category. Practitioners and others reviewing these records should be on alert that, regardless of the legitimacy of the privacy, national security or other concerns of the Rule 70 provider, the evidence ultimately produced by them may or may not represent a full and fair picture of the subject matter at issue precisely because of the limitations inherent in the Rule 70 procedures.

431 This holding refers to the requirement, imposed in *Slobodan Milošević* and sought to be imposed in *Milutinović et al.* that the Defence could seek to expand on the scope of cross-examination only with the approval of the Rule 70 provider; in this instance, the U.S. government.

432 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark, 16 February 2007, para. 27.

433 *Ibid.*, para 26.

434 *Ibid.*, para 28.

435 *Ibid.*, para 28.

436 *Ibid.*, para 32. This decision was upheld after the Prosecution sought an interlocutory appeal. See *Prosecutor v. Milutinović et al.*, IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65 *ter* Witness List, 20 April 2007, paras. 11-22.

437 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark, 16 February 2007, para. 30; and See O’Sullivan, E & Montgomery, D “*The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY*”, *Journal of International Criminal Justice* 8 (2010), pages 511-538. (in which the tension between the privacy concerns of a Rule 70 provider and the accused right to confront the witnesses against him at trial and to a fair trial are discussed in greater depth).

F. The Accused

74. All individuals who are indicted at the ICTY are entitled to the right to silence at trial.⁴³⁸ Hence no accused can be forced to testify at trial or to answer questions in any other fashion at trial unless he voluntarily consents to waive his right to silence. On the other hand, the accused always has the right to testify, under oath, at trial if he chooses to do so. When an accused does choose to testify, his testimony is subject to the same procedures and rules which apply to any other trial witness. He must make a solemn declaration promising to tell the truth,⁴³⁹ and he will be subject to cross-examination by the Prosecution and any co-accused. However, testimony from an accused may be afforded greater weight by the Trial Chamber if it is presented at the outset of the Defence case before the testimony of any other Defence witnesses has been presented.⁴⁴⁰
75. The fact that an accused can offer sworn testimony on his own behalf during ICTY trials varies significantly from many civil law jurisdictions which often have procedural rules permitting the accused to make an unsworn statement at trial, but precluding the accused from testifying under oath as part of his own defence.⁴⁴¹
76. Similar to civil law practice an accused at the ICTY can also make an unsworn statement at trial which will not be cross-examined.⁴⁴² Such a statement can be given after the opening statements of the parties at the beginning of trial or, if the Defence defers giving its opening statement until the start of the Defence case, after the opening statement of the Prosecution at the beginning of trial.
77. The accused does not have the absolute right to make an unsworn statement at the beginning of trial, though a request to do so is generally granted. Rule 84 *bis* provides that such a statement can be made only if “the Trial Chamber so decides” and that the statement will be made “under the control of the Trial Chamber.”⁴⁴³ If an accused uses the opportunity to present an unsworn statement for some improper or disruptive purpose the Trial Chamber clearly has the discretion to order the accused to focus only on matters relevant to the trial or to his Defence or to cut the accused off altogether.
78. The Trial Chamber also has the discretion to give whatever weight it chooses to an unsworn statement given by an accused under Rule 84 *bis*(A), including the discretion to give it no weight at all.⁴⁴⁴ In light of that, an important consideration for any counsel whose client is considering making an unsworn statement at the beginning of trial, is whether the benefits of providing that statement, which may be given little to no weight, outweigh the fact that such a statement, depending on its content, may reveal information about the accused and/or the Defence case strategy to the Prosecution before the Prosecution evidence has even begun.

438 Article 21, ICTY Statute; Article 14(g), ICCPR; Article 6, ECHR.

439 Rule 90(A), ICTY RPE.

440 See e.g., *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgement, 30 November 2005, para. 22.

441 See Giuliano Turone, “The Denial of the Accused’s Right to Make Unsworn Statements in Delalić” *Journal of International Criminal Justice* (2004) 455; 455-458 (discussing the differences between civil and common law systems on this topic).

442 Rule 84 *bis*(A), ICTY RPE.

443 Rule 84 *bis*(A), ICTY RPE.

444 Rule 84*bis*(A) and (B), ICTY RPE, “The Trial Chamber shall decide on the probative value, if any, of the statement.”

G. Suspects or Witnesses whose Testimony may be Self-Incriminating

79. The accused has the right not to be compelled to testify against himself at trial, however the same right does not apply to witnesses who are suspected of committing war crimes, crimes against humanity, genocide or crimes under the laws of domestic jurisdictions. Trials at the ICTY commonly include testimony from such suspects. Usually such witnesses testify after entering into an agreement with the Prosecution in which they have agreed to testify against the accused in exchange for a grant of immunity or pursuant to a plea bargain in which the witness has plead guilty to certain charges on condition that the Prosecution will advocate on the witness's behalf for a reduced sentence.⁴⁴⁵
80. It can also be the case that individuals who are suspected of committing international crimes are called upon to testify without the benefit of any agreement with the Prosecution or that a witness, who is not a known suspect, is questioned by either side about matters which reveal themselves at trial as subjects which could potentially be incriminating to the witness.
81. The ICTY RPE provides that a witness "may object" to making any statement in court which may tend to incriminate the witness.⁴⁴⁶ When this occurs, however, the Trial Chamber may honour the witness's objection or, as is more likely, compel the witness to answer the question regardless of his objection to it.⁴⁴⁷
82. The RPE state that testimony which is compelled in this manner "shall not" be used as evidence against the witness in any subsequent prosecution for any offence other than false testimony.⁴⁴⁸ It is unclear, however, whether Rule 90(E), which contains this provision, applies to all jurisdictions, including potential future prosecutions in domestic jurisdictions, or applies only to future prosecutions at the ICTY.
83. Although no rule of procedure or evidence at the ICTY requires it, good ethical practice would appear to dictate that when it becomes apparent that a witness is going to incriminate himself the Trial Chamber should advise the witness of that fact and provide the witness with the opportunity to consult with counsel regarding his anticipated testimony and its potential to incriminate the witness or not as the case may be.⁴⁴⁹ A witness who refuses to answer a question, based on his view that the answer will tend to incriminate him, may be held in contempt of the Trial Chamber;⁴⁵⁰ cause on its own for the witness to be given the chance to obtain the advice of independent counsel before making a decision to answer a potentially incriminating question or not.
84. A comparison to the rules governing the same situation at the ICC reflects this last point. At the ICC when a witness is notified that he will be called as a witness he must also be advised about the provisions related to self-incrimination. If a witness has not been so notified before his appearance in court the Trial Chamber is required to so notify him before the witness's testimony begins.⁴⁵¹ At trial at the ICC if a witness objects to answering a question on the basis that it may incriminate him, and if the witness has been given "assurances" before his testimony that he will not be prosecuted, then the witness may be required to answer the

445 See Chapter IX "Plea Agreements", which discusses the plea bargain process in greater depth.

446 Rule 90(E), ICTY RPE.

447 Rule 90(E), ICTY RPE.

448 Rule 90(E), ICTY RPE.

449 Defence counsel can also raise the issue with the Trial Chamber.

450 Rule 77(A)(i), ICTY RPE.

451 Rules 190, 74(1), ICC RPE; and see C Rohan "Rules Governing the Presentation of Testimonial Evidence" in K Kahn, C Buisman, C Gosnell, *Principles of Evidence in International Criminal Justice* (New York, Oxford Press,2010), pages 528-529 (discussing the various procedural

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incriminating question.⁴⁵² If the witness has not been given any such assurances, the Trial Chamber may require the witness to answer the question only after assuring the witness that the evidence provided will be kept confidential, never disclosed to the public or any state and will never be used either directly or indirectly against the witness at any prosecution at the ICC.⁴⁵³

85. If the Trial Chamber at the ICC determines that it would nevertheless not be appropriate to provide assurances to a witness who has objected to a question on self-incrimination grounds “it shall not require the witness to answer the question”⁴⁵⁴, though the questioning of the witness on other matters may still proceed.
86. Practitioners or others assessing the reliability or credibility of testimony provided in ICTY trials from witnesses who have asserted a concern over self-incrimination must take into account the protections, if any, provided to the witness before his testimony was compelled under the ICTY rules. This may be difficult as hearings regarding the basis for the witness’s concern regarding self-incrimination may well take place in closed or private session and therefore never be part of the public record of the trial.

H. Witnesses who are Impaired due to Age or Health

87. The trials at the ICTY have on occasion included the testimony of witnesses who were impaired in some manner due to their age or physical or mental health at the time of trial. Each case varies according to its particular circumstances, however some guidance exists as to how such witnesses have been treated by the Trial Chambers and how their testimony may be assessed.
88. Rule 90(A) at the ICTY requires that every witness must make a solemn declaration before testifying, in which the witness swears on oath to tell the truth.⁴⁵⁵ Needless to say this requirement is fundamental to the integrity of the trial process as a means of attempting to assure that testimony given at trial is truthful, accurate and reliable.
89. The solemn declaration may not be required, however, from witnesses who are children at the time of their testimony, though such witnesses have been rare at the ICTY. In such a case, the rules provide that if, in the opinion of the Trial Chamber, the child does not understand the nature of a solemn declaration, the child may still testify if he or she is mature enough (again, in the opinion of the Trial Chamber) to be able to report the facts which are the subject of the testimony and understands the duty to tell the truth. A judgement, however, “cannot be based on such testimony alone.”⁴⁵⁶
90. This rule has been applied, by analogy, to an adult witness at the ICTY, at least in one instance. An elderly witness called to testify as part of the Prosecution case in *Haradinaj et al.* was apparently confused by the language of the solemn declaration and did not take the oath, even after it was read to him several times. He

protections which must be provided to a witness whose testimony may be self-incriminating).

452 *Ibid.*, and see Rule 74(3)(b), ICC RPE.

453 Rule 74(3)(c.), ICC RPE. Before agreeing to such assurances the Trial Chamber is required to obtain the views of the Prosecution as to whether assurances should be given or not to the witness in question, consider the importance of the anticipated testimony from the witness to the case, assess the potential and nature of the self-incrimination, if known, and assess the sufficiency of the protections for the witness under the particular circumstances. Rule 74(5) *et seq.*, ICC RPE and see *Prosecutor v. Lubanga*, ICC-01/04-01/06, TR: 12 May 2009 (finding that if formal assurances are provided to a witness that his testimony cannot be used in any future prosecution, then the public must be excluded from all or the relevant portion of the evidence provided by the witness).

454 Rule 74(6), ICC RPE.

455 The solemn declaration states: “I solemnly declare that I will speak the truth, the whole truth, and nothing but the truth.” Rule 90(A), ICTY RPE.

456 Rule 90(B), ICTY RPE.

was still permitted to testify. Thereafter the Defence moved to exclude his testimony from the trial record because the witness “was demonstrably confused about the nature of the proceedings and his role therein,” and never did take or appear to understand, the solemn declaration.⁴⁵⁷

91. The Trial Chamber agreed that the witness appeared to be confused by the procedure of taking the solemn declaration, but permitted the testimony to remain in the record even though it was never given on oath because when the witness was asked, during his testimony, if he would promise to tell the truth, he said that was what he was doing, “I’m telling you the truth [...] I told you the truth.”⁴⁵⁸ The witness also appeared to understand the questions; a circumstance relied upon by the Trial Chamber as cause to find he was not confused and knew his role as a witness in a trial.
92. This decision, while understandable under the specific circumstances in *Haradinaj et al.*, should not be viewed as undermining in any respect the well-recognized need for all witnesses to swear to tell the truth before testifying at trial. It is limited to its facts. It is, however, an illustration of the kinds of difficulties which may confront counsel and the Trial Chamber when dealing with a witness who is impaired by age, illness or other infirmity, from understanding the somewhat daunting rules and procedures which govern any criminal trial proceeding.
93. Trials at the ICTY, as with all criminal trials, may sometimes involve witnesses who, at the time of trial, are mentally or emotionally unstable. The Trial Chamber and counsel are then faced with the challenge of determining how to approach the witness during questioning and/or whether to permit the witness to testify at all. When the witness is crucial to a party’s case the Trial Chamber may be faced with a difficult balancing test between the right of the party who is presenting the witness to attempt to elicit his testimony and the right of the party cross-examining the witness to have a realistic opportunity to confront the witness by testing the witness’s ability to reliably and accurately recall and relate the facts. The Chamber will also be concerned with protecting the witness from undue emotional or mental trauma given the witness’s existing condition.
94. In the *Haradinaj et al.* case at the ICTY it became clear, very near the beginning of the testimony of a witness called by the Prosecution, that the witness was in distress significant enough to cause the Trial Chamber to temporarily adjourn the proceedings so that the mental and emotional status of the witness could be evaluated. The witness eventually returned to resume testimony but signs of mental and/or emotional distress or confusion became apparent again. At that point Defence counsel asked to intervene to conduct a short *voir dire* of the witness regarding his current condition. During that examination the witness first revealed his existing mental health issues, including that he suffered on occasion from auditory and visual hallucinations.⁴⁵⁹ Given that information the Trial Chamber referred the witness for medical assistance and subsequently excused him from further testimony.
95. The question then arose as to whether the testimony the witness gave, prior to revealing his mental illness, could remain in the record; testimony which had never been completed during the Prosecution case-in-chief and therefore was never cross-examined.
96. In ultimately deciding to exclude the testimony, the Trial Chamber noted that an accused’s right to cross-examination was not absolute and that not all restrictions on cross-examination entail a violation of that right

457 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Reasons for the Decision on Witness 56’s Evidence, 15 February 2008, para. 2.

458 *Ibid.*, para 7.

459 *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Reasons for Trial Chamber’s Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and Deny His Testimony Pursuant to Rule 92quater, 14 December 2007, paras. 5-7, 13.

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or a violation of the right to a fair trial.⁴⁶⁰ It did hold, however, that testimony which has never been cross-examined is not sufficient to sustain a conviction and must be corroborated.⁴⁶¹ That portion of the testimony of the witness in question which related to the acts and conduct of the accused was entirely uncorroborated and was inconsistent with his prior statements to the Prosecution. Under those circumstances the Trial Chamber determined it had to exclude the witness's partial direct examination not just because it had never been and never could be cross-examined, but because there were reasons to find the testimony was unreliable in any event.

97. A different result occurred in the *Rwamakuba* case at the ICTR where a witness testified that the numerous discrepancies between the witness's several prior statements were the result of memory lapses caused by amnesia.⁴⁶² The witness's *viva voce* testimony also contained a number of internally inconsistent versions of the events which were the subject of the testimony. The Trial Chamber there, unlike the situation in *Haradinaj et al.*, had no independent proof that the witness's claim of amnesia was credible. Hence the testimony was rejected, not due to the mental condition of the witness, but based on a finding that the witness simply was not credible. Indeed, the Trial Chamber noted that even if the claim of amnesia were credible, it would simply provide another reason to reject the reliability of the witness's testimony.⁴⁶³
98. It is not uncommon for testimony from individuals suffering from some level of mental or emotional distress to be called during international criminal trials, given the nature and subject matter of such cases. Defence counsel must remain alert to instances, however, in which a witness's current mental or emotional stability may be at issue as those conditions obviously can affect the reliability of the witness's testimony. When there is cause to believe that is the case the Trial Chamber has the power and duty to control the mode of questioning of such witnesses; as it does with any witness. It must also, however, be vigilant to ensure the accused is afforded a fair trial.

Conclusion

99. This chapter does not, of course, address every situation which can arise with a *viva voce* witness during trial. It is hoped, however, that it will provide practitioners with an informed basis from which to assess the quality and reliability of the evidence produced at the ICTY trials as well as provoke discussion as to how to address similar issues in domestic trials involving war crimes, crimes against humanity and genocide.

460 *Prosecutor v. Haradinaj et al.*, IT-04-84-T- Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and Deny His Testimony Pursuant to Rule 92quater, 14 December 2007, para. 8; and *See Prosecutor v. Brđanin* (Oral Decision), IT-99-36-T, 24 February 2004, TR: 25,085; *Prosecutor v. Martić*, IT-95-11-T, Decision on Defence Motion to Exclude the Testimony of Milan Babic Together With Associated Exhibits From Evidence, 9 June 2006, para. 56.

461 *Prosecutor v. Martić*, IT-95-11-A, Appeals Judgement, 8 October 2008, para. 20; *Prosecutor v. Brđanin*, IT-99-36-T, Trial Judgement, 1 September 2004, footnotes 944, 2261.

462 *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Trial Judgement, 20 September 2006, para. 182.

463 *Ibid.*

VIII. Direct, Cross-Examination and Re-Examination

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1. Examination, cross-examination and re-examination of witnesses are essential parts of the adversarial system of the presentation of evidence that has been adopted at the ICTY. Successful examination should enable the party calling the witness to elicit from him all the relevant facts he can provide in support of the party's case. An effective cross-examination should aim to destroy or weaken the effect of the evidence given by the witness in chief and elicit information favourable to the cross-examining party. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed to put questions to correct matters or deal with new facts arising out of cross-examination.*
2. This chapter will provide a concise review of the guiding principles concerning the examination of witnesses. Where appropriate, examples from cases before the ICTY have been included to illustrate how these principles operate in practice.

A. Examination-in-Chief

3. Examination-in-chief is always conducted by the party calling a witness to testify. The main purpose of examination-in-chief is to elicit from the witness all relevant facts that he can provide in support of the party's case. A witness may also be examined with the purpose of eliciting evidence to refute allegations made during the opposing party's case. In order to examine witnesses effectively it is essential that counsel has a good knowledge of the salient aspects of his case and knows what the witness is likely to say.
4. Rule 85 of the ICTY and ICTR Rules of Procedure and Evidence provide for examination-in-chief, cross-examination and re-examination: "Examination-in-chief, cross-examination and re-examination shall be

* Chapter co-authored by Gillian Higgins and Cindy Nesbit. Gillians Higgins is an international criminal barrister. She co-founded the International Criminal Law Bureau and has practised before the ICTY, ICTR, and the ICC. She has been a consultant to the ECCC and the Court of BiH in Sarajevo. She lectures regularly on procedural and substantive international criminal law. Cindy Nesbit, B.A., J.D., LL.M. (adv), Chambers Legal Intern, ICTY on the cases of Milan Martić and Rasim Delić, Defence Legal Assistant, ICTY on the case of Ivan Čermak, Defence Research Assistant, ICTY on the case of Idriz Balaj.

allowed in each case. It shall be for a party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.”⁴⁶⁴

5. The guiding principles of how to conduct an examination-in-chief are set out below.

A.1 General Rule against Leading Questions

6. As a general principle, during an examination-in-chief, the examiner must not ask leading questions. It is the practice of the *ad hoc* Tribunals not to allow leading questions on matters in dispute.⁴⁶⁵ A leading question is one “which either (a) suggests the desired answer; or (b) assumes the existence of a disputed fact.”⁴⁶⁶

7. Evidence elicited from the prompting or leading of a witness has very little, if any, probative value. At the *ad hoc* Tribunals, if evidence is given as a result of a leading question, it is not *per se* inadmissible, but the weight to be attached to it may be substantially reduced⁴⁶⁷ (see case box *Karadžić and Perišić case - Examples of leading questions at the ICTY*; more examples can be found in Annex 2).



Karadžić and Perišić cases - Examples of leading questions

In this excerpt, the Prosecutor is asking the witness about his “thesis” in relation to military action conducted by Bosnian Serbs.

Note the change in the prosecutor’s phrasing of the question. Initially, he presumed that certain materials were not available to the witness when drawing his conclusions. However, once the question was characterised by the Judge as leading, the prosecutor changed its structure in order to ascertain what materials were available to the witness.

- ◆ *[Prosecutor]: Now, I presume that your -- you arrived at this conclusion without benefit of access, for example, to internal Bosnian Serb military records or contemporaneous internal political documents.*
- ◆ *[Defence]: Excuse me, Mr. President. I'm losing track of who's testifying here. These last two questions is just [the Prosecutor] testifying and asking leading questions.*
- ◆ *[Trial Chamber]: Mr. [Prosecutor], I think you are beginning to behave a little bit like Dr. Karadžić in that respect*
- ◆ *[Prosecutor]: I'm sorry, Your Honour, but with respect to the previous answer, I thought it was -- while arguably leading, it was a predicate question about which there was no dispute. But, fine, I will ask it in a classically non-leading way. [...] General Smith, in arriving at your thesis, did you have access to internal Bosnian Serb military records or to internal political documents?**

In this example Defence counsel asks a leading question and rephrases it following an objection by the prosecutor.

- ◆ *[Defence counsel]: And any -- when you say any “documents coming in or leaving that office had to be registered,” I take it, I'm asking if you know, any decision that is made by the Chief of the General Staff, a written decision or written order, is something that would have to be registered, if you know that?*
- ◆ *[Prosecutor]: Objection, Your Honour...It's a leading question. [Trial Chamber]: Mr. [Defence counsel].*
- ◆ *[Defence counsel]: Q. Do you know what the requirements were for any written decision and/or order that was authored by, promulgated, or instituted by the Chief of the General Staff with regard to it being recorded?**

* *Prosecutor v. Karadžić*, IT-95-5/18-T, T:11914-5, Transcript, 15 February 2011.

** *Prosecutor v. Perišić*, IT-04-81-T, T:12510, Transcript, 8 July 2011.

464 Rule 85(B), ICTY and ICTR RPE.

465 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on Prosecutor’s Motion on Trial Procedure, 19 March 1999.

466 May, Richard and Steven Powles, *Criminal Evidence*, 5th Edition, 2004 (“May and Prowles, *Criminal Evidence*”), p. 604.

467 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Prosecution Motion concerning use of Leading Questions, the Attribution of Time to the Defence Cases, the Attribution of Time to the Defence Cases, the Time Allotted for Cross-Examination by the Prosecution, and Associated Notice Requirements, 4 July 2008 (“Prlić Decision Concerning Leading Questions”), paras. 17-19, citing *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision on Modalities for Examination of Defence Witnesses, 16 April 2005, para. 6.

A.2 Leading Questions on Non-Contentious Issues

8. Leading questions may be permitted during an examination-in-chief on issues that are non-contentious between the parties. It is good practice to agree with the opposing party before the commencement of an examination-in-chief about those areas upon which leading questions are intended and inform the Trial Chamber that such an agreement has been reached. This is an important time-saving device (see case boxes *Gotovina case - Leading questions on non-contentious issues*).

A.3 Letting the Witness Tell the Story

9. It is important for the examiner to assess in respect of each witness whether it is better to permit the witness to tell his own story in his own way, guided minimally by counsel, or for counsel to take him through his account by means of a set of structured questions. There is no hard and fast rule in this regard. Often, minimal intervention by counsel is extremely effective. In other situations, a witness will require counsel's guidance in the form of succinct questions to ensure that the evidence given is both relevant and comprehensive.

A.4 The Framing of Questions

10. The preparation of an effective examination-in-chief is a time consuming exercise, requiring counsel to understand and master all the relevant facts of the case. The examination must be succinct and yet sufficiently detailed to ensure that all relevant evidence is elicited from each witness. It must not be repetitive, verbose, complicated or argumentative. Rather, it should aim to consist of clearly structured, relevant and straightforward questions which do not lead the witness to one conclusion or another.
11. A question should never be asked without an object in mind or without being able to connect the object with the case if objected to as irrelevant. Such an approach should ensure both a structured, concise and time efficient examination process.
12. In order to examine a witness efficiently, counsel must know what the witness is expected to say. In cases before the *ad hoc* Tribunals, it is common for both an investigator and counsel to have prepared a proof of



Gotovina case - Examples of leading questions on non-contentious issues

Examples of leading questions on non-contentious issues may include eliciting evidence about a witness's background, employment history or area of expertise:

- ◆ *Q. You previously served with the South African Defence force and in 1995, you served as the United Nations security coordinator for Sector South in Knin; is that correct?**
- ◆ *A: Yes.*
- ◆ *Q. You've previously provided three statements to the Office of the Prosecutor, the first on 8 November 1995, the second on the 4th of February 1996, and the third on the 22nd of February 2008. Is that correct?**
- ◆ *A: Yes.*
- [...]*
- ◆ *Q. I'd like to start firstly with your CV and your experience as a police officer...And, Your Honour, for the purposes of the Bench, I have discussed with Ms. Gustafson and it's appropriate that I lead this part of the evidence. If the Bench is satisfied... Is it correct, Mr. Albiston, that after having served as a police officer in the UK and with the United Nations for a total of 28 years, you then worked for a period of six years as a consultant in matters of policing, security, and intelligence?*
- ◆ *A. That's correct.*
- ◆ *Q. Now, you began your career in 1975 with the London Metropolitan Police force and effectively worked your way up through the ranks, until in 1989, as I understand, you were transferred to the Royal Ulster Constabulary in Northern Ireland. Is that right?*
- ◆ *A. That's correct, ma'am, yes...****

* *Prosecutor v. Gotovina et al.*, IT-06-90-T, T:1710, 16 April 2008.

** *Ibid.*

*** *Ibid.*, T:23758-9, 3 November 2009.

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evidence/draft statement from the witness to be called. Such preparation and time spent with the potential witness should enable counsel to assess the probative value of the evidence and whether or not the individual is likely to present as a credible witness.

13. Asking open-ended questions to which counsel does not know the answer may risk exposing the witness to unnecessary cross-examination and may result in the giving of an answer that might damage the questioner's own case.

A.5 No Comments on a Witness' Testimony

14. The party conducting an examination-in-chief must not comment on the testimony the witness provides.⁴⁶⁸ The advocate's role is to pose questions and not comment on the answers given. It is the answer of the witness that constitutes the evidence, not the question or comment of the advocate. Comments and observations should be reserved for the bench (see case box *Akayesu case - No commentary on witness testimony*).

B. Cross-Examination

15. The aim of cross-examination is to destroy or weaken the effect of the evidence given by the witness in chief and to elicit from the witness information favourable to the cross-examining party. It is a weapon to test the veracity of a statement made by a person. Cross-examination should be conducted with the courtesy and consideration which a witness is entitled to expect in a court of law.
16. An effective cross-examination may have a range of different objectives. It may be that the cross-examiner wants to show that the witness did not see what he said he saw or did not hear what he said he heard. It may be the aim to reveal that the witness spoke from hearsay or is unable to particularise the incident to which he refers. The cross-examiner may want to show that the witness who had identified something had done so through mistake or that his account is inconsistent with a version of events he had given on a previous occasion. The cross-examiner may aim to bring out skilfully all that the witness omitted to say, suppressed or deliberately forgot to mention. The purpose of cross-examination is to show that the witness should not be believed on oath and/or is not otherwise accurate or reliable. As such, a witness may be cross-examined about his previous convictions and antecedents. The cross-examination must, however, be relevant to the standing of the witness before the ICTY.
17. In order to cross-examine effectively, counsel will require sufficient material concerning the individual testifying and those events to which he will speak. This is where the importance of effective and thorough investigations on the ground is crucial.



Akayesu case- No commentary on witness testimony

The accused, Mr Akayesu, was conducting the cross-examination of the witness in the excerpt below:

- ◆ *Mr. President: Madam, we asked you why calm reigned until April 18th 1994 and you said that it was because Akayesu wanted there to be calm.*
- ◆ *The Witness: Yes, I can confirm that.*
- ◆ *Mr. President: Is this a correct response?*
- ◆ *The Witness: Yes, this is correct.*
- ◆ *The Accused: I think that this is more of a feeling on your part and this is not enough to prove that there was calm.*
- ◆ *Mr President: Let me remind the accused again, that your commentary is superfluous. You have asked an important question, why was there calm? And she says thanks to you. That is sufficient as a response.*
- ◆ *The Accused: I understand Mr. President.*

* See *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial transcript, 14 January 1997.

468 *Prosecutor v. Akayesu*, ICTR-96-4-T, Transcript, 14 January 1997.

B.1 Scope of Cross-Examination

18. In *Milošević*, the Trial Chamber affirmed that the scope of cross-examination is limited by Rule 90(H)(i) of the ICTY RPE.⁴⁶⁹
19. Rule 90(H)(i) states that:
 - (H)(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.
 - (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
 - (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.
20. It is interesting to note that in *Prlić et al.*, the Trial Chamber stated that “[w]hen the question has not been raised or is not part of the scope of the examination-in-chief, in that case the accused who wishes to put questions during the cross-examination must formulate his questions in the most neutral manner possible, and the question must not be leading in that case.”⁴⁷⁰

B.2 Time Limits

21. In proceedings before the ICTY, it is relatively common for the Trial Chamber to put time limits on the cross-examination of both parties. Timing is a particular issue for trials before the *ad hoc* Tribunals, given the relative size and complexity of the cases pending before them. Such time restrictions on cross-examination do not violate the rights of the accused *provided* there is sufficient flexibility in varying the time limits where necessary to safeguard the right to an effective cross-examination.⁴⁷¹

B.3 Leading Questions

22. Leading questions may be asked in cross-examination. However, questions should not be asked in the form of a comment or invitation to argument, since the purpose of cross-examination should be to elicit matters of fact.⁴⁷²

B.4 Putting the Case

23. At the ICTY, Rule 90(H)(ii) sets out the obligation that during the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction to the evidence given by the witness. This rule, in sum, requires counsel to put his version of the case to the witness so that the witness may have the opportunity to explain or deny the contradiction. If a party fails to do this, he is generally taken

469 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005 (“Slobodan Milošević Decision Regarding Witnesses”), para.9.

470 *Prosecutor v. Prlić et al.*, IT-04-7415-T, May 2007, T: 18306.

471 *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on prosecution motion concerning use of leading questions, the attribution of time to the defence cases, the time allowed for cross-examination by the prosecution, and associated notice requirements, 4 July 2008.

472 Study on the Minimum Rules of Conduct in Cross-Examination to be Applied by the International Criminal Tribunal For The Former Yugoslavia, Ilias Bantekas, *Revue Hellenique de Droit International*, 1997, pages 205-215.

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to have accepted the witness' evidence. In practice this means that counsel may be precluded during closing argument from attacking or questioning that part of a witness' evidence which he has not challenged in cross-examination when he had the opportunity to do so.

B.5 Discretion to Permit Enquiry into Additional Matters

24. At the ICTY and the ICTR, there is provision within the RPE to allow the Trial Chamber in the exercise of its discretion to inquire into additional matters during cross-examination beyond those matters specifically permitted under Rule 90(H) as a "Judge may at any stage put any question to the witness."⁴⁷³

C. Common Objections to Questioning

25. This section will examine the timing and substantive nature of some of the objections commonly made by counsel during the questioning of witnesses. On a practical level, it should be noted that rulings made in response to timely objections during testimony do not negate a party's right to submit subsequent written motions challenging those rulings.⁴⁷⁴

C.1 The Timing of Objections: Practical Considerations

26. Oral objections during either the examination or cross-examination of witnesses should be raised at the earliest opportunity. In respect of an objection to evidence contained in a specific question, the objection must ordinarily be made as soon as the question has been asked and before the answer has been given. The parties are expected to make timely objections to any issue challenged. Failure to do so contemporaneously may have consequences depending on the type of objection and the prejudice caused. For example, failure to make a timely objection to the admission of evidence normally results in a waiver to object to its admission at a later stage unless there was a satisfactory reason for the failure to object contemporaneously and a credible showing that the accused will suffer prejudice if a waiver is found.

C.2 Common Objections

27. When preparing the questioning of a witness, counsel must always be alert to possible objections to the presentation of his evidence. Objections may be raised on the basis of the question being irrelevant to the charges and/or the particular area of a witness's testimony. Often, an objection is raised to counsel attempting to get a witness to give evidence in respect of something that is not within the witness' knowledge or experience. There may be objections raised in respect to questions that seek opinion from fact witnesses or questions that attempt to solicit comment from the witness as opposed to fact. A common objection during the course of an examination-in-chief or re-examination is that the examiner's question is leading.
28. Counsel may also object to questions that call for speculation, or contain inaccurate summaries of facts or testimony, questions that refer to facts not in evidence, and those beyond the scope of examination-in-chief. Counsel may also raise objections to the admission of evidence on the basis of relevance; authenticity and/or context. Counsel must be ready to both object and defend the substance and the manner of his questioning.

473 Rule 85 (B), ICTY and ICTR RPE.

474 K.Khan and Dixon, *Archbold International Criminal Courts Practice, Procedure and Evidence* (2009) ("Archbold International Criminal Courts"), page 567.

D. The Use of Documentary Evidence during Examination and Cross-Examination of a Witness

29. During trial proceedings, the Trial Chamber may admit any relevant evidence that it deems to have probative value and may request verification of the authenticity of any piece of evidence obtained out of court.⁴⁷⁵ The Court generally takes a fairly liberal approach to admitting documents, “as often documents are not the ultimate proof of guilt or innocence, but...provide a context and complete the picture presented by the evidence gathered.”⁴⁷⁶ However, all evidence must meet the minimum standards of relevance and reliability and should not be cumulative or repetitious.
30. While there is no explicit requirement in the ICTY’s Statute or Rules stating that documentary evidence must be admitted through a witness, in principle this is the preferred approach.⁴⁷⁷ It is possible to admit documents into evidence without tendering them through a witness,⁴⁷⁸ but counsel must be allowed to challenge such evidence through cross-examination of a witness, oral argument, or in a written brief⁴⁷⁹ in order to preserve the accused’s right to a fair trial.⁴⁸⁰ The parties may introduce documents directly under Rule 89, provided the documents display sufficient *indicia* of reliability.⁴⁸¹ However, documents that are introduced without authentication by a witness will generally be accredited less probative value than documents that were so introduced unless the contents are not in dispute.⁴⁸²
31. In order for a document submitted through a witness during direct examination to meet the required degree of reliability, the examiner must “lay the source of the document”.⁴⁸³ The party conducting the cross-examination of a witness must ask the witness about the background and the source of the documents it wishes to submit through the witness in order to allow him to recognise or reject the document.⁴⁸⁴ Documents used in cross-examination should only be admitted into evidence “if they contain material which has actually become part of the evidence in the case.”⁴⁸⁵ Documents may also be introduced during the cross-examination

475 Rule 89(E), ICTY RPE, 10 December 2009; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution motion for admission of witness statement of investigator Bernard O’Donnell *in lieu* of viva voce testimony pursuant to Rules 54 and 92 *bis*, 12 February 2004 (“Slobodan Milošević Decision regarding Bernard O’Donnell”), page 3.

476 *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Motion of Prosecution for Admissibility of Evidence, January 1998 (“Delalić Decision on Motion for Admissibility”), para. 20.

477 *Prosecutor v. Strugar*, IT-01-42-T, Decision II on the admissibility of certain documents, 9 September 2004 (“Strugar Decision”), para. 9; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision on the Admission of Exhibits tendered during the Rejoinder Case, 23 October 2002 (“Naletilić Decision on Admission during Rejoinder”), page 2; *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision on the admission of exhibits, 15 May 2002, page 3.

478 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 27 (Annex IV (B)); *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March, 2000, para. 35; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution motion for admission of witness statement of investigator Bernard O’Donnell *in lieu* of viva voce testimony pursuant to Rules 54 and 92 *bis*, 12 February 2004, page 3.

479 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution motion for admission of witness statement of investigator Bernard O’Donnell *in lieu* of viva voce testimony pursuant to Rules 54 and 92 *bis*, 12 February 2004, page 3.

480 *Prosecutor v. Strugar*, IT-01-42-T, Decision II on the admissibility of certain documents, 9 September 2004, para. 9.

481 *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on Motion of Prosecution for Admissibility of Evidence, January 1998 (“Delalić Decision on Motion for Admissibility”), para. 22.

482 *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Decision on the Admissibility of Documents of the Defence of Enver Hadžihasanović, 22 June 2005, paras. 33-35; *Prosecutor v. Orić*, IT-03-68-T, Trial Judgement, 30 June 2006, para. 29; *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, Trial Judgement, 15 March 2006, paras. 297-298.

483 *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision on the Admission of Exhibits tendered during the Rejoinder Case, 23 October 2002, page 3.

484 *Ibid.*, page 2

485 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838

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of witnesses for the purpose of providing context for a witness' testimony, impeaching the witness, or proving or disproving any legal or factual element of the charges against the accused.

32. Documents which have not been disclosed by the Prosecution in accordance with Rule 66⁴⁸⁶ may still be used in cross-examination in accordance with the jurisprudence of the ICTY as this rule deals only with material used for the Prosecution's case-in-chief.⁴⁸⁷ The Prosecution cannot however introduce evidence during cross-examination if the witness does not adopt it, rejects it, or is unable to say anything meaningful about it.⁴⁸⁸ While the Prosecution may put material to Defence witnesses in accordance with Rule 90(H), it cannot admit material into evidence where there is no basis for its admission.⁴⁸⁹

E. The Use of Prior Witness Statements during the Examination and Cross-Examination of Witnesses

33. The admissibility of written witness statements obtained prior to trial during the examination and cross-examination of witnesses is governed by Rules 89, and 92 of the ICTY RPE.

E.1 Rule 92 bis

34. Rule 92 bis was created as a means to expedite the trial process and is used mainly to establish "crime-based" evidence.⁴⁹⁰ The rule sets out certain requirements which must be fulfilled in order to admit a witness statement into evidence *in lieu* of live testimony. For purposes of this chapter, suffice it to say that there is no cross-examination of witness statements submitted under this rule. Such statements may be admissible in order to prove a matter other than the acts and conduct of an accused. Written witness statements will not be allowed *in lieu* of testimony, however, where it is in the public interest that such evidence be presented orally, where such evidence is deemed unreliable or overly prejudicial, or where the witness should be made available for cross-examination.⁴⁹¹

Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, para. 11.

486 This Rule relates specifically to the Prosecution's disclosure obligations.

487 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, para. 11.

488 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jašović, 26 August 2005 ("*Slobodan Milošević* Decision regarding Dragan Jašović"), paras. 24-25; *Slobodan Milošević* Decision Regarding Witnesses, para. 9.

489 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jašović, 26 August 2005, paras. 24-25; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balević, Vladislav Jovanović, Vukašin Andrić and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, 17 May 2005, paras. 9-10. See also Chapter VI "Evidentiary issues at trial" for a more detailed explanation of admission issues.

490 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, paras. 9-10, 16.

491 For further discussions on the use of written witness statements at trial, see Chapter VI "Evidentiary Issues at Trial", Section E.

35. The *Brđanin and Talić* case set out the following general rules related to statements sought for admission under Rule 92 bis:

- ◆ Evidence going directly to the accused's acts or conduct cannot be admitted regardless of how repetitive it is;
- ◆ The cumulative nature of the evidence is relevant for evidence that does not go directly to the acts or conduct of the accused;
- ◆ Extreme caution must be used before admitting written statements related to the acts and conduct of subordinates where an accused is subject to superior responsibility liability;
- ◆ The applicant should provide general information about other witnesses who will provide similar evidence and the nature of the overlap; and,
- ◆ The parties should assist the Trial Chamber by adequately addressing the relevant considerations set out in the Rule⁴⁹², where the reliability and credibility of a proposed 92 bis witness is at issue, and the evidence is not cumulative.⁴⁹³

36. Rule 92 bis(E) also allows the Trial Chamber to require a witness who has provided written evidence to appear for cross-examination. Once a Trial Chamber determines that the witness must appear for cross-examination, because his statements do not fall within the parameters of rule 92 bis, the admission of any prior statements or testimony is governed by Rule 92ter.⁴⁹⁴ In making such a determination, the Trial Chamber will consider several factors. First, if the acts and conduct of persons described in the testimony reach a certain degree of proximity to the accused, the witness may have to appear for cross-examination.⁴⁹⁵

492 *Prosecutor v. Brđanin and Talić*, Decision on “Objection and/or Consent to Rule 92bis Admission of Witness Statements Number One” 30, January 2002 at paras. 17-18, 30, and *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision regarding Prosecutor’s Notice of Intent to Offer Transcripts under Rule 92 bis(D), 9 July 2001.

493 *Prosecutor v. Gotovina, et al.*, IT, Decision on the First Batch of Rule 92 bis Witnesses, 3 June 2008, para. 8.

494 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 7 October 2010 (“Stanišić and Simatović Decision Pursuant to Rule 92 bis”), para. 35. The substance of 92 ter statements is discussed in Chapter 6, “Evidentiary Issues at Trial.”

495 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 7 October 2010, para. 35; *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to



Mičo Stanišić and Stojan Župljanin case - Admission via Rule 92 bis prevents the opportunity for cross-examination

The Trial Chamber was presented with a number of adjudicated facts of which it chose not to take judicial notice. Thereafter, pursuant to Rule 92 bis, the Prosecution requested that the ICTY admit transcripts and written statements in lieu of viva voce testimony for certain witnesses specifically dealing with those adjudicated facts. These witnesses would, therefore, not be subject to cross-examination. The Prosecution also requested that certain exhibits “indispensable” to those witnesses’ testimony also be admitted.

The Defence sought to cross-examine these witnesses, citing the need to test their “reliability and credibility”. The Defence also asserted that some of the denied adjudicated facts to which the statements related dealt with “highly contested, live and important issues in the trial”. The Defence contended that the cross-examination of these witnesses in previous trials “did not adequately address these matters”.

In relation to these proposed 92 bis witnesses, the Trial Chamber found that their previous testimony related to issues such as the ethnic composition of particular areas, the background of the conflict, the security situation in particular locations, shelling of Kozarac, looting and destruction done by Serbs, and various incidents of abuse and killing of civilians.

The Trial Chamber found that these points of testimony were relevant to the indictment and correlated to certain denied adjudicated facts. Moreover, this testimony did not go “to proof of the acts and conduct of the Accused”, nor did it contain information pivotal to the Prosecution’s case. Therefore, the Trial Chamber saw no need for the witnesses to appear for cross-examination.

* *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, IT-08-91-T, Written Reasons for the Oral Decision Granting in Part Prosecution’s Motion for Admission of Evidence of ST068, ST224, ST242, ST246 and ST248 pursuant to Rule 92 bis, 5 January 2011, para. 3,7, 9, 18, 19, 24, 25, 29, 30, 32, 36, 39, 41.

Secondly, where the written evidence is a “critical element of the Prosecution’s case” or is “pivotal” to the Prosecution’s case, the Trial Chamber may choose to require cross-examination of the witness or exclusion of the evidence.⁴⁹⁶ Generally, though, evidence will be excluded only if its “prejudicial effect cannot be counter-balanced by allowing the accused the opportunity to cross-examine the witness.”⁴⁹⁷ The Trial Chamber will also consider whether the issues contained within the statement are “live and important” issues given the context of the specific circumstances of the case, including assessing whether the accused has put this evidence into issue and vigorously put forward a contrary case.⁴⁹⁸ Trial Chambers have also considered the cumulative nature of the evidence and whether the cross-examination in the previous proceeding adequately addressed the relevant issues in the current proceedings.⁴⁹⁹



Blagoje Simić et al. case- Unadmitted sections of 92 bis statements & refreshing a witness’ memory

*In this case, the Trial Chamber admitted witness Đorđe Tubaković’s statement into evidence under Rule 92 bis but did not admit those sections related to the acts and conduct of the accused. Tubaković thereafter testified at trial. His trial testimony was inconsistent with those redacted sections of his prior witness statement. The Prosecution requested leave to use the original, unredacted version of the statement to challenge Mr. Tubaković’s credibility.**

A second witness, Vaso Antić, also had part of his witness statement admitted under Rule 92 bis and also made contradictory statements during the trial, in respect of which the Prosecution sought to use the whole statement in order to refresh the witness’ memory.

The Appeals Chamber held there is a distinction between a statement which is submitted as evidence under Rule 92 bis and a statement which is being used for another purpose. It went on to confirm that those sections of the statement not admitted into evidence under Rule 92 bis could be used by the Prosecution in order to refresh the witness’ memory or to impeach him during live testimony at trial.

* *Prosecutor v. Blagoje Simić et al.*, IT-95-9-AR73.6 & IT-95-9-AR73.7, Decision on Prosecution interlocutory appeals on the use of statements not admitted into evidence pursuant to Rule 92 bis as a basis to challenge credibility and to refresh memory, 23 May 2003, paras. 3-4, 5, 12, 18, 16.

37. Any evidence that is admitted without cross-examination requires corroboration in order to be sufficient to constitute a basis for a conviction.⁵⁰⁰
38. Rules 89(C) and 92 bis are inter-related.⁵⁰¹ Parties cannot attempt to tender written statements under Rule 89(C) in order to avoid the stricter standards of Rule 92 bis.⁵⁰² Rule 92 bis is the *lex specialis* which takes the

Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis, 13 January 2006, para. 19, citing *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, paras. 9-10, para.13.

496 *Ibid.*

497 *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motion for Admission of Transcripts Pursuant to Rule 92 bis (D) and of Expert Reports Pursuant to Rule 94 bis, 13 January 2006, para. 20.

498 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 7 October 2010, para. 35.

499 *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, Decision on Prosecution’s Motion for Admission of Written Evidence Pursuant to Rule 92 bis, 7 October 2010, para. 35; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution Request to have Written Statements Admitted under Rule 92 bis, 21 March 2002, para. 24; *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules, 16 January 2006, para. 16; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution’s Second Motion for Admission of Evidence Pursuant to Rule 92 bis, 13 September 2006 (“Milutinović Decision Denying Admission”), para. 6; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, paras. 9-10, para. 13.

500 *Prosecutor v. Martić*, IT-95-11-T, Trial Judgement, 12 June 2007, para. 27.

501 *Prosecutor v. Blagoje Simić et al.*, IT-95-9-T, Decision on Prosecutor’s Motion for Trial Chambers Redetermination of its Decision of 2 April 2003 related to Cross-Examination of Defence Rule 92 bis Witnesses or Alternatively Certification under Rule 73(B) of the Rules of Procedure and Evidence, 28 April 2003, p. 2; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admissibility of Prosecution Investigator’s Evidence, 30 September 2002 (“Slobodan Milošević Decision on Investigator’s Evidence”), para. 11.

502 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 bis(C), 7 June 2002, para. 31.

admissibility of written statements and transcripts out of the scope of *lex generalis* of Rule 89(C).⁵⁰³ Hence, if a tendered statement contains hearsay evidence, it may be admitted only if it complies with Rule 92 *bis*.⁵⁰⁴ Moreover, all evidence admitted under Rule 92 *bis* must meet the general requirements of Rule 89(C) in that it may be admitted only if it is relevant, probative, and reliable.⁵⁰⁵ Moreover, a Trial Chamber must exclude probative evidence if its probative value is substantially outweighed by the need to ensure a fair trial.⁵⁰⁶ However, Rule 92 *bis* has no effect on hearsay material that was not prepared for the purposes of legal proceedings.⁵⁰⁷ (see case box *Mičo Stanišić and Stojan Župljanin case - Admission via Rule 92 bis prevents the opportunity for cross-examination*).

39. Unadmitted sections of a 92 *bis* statement may still be used to refresh a witness' memory or to challenge his credibility during cross-examination (see case box *Blagoje Simić et al. case - Unadmitted Sections of 92 bis statements & refreshing a witness' memory*).

E.2 Rule 92 *ter*

40. Rule 92 *ter* allows for the admission of written statements or transcripts of prior testimony given by a witness, even when that evidence goes to the accused's acts and conduct, if (a) the witness is present in court, (b) available for cross-examination, and (c) attests that the statement or prior testimony accurately reflects what he would say if examined on the same issues in court.⁵⁰⁸
41. The fact that such a statement may discuss the acts and conduct of an accused does not render it inadmissible. Rather, the Trial Chamber has the discretion to decide whether to enter it in evidence and how much weight it should carry.⁵⁰⁹



Mičo Stanišić and Stojan Župljanin case - Cross-examination under Rule 92 *ter*

In this case, the Prosecution requested that written statements be admitted in lieu of viva voce testimony pursuant to Rule 92 bis. However, the Defence requested that it be allowed to cross-examine the witness in order to test the "reliability and credibility" of his testimony. It also stated that the issues addressed by this witness were "highly contested", that any inconsistencies in his account would need to be explored, and that cross-examination in the previous trial did not adequately address the matters in the present case.*

The Trial Chamber found that Rule 92 ter and not 92 bis applied. In his prior court testimony, the witness discussed not only his personal background but also gave his interpretation of a report prepared by the 5th Krajina Corps which discussed the number of persons killed and captured as well the term 'mopping up'; the fact that there were no armed formations of Green Berets in a particular area; that a particular brigade took part in an incident; and that security organs would have been consulted prior to any attack. He also discussed events leading up to wider armed conflicts and the presence and activities of the Muslim paramilitary. The Trial Chamber determined that the report concerned "acts and conduct of the Accused and raise[d] important matters upon which the Defence should be allowed the right to cross-examine."Therefore, it required that this witness appear for cross-examination in accordance with the provisions of Rule 92 ter.

* *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, IT-08-91-T, Written Reasons for the Oral Decision pursuant to Rules 92 *bis* and 92 *ter* Granting in part Prosecution's Motion for Admission of Evidence of ST247, 3 December 2010, para. 1, 7, 14, 15.

503 *Ibid.*

504 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 September 2006, para. 5.

505 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para. 18; *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, paras. 9-10, para. 31; *Prosecutor v. Milutinović et al.*, Decision on Prosecution's Rule 92 *bis* Motion, 4 July 2006, para. 5; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 September 2006, para. 4.

506 *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 13 September 2006, para. 4; *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*, 12 September 2006, para. 9.

507 *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C), 7 June 2002, paras. 9-10, para. 31.

42. This rule, while aiming to expedite the trial process, also seeks to ensure the accused's right to a fair trial by allowing for a witness whose prior statements have been admitted into evidence to be cross-examined at trial (see case box *Mičo Stanišić and Stojan Župljanin case - Cross-examination under Rule 92 ter*).
43. Associated exhibits that were discussed by the witness in his prior witness statement or previous trial testimony may be tendered for admission into evidence with the 92 *ter* statements if they meet the requirements for admission under rule 89 and are an "inseparable and indispensable" part of the witness' prior evidence.⁵¹⁰ In order for exhibits to be deemed "inseparable and indispensable", they must have been "discussed within the testimony, and it must be shown that, without the document, the witness' testimony would lose probative value or become incomprehensible."⁵¹¹ The admissibility rules required by Rule 89(C), that the evidence be relevant and have probative value, and Rule 89(D), which permits the exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, continue to apply to Rule 92 *ter* evidence.⁵¹²



Tolimir case - Strictness of the unavailable Standard

*In this case, the Prosecution sought admission of evidence from three witnesses they determined to be "unavailable". The first witness expressed reservations about testifying. Despite the Prosecution's best efforts, they were unable to "prevail upon" him to testify again. The witness suffered from Post-Traumatic Stress Disorder and was concerned about the stress associated with testifying.**

The second witness was also hesitant to testify due to "serious psychological and emotional trauma" resulting from having to relive his experiences in the war while giving testimony in the Popović case. As a result, he was "unwilling to endure the prospect of a similar experience as a result of these proceedings."

The third witness refused to testify out of concern for the safety and welfare of his family.

Despite the Prosecution's claims, however, the Trial Chamber did not find that any of these witnesses met the condition of being unavailable within the meaning of Rule 92quater. The Trial Chamber stated that the "Prosecution's inability 'to prevail upon' these witnesses is [not a] sufficient reason to find that these witnesses are 'unavailable'..., particularly since the Prosecution has failed to provide any documentation or other proof of the witnesses' unavailability...With regard to [the third witness], the Prosecution failed to specify the experiences in which the witness' unavailability is rooted."

* *Prosecutor v. Tolimir*, IT-05-88/2-T, Partial Decision on Prosecution's Rule 92 bis and Rule 92 *ter* Motion for Five Witnesses, 27 August 2010, para. 6, 10-11, 14, 33.

- 508 *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.4, Decision on Interlocutory appeal on the admissibility of evidence-in-chief in the form of written statements, 30 September 2003, disposition; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution's motion to admit prior statements as substantive evidence, 25 April 2005, para. 16. The rules governing the admission of statements pursuant to rule 92 *ter* are discussed in greater depth in Chapter 6.
- 509 *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the form of Written Statements, 30 September 2003, para. 19; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005 ("Limaj Decision"), para. 16.
- 510 *Prosecutor v. Karadžić*, IT-9505/18-T, Decision on Prosecution's Submission regarding Additional Transcript Pages from Momčilo Mandić's *Stanišić & Župljanin* Testimony for Admission into Evidence, 8 September 2010, para. 5; *Prosecutor v. Milan Lukić & Sredoje Lukić*, IT-98-32/1-T, Decision on Confidential Prosecution Motion for the Admission of Prior Testimony with Associated Exhibits and Written Statements of Witnesses pursuant to Rule 92 *ter*, 9 July 2008, para. 15.
- 511 *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A-C, 3 November 2009, para. 7.
- 512 *Prosecutor v. Tolimir*, IT-05-88/2-PT, Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 *ter* with Appendices A-C, 3 November 2009, para. 8; *Prosecution v. Đorđević*, IT-05-87/1-T, Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 *ter*, 10 February 2009, para. 6.

E.3 Rule 92 quater

44. Rule 92 *quater* governs the admissibility of a prior written statement of a witness who is unavailable at the time of trial.⁵¹³ Under this Rule, “a written statement or transcript [of a person] who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted[...] if the Trial Chamber (i) is satisfied of the person’s unavailability...; and (2) finds from the circumstances in which the statement was made and recorded that it is reliable.” A Trial Chamber may, in its discretion, reject such evidence, in whole or in part, if it goes to the proof of the accused’s acts and conduct.
45. In order for a statement to be admitted under this rule, the witness whose statement or transcript is tendered for admission must be unavailable for “reasons beyond control”, and the written evidence must be deemed to be sufficiently reliable to be admitted without testing by cross-examination⁵¹⁴ (see case box *Tolimir case - Strictness of the Unavailable standard*).
46. The requirements of Rule 89, that the proposed evidence be relevant and have probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial, must also be met as with any other evidence.⁵¹⁵ When weighing the value of such evidence, the Trial Chamber will look at issues related to the substance of prior cross-examination, the alleged interests of counsel, and challenges to the witness’ credibility.⁵¹⁶

E.4 Prior Consistent Statements

47. While there is no explicit rule forbidding the use of prior consistent statements from a witness, such statements are generally inadmissible at the ICTY as they are considered to constitute cumulative evidence which is of limited probative value.⁵¹⁷ Even when allowed into evidence, they cannot be used to vouch for a witness’ credibility, but may only be used for the limited purpose of rebutting a charge of recent fabrication by showing the prior consistency in the witness’ previous account⁵¹⁸ (see case boxes *Mičo Stanišić and Stojan Župljanin case - Prior*



Mičo Stanišić and Stojan Župljanin case - Prior statement to rebut a charge of recent fabrication

- ◆ *[Trial Chamber]: Ms. [Prosecutor], it’s late. The witness is probably tired as we all are, concentration tends to wane. But generally, you are re-examining your witness. And correct me, but isn’t this document already in as an exhibit? So I am not sure I see the path that you are taking with re-examining him on what I suppose, according to your case, is a previous consistent statement. How does it assist the [Trial] Chamber?*
- ◆ *[Prosecutor]: Sir, to clarify, this statement is not an exhibit. The exhibit that’s tendered for this witness is his prior testimony in the Brđanin case. Your Honours don’t have the benefit of having this as informal evidence. My concern is that a bald statement by my learned friend [defence counsel] that he has completely changed his story, so to speak, which, I think, is what he’s wanting you to take away from this is not a true representation of what has come from this witness today.**

* *Prosecutor v. Mičo Stanišić and Stojan Župljanin*, IT-08-91-T, T:963, 6 October 2009.

513 This rule is also discussed at greater length in Chapter 6, Evidentiary Issues at Trial.”

514 *Prosecutor v. Tolimir*, IT-05-88/2-T, Partial Decision on Prosecution’s Rule 92 *bis* and Rule 92 *ter* Motion for Five Witnesses, 27 August 2010, paras. 29, 33.

515 *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92quater, 5 February 2009, para. 7.

516 *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92quater, 5 February 2009, para. 8; *Prosecutor v. Popović et al.*, IT-05-88-AR73A, Decision on Beara’s and Nikolić’s Interlocutory Appeals Against Trial Chamber’s Decision of 21 April 2008 Admitting 92 *quater* Evidence, 18 August 2008, paras. 31, 44.

517 May, Richard and Marieke Wierda, *International Criminal Evidence*, 2002 (“May and Wierda, *International Criminal Evidence*”), page 236.

518 *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 147.

Statement to Rebut a Charge of Recent Fabrication and Kordić and Čerkez case - Prior Consistent Statement Denied Admission into Evidence).

E.5 Refreshing a Witness' Memory

48. Prior statements made by a witness can be used for a number of different reasons. One of them is to refresh a witness' memory.⁵¹⁹ A witness's memory can be refreshed when a witness asserts, during testimony, that he does not recall a particular fact or incident. The previous statement of the witness, recounting that fact or incident, can then be shown or read to him as a means to refresh his recollection. Thereafter the witness will be asked if review of the statement has, in fact, refreshed his memory about the event at issue. If so, he may testify about it. There are times when showing a witness his prior statement will not refresh his memory; however, practically speaking, they are exceptional.

49. Other aides, such as contemporaneous notes or diaries, may also be used to refresh a witness' memory.⁵²⁰

50. The Trial Chamber in determining the witness' credibility or reliability regarding an issue which required refreshing the witness' memory will look to the totality of the circumstances surrounding the witness's testimony in making that determination.⁵²¹

E.6 Impeachment

51. Prior witness statements may also be used to impeach a witness. As a general rule impeachment evidence serves to call the credibility and reliability of a witness's testimony into question. It is not used as substantive evidence. However, in specific circumstances where a witness has previously made a statement which contradicts his in-court testimony, and his in-court testimony is adverse or hostile to the party who called him, the Trial Chamber may consider the prior statement as substantive evidence and rely on it for its truth.⁵²²

52. In a situation where a witness is confronted with his own prior statements that are inconsistent with one another, it is important to remember that the testimony, which the Trial Chamber will rely upon, is the live

	Kordić and Čerkez case - Prior consistent statement denied admission into evidence
<p><i>In this case, the Prosecution asked to admit the transcripts of four witnesses related to attacks in central Bosnia.* The Defence objected, stating that the admission of those transcripts violated the accused's rights of confrontation and cross-examination. In relation to witness N, the Defence claimed that since this witness had already testified, the admission of his prior testimony was unnecessary and cumulative.** The Trial Chamber agreed, stating:</i></p> <p style="padding-left: 40px;"><i>“The Trial Chamber cannot see any justification for admitting the transcript of witness testimony of a witness who has already given evidence and been subject to cross-examination in this trial. The inclusion of this material is unnecessarily repetitious as it already forms part of the record of this trial, and the transcript of witness N (Tab 18) as part of the Dossier is accordingly not admitted.”***</i></p>	
<p><small>* <i>Prosecutor v. Kordić and Čerkez</i>, IT-95-14/2-T, Decision on the Prosecution Application to Admit the Tulica Report and Dossier into Evidence, 29 July 1999, para. 24.</small></p> <p><small>** <i>Ibid.</i>, para. 25.</small></p> <p><small>*** <i>Ibid.</i>, para. 26.</small></p>	

519 *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004 (“Hadžihasanović Decision on Interlocutory Appeal”), page 3.

520 May, Richard and Marieke Wierda, *International Criminal Evidence*, 2002, page 169; *Prosecutor v. Blaškić*, IT-95-14-T, Decision of Trial Chamber I on the Appearance of Colonel Robert Stewart, 25 March 1999.

521 *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-AR73.2, Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness, 2 April 2004, page 3.

522 *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 16 and 17. See also Section E.7, “Hostile Witnesses”, of this Chapter.

E. The Use of Prior Witness Statements during the Examination and Cross-Examination of Witnesses

testimony given by the witness at trial.⁵²³ It has also been held that statements made by third parties cannot be used to impeach a testifying witness.⁵²⁴

53. When deciding whether to impeach a witness for his prior inconsistent statements, counsel should consider whether discrediting the witness is:
- ◆ tactically desirable by determining if impeachment is consistent with counsel's theory of the case;
 - ◆ a benefit that outweighs the risk of harm; and,
 - ◆ discrediting the evidentiary value of the witness' prior statement.⁵²⁵
54. Documentary evidence may also be used to challenge a witness' credibility.⁵²⁶ It is permissible to put a document to a witness which is not already in evidence and which contains factual assertions contrary to the testimony of the witness who is being examined, even if that document is not alleged to have been authored by the witness or is not adopted by the witness. If the witness contests the factual contents of the document, however, the document cannot be admitted as evidence through that witness, although it may be admitted through a different witness who can speak to its contents.
55. Other methods of substantive impeachment include:
- ◆ demonstrating that the witness lacked the ability to perceive, observe, remember or recount matters about which he has testified;
 - ◆ highlighting contradictions in the witnesses testimony if any arise;
 - ◆ eliciting evidence from the witness himself or others that shows the witness is biased or influenced by improper factors such as fear, prejudice or pecuniary interest; and,
 - ◆ undermining the witness' character for honesty and veracity by presenting evidence of prior criminal convictions or other events reflective of dishonesty.⁵²⁷

E.7 Hostile Witnesses

56. In some cases, a witness may provide a statement that is relied upon by counsel but, when questioned during the trial, gives testimony contrary to the original statement. If the witness is considered to bear "a hostile animus to the party calling him and does not give his evidence fairly and with a desire to tell the truth", he may be considered hostile to the party who called him to testify.⁵²⁸ In this situation, counsel may (but only by first seeking leave from the Trial Chamber) treat the witness as a hostile; a procedure which allows counsel - who having called the witness as part of his own case is normally not permitted to ask leading questions - to cross-examine the witness about his prior inconsistent statement⁵²⁹ and ask him leading questions in the

523 *Prosecutor v. Naletilić and Martinović*, IT-98-34-T, Decision on the Admission of Witness Statements into Evidence, 14 November 2001, page 3. See also *Prosecutor v. Kvočka et al.*, IT-98-30/1, Judgement, para. 800 (Annex A), stating that while prior statements could be used to challenge credibility, they could not be admitted as evidence.

524 *Prosecution v. Halilović*, IT-01-48-T, Decision on Prosecution's motion to vary its Rule 65 *ter* list, 7 February 2005, page 6.

525 Kerper, Janeen, *Killing Him Softly with his Words: The Art and Ethics of Impeachment with Prior Statements*, 21AMJTA 113, Summer 1997 ("Kerper, Killing Him Softly"), pages 82-89.

526 May, Richard and Marieke Wierda, *International Criminal Evidence*, 2002, page 171.

527 Kerper, *Killing Him Softly*, page 82; May, Richard and Marieke Wierda, *International Criminal Evidence*, 2002, pages 170-171.

528 May, Richard and Marieke Wierda, *International Criminal Evidence*, 2002, page 606.

529 *Prosecutor v. Halilović*, IT-01-48-T, Decision on Admission into Evidence of Prior Statement of Witness, 5 July 2005, pages 4-5; *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution's Motion to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 16 and 17, paras. 8-9.

VIII. Direct, Cross-Examination and Re-Examination

course of doing so.⁵³⁰ It should be noted that merely providing unfavourable evidence or being unable to recall information contained in a prior statement is not sufficient to treat a party's own witness as hostile. The witness must be seen as unwilling to tell the truth or answer questions.⁵³¹ To determine whether a witness is hostile, "the court will have to regard the witness' demeanour, the terms of any inconsistent statement, and the circumstances in which [the prior inconsistent statement] was made."⁵³²

57. As explained in *Limaj et al.*, a hostile witness is "a witness who's not prepared to answer truthfully and willingly."⁵³³ To qualify as such, the witness should be "refusing to answer questions, giving false testimony or withholding relevant information."⁵³⁴
58. A Trial Chamber may allow a party to impeach or cross-examine its own witness by putting inconsistent statements to its witnesses, without declaring the witness hostile, if the Trial Chamber considers that it is in the interest of justice to do so.⁵³⁵ This will generally occur, however, when the impeachment involves only a discreet part of the witness' testimony as, for example, when a witness expresses reluctance to testify only regarding certain matters but is otherwise willing to cooperate with the trial process and the party who called him to testify (see Annex 1 - *Argument by the prosecutor to apply to treat a witness as hostile*).

F. Re-Examination

59. Re-examination is the process whereby the party who has examined a witness-in-chief is allowed to put questions to correct matters or new facts arising out of cross-examination.⁵³⁶ It is not an opportunity to elicit further evidence-in-chief or to raise entirely new issues. The re-examiner may deal with all matters relevant to those raised in cross-examination, even if not dealt with expressly by the cross-examiner. The objective of re-examination is to reconcile discrepancies, if any and if possible, between the statements in the examination-in-chief and cross-examination, or to remove any ambiguity or suspicion cast upon the evidence during cross-examination. New matters may only be introduced with the express leave of the Trial Chamber. As with direct examination, leading questions are also not permitted on re-examination.
60. A witness may be asked about a previous consistent statement if there was an allegation of recent fabrication during cross-examination and may also be asked to clarify a prior statement if that statement was addressed during cross-examination.⁵³⁷ The re-examining party is allowed to use documents to refresh the witness' memory⁵³⁸ or to respond to a new subject dealt with for the first time during cross-examination.⁵³⁹

530 *Prosecutor v. Šešelj*, IT-03-67-T, T: 8491, 19 June 2008.

531 May and Wierda, *International Criminal Evidence*, 2002, page 607.

532 *Prosecutor v. Limaj et al.*, IT-03-66-T, T: 2737, 01 February 2005.

533 *Ibid.*, T:2141.

534 *Ibid.*, T:2143.

535 *Prosecutor v. Popović et al.*, IT-03-88AR7.3, Decision on Appeals against Decision on Impeachment of a Party's Own Witness, 1 February 2008, paras. 26, 28.

536 *Prosecutor v. Karadžić*, IT-95-5/18-PT, Order on the Procedure for the Conduct of Trial, 8 October 2009, para. J; *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-T, Order on Revised Guidelines on the Admission and Presentation of Evidence, 2 October 2009, para. 23; *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Motion on Presentation of Evidence by the Accused, Esad Lanzo, 1 May 1997, para. 22.

537 May and Wierda, *International Criminal Evidence*, page 627; Tapper, Colin, *Cross & Tapper on Evidence*, Eleventh Edition Evidence Eleventh Edition (2007), page 346; Murphy, Peter, *Murphy on Evidence*, Tenth Edition (2008), page 584.

538 May and Wierda, *International Criminal Evidence*, page 628.

539 *Prosecutor v. Prlić et al.*, IT-04-74-T, Order to Admit Evidence regarding Zdenko Andabak, 27 April 2010, page 7.

Conclusion

61. The aim of this chapter has been to highlight the main principles of examining and cross-examining witnesses in an adversarial trial setting such as that utilised at the *ad hoc* Tribunals and the ICC. In order to successfully employ these principles, it is crucial for counsel to master the factual and legal matrix of his client's case and to determine as early as possible, the main challenges to the Prosecution's case. Such determinations will ultimately assist counsel in focusing on the real issues in dispute and the merits of the Defence case, so as to enable counsel to conduct examinations at trial in an expeditious and professional manner.

Annex 1: Argument by the Prosecutor to Apply to Treat a Witness as Hostile

In the following excerpt of the transcript of Prosecutor v. Limaj et al., IT-03-66-T, T: 2126-43, 18 January 2005, the Prosecutor seeks permission from the Court to have his witness treated as hostile. Defence counsel contest the Prosecutor's application.

» *[Prosecution]: ...And after a lot of questioning and going around the houses and some difficulty...the witness stated that it was possible that a soldier would be told to leave the unit and that they could be removed. That was after a great deal of, in my view and in my submission, efforts on his part to resist answering the question... So although that testimony ended up in the end consistent, I include that as an example of the witness' efforts to resist answering questions and to try not to give us the same information he's clearly stated earlier in his prior statements.*

We've passed out today a letter which I think the Court has already received. It's addressed to the Trial Chamber, sent by the witness on 23 November 2004, where he says he will not be a witness for the Officer of the Prosecutor...

I include this letter, Your Honour, because there are two issues which are slightly different but they are related. The first is the witness is an adverse witness which under the Rules which I practice on, as he aligned himself with the opposing party. That [is], clearly, the case with this witness. He's openly stated he did not want to come for us. [Defence counsel] stated yesterday the witness refused to be a Prosecution witness; he's happy to be a Defence witness. He considers himself adverse to the Office of the Prosecutor...

I'm just pointing out that he through this letter and through his statements when he was served with the subpoena to come here, he again said to the person serving him: I don't want to come. He obeyed the subpoena. He's adverse. He's an adverse witness. Through the examples I've shown Your Honours he's also a hostile witness, in that he's trying to avoid giving this information and he has given materially different statements on -- in court yesterday than he has in previous interviews to us, to the Defence, and to the press on important issues. And there is a direct contradiction that it is a clear effort from him to try to avoid answering the question...

» *[Defence counsel 1]: ...We submit this application is without both foundation or merit. We submit that Your Honours can, absent as we understand it any jurisprudence arising from [the ICTY] on the point, safely adopt the principle that adverse means hostile and not merely unfavourable. In indicating that is the principle we invite you to apply, we [by] no means concede in that...position has been arrived at here or indeed anywhere near it...*

First of all...this witness is a commander of considerable seniority...we invite the court to read the last sentence of the letter written on his behalf indicating that his lack of preparedness to give evidence...is rather a recognition of the delicate position in which historically and today he finds himself.

He...is the only witness interviewed by any Defence team who specifically requested the attendance of the OTP during the interview. That of itself is another indicator, we submit, of a position very far from animosity towards the party calling him. He made no signed statement at the Office of the Prosecutor. He was the subject of a subpoena compelling his attendance, having written the letter or it having been written on his behalf at the back-end of last November.

Nonetheless, notwithstanding all of those matters, they chose to call him, to set up this skittle in order to knock it down. There was from 1946 a precedent that they could have adopted, the medical case, this Nuremberg case. They could have invited the [ICTY] to call the witness, had they feared what they now say has come about...

» *[Defence counsel 2]: ...in the courts in which I practice, this application would be denied based upon what he has*

done thus far.

With regard to the issue of this gentleman's demeanour, I find it curiously strange that he would be in any sense whatsoever characterised or defined as hostile. We've actually had an example of a witness who exhibited some hostility towards questioners in this court, and that was [Mr. S] who engaged in banter with us, and as a matter of fact you could say was pugilistic in some of his responses. Such is not the case with this witness; as a matter of fact to the contrary: In one situation where he was presented with a map that failed to have sufficient information on it for him to give the Prosecutor that which he desired, he attempted on his own to worry through the document and point out the very fact for which the Prosecutor was looking...

- » *[Prosecutor]: ...It's settled in [the ICTY's]...case law Brđanin and Talić case, the Blagojević case, that a party calling a witness may treat a witness as hostile. Hostility does not mean in anger, hostility in the normal sense of the word. Hostility can normally be demonstrated simply be changing their statements from ones which the party calling them reasonably expect them to rely on.*
- » *[Trial Chamber]: Is it too concise to say that it's a witness who's not prepared to answer truthfully and willingly?*
- » *[Prosecutor]: Quite right...or who...will take every step possible to avoid answering the question; and...will not alter or answer truthfully in line with prior statements...[T]he purpose of this application is to be allowed to use leading questions to show the witness his prior statements, allow him to explain to the [Trial] Chamber these discrepancies, and there are...some marked discrepancies on material issue.*
- » *[Trial Chamber]: ...The Chamber is of the view that the application should be refused. The issue which we are to consider is...whether or not the witness should be declared hostile. The essence of a hostile witness is usually regarded as one who is not prepared to speak the truth. That can be by simply refusing to answer or by giving false testimony or withholding relevant information...the matters that have been identified are not such, in our view, as to persuade us that the view ought to be taken that this witness is hostile in the sense that I have identified...*

Annex 2: Examples of Leading Questions

In this excerpt of Gotovina et al., Defence counsel is attempting to get information related to interactions between civilians and the Special Police, specifically concerning how the Special Police were to deal with civilians in various circumstances. However, in his attempt to obtain this information, Mr. Kuzmanović led the witness. Notice the difference between the original and revised versions of his question.

- » *[Defence counsel]:...The Special Police had technical expertise in terms of encountering not just in vehicles but in other places booby-traps, mines. Is that a reason for the Special Police to be involved in certain instances in checking out vehicles and buildings?*
- » *[Trial Chamber]: Mr.[Prosecutor].*
- » *[Prosecutor]: It's a leading question.*
- » *[Trial Chamber]: It is. Mr.[Defence counsel]*
- » *[Defence counsel]: Q. Can you give a reason as to why Special Police would be involved in removal of vehicles and/or checking out buildings?*
- » *[Prosecutor]: It's a leading question.*
- » *[Trial Chamber]: It is. Mr.[Defence counsel]*
- » *[Defence counsel]: Q. Can you give a reason as to why Special Police would be involved in removal of vehicles and/or checking out buildings?**

In this passage of Popović, Defence counsel is inquiring about particular passages from the witness' prior written statement, which describe problems encountered due to the large number of prisoners being held and the unstable security situation.

- » *[Defence counsel]: Mr. Pandurević, did you intend the references to what in Serbian is "asanacija" and what has been translated as "security of the terrain" to refer to guarding and burying prisoners in the Zvornik area?*
- » *[Prosecutor]: Objection, leading. "What did you intend that to mean?"*
- » *[Trial Chamber]: Yes, can you rephrase it, please.*
- » *[Defence counsel]: I don't think that's a leading question. He is entitled to answer the case that's put against him absolutely. That's the Prosecution case. He is entitled to answer that as steadfastly as he is entitled to enter a not-guilty plea*
- » *[Prosecutor]: I absolutely agree, but he first needs to set the foundation by letting the witness say what he intends. That's the important thing.*
- » *[Defence counsel]: Well, I've got nothing further to say. I'd like you to rule on this. [Trial Chamber]: Yes, exactly... Our conclusion is that we consider the question as put as leading, to be a leading one, and we therefore suggest that you rephrase it and possibly agree to the way suggested by [the Prosecutor]. Of course, you will be able to follow it through once you have rephrased the question.*
- » *[Defence counsel]: Q. Mr. Pandurević, when you wrote this report, what did you believe to be the state of health of the prisoners that Brano Grujić had referred to?****

* Prosecutor v. Gotovina et al., IT-06-90-T, T:25315-6, Transcript, 26 November 2009.

** Prosecutor v. Popović et al., IT-05-88-T, T:30992-3, Transcript, 2 February 2009.

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1. It is sometimes forgotten that the first judgement handed down at the ICTY came about as a result of a guilty plea.* On 31 May 1996, Dražen Erdemović pleaded guilty to one count of crimes against humanity at his initial appearance.⁵⁴⁰ Since then, twenty-two accused have pleaded guilty at the ICTY.⁵⁴¹ This chapter examines the law of the ICTY on plea agreements and, in particular, the requirements of Rule 62, Rule 62 *bis*, and Rule 62*ter*. Throughout, specific reference is made to the pleadings filed in the *Obrenović* case, as an illustration of a written plea agreement and factual basis which underlie and support the guilty plea process. Finally, considerations on determining whether, when and how to negotiate a plea agreement are addressed.

A. Purposes of Plea Agreement

2. The ICTY jurisprudence has identified a number of aspects of the plea agreement process:
 - ◆ An admission of guilt demonstrates honesty and it is important for the Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators.⁵⁴²
 - ◆ A guilty plea contributes to the fundamental mission of the Tribunal to establish the truth in relation to crimes subjected to its jurisdiction.⁵⁴³
 - ◆ An admission of guilt and acceptance of the facts provides a unique and unquestionable fact-finding tool that greatly contributes to peace-building and reconciliation among the affected communities.⁵⁴⁴ Individual accountability which leads to a return to the rule of law, reconciliation, and the restoration of true peace

* Chapter co-authored by Eugene O'Sullivan and Slobodan M. Zečević. Eugene O'Sullivan, Defence Counsel at the ICTY for Zejnir Delalić (*Čelebići* case), Milojica Kos, Biljana Plavšić, Miodrag Jokić, Milan Milutinović, and legal consultant for Mićo Stanišić. Slobodan M. Zečević, LL.B, LL.M, Attorney at Law, Belgrade Bar since 1981, Managing partner of Zečević & Lukić Law offices, Belgrade, Serbia, current President of ADC-ICTY, Defence counsel at the ICTY on the cases of Milan Simić (*Šamac* case), Gen. Momir Talić (*Krajina* case), Miroslav Deronjić (*Bratunac* case), Milan Milutinović (*Kosovo* case) and Mićo Stanišić (*Stanišić & Župljanin* case).

540 *Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgement, 26 November 1996.

541 As of 15 June 2011, Milan Babić, Predrag Banović, Miroslav Bralo, Ranko Češić, Miroslav Deronjić, Damir Došen, Dražen Erdemović, Miodrag Jokić, Goran Jelisić, Dragan Kolundžija, Darko Mrđa, Dragan Nikolić, Momir Nikolić, Dragan Obrenović, Biljana Plavšić, Ivica Rajjić, Duško Sikirica, Milan Simić, Stevan Todorović, Dragan Zelenović. (See, <http://www.icty.org/sections/TheCases/GuiltyPleas>).

542 *Prosecutor v. Erdemović*, IT-96-22, Sentencing Judgement, 5 March 1998, para. 16; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 83.

543 *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement 31 July 2001, para. 81; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 83.

544 *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 81; *Prosecutor v. Sikirica et. al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, para. 149; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 83.

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across the territory of the former Yugoslavia is an integral part of the mission of the ICTY.⁵⁴⁵ The Trial Chamber in the Sentencing Judgement in the *Erdemović* case described the ICTY's mandate in the following terms:

*“The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process. The International Tribunal must demonstrate that those who have the honesty to confess are treated fairly as part of a process underpinned by principles of justice, fair trial and protection of the fundamental rights of the individual. On the other hand, the International Tribunal is a vehicle through which the international community expresses its outrage at the atrocities committed in the former Yugoslavia. Upholding values of international human rights means that whilst protecting the rights of the accused, the International Tribunal must not lose sight of the tragedy of the victims and the sufferings of their families.”*⁵⁴⁶

- ◆ A plea of guilt contributes to public advantage and the work of the Tribunal by providing considerable saving of resources for, *inter alia*, investigation, counsel fees and the general costs of a trial.⁵⁴⁷ The Trial Chamber in the *Todorović* case concurred with the words of Judge Cassese in the *Erdemović* sentencing appeal on the public advantage to a plea of guilty:

*“It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties - it bears stressing - are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage.”*⁵⁴⁸

- ◆ An admission of guilt may in the case of some victims and witnesses relieve them from the stress of giving evidence.⁵⁴⁹

B. The Law of the ICTY on Plea Agreements

3. The practice and procedure at the ICTY regarding guilty pleas is governed by three rules: Rule 62, Rule 62 *bis*, and Rule 62 *ter*.⁵⁵⁰ Rule 62 provides, *inter alia*, that when an accused is brought before a Trial Chamber to be formally charged, he or she shall be called upon to enter a plea of guilty or not guilty on each count in the

545 *Prosecutor v. Erdemović*, Sentencing Judgement, IT-96-22, 29 November 1996, paras. 57-58.

546 *Prosecutor v. Erdemović*, Sentencing Judgement, IT-96-22, 5 March 1998, para. 21.

547 *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 80; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 84.

548 *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 80.

549 *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 120; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 84.

550 ICTY Rules of Procedure and Evidence, IT/32/Rev. 45, 8 December 2010.

indictment, either at this initial appearance or within thirty days. In the case of a plea of guilty, the Trial Chamber may enter a finding of guilt pursuant to Rule 62 *bis*, provided that four criteria are satisfied:

- (1) the plea must be voluntary;
 - (2) informed;
 - (3) unequivocal; and,
 - (4) based on a sufficient factual basis for the crime and the accused's participation in it.
4. Finally, Rule 62 *ter* set out the plea agreement procedure which provides for the following: "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:
- ◆ apply to amend the indictment accordingly;
 - ◆ submit that a specific sentence or sentencing range is appropriate; and,
 - ◆ not oppose a request by the accused for a particular sentence or sentencing range.
5. According to ICTY law, the Trial Chamber shall not be bound by any plea agreement entered into between the parties. 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. For example, good cause may be established if the security of individuals may be jeopardized by making the terms of the plea agreement public or if it would prejudice further or ongoing investigations.
6. At first glance, Rule 62 and Rule 62 *bis* and Rule 62 *ter* not only appear to provide very little substance or guidance to the plea process, the relationship between these three provisions is not satisfactorily harmonised. Rule 62 seems to indicate that an accused may only enter a plea of guilty at his or her initial appearance, whereas Rule 62 *bis* and Rule 62 *ter* provide that an accused may either plead guilty at initial appearance or request to change his or her plea to guilty at a later stage.
7. The history of these provisions and the practice of taking guilty pleas before the ICTY provide an explanation. In the original version of Rules, only Rule 62 existed, which explains why a plea of guilty or not guilty could be entered at the accused initial appearance. The concept of a negotiated guilty plea which is common to domestic adversarial criminal law systems was not initially contemplated at the ICTY. Indeed, in the first Annual Report of the ICTY, following the adoption of the first set of Rules by the Judges in plenary session, the President of the Tribunal wrote that the practice of plea bargaining finds no place in the rules.⁵⁵¹ Rule 62 *bis* was added to the rules in November 1992 in the light of the *Erdemović* case and Rule 62 *ter* was added to the rules in December 2001. These latter two rules reflect the practice at the ICTY: an accused may enter a plea of guilty either in the pre-trial or trial phase. In other words, an accused may plead guilty at his or her initial appearance, or change a plea of not guilty entered at the initial appearance to a plea of guilty at a later stage in proceedings.⁵⁵²

551 See the First ICTY Annual Report, UN Doc. A/49/342-S/1994/1007, 29 August 1994, para. 74.

552 For examples of guilty pleas entered during the trial phase of proceedings, see: *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001 and *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 November 2002. However, an accused who pleads guilty prior to the commencement of trial will usually receive full credit for that plea. *Prosecutor v. Erdemović*, IT-96-22, Sentencing Judgement, 5 March 1998, para. 16; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 81; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 150.

C. Written Plea Agreement

8. With the addition of Rule 62 *bis* and Rule 62 *ter*, the judges at the ICTY identified the legal requirements for a valid guilty plea, a procedure for plea bargaining between the Defence⁵⁵³ and the Prosecution and the powers of the Trial Chamber to ensure the validity of the plea and to determine sentence. Pursuant to Rule 62 *bis*, the Trial Chamber must be satisfied that four requirements are fulfilled. First, the guilty plea must be made voluntarily.⁵⁵⁴ This means that the accused must be mentally competent to understand the consequences of pleading guilty and the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence.⁵⁵⁵



Erdemović case - Informed guilty plea and alternative charges

*In the Erdemović case, the accused Dražen Erdemović was charged with alternative counts of murder both as a war crime and as a crime against humanity. At his initial appearance, Erdemović pleaded guilty to murder as a crime against humanity, which at the time was considered as a more serious charge than murder as a war crime. The Appeals Chamber found that there was a misapprehension on the accused's part as to the difference between the two charges and therefore that the guilty plea entered by Erdemović could not be considered "informed". Consequently, the Appeals Chamber remitted the case to another Trial Chamber, in order to give Erdemović the possibility to enter a new plea "in full knowledge of the nature of the charges and the consequences of his plea."**

In the words of Judges McDonald and Vohrah:

*"the difference between a crime against humanity and a war crime was not adequately explained to the Appellant by the Trial Chamber at the initial hearing nor was there any attempt to explain the difference to him at any later occasion when the Appellant reaffirmed his plea. The Presiding Judge appears to assume that the Appellant had been advised by his counsel as to the distinction between the charges and that the Prosecution "will make things very clear". From the passage of the transcript (...) quoted, it is apparent that defence counsel himself did not appreciate either the true nature of the offences at international law or the true legal distinction between them. It is also clear on the record that the difference between the charges was never made clear by either the Prosecution or by the Presiding Judge."***

* *Prosecutor v. Erdemović*, IT-96-22-A, Appeals Judgement, 7 October 1997.

** *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 19.

9. Second, the guilty plea must be informed.⁵⁵⁶ When pleading guilty, the accused must understand the nature of the charges and the consequences of pleading guilty generally and the nature and distinction of any different charges in the indictment.⁵⁵⁷ Here the concern is whether the accused understands that he or she forgoes the right to a trial by pleading guilty and all related procedural guarantees and, in the case of an indictment which charges the accused in the alternative, whether he or she understands the difference between the crimes charged, *i.e.*, war crimes, crimes against humanity, and genocide (see case box *Erdemović case - Informed guilty plea and alternative charges*).

553 Rule 2, ICTY RPE defines "Defence" as the accused, and/or the accused's counsel.

554 Rule 62 *bis* (i), ICTY RPE.

555 *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 10.

556 Rule 62 *bis* (ii), ICTY RPE.

557 *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 14.

10. Third, the guilty plea must not be equivocal.⁵⁵⁸ This requirement is considered essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise. Where the accused pleads guilty but persists with an explanation of his or her actions which amounts to a defence in law the Trial Chamber must reject the plea and have the defence tested at trial⁵⁵⁹ (see case box *Erdemović case - Equivocal guilty plea*).

11. Fourth, there must be a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent *indicia* or on lack of any material disagreement between the parties about the facts of the case.⁵⁶⁰

12. The four legal requirements for a valid guilty plea (Rule 62 *bis*) and the plea agreement procedure (Rule 62*ter*) can best be understood and illustrated by examining the pleadings filed in the case of Dragan Obrenović.⁵⁶¹ The Obrenović Motion provides an example of the way in which the agreement between the Prosecutor and the Defence is presented by way of motion to a Trial Chamber for



Erdemović case - Equivocal guilty plea

The Separate Opinion of Judges McDonald and Vorhah can be very helpful in order to understand the scope of the “equivocal” requirement for a guilty plea:

“The requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise. This requirement imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial. The courts in common law jurisdictions all over the world, except in the United States, have consistently declared that a guilty plea must be unequivocal. It would appear that in the United States the constitutional right to plead as one chooses outweighs any requirement that a defence be tested on the merits at trial. The validity of a guilty plea turns primarily on the voluntariness of the plea, that it is informed, and that it has a factual basis. If a United States court is satisfied that these conditions are fulfilled, apparently, it will be more willing than courts of other common law jurisdictions to accept a prima facie equivocal plea in recognition of pragmatic considerations relating to the practicality and the reality of plea-bargaining whereby credit is given for pleading guilty by reduction of sentence.

[...]

*Whether a plea of guilty is equivocal must depend on a consideration, in limine, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law. The Appellant pleaded guilty but claimed that he acted under duress. It follows therefore that we must now examine whether duress can constitute a complete defence to the killing of innocent persons.” **

After the examination of the law on duress, the Appeals Chamber concluded that duress cannot be a complete defence, but rather a mitigating circumstance that will be assessed during sentencing. Therefore, as the allegation of duress could not affect the guilty plea of Erdemović, the plea was not considered “equivocal” by the Appeals Chamber.

* *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vorhah, 7 October 1997, paras 29, 31.

558 Rule 62 *bis* (iii), ICTY RPE.

559 *Prosecutor v. Erdemović*, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vorhah, 7 October 1997, para. 29.

560 Rule 62 *bis* (iv), ICTY RPE.

561 *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, IT-02-60-T, Joint Motion for Consideration of Plea Agreement Between Dragan Obrenović and the Office of the Prosecutor, 20 May 2003 (“Obrenović Motion”).

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consideration, along with the Plea Agreement⁵⁶² and the Factual Basis.⁵⁶³ As the Obrenović Motion indicates, the motion itself is designed to reduce to writing the agreement between the parties to assist the Trial Chamber in assessing the validity of the plea agreement and to impose an appropriate sentence.⁵⁶⁴ The Trial Chamber is still required to assure itself of the legal validity of the plea of guilty in open court pursuant to Rule 62 *bis* and Rule 62 *ter*.

13. To satisfy the requirements that the plea of guilty was voluntary, informed, and unequivocal, the Plea Agreement includes express statements from both the accused and his counsel. The accused acknowledges that he has read the Plea Agreement in a language he understands, that he reviewed it carefully with his counsel, who advised him of his rights, possible defences, and the consequences of entering into the agreement. He confirms that he is of sound mind, that he understands all the terms of the Plea Agreement, that he voluntarily entered into it, and that no one threatened or forced him to enter into it. The signed declaration by counsel confirms that he provided proper advice to his client concerning the terms of the Plea Agreement, his rights, possible defences, the maximum possible sentence, the consequences of pleading guilty, and his belief that his client is of sound mind and that his decision to plead guilty was informed and voluntary.
14. The factual basis required pursuant to Rule 62 *bis* (iv) is case specific. In the *Obrenović* case, this requirement was satisfied by preparing a very detailed Statement of Facts which was signed by the accused on the same date as he signed the Plea Agreement.⁵⁶⁵ The Parties and in particular the accused agreed that the facts set forth in the Statement of Facts supported a finding of guilt beyond a reasonable doubt, that they were true and correct, and that the accused did not dispute them.⁵⁶⁶
15. The *Obrenović* case also provides an example of other components of the plea agreement procedure. The Plea Agreement fully set out the specific count in the indictment to which the accused pleaded guilty with the acknowledgement by the accused that he is in fact guilty and fully responsible for his actions.⁵⁶⁷ The nature of the charges to which the accused is pleading guilty are detailed including any factual corrections which the parties agree more accurately reflect the criminal acts, conduct, and mental state of the accused.⁵⁶⁸ The Plea Agreement provides that the accused waives the rights he would normally enjoy at trial, including the rights guaranteed by “fair trial” provisions of Article 20 and Article 21 of the ICTY Statute, while preserving the right to be represented by counsel at all stages of the proceedings.⁵⁶⁹ The Plea Agreement included specific provisions concerning sentencing.⁵⁷⁰
16. Certain aspects of this part of the agreement were specific to the particular circumstances of the *Obrenović* case. This included the Prosecution’s recommended sentence of 15 to 20 years and the agreement by the accused not to appeal the sentence imposed by the Trial Chamber, unless it exceeded the range recommended by the Prosecution. This part of the Plea agreement expressly makes reference to the relevant provisions of the Rules and Statute on sentencing. An accused may be sentenced to a maximum sentence of life

562 Plea Agreement, Annex A of *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, IT-02-60-T, Joint Motion for Consideration of Plea Agreement Between Dragan Obrenović and the Office of the Prosecutor, 20 May 2003.

563 Tab A to Annex A of the Obrenović Motion is the Statement of Facts as set out by Dragan Obrenović.

564 *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, IT-02-60-T, Joint Motion for Consideration of Plea Agreement Between Dragan Obrenović and the Office of the Prosecutor, 20 May 2003, paras. 1-3.

565 Tab A to Annex A of the Obrenović Motion is the Statement of Facts as set out by Dragan Obrenović.

566 Annex A of the Obrenović Motion, para 7.

567 Plea Agreement, Annex A of the Obrenović Motion, paras. 2-3.

568 Plea Agreement, Annex A of the Obrenović Motion, paras. 5-6.

569 Plea Agreement, Annex A of the Obrenović Motion, paras. 17-18.

570 Plea Agreement, Annex A of the Obrenović Motion, paras. 12-16.

imprisonment pursuant to Rule 101 and the sentence range recommended by the Prosecution is not binding on the Trial Chamber, which is free to sentence the accused as it sees fit (Rule 62 *ter* (B)). Pursuant to Article 24 of the Statute and Rule 101, the Trial Chamber determines sentence based on such factors as the gravity of the offence and the individual circumstances of the convicted person, both aggravating and mitigating circumstances.⁵⁷¹ The evidence in relation to these matters is presented to the Trial Chamber at sentencing hearing (Rule 62 *bis*), during which both the Prosecution and the convicted person may call evidence. These aspects of the Plea Agreement are intended to show that the accused's guilty plea was voluntary, informed, and unequivocal.

D. Mitigating Circumstances and Guilty Pleas

17. In addition to the factors that a Trial Chamber must consider in mitigation of a sentence - voluntary surrender, age, personal and family circumstances, credit for time served - there are specific factors which may mitigate a sentence following a guilty plea.

D.1 Admission of Guilt

18. The primary factor to be considered in mitigation of an accused person is his decision to enter a guilty plea.⁵⁷² As noted above,⁵⁷³ ICTY jurisprudence has found accused who plead guilty should receive credit for an admission of guilt: it demonstrates honesty, it may encourage other indictees to come forward, it contributes to establishing the truth in relation to crimes, and it relieves witnesses from testifying at trial. An accused may plead guilty at anytime, either pre-trial or during the trial.⁵⁷⁴ However, an accused who pleads guilty prior to the commencement of trial will usually receive full credit for that plea.⁵⁷⁵

D.2 Expression of Remorse

19. Remorse is a mitigating factor, if the Trial Chamber is satisfied that the expressed remorse is sincere.⁵⁷⁶ At the sentencing hearing,⁵⁷⁷ the convicted person may make a statement either in writing or orally during the hearing. With the leave of the Trial Chamber, pursuant to Rule 84 *bis*, an oral statement may be made without taking a solemn declaration and without being questioned about its contents. Any remorse expressed by the convicted person during this statement is evaluated by the Trial Chamber, which may consider it in mitigation of sentence.

⁵⁷¹ See Chapter X "Sentencing" for further explanation on aggravating and mitigating circumstances.

⁵⁷² *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgement, paras. 66-81; *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, para. 148.

⁵⁷³ See *infra* Section A.

⁵⁷⁴ See *Prosecutor v. Sikirica et. al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, where the three accused pleaded guilty following the completion of the presentation of evidence by the Prosecution.

⁵⁷⁵ *Prosecutor v. Erdemović*, IT-96-22, Sentencing Judgement, 5 March 1998, para. 16; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 81; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 150.

⁵⁷⁶ *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 92. *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, paras. 152, 194, 230; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 89; *Prosecutor v. Erdemović*, IT-96-22, Sentencing Judgement, 5 March 1998, para. 16; *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 775.

⁵⁷⁷ See Rule 62 *bis*, ICTY RPE.

D.3 Conduct Posterior to the Crimes

20. The conduct of the accused posterior to the crimes may be considered in mitigation of sentence, if since the commission of the offence, the accused has taken steps toward reparation to victims or society⁵⁷⁸ (see case box *Plavšić case - Post-conflict conduct as a mitigating factor*).

D.4 Cooperation with the Prosecution

21. Cooperation of the convicted person with the Prosecution is often an express requirement of a negotiated plea agreement. The Prosecution may want the convicted person to testify as a Prosecution witness in subsequent trials and to provide information which the Prosecution can use in on-going investigations. This of course will depend on the knowledge of the convicted person and whether the Prosecution believes that he or she can provide credible information. Both the Defence and the Prosecution will typically make submissions about the obligation of the convicted person to cooperate with the Prosecution at the sentencing hearing. This obligation is usually on-going and the convicted person may not have completely fulfilled it by the time the parties address the Trial Chamber on this matter. The honesty, completeness, and forthrightness of this cooperation are important factors which the Trial Chamber will consider in the mitigation of a sentence.



Plavšić case - Post-conflict conduct as a mitigating factor

In the Plavšić case, the conduct of the accused in the aftermath of the war in Bosnia and Herzegovina was considered by the Trial Chamber during sentencing:

“The Prosecution accepts that Mrs. Biljana Plavšić, as President of Republika Srpska, demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (“Dayton Agreement”) after the cessation of hostilities in Bosnia and Herzegovina. It also accepts that in that position, the accused also attempted to remove obstructive officials from office, and contributed significantly to the advancement of the Dayton peace process under difficult circumstances in which she manifested courage. (...) The Trial Chamber is satisfied that Mrs. Plavšić was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The Trial Chamber gives it significant weight.”

* *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras. 85, 94.

E. Considerations in Determining Whether, How, and When to Negotiate a Plea Agreement

22. A plea agreement is a means of resolving a criminal matter by way of negotiation between the Prosecutor and the Defence. It is an alternative to having a case go to trial, or it may be a means of settling a matter, after a trial has commenced.
23. At the ICTY, with the exception of the first guilty plea by Dražen Erdemović at his initial appearance, all other plea agreements have occurred during the pre-trial phase or during the trial phase. If a plea agreement is to be achieved a number of factors must come together. While preparing a case for trial, counsel will learn about the facts of the case and work to earn the trust and confidence of the client. Counsel must make determinations concerning the strengths and weaknesses of the Prosecution case and evaluate possible

⁵⁷⁸ *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, paras. 85-94; *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgement, 2 August 2001, para. 713.

answers to those allegations and potential legal defences which could be presented on behalf of the accused. The pre-trial phase at the ICTY normally lasted years and during this time Defence counsel had time to work both with the client and the Prosecutor on matters that would either streamline issues for trial or result in a negotiated plea agreement.

24. The starting point in this process is to evaluate disclosure from the Prosecution and Defence investigation work. Within the context of criminal prosecutions for war crimes, crimes against humanity, and genocide, the factual and legal issues are often very complex and wide ranging. Indictments may cover a very large geographic and temporal area. Depending on the scope of the indictment and the allegations against the accused, disclosure by the Prosecution of both inculpatory and exculpatory material may be tens of thousands of pages of material, including hundreds of witness statements, audio-visual materials, expert opinions on forensic evidence, military matters, police matters, constitutional and legal matters, demographics, reports by international organizations and NGOs, etc. In addition, investigative work conducted on behalf of the accused may for its part yield a tremendous amount of material of a similar nature. In this digital age, the amount of information produced and the ease with which it is distributed is often overwhelming.
25. At some point in the pre-trial phase, counsel has an obligation to discuss the option of a plea agreement with the client, as an alternative to going to trial. The client must be informed that this option as well as the possibility of having a trial is available to him or her. Normally, this will be discussed as both counsel and the accused review and analyse the evidence the Prosecution intends to use at trial and the results of Defence investigation work. Counsel must bear in mind that an accused who pleads guilty prior to the commencement of trial will usually receive full credit for that plea in the mitigation of a sentence. Of course, the client is in the best position to provide insight into the events surrounding the crimes charged in the indictment. However, the challenges facing counsel in preparing and developing a theory of the case, and any possible plea agreement, depend a great deal on the nature of the charges against the accused and his alleged activities during the period relevant to the indictment. If, for example, the accused was a camp guard, a soldier, or a policeman who is charged with direct perpetration of murder, beatings, or sexual assault, then the most important factors are likely be evidence provided by victims or eye witnesses, and the client's version of events. On the other hand, the accused may be a high ranking military or police commander, or a senior politician, who is far removed from the scene of the alleged crimes. In these circumstances, there will likely be complex factual and legal issues surrounding charges ranging from superior authority, joint criminal enterprise, aiding and abetting, and instigation. Accused in more senior positions may be more sophisticated than a foot soldier or regular policeman, however the concepts associated with vicarious liability and accomplice liability may require considerable time and effort to work through with a client.
26. Certainly, the client's role in this process is of the utmost importance. Different from the counsel who can only provide a legal opinion on the disclosed body of evidence and advise in relation to process on guilty plea, it is the client first and foremost who must make the fateful decision whether to plead guilty or go to trial. In our opinion very rightly so, as counsel has a number of factors which limits his or her ability to judge the disclosed body of evidence the Prosecution intends to rely on. Counsel may face a dilemma as the amount of disclosure from the Prosecution grows. This disclosure will include both inculpatory⁵⁷⁹ and exculpatory⁵⁸⁰ material and items material to the preparation of the defence.⁵⁸¹ Furthermore, this disclosure from the Prosecution is likely to continue not only during the pre-trial phase, but also after trial proceedings have commenced. Counsel may not therefore be entirely certain whether all important material the Prosecution

579 Rule 66(A), ICTY RPE.

580 Rule 68, ICTY RPE.

581 Rule 66(B), ICTY RPE.

IX. Plea Agreements

intends to rely on at trial has been fully disclosed and analysed, when discussions on guilty plea are started with the client and ultimately with the Prosecution. To this end, counsel must at all times be aware of his or her limitations and must approach the matter with appropriate seriousness. It is incumbent on counsel to explain all these factors and their consequences carefully to the accused and ultimately leave the final decision to the accused. This would explain why accused at the ICTY have pleaded guilty both before and after the commencement of trial proceedings. With the assistance of counsel, the accused must form his own view of the charges contained in the indictment and the consequences of pleading guilty or contesting the charges at trial.

27. The *quid pro quo* of a successful plea agreement is normally a reduced sentence and the dropping of certain charges against the accused in exchange for the admission of guilt and co-operation with the Prosecution. Normally, this would involve appearing as a Prosecution witness in subsequent trials or providing information that can assist the Prosecution in its investigations. The negotiation process and the resulting plea agreement are entirely *inter partes*. The Trial Chamber is not involved and the judges only become aware of the plea agreement when it is presented to them by way of motion under Rule 62*ter*.⁵⁸² This means that the accused cannot know in advance of presenting the plea agreement documents to the Trial Chamber whether it will be accepted by the Trial Chamber. As a preliminary matter, there must be an agreement (a proffer agreement) between the Defence and the Prosecution that if no plea agreement is concluded between the parties, no information provided by the accused and no details of the discussions between the parties may be used against the accused during a subsequent trial. Furthermore, in the event the parties finalise a plea agreement, special care must be taken by Defence counsel to ensure that all the details of the plea agreement documents satisfy the requirements of Rule 62 *bis* and Rule 62 *ter* and that the accused is made aware that the Trial Chamber will insist on strict compliance with those provisions before accepting the plea of guilt. At this stage, both the Defence and the Prosecution have an interest in ensuring that the plea agreement is accepted by the Trial Chamber.
28. In most instances, in exchange for the accused's plea of guilty and full cooperation, the Prosecution will apply to the Trial Chamber to amend the indictment (*i.e.* drop charges).⁵⁸³ The extent to which the indictment is amended is a matter which must be negotiated between the parties. It is important to note that the ICTY permitted cumulative charging which often resulted in the Prosecution "over indicting" an accused. For example, the indictment may charge the accused with grave breaches of the Geneva Conventions,⁵⁸⁴ violations of the laws and customs of war,⁵⁸⁵ crimes against humanity, including persecution,⁵⁸⁶ and genocide⁵⁸⁷ based on the same factual allegations as well as alleging numerous modes of liability: planning, instigation, ordering, committing (as a direct perpetrator or as a participant in a joint criminal enterprise), aiding and abetting,⁵⁸⁸ or as a superior authority⁵⁸⁹. The Prosecution may believe that they can prove each and every charge against an accused at trial. However, as a practical matter, a plea agreement reflects the criminal conduct for which the accused is prepared to accept responsibility and for which the Prosecution is satisfied could be proven beyond a reasonable doubt at trial.

582 See *Prosecutor v. Vidoje Blagojević, Dragan Obrenović, Dragan Jokić*, IT-02-60-T, Joint Motion for Consideration of Plea Agreement Between Dragan Obrenović and the Office of the Prosecutor, 20 May 2003 ("Obrenović Motion").

583 Rule 62 *ter* (i), ICTY RPE.

584 Article 2, ICTY Statute.

585 Article 3, ICTY Statute.

586 Article 5, ICTY Statute.

587 Article 4, ICTY Statute.

588 Article 7(1), ICTY Statute.

589 Article 7(3), ICTY Statute.

29. In relation to sentencing recommendations, the Prosecution and the Defence may make a joint recommendation in the plea agreement, the Prosecution alone may make a sentencing recommendation,⁵⁹⁰ or the parties may make their sentencing recommendations in writing, orally, or both at a later stage (*i.e.* at the sentencing hearing). The primary factor to be considered in mitigation of a sentence against an accused person is his or her decision to enter a guilty plea.⁵⁹¹ However, Rule 62 *ter* (B) expressly provides a Trial Chamber is not bound by any plea agreement (see case box *Dragan Nikolić and Momir Nikolić cases - Harsher punishment than the one proposed in the plea agreement*).
30. A common feature of a plea agreement is the requirement that the convicted person agrees to cooperate fully and truthfully with the Prosecution.⁵⁹² The plea agreement may specify that this cooperation includes meeting with representatives of the Office of the Prosecutor to provide Obrenović Motion information concerning on-going investigations, or on-going and future trial proceedings. Indeed, one of the incentives for the Prosecution entering into a plea agreement is to secure the testimony of the accused against co-accused or accused in related trials. In some instances, a condition in the plea agreement may be that the sentencing hearing and sentencing recommendation not take place until the convicted person testifies in a subsequent trial. As a practical matter, this can only be made a condition of the plea agreement, if the convicted person's testimony can be heard soon after the plea agreement is concluded and accepted by a Trial Chamber. In addition, if the convicted person fails to cooperate fully with the Prosecution after being sentenced, the only practical consequence may be that non-cooperation may affect a request for early release from detention. When a request for early release is made, the Prosecutor submits a detailed report of any cooperation that the convicted person has provided to the Prosecution and the significance thereof which can be considered along with other factors in deciding whether to release the convicted person from prison.⁵⁹³
31. An important factor in relation to the factual basis underlying the plea agreement and the co-operation of the convicted person is the language of Rule 62 *bis* (iv). That provision states that “the Trial Chamber must be satisfied that there is a sufficient factual basis for the crime and the accused’s participation in it, either on the basis of independent *indicia* or on lack of any material disagreement between the parties about the facts of the case.” The existence of “independent *indicia*” or a “lack of material disagreement” between the



Dragan Nikolić and Momir Nikolić cases - Harsher punishment than the one proposed in the plea agreement

In two cases - Dragan Nikolić and Momir Nikolić - the Trial Chamber imposed a higher sentence on both accused than the recommendations made by the Prosecution and the Defence. In the Momir Nikolić case, the Trial Chamber imposed a sentence of twenty-seven years, rejecting the Prosecution recommendation of fifteen to twenty years and the Defence recommendation of ten years. In the Dragan Nikolić case, the Prosecution recommended a sentence of fifteen years and the Trial Chamber handed down a sentence of twenty-three years.***

* *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, Sentencing Judgement, 2 December 2003. Sentence was reduced to twenty years on appeal: *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Sentencing Judgement, 8 March 2006.

** *Prosecutor v. Dragan Nikolić*, IT-94-2-S, Sentencing Judgement, 18 December 2003. Sentence was reduced to twenty years on appeal: *Prosecutor v. Dragan Nikolić*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005.

590 Rule 62 *ter* (ii), ICTY RPE.

591 *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgement, paras. 66-81; *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, paras. 148, 151, 193, 228; *Prosecutor v. Erdemović*, IT-96-22-S, Sentencing Judgement, 5 March 1998, para. 16; *Prosecutor v. Jelisić*, IT-95-10-T, Trial Judgement, 14 December 1999, para. 127; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 80; *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 84.

592 Plea Agreement, Annex A of the Obrenović Motion, para 9.

593 Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev. 2, 1 September 2009, para. 3(c).

parties may be the result of a full review and analysis by the accused and defence counsel of material disclosed by the Prosecution which it intends to use at trial. In other words, accepting criminal liability by pleading guilty may not mean that the convicted person can necessarily provide meaningful information to the Prosecution or be able to testify from personal knowledge about all events related to other trials. It is important that the accused and the Prosecution are *ad idem* on the extent to which an accused can provide meaningful information or testimony in the future.

F. Plea Agreement in Traditionally Inquisitorial Systems

32. As noted at the beginning of this chapter, the first judgement at the ICTY was in the *Erdemović* case. However, the taking of his guilty plea was not without considerable difficulties as a result of this “Anglo-Saxon” procedure which was foreign to counsel to Erdemović (from the former Yugoslavia) and the members of the Trial Chamber (French, Costa Rican, and Egyptian). In the *Erdemović* appeal, Judge Cassese wrote that this practice does not have a direct counterpart in the civil law tradition, where an admission of guilt is simply part of the evidence to be considered and evaluated by the court.⁵⁹⁴ Indeed, on appeal, counsel for Erdemović argued that his client’s guilty plea ensued from a misunderstanding by both the accused and counsel of the implications of pleading guilty. He pointed out that the institution of a plea of guilty by an accused was foreign to the procedure applied in the former Yugoslavia and described it as an example of the “collision” between the Anglo-Saxon and continental European criminal legal systems.⁵⁹⁵
33. The example of the *Erdemović* case before the ICTY, will no doubt have implications on plea bargaining before the domestic courts in countries of the former Yugoslavia, in which plea agreements have been recently introduced. There are a number of concerns. There may be strong negative public reaction and criticism towards prosecutors who propose and accept plea agreements, as well as the courts which must ultimately evaluate the plea agreements and impose sentence.
34. There is a lack of uniformity in plea bargaining as a result of the fact that the opportunity to enter into such an agreement has been only recently introduced in the legal system and it inevitably will take time to create and develop certain standards for this process in the domestic criminal practice. It may be understandable that counsel from the inquisitorial system lack the experience and sufficient knowledge of the plea bargaining process.
35. For example, in the Republic of Serbia, negotiation of a plea agreement is not regulated. Indeed, the contents of the plea agreements are often made public before the courts decide whether or not to accept such a plea, which is extremely worrisome for the Defence.
36. In this regard, a proffer agreement is an extremely important part of negotiating process. Defence counsel must always bear in mind the possibility that the accused and the Prosecution will not ultimately come to an agreement. To this end a proffer agreement concluded between the parties before the start of plea bargaining negotiations gives certain assurances to the accused that the information provided during the interview to the Prosecution will not be used against him in case the plea agreement fails.
37. The problems for the accused could arise when the parties fail to reach the agreement or the court does not accept the proposed agreement by the parties. In such a case, the existing practice in Serbia will be highly

594 *Prosecutor v. Erdemović*, IT-96-22-A, Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 7.

595 *Prosecutor v. Erdemović*, IT-96-22-A, Defence’s Brief Concerning Preliminary Issues, 16 May 1997.

prejudicial to the accused. Namely, he or she is not given immunity in relation to information provided to the Prosecution, despite the fact that the law⁵⁹⁶ provides for some protection for the accused:

- 1) The admission of guilt provided for by the agreement cannot be used as evidence during trial;⁵⁹⁷
- 2) All written documents related to plea agreement are destroyed under court supervision;⁵⁹⁸
- 3) The Judge deciding on acceptance of the plea agreement is excused.⁵⁹⁹

38. However, as discussed above, in cases where an agreement is reached, but is not ultimately accepted by the court, the fact that terms of the agreement become public amounts to an admission of guilt even before the trial begins. Challenging such an allegation during the trial in such circumstances becomes difficult, if not impossible.
39. A proffer agreement therefore must be entered at the very beginning of the negotiating process between the accused and the Prosecution. From the Defence perspective this agreement must contain provisions granting immunity to the accused in relation to information provided to the prosecutor during the negotiating process. Also such agreements must contain provisions guaranteeing strict confidentiality of the negotiating process and understanding that application of such strict confidentiality will be extended during the actual plea negotiations, and ultimately applied to provisions of the plea agreement itself.

Conclusion

40. As we have seen, the plea agreement process was novel to the practice and procedure at the ICTY. Following the *Erdemović* case, rules were adopted to govern the plea agreement procedure. The plea process is “party driven” in the sense that the Defence and Prosecution determine the terms and conditions of the plea agreement. The Trial Chamber ultimately determines whether to accept the plea agreement and whether to be bound by the terms of the agreement negotiated between the parties. With the introduction of the plea bargaining process into domestic legal systems, which never in the past provided for this means of resolving a criminal matter, counsel and judges will have to learn to deal with a whole array of new issues. As illustrated in the *Erdemović* case, sometimes the “collision” between the continental European and the Anglo-Saxon legal traditions requires legal re-education and sometimes lengthy periods of adaptation and development. A certain degree of uniformity has developed at the ICTY concerning the plea agreement procedure and, as the *Obrenović* case shows, the documents underlying this procedure - the plea agreement and the factual basis - attempt to provide full details of the understanding and obligations on each party in this process. This is meant to assist the Trial Chamber in determining whether the conditions for accepting a plea of guilty have been satisfied, in understanding the respective rights and obligations of the parties, and in ultimately deciding the sentence to impose upon the convicted person.

596 Law on Criminal procedure of the Republic of Serbia, Official Gazette 76/2010 Article 282 A to D.

597 *Ibid.*, Article 282 V (9)

598 *Ibid.*, Article 282 V (10)

599 *Ibid.*

Annex 3: Obrenović Plea Agreement

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**THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA**

Case No. IT-02-60-T

THE PROSECUTOR

v.

DRAGAN OBRENOVIĆ

**ANNEX A
TO THE JOINT MOTION FOR CONSIDERATION OF PLEA AGREEMENT
BETWEEN DRAGAN OBRENOVIĆ AND THE OFFICE OF THE PROSECUTOR**

PLEA AGREEMENT

Introduction

1. This constitutes the Plea Agreement, pursuant to Rule 62*bis* of the Rules of Procedure and Evidence ("the Rules"), between the Accused, Dragan Obrenović, through his Counsel David Eugene Wilson, and the Office of the Prosecutor (OTP). The purpose of this Agreement is to clarify the understanding of the parties as to the nature and consequences of Mr. Obrenović's guilty plea and to assist the parties and the Trial Chamber in ensuring that the plea is valid, according to the Rules set forth by this Tribunal. The terms of the agreement are as follows:

Plea to Count 5 of the Indictment, Persecutions, A Crime Against Humanity

2. Dragan Obrenović agrees to plead guilty to Count 5 of the Second Amended Joinder Indictment dated 27 May 2002, alleging Persecutions, a Crime Against Humanity, punishable under Article 5(h) of the Statute of the Tribunal, which states the following in relevant part:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (h) persecutions on political, racial and religious grounds

3. Dragan Obrenović agrees that he is pleading guilty to Count 5 because he is in fact guilty and acknowledges full responsibility for his actions that are the subject of the Indictment.

Consideration for Dragan Obrenović's Plea and Co-operation

4. In exchange for Dragan Obrenović's plea of guilty to Count 5, Persecutions, a Crime Against Humanity, his complete co-operation with the OTP as set forth in paragraphs 9 – 11 of this Agreement, and the fulfilment of all his obligations under this Agreement, the Office of the Prosecutor agrees to the following:

- (a) That the Prosecutor will recommend to the Trial Chamber that they impose a sentence within the range of 15 to 20 years and that the Accused be given credit for the time he has served in ICTY custody. The Accused will make his sentencing recommendation upon the filing of his pre-sentence memorandum.
- (b) That, at the time of the acceptance of the plea by the Trial Chamber, the Prosecutor will move to dismiss without prejudice to either party the remaining charges against Dragan Obrenović set out in the Indictment.

Nature of the Charges

5. Dragan Obrenović understands that he is pleading guilty to Count 5 of the Indictment, Persecutions, a Crime Against Humanity, specifically acknowledging and admitting his conduct as set forth in paragraphs 4-8, 15-27, 29-33, 36, 45, 46, 46.6 - 46.12, 47, 47.6 – 47.8, 48, 50, 51, 58 and 59 of the Indictment and further described in this agreement. However, Dragan Obrenović and the Prosecution agree that the following corrections are to be made to the Indictment:

- (a) *Paragraph 46.9, fourth sentence:* Replace "under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade" with "under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade".
- (b) *Paragraph 46.10, fourth sentence:* Replace "under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ" with "under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ".

- (c) *Paragraph 46.11, third sentence:* Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.
- (d) *Paragraph 46.11, fourth sentence:* Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ”.
- (e) *Paragraph 46.12, third sentence:* Replace “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and DRAGAN JOKIĆ” with “under the authority of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade and the direction of DRAGAN JOKIĆ”.
- (f) *Paragraph 47.7, first sentence:* Remove “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.
- (g) *Paragraph 47.7, last sub-paragraph:* Add sentence to end of paragraph to read “DRAGAN OBRENOVIĆ, in his capacity as Chief of Staff of the Zvornik Brigade, had knowledge of and acquiesced to the capture, interrogation and execution of these four prisoners”.
- (h) *Paragraph 47.8, second sentence:* Remove “under the direction of DRAGAN OBRENOVIĆ in his capacity as Chief of Staff of the Zvornik Brigade”.
- (i) *Paragraph 47.8:* Add sentence to end of paragraph to read “DRAGAN OBRENOVIĆ, in his capacity as Chief of Staff of the Zvornik Brigade, had knowledge of and acquiesced to the capture, interrogation and execution of this prisoner”.
6. Dragan Obrenović understands that if a trial were held, the Prosecutor would be required to prove the following elements of Article 5 beyond a reasonable doubt:

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Persecutions

- (a) an armed conflict existed during the time frame of the Indictment

It is understood and agreed by Dragan Obrenović and the OTP that the armed conflict alleged in paragraph 15 of the Indictment is the armed conflict that began on 6 April 1992 and ended with the Dayton Peace Agreement, signed on 14 December 1995.

- (b) there was a widespread or systematic attack directed against a civilian population and, in a manner related to that attack, Dragan Obrenović committed acts against the civilian population that violated fundamental human rights

It is understood and agreed that the widespread or systematic attack on the civilian population of Srebrenica as alleged in paragraph 17 of the indictment and described in paragraphs 18 through 26 of the Indictment includes:

(1) the murder of over 7000 Bosnian Muslim men ages 16-60, including some women, children and elderly men, from the period beginning 14 July through 1 November 1995; (2) the cruel and inhuman treatment of Bosnian Muslim civilians, including beatings of civilians in schools and other detention centres in the Zvornik area on 13 through to 16 July 1995; (3) the terrorisation of Bosnian Muslim civilians from Srebrenica and Potočari from 13 to 16 July 1995; and (4) the destruction of personal property and effects of Bosnian Muslim civilians from Srebrenica who were detained and murdered in the Zvornik area.

- (c) Dragan Obrenović's conduct was committed on political, racial or religious grounds and was committed with discriminatory intent.

It is understood and agreed that one of the reasons Mr. Obrenović committed the conduct described in the Indictment and herein was because the victims were Bosnian Muslims.

- (d) Dragan Obrenović was aware of the wider context in which his conduct occurred.

It is understood and agreed that Mr. Obrenović was aware of the widespread or systematic abuses described in the Indictment and in this agreement and of their effect on the entire population of Bosnian Muslims from the Srebrenica enclave.

Factual Basis

7. Dragan Obrenović and the Prosecution agree that if the Prosecution were to proceed with evidence, the facts and allegations as set out in paragraphs 4-8, 15-27, 29-33, 36, 45, 46, 46.6 - 46.12, 47, 47.6 – 47.8, 48, 50, 51, 58 and 59, Annex A, Annex B, and Attachments A-E of the Amended Joinder Indictment dated 27 May 2002, would be proven beyond a reasonable doubt, and that those facts are true and correct and not disputed by Dragan Obrenović (with the corrections to the Indictment made in paragraph 5 above). Specifically, Dragan Obrenović acknowledges the facts set forth in the “Statement of Facts as set out by Dragan Obrenović” attached to this Agreement at Tab A.

8. The Prosecution and Dragan Obrenović agree that the evidence supports a finding of guilt on Count 5, Persecutions, of the Indictment.

Co-operation by Dragan Obrenović

9. This Agreement is contingent upon Dragan Obrenović’s voluntary decision to accept responsibility for his actions and to co-operate with and to provide truthful and complete information to the Office of the Prosecutor whenever requested. Mr. Obrenović agrees to provide information in accordance with a previously negotiated written proffer agreement and to provide additional information beyond that detailed in the proffer agreement. In accordance with such co-operation, Dragan Obrenović agrees to meet as often as necessary with members of the Office of the Prosecutor in order to provide them with full and complete information and evidence that is known to him regarding the events surrounding the attack and fall of the Srebrenica enclave July 1995. Mr. Obrenović agrees to be truthful and candid, and to freely answer all questions put to him by members of the Office of the Prosecutor. Mr. Obrenović agrees to testify truthfully in the trial of the co-Accused in this case before the International Criminal Tribunal for the Former Yugoslavia (ICTY) and in any other trials, hearings or other proceedings before this Tribunal for accused charged with offences relating to the fall of Srebrenica in July 1995 and its aftermath, as requested by the OTP.

10. The Prosecution and Mr. Obrenović also agree that they will jointly recommend to the Trial Chamber that sentencing of Mr. Obrenović in this matter not be set until after Mr. Obrenović has testified in the trial of the co-Accused in this case, in order that the full nature

and scope of Mr. Obrenović's co-operation may be seen and evaluated by the Trial Chamber prior to sentencing.

11. It is understood and agreed by Dragan Obrenović and the Prosecution that all information and testimony provided by Mr. Obrenović must be absolutely truthful. This means that Dragan Obrenović must neither minimise his own actions nor fabricate someone else's involvement.

Maximum Possible Penalty and Sentencing

12. Dragan Obrenović understands that, pursuant to Rule 101 of the Rules, he could face a sentence, if convicted after trial, of a term of imprisonment up to and including the remainder of his life.

13. Dragan Obrenović understands that the Prosecution's recommendation of 15 to 20 years is not binding on the Trial Chamber and that the Trial Chamber is free to sentence the Accused as it sees fit.

14. Dragan Obrenović agrees that he will not appeal the sentence imposed by the Trial Chamber unless the sentence imposed is above the range recommended by the Prosecutor.

15. Dragan Obrenović agrees that he will not move to withdraw his guilty plea or appeal his conviction pursuant to his guilty plea.

16. Dragan Obrenović understands that, pursuant to Article 24 of the Statute and Rule 101 of the Rules, the Trial Chamber should take into account in determining the appropriate sentence such factors as the gravity of the offence and the individual circumstances of the convicted person. In addition, the Trial Chamber should take into account such factors as: any aggravating circumstances, any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction, the general practice regarding prison sentences in the courts of the former Yugoslavia, and the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.

Waiver of Rights

17. By pleading guilty, Dragan Obrenović understands he will be giving up the following rights:

- (a) the right to plead not guilty and require the Prosecution to prove the charges in the Indictment beyond a reasonable doubt at a fair and impartial public trial;

- (b) the right to prepare and put forward a defence to the charges at such public trial;
- (c) the right to be tried without undue delay;
- (d) the right to be tried in his presence, and to defend himself in person at trial or through legal assistance of his own choosing at trial;
- (e) the right to examine at his trial, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf at a trial under the same conditions as witnesses against him;
- (f) the right not to be compelled to testify against himself or to confess guilt;
- (g) the right to testify or to remain silent at trial; and
- (h) the right to appeal a finding of guilty or to appeal any pre-trial rulings.

18. It is understood that by pleading guilty the Accused does not waive his right to be represented by Counsel at all stages of the proceedings.

Voluntariness of the Plea

19. Dragan Obrenović acknowledges that he has entered this Plea Agreement freely and voluntarily, that no threats were made to induce him to enter this guilty plea, and that the only promises made to him are those set forth in this agreement.

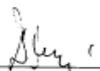
Other Agreements

20. Except as expressly referenced at paragraph 9 hereto, there are no additional promises, understandings or agreements between the Office of the Prosecutor and Dragan Obrenović or his Counsel, David Eugene Wilson.

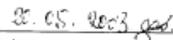
IT-02-60-T p.16679

Declaration of Dragan Obrenović

21. I, Dragan Obrenović, have read this Plea Agreement in a language which I understand and have carefully reviewed every part of it with my Counsel, David Eugene Wilson. Mr. Wilson has advised me of my rights, or possible defences, and of the consequences of entering into this Agreement. No other promises or inducements have been made to me, other than those contained in this Agreement. Furthermore, no one has threatened me or forced me in any way to enter into this Agreement. I have entered into this Agreement freely and voluntarily, and am of sound mind. I understand the terms of this Agreement, and I voluntarily agree to each of the terms.



Dragan Obrenović



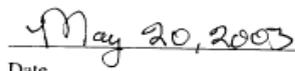
Date

Declaration of Counsel

22. I, David Eugene Wilson, am Dragan Obrenović's Counsel. I have carefully reviewed every part of this Agreement with my client. Further, I have fully advised my client of his rights, and possible defences, of the maximum possible sentence and the consequences of entering into this Agreement. To my knowledge, my client is of sound mind and his decision to enter into this Agreement is an informed and voluntary one.



David Eugene Wilson
Counsel for Dragan Obrenović



Date

On this 20th day of May 2003 the undersigned parties fully agree to each and every term and condition of this Plea Agreement:



Dragan Obrenović



David Eugene Wilson
Counsel for Dragan Obrenović



Dušan Slijepčević
Co-Counsel for Dragan Obrenović

Carla Del Ponte
Prosecutor



Peter McCloskey
Senior Trial Attorney
Office of the Prosecutor

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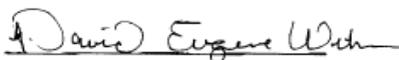
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IT-02-60-T p.16677

Declaration of Counsel

22. I, David Eugene Wilson, am Dragan Obrenovic's Counsel. I have carefully reviewed every part of this Agreement with my client. Further, I have fully advised my client of his rights, and possible defences, of the maximum possible sentence and the consequences of entering into this Agreement. To my knowledge, my client is of sound mind and his decision to enter into this Agreement is an informed and voluntary one.



David Eugene Wilson
Counsel for Dragan Obrenovic

20 May 2003

Date

On this 20th day of May 2003 the undersigned parties fully agree to each and every term and condition of this Plea Agreement:



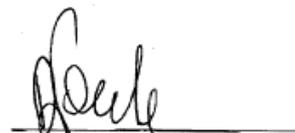
Dragan Obrenovic



David Eugene Wilson
Counsel for Dragan Obrenovic



Dušan Šljepčević
Co-Counsel for Dragan Obrenovic



Carlo Paul Dente
Prosecutor



Peter MacInnes
Senior Trial Attorney
Office of the Prosecutor

Case No. IT-02-60-T

9

20 May 2003

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1. The Trial Chambers pronounce judgements and impose sentences on persons convicted of serious violations of international humanitarian law that fall within the ICTY's jurisdiction. After the parties complete the presentation of their cases, the Presiding Judge declares the hearing closed, and the Trial Chamber deliberate in private.*
2. When the Trial Chamber finds the accused guilty of a crime, a conviction is entered and a sentence is imposed. If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it will impose a sentence in respect of each finding of guilt, indicating whether the sentences should be served consecutively or concurrently. The Trial Chamber also has the power to impose a single sentence that reflects the totality of the criminal conduct of the accused.
3. The Prosecution and Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. When exercising its discretion to determine an appropriate sentence, the Trial Chamber must take into account the gravity of the offence, the individual circumstances of the convicted person, any aggravating or mitigating circumstances, and the general practice regarding prison sentences in the courts of the former Yugoslavia.
4. The Trial Chamber must also take into account the extent to which any penalty imposed on the convicted person by a national court for the same act has already been served. The maximum sentence that a Trial Chamber may impose is life imprisonment.
5. This Chapter is set forth in a number of sections. Section A lays out the legal framework for sentencing at the ICTY. Section B outlines the objectives of sentencing noting that deterrence and retribution serve as the primary purposes of sentencing. Section C enumerates the factors taken into consideration during the sentencing process including the gravity of the offences committed and the consideration of practices in the former Yugoslavia. Section D discusses a number of aggravating and mitigating circumstances to be considered in a sentencing judgement. Section E focuses on the specific case of guilty pleas as a basis for conviction and

* This chapter was authored by Gregor D. Guy-Smith, co-founder of the (ICLB) International Criminal Law Bureau; former President of the Association of Defence Counsel (ADC- ICTY); Chair of the ADC- ICTY Disciplinary Council; Member of the ICTY Rules Committee and Chair of the *Ad-Hoc* Post Tribunal Matters Committee. He has practised as defence counsel for over 30 years and served as counsel on the following ICTY cases: *Prosecutor v. Limaj et al.* (Kosovo); *Prosecutor v. Haradinaj et al.* (Kosovo) and *Prosecutor v. Perišić* (Sarajevo, Srebrenica, Zagreb).

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sentencing. Finally, Section F focuses on the importance of individualised sentencing and the relationship between different cases.

A. The Sentencing Legal Framework

6. The ICTY Statute and the ICTY Rules of Procedure and Evidence provide a number of guidelines regarding the legal framework governing sentencing. Article 23(1) of the ICTY Statute provides that “[t]he Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.” Article 24(1) of the ICTY Statute provides that the “penalty imposed by the Trial Chamber shall be limited to imprisonment. 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.”
7. According to Rule 101 of the ICTY RPE:

“(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

 - 1) any aggravating circumstances;
 - 2) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
 - 3) the general practice regarding prison sentences in the courts of the former Yugoslavia;
 - 4) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.”
8. Rule 87(C) ICTY RPE deals with the manner in which sentences should be imposed:

“If the Trial Chamber finds the accused guilty on one or more 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.”

B. Sentencing Objectives

9. Sentencing objectives and the purposes of incarceration are rooted in similar concepts which include retribution, incapacitation of the dangerous, deterrence, punishment and rehabilitation. Deterrence and retribution, however, are the main objectives of sentencing. The *Kunarac* Trial Chamber discussed the objectives of sentencing at the ICTY stating:

“The Trial and Appeals Chambers of the International Tribunal generally consider what is variously and often interchangeably referred to, for example, as sentencing ‘objectives’, ‘purposes’, ‘principles’, ‘functions’ or ‘policy’ in the assessment of the term of actual imprisonment for convicted persons.⁶⁰⁰ These are considered in addition to the gravity of the offence and mitigating and aggravating circumstances. What appear to be justifications for imprisoning convicted persons, or theories of punishment, actually are treated as or resemble sentencing factors, in the sense that these considerations are consistently said to affect, usually in an unspecified manner, the length of imprisonment.

In the present case, the Prosecutor submits that the Trial Chamber ought to consider the principles of retribution, incapacitation of the dangerous, deterrence, punishment and rehabilitation when determining the sentences to be imposed on each of the accused.”⁶⁰¹

10. It noted that the above considerations when determining the sentences to be imposed required careful consideration in determining which, if any, were applicable to the sentence to be imposed.

B.1 Deterrence

11. In discussing the issue of deterrence, the *Kunarac* Trial Chamber acknowledged that the jurisprudence of the ICTY “seems to support deterrence and retribution as the main general sentencing factors.”⁶⁰²
12. The *Kunarac* Trial Chamber stated that the principle of “special deterrence” as a general sentencing factor is generally of little significance because “the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair.”⁶⁰³
13. In discussing “general deterrence” the *Kunarac* Trial Chamber followed the jurisprudence holding that “general deterrence should not be accorded undue prominence in the assessment of an overall sentence to be imposed.”⁶⁰⁴ The reason is that a sentence should in principle be imposed on an offender for his culpable conduct - it may be unfair to impose a sentence on an offender greater than is appropriate to that conduct solely in the belief that it will deter others.

600 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, footnote 1430 citing, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 185 (deterrence as “purpose” and deterrence and retribution as “factors” used in “overall assessment of sentences”); *Prosecutor v. Tadić*, IT-94-1-A, IT-94-1-Abis, Judgement on Sentencing Appeal, 26 Jan 2000, para. 48 (deterrence as “principle” and “factor” used in the “overall assessment of the sentences”); *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, paras. 761-763 (under the heading “Purposes and objectives of the sentence”, retribution, protection of society, rehabilitation, deterrence, putting an end to serious violations of international humanitarian law and contribution towards restoration and maintenance of peace in the former Yugoslavia as “parameters” and “objectives” when fixing the length of a sentence); *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Judgement, 14 January 2000, paras. 848, 849 (under the respective heading and sub-heading of “Factors to be considered in sentencing” and “General sentencing policy of the International Tribunal”, deterrence, retribution, what appears to be a positive general prevention theory and rehabilitation are referred to as “purposes”); *Prosecutor v. Jelisić*, IT-95-10-T, Trial Judgement, 14 December 1999, para. 133 (as an aggravating circumstance the contribution of the ICTY to the restoration of peace in the former Yugoslavia); *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Judgement, 10 December 1998, paras. 288-291 (under the heading “Sentencing Policy of the Chamber”, deterrence and retribution as “functions”, rehabilitation, public reprobation and stigmatisation used as guidance in determination of sentence); *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, paras. 1230-1235 (retribution, deterrence, protection of society, rehabilitation and motives for the commission of offences as “factors” to be taken into consideration in determination of sentence).

601 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T 22, Trial Judgement, 22 February 2001, para. 836.

602 *Ibid.*, para. 838; see also *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 185; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Judgement, 14 January 2000, para 848; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 806.

603 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T 22, Trial Judgement, 22 February 2001, para. 840.

604 *Ibid.*, citing *Prosecutor v. Tadić*, IT-94-1-A, IT-94-1-Abis, Judgement on Sentencing Appeal, 26 January 2000, para. 48.

B.2 Rehabilitation

14. Rehabilitation as a sentencing objective, although supported by the Chambers in principle, was not found to be a significant relevant sentencing objective at the ICTY. Inasmuch as the only penalty a Trial Chamber at the ICTY can impose is imprisonment, the scope of any rehabilitative program would be entirely dependent on the states in which convicted persons will serve their sentences, not on the ICTY.⁶⁰⁵

B.3 Retribution

15. Article 24 of the ICTY Statute and Rule 101(B) ICTY RPE largely focus on sentencing factors relating to the individual accused and his criminal conduct, including the gravity of the offence. These provisions essentially require an enquiry into the conduct of the accused in order to determine a just punishment for his crime.

C. Factors taken into Consideration in the Sentencing Process

16. Article 24(2) of the ICTY Statute states that the Trial Chamber in imposing sentences “should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”

C.1 Gravity of the Offence

17. The Chambers at the ICTY have consistently held that the gravity of the criminal conduct is the most important factor to consider in determining sentence.⁶⁰⁶ The Trial Chamber in *Kupreškić* stated:

*“The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.”*⁶⁰⁷

18. In determining the gravity of offence, a number of factors that are considered by the Tribunal include the effect on the victim or persons associated with the crime and nearest relations, but it must be related to a specific and general harm of the victim and his or her relations.⁶⁰⁸ The gravity of the offence should be considered with respect to the particular and peculiar circumstances of each case, but certain crimes such as crimes against humanity are by definition of extreme gravity.⁶⁰⁹ The Appeals Chamber, in the *Delalić et al.* case (also known as *Čelebići*), confirmed its “acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence.”⁶¹⁰

605 See Article 27, ICTY Statute; Rules 103 and 104, ICTY RPE.

606 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para.1225; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Trial Judgement, 14 January 2000, para. 852; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 182; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 731; *Prosecutor v. Kunarac et al.*, IT-96-23-T, Trial Judgement, 22 February 2001, para. 856.

607 *Prosecutor v. Kunarac et al.*, IT-96-23-T, Trial Judgement, 22 February 2001, para. 856, citing *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 852, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, para. 271; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, paras. 178, 248, 271.

608 *Prosecutor v. Delalić et al.*, IT-96-21-T, Trial Judgement, 16 November 1998, para.1226.

609 *Ibid.*, para.1227.

610 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 731.

C.2 Consideration of Sentencing Practices in the Former Yugoslavia

19. Article 24(1) of the ICTY Statute and Rule 101(B)(iii) ICTY RPE require the Trial Chamber, in determining sentence, to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia. However, while the Chamber may have recourse to the sentencing practices in the former Yugoslavia, such practices do not bind the Chamber
20. Whether a Trial Chamber has the discretion to impose a sentence greater than contemplated under the sentencing scheme of the former Yugoslavia (the maximum sentence being 20 years) was conclusively resolved by the Appeals Chamber in *Tadić*. The Appeals Chamber in *Tadić* interpreted the relevant provisions of the Statute and Rules to mean that, while a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion in imposing sentence is not bound by such practice.⁶¹¹ The Chamber found specifically that the wording of the Rules states clearly that the ICTY is given the power to sentence an accused for the rest of his natural life rejecting *Tadić*'s claim that the sentencing guidelines should be bound by the practice of courts in the former Yugoslavia.⁶¹² As reiterated by the Appeals Chamber, the ICTY is bound to apply the law of the ICTY and not that of the former Yugoslavia.⁶¹³
21. A related issue is the concept of *nulla poena sine lege*, or no penalty without law. The ICTY has rejected arguments by the accused that the sentencing laws of the ICTY conflicted with the laws of the former Yugoslavia and that because the ICTY sentencing law did not exist at the time of the crimes the accused were not bound by such law. As stated in the *Stakić* Appeal Judgement "the Trial Chamber was bound to apply the law of the ICTY and not that of the former Yugoslavia" and therefore the contention that "the Trial Chamber attempted to re-write the law of the SFRY and by doing so violated the principles of [...] *nulla poena sine lege* is without merit."⁶¹⁴

C.3 Credit for Time Served

22. Under Rule 101(C) ICTY RPE the accused is entitled to credit for the time spent in detention pending and during trial.⁶¹⁵

D. Aggravating Circumstances and Mitigating Circumstances

23. The Prosecution is required to prove aggravating circumstances beyond a reasonable doubt.⁶¹⁶ The standard of proof with regard to mitigating circumstances is *not*, as with aggravating circumstances, proof beyond reasonable doubt,⁶¹⁷ but proof on a balance of probabilities: the circumstance in question must have existed or exists "more probably than not".⁶¹⁸
24. With the foregoing in mind it is important to note that conduct not described in the indictment, including uncharged conduct that was part of the same course of conduct or common scheme or plan as the offence of

611 *Prosecutor v. Tadić*, IT-94-1A, Judgement on Sentencing Appeal, 26 January 2000, para. 20.

612 *Ibid.*, para. 21.

613 *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 398.

614 *Ibid.*

615 See, for example, *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Judgement, 23 February 2011, para. 2228.

616 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 763.

617 *Prosecutor v. Milan Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 43.

618 *Ibid.*; *Prosecutor v. Bralo*, IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007, para. 23.

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conviction will not be considered an aggravating factor. The reason for this is manifest: an offender can only be sentenced for conduct for which he has been convicted.⁶¹⁹

25. The ICTY RPE do not exhaustively define all the factors that may constitute either aggravating or mitigating circumstances.⁶²⁰ Factors which have been considered as such are detailed below.

D.1 Aggravating Circumstances

26. Rule 101 (B)(i) ICTY RPE requires the Trial Chamber, in determining sentence, to consider any aggravating circumstances in relation to the crimes of which the accused stands convicted. Two of the most common aggravating circumstances are:

- ◆ vulnerability of the victims, for example: women, children, elderly people and men who had been rendered helpless (unarmed, exhausted, confined or wounded) and were subjected to cruel treatment at the hands of their captors;⁶²¹ and,
- ◆ position of the accused and abuse of a position of authority may be considered in terms of the direct participation of the accused aggravating any Article 7(3) responsibility or the accused's seniority or position of authority may aggravate his direct responsibility under Article 7(1). While a position of authority, even at a high level, does not automatically warrant a harsher sentence, the *abuse* of such may constitute an aggravating factor.⁶²² The Appeals Chamber in *Stakić* noted that "in considering the superior position in connection with Article 7(1), the Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal that superior position itself does not constitute an aggravating factor. Rather it is the abuse of such position which may be considered an aggravating factor."⁶²³ The key consideration in respect of a person convicted under Article 7(3) of the Statute, which essentially incorporates the personal authority of the accused as an element, is that counting the position of authority and the power of a high-ranking officer over others as an aggravating factor would result in an impermissible double counting.⁶²⁴ However, proof of active participation by a superior (in the context of Article 7(3) of the Statute) in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and has been considered as a potential basis for aggravating the sentence.⁶²⁵

27. As noted above, the list of potential aggravating factors is not exhaustive.⁶²⁶ A number of other aggravating circumstances have been identified and considered by the ICTY. They include:

619 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 763 ("The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence.").

620 *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgement, 12 June 2010, para. 2136.

621 *Prosecutor v. Obrenović*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, paras.102-103; *Prosecutor v. Momir Nikolić*, IT-02-60/1-S, 2 December 2003, paras. 137,139; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgement,12 June 2010, para. 2153.

622 *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Appeal Judgement, 12 November 2009, para. 302.

623 *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 411, citing *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeal Judgement, 1 June 2001, paras. 358 - 359. Moreover, the Appeals Chamber recalled in *Blaškić*, that where responsibility under both Article 7(1) and Article 7(3) is alleged under the same counts, and where the legal requirements pertaining to both of these modes of responsibility have been established, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing. *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, paras. 91, 727.

624 *Prosecutor v. Obrenović*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 102 citing *Prosecutor v. Natelić and Martinović*, IT-98-34-T, Trial Judgement, 31 March 2003, para. 751; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 853; *Prosecutor v. Momir Nikolić*, IT-02-60/1-2, 2 December 2003, paras. 135,139; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Trial Judgement, 12 December 2007, paras. 999-1001; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgement 12 June 2010, paras. 2157-2158, 2165, 2196; *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, para. 411, citing *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, Appeal Judgement, 1 June 2001, paras. 358 - 359.

625 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 736-737.

- ◆ the duration of the criminal conduct;
 - ◆ premeditation and motive; in *Krstić* the Trial Chamber stated that “when a genocide or a war crime, neither of which requires the element of premeditation, are in fact planned in advance, premeditation may constitute an aggravating circumstance. [...] In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm. Indeed, reluctant participation in the crimes may in some instances be considered as a mitigating circumstance.”;⁶²⁷
 - ◆ the enthusiasm with which a crime was committed;
 - ◆ a discriminatory state of mind where discrimination is not an element of the offence; ICTY case law establishes that Chambers are entitled to consider ethnic and religious discrimination as aggravating factors, but only to the extent that they were not considered as aggravating the sentence for any conviction which included such discrimination as an element of the crime. For instance, a discriminatory state of mind cannot aggravate the sentence for the crime of persecution in Article 5(h) of the Statute;⁶²⁸
 - ◆ the number of the victims;⁶²⁹ however, not in cases such as *Blagojević and Jokić* where the number of victims was already reflected in the crimes for which each accused were convicted; specifically complicity in genocide and extermination, respectively;⁶³⁰
 - ◆ the victims’ status⁶³¹ and the effect of the crimes upon them; however, the impact on relatives of the victim is “irrelevant to the culpability of the offender” and “it would be unfair to consider such effect in determining a sentence.”⁶³² Moreover, the Trial Chamber in *Blagojević and Jokić* held that the status of the victims - in that case predominantly civilians including women, children and the elderly - was part of the definition of the crimes for which the accused were convicted;⁶³³
 - ◆ the systematic nature of the crimes;
 - ◆ the intimidation of witnesses; and,
 - ◆ the circumstances of the crimes generally.
28. It is only circumstances which have been put specifically before the Trial Chamber, whether in the indictment or during the trial, that may be considered in aggravation. The existence of such aggravating circumstances must be proven beyond reasonable doubt.

626 See, generally, *Prosecutor v. Martić*, IT-95-11-T, Trial Judgement, 12 June 2007 para. 495 and cases cited therein; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Trial Judgement, 12 December 2007, para. 996 and cases cited therein.; *Prosecutor v. Popović et al.*, IT-05-88-T, 12 June 2010, para. 2139 and case cited therein.

627 *Prosecutor v. Krstić*, IT-98-33-T, Trial Judgement, 2 August 2001 para. 711.

628 *Prosecutor v. Kunarac et al.*, IT-96-23, IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 357, citing *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 508 (stating that a discriminatory intent “is an indispensable ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5(h), concerning various types of persecution.”); see also *Todorović* : “[s]ince a discriminatory intent is one of the basic elements of the crime of persecution, this aspect of Todorović’s criminal conduct is already encompassed in a consideration of the offence. [I]t should not be treated separately as an aggravating factor.”, *Prosecutor v. Todorović*, IT-95-9/1-S, Trial Judgement, 31 July 2001, para. 57.

629 *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, paras. 814-815; *Prosecutor v. Hadžihasanović et al.*, IT-01-47-A, Appeal Judgement, 22 April 2008, paras. 310, 317; *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 686.

630 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Trial Judgement, 17 January 2005, para. 841.

631 *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement para. 686; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Judgement, Volume 3, 26 February 2009, para. 1151.

632 *Prosecutor v. Krnojelac*, IT 97-25-A, Appeal Judgement, 17 September 2003, para. 260.

633 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Trial Judgement, 17 January 2005, para. 843.

D.2 Circumstances Deemed Not to be Aggravating

29. It has been held that abstract comparisons of the “*per se* gravity of the crimes”, comparing the severity of crimes against humanity and violations of the laws or customs of war is wrong.⁶³⁴ The Appeals Chamber held in *Aleksovski* that there is no distinction in law between the seriousness of a crime against humanity and that of a war crime.⁶³⁵ For example, in *Tadić* the Appeals Chamber overturned the Trial Chamber finding that there should be a distinction between war crimes and crimes against humanity, and again in *Aleksovski* the Appeals Chamber found that the authorized penalties for crimes is fixed by reference to the circumstances of the case and not by the form of the crime.⁶³⁶
30. Similarly, false defences, disrespectful attitude towards the Chamber and the effect of the conviction on third parties are impermissible considerations as aggravating factors.⁶³⁷

D.3 Prohibition Against Double Use of the Same Factor as an Aggravating Circumstance

31. Factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*.⁶³⁸ For example, in *Krnojelac* the Trial Chamber considered the particular vulnerability of the direct victims and the length of time during which crimes were committed while the accused acted as warden as aggravating circumstances in relation to the gravity of the offences committed. It therefore did not consider them again as matters of aggravation in relation to sentencing because they had already been taken into account.⁶³⁹

D.4 Mitigating Circumstances

32. Rule 101(B)(ii) ICTY RPE states that in determining a sentence, a Trial Chamber shall take into account “any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction”⁶⁴⁰ Factors that have been taken into account by the ICTY as evidence in mitigation include:
- ◆ co-operation with the Prosecution including providing “truthful and complete information to the Tribunal” whenever requested;⁶⁴¹
 - ◆ the admission of guilt or a guilty plea which may go to mitigation because it can demonstrate repentance, honesty, and readiness to take responsibility, help establish the truth, contribute to peace and reconciliation, set examples to other persons guilty of committing crimes, relieve witnesses from giving evidence in court, and save the ICTY time and resources;⁶⁴²

634 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, para. 851.

635 *Ibid.*, citing *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 69.

636 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, para. 851, citing *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 69.

637 *Prosecutor v. Kunarac et al.*, IT-96-23-T, IT-96-23/1-T, Trial Judgement, 22 February 2001, paras. 852-854.

638 *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgement, 15 March 2002, para. 517; *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, para. 58; *Prosecutor v. Predrag Banović*, IT-02-65/1-S, Sentencing Judgement, para. 53; *Prosecutor v. Obrenović*, IT-02-60/2-S, Sentencing Judgement, 10 December 2003, para. 101; *Prosecutor v. Delalić et al.*, IT-96-21-Tbis-R117, Sentencing Judgement, 9 October 2001, para. 53.

639 *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgement, 15 March 2002, para. 517.

640 As stated in *Serushago*, Trial Chambers are “required as a matter of law to take account of mitigating circumstances.” *Prosecutor v. Serushago*, ICTR 98-39-S, Appeal Judgement on Sentencing, 5 February 1999, para. 22; and *See also Prosecutor v. Musema*, ICTR-96-13-A, Appeal Judgement, 16 November 2001, para. 395.

641 *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 95-96; *Prosecutor v. Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 88; Rule 101(B)(ii), ICTY RPE.

- ◆ an expression of remorse, provided that it is sincere, which can include efforts of remorse during or after the alleged events or the assistance in reconciliation efforts;⁶⁴³
- ◆ voluntary surrender to the tribunal which can also prove a showing of remorse;⁶⁴⁴
- ◆ good character with no prior criminal convictions suggesting the possibility of reform;⁶⁴⁵
- ◆ comportment in detention but because most accused comport themselves well the ICTY has only attached a limited importance to this condition;⁶⁴⁶
- ◆ personal and family circumstances including an accused having children or a spouse as family circumstances are generally considered a mitigating factor;⁶⁴⁷
- ◆ the character of the accused subsequent to the conflict including contributions made to ending the conflict which may include participation in political activities or in ceasefire and peace talks following the conflict and other attempts to encourage peace;⁶⁴⁸
- ◆ duress including the extremity of the situation faced by the accused and real risk that the accused would have been killed had he disobeyed an order;⁶⁴⁹ and indirect participation including a limited or indirect participation or authority over the crimes charged;⁶⁵⁰
- ◆ diminished mental responsibility based on a balance of probabilities, or that it was more probable than not that the condition existed at the relevant time;⁶⁵¹
- ◆ age, particularly if the accused is of an “advanced age”;⁶⁵²
- ◆ assistance to detainees or victims such as ameliorating poor conditions at a detention camp in relation to particular detainees;⁶⁵³ and,

642 *Prosecutor v. Jelisić*, IT-95-10-A, Appeal Judgement, 5 July 2001, para. 122; *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 76.

643 *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 89; *Prosecutor v. Erdemović*, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 16(iii); *Prosecutor v. Jelisić*, IT-95-10-T, Trial Judgement, 14 December 1999, para. 127 (Jelisić’s sincerity of remorse not accepted); *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 775 (Blaškić’s sincerity of remorse not accepted); *Prosecutor v. Omar Serushago*, ICTR-98-39-S, Judgement on Sentencing Appeal, 5 February 1999, paras. 40-41; *Prosecutor v. Georges Ruggiu*, ICTR-97-32-I, Trial Judgement, 1 June 2000, paras. 69-72.

644 *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 73, 89; but See *Prosecutor v. Milan Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 74, disapproving this factor as a basis for mitigation.

645 *Prosecutor v. Erdemović*, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 16(i); *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 459; but See *Prosecutor v. Milan Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 91, finding that prior good character is a mitigating factor only in exceptional circumstances.

646 *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 100; *Prosecutor v. Dragan Nikolić*, IT-94-2-S, Sentencing Judgement, 18 December 2003, para. 268.

647 *Prosecutor v. Kunarac et al.*, IT-96-23-A, Appeal Judgement, 12 June 2001, paras. 362, 408.

648 *Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 773; See also *Prosecutor v. Blaškić*, IT-95-15-A, Appeal Judgement, 29 July 2004, para. 696, where the Appeals Chamber held that the factors taken into account as evidence in mitigation include, *inter alia*, the character of the accused subsequent to the conflict; See also *Prosecutor v. Plavšić*, IT-00-39 & 40/1-S, Sentencing Judgement, 27 February, para. 94: “For instance, in the *Plavšić* case, the Trial Chamber accepted Biljana Plavšić’s post-conflict conduct as a mitigating factor because after the cessation of hostilities she had demonstrated considerable support for the 1995 General Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace.” See also *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, paras. 90-91, 103.

649 *Prosecutor v. Erdemović*, IT-96-22-Tbis, Sentencing Judgement, 5 March 1998, para. 17 (stating that duress “may be taken into account only by way of mitigation.”).

650 *Prosecutor v. Krstić*, IT-98-33-A, Appeal Judgement, 19 April 2004, para. 273.

651 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 590.

652 *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004, para. 100.

653 *Prosecutor v. Sikirica et al.*, IT-95-8-S, Sentencing Judgement, 13 November 2001, paras. 195,229.

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- ◆ poor health is to be considered only in exceptional or rare cases including where an accused's life expectancy would be adversely affected by incarceration.⁶⁵⁴
33. This list is not exhaustive and Trial Chambers are “endowed with a considerable degree of discretion in deciding on the factors which may be taken into account.”⁶⁵⁵

E. Guilty Plea as a Basis for Conviction and Sentence

34. In the specific case of a sentencing judgement following a guilty plea, the Trial Chamber, pursuant to Rule 62 *bis(iv)* ICTY RPE must be satisfied that “there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent *indicia* or on lack of any material disagreement between the parties about the facts of the case”. A common procedure is that the parties enter negotiations and agree on the facts underlying the charges to which the accused will plead. The parties may also submit, pursuant to Rule 100(A) ICTY RPE, “any relevant information that may assist the Trial Chamber in determining an appropriate sentence.” On the basis of the facts agreed upon by the parties as well as the additional information provided by the parties pursuant to Rule 100(A) (including those facts presented during the sentencing hearing), the Trial Chamber exercises its discretion in determining the sentence. A Trial Chamber need not make explicit findings on facts agreed upon by the parties or on undisputed facts. The reference by a Trial Chamber to such facts is by itself indicative that it accepts those facts as true.⁶⁵⁶

E.1 Effect of Plea Agreement on Sentence

35. In exercising its discretion to impose a sentence, a Trial Chamber must take into account the special context of a plea agreement as an additional factor. A plea agreement is a matter of considerable importance as it involves an admission of guilt by the accused.⁶⁵⁷ Furthermore, recommendation of a range of sentences or a specific maximum sentence reflects an agreement between the parties as to what in their view would constitute a fair sentence. The Appeals Chamber has noted that Rule 62 *ter* (B) ICTY RPE unambiguously states that Trial Chambers shall not be bound by any agreement between the parties. Nevertheless, in the specific context of a sentencing judgement following a plea agreement a Trial Chamber shall give due consideration to the recommendation of the parties and, should the sentence diverge substantially from that recommendation, give reasons for the departure.⁶⁵⁸ Those reasons, combined with the Trial Chambers' obligation pursuant to Article 23(2) of the Statute to render a Judgement “accompanied by a reasoned opinion in writing”, will facilitate a meaningful exercise of the convicted person's right to appeal and allow the Appeals Chamber “to understand and review the findings of the Trial Chamber”.⁶⁵⁹

654 *Prosecutor v. Milan Simić*, IT-95-9/2-S Trial Judgement, 17 October 2002, para. 98. All the above mentioned mitigating circumstances have been mentioned at *Prosecutor v. Blaškić*, IT-95-15-A, Appeal Judgement, 29 July 2004, para. 696.

655 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 780.

656 *Prosecutor v. Milan Babić*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 18.

657 See Chapter IX “Plea Agreements” for further discussions on this issue.

658 *Prosecutor v. Dragan Nikolić*, ITf-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 89.

659 *Ibid.*, citing *Prosecutor v. Kunarac et al.*, IT-96.23-A, Appeal Judgement, 12 June 2001, para. 41.

F. The Importance of Individualized Sentencing and Comparison to Other Cases

36. It is the overriding obligation of the Trial Chamber to “individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime.”⁶⁶⁰ In *Delalić et al.* the Appeals Chamber observed that, as a general principle, comparisons with other cases which have already been the subject of final determination for the purpose of assessing an appropriate sentence in a specific case are usually “of limited assistance.”⁶⁶¹
37. In particular, the Appeals Chamber stated:
- “While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the sole basis for sentencing an individual.”*⁶⁶²
38. The importance of individualized sentencing, taking into account all of the factors surrounding a particular convicted accused is therefore of paramount importance.

G. Sentencing where there are Cumulative Convictions

39. The Appeals Chamber in the *Delalić et al.* case held that cumulative charging is to be allowed.⁶⁶³ The primary reason is that it is impossible for the Prosecutor to determine with certainty, prior to the presentation of all the evidence, which of the charges brought against an accused will be proved. A Trial Chamber is in a better position, after the parties’ presentation of the evidence, to evaluate which charges should be retained.⁶⁶⁴
40. The Appeals Chamber in the *Delalić et al.* case held that cumulative convictions, however, are permissible only in certain circumstances.⁶⁶⁵ It is worth quoting the relevant section of that judgement in full:

“[t]his Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the



Krnojelac case - Assessing the materially distinct element

In Krnojelac the Chamber found that the materially distinct element required by Article 3 offences is a close link between the acts of the accused and the armed conflict, whereas the Article 5 requirement is that the offence be committed within the context of a widespread and systematic attack against a civilian population. Therefore, in Krnojelac cumulative convictions for cruel treatment and persecution based on the same conduct was permissible because they were based on Article 3 and Article 5 charges. In contrast, the crimes of imprisonment and other cruel or inhumane acts were based on the same crime as persecution, all under Article 5, and because persecution requires a discriminatory act and discriminatory intent, it is the more specific provision and a conviction is entered only for persecution and not for inhumane acts or imprisonment.**

* *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Judgement, 15 March 2002, para. 503.

660 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 717.

661 *Ibid.*, para. 719.

662 *Ibid.*, (emphasis in the original).

663 *Ibid.*, para. 400.

664 *Ibid.*; see also *Prosecutor v. Kunarac et al.*, IT-96.23-A, Appeal Judgement, 12 June 2001, para. 48.

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conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

*Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.*⁶⁶⁶

41. Once all the evidence has been assessed, a Trial Chamber first has to determine whether an accused is charged with more than one statutory offence based upon the same conduct. Secondly, if there is evidence to establish both offences, but the underlying conduct is the same, the Trial Chamber has to determine whether each relevant statutory provision has a materially distinct element not contained in the other. This involves a comparison of the elements of the relevant statutory provisions - the facts of a specific case play no role in this determination. Thirdly, if the relevant provisions do not each have a materially distinct element, the Trial Chamber should select the more specific provision (see case box - *Krnojelac case - Assessing the materially distinct element*).
42. The impact that cumulative convictions based on the same conduct will have on sentencing is that it must be clear that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the accused.⁶⁶⁷ The prejudice that an accused will or may suffer because of cumulative convictions based on the same conduct must also be taken into account when imposing the sentence.

Conclusion

43. The resolution of what is an appropriate sentence after conviction is never easy. Indeed, the answer to this question is often hotly contested by the public. Some might feel that the sentence imposed was too little and others too great.
44. The primary purposes of sentences under the jurisdiction of the ICTY, which has concerned itself with war crimes, crimes against humanity and genocide in the former Yugoslavia, are retribution and deterrence.⁶⁶⁸
45. Retribution requires the imposition of a just and appropriate punishment and nothing more. Deterrence serves a two-fold function by imposing fair and appropriate penalties to deter the convicted person from committing any future violation and the general deterrent effect of discouraging other potential perpetrators from committing the same or similar crimes.
46. Considering that there is a substantial body of sentencing practice and law at the ICTY and that many of the future cases to be tried revolve around the same facts and occurrences, it is the Defence practitioner's responsibility to be educated as to the previous sentences that have been imposed, the potential sentences that could be imposed upon conviction, and to strive to present all the relevant information that will allow the sentencing body to properly render a fair, informed, and individualized sentence.

665 *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 412-413.

666 *Ibid.*

667 *Ibid.*, paras. 429-430.

668 *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Judgement, 12 June 2010, para. 2128, citing *Prosecutor v. Mrkšić and Šljivančanin*, IT-95-13/1-A, Appeal Judgement, 5 May 2009, para. 415; *Prosecutor v. Krajišnik*, IT-00-39-A, Appeal Judgement, 17 March 2009, para. 803; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, para. 806; *Prosecutor v. Aleksovski*, IT-95-14/1-A, Appeal Judgement, 24 March 2000, para. 185.

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1. After the trial proceedings in a case are completed and the Trial Chamber returns its verdict convicting or acquitting the accused of some or all of the charges,^{*} both the accused and the Prosecution have the automatic right to appeal that verdict in whole or in part.⁶⁶⁹ The accused and the Prosecution also have the right to appeal any sentence imposed by the Trial Chamber.
2. The same rules of Procedure and Evidence which govern the proceedings at trial apply to proceedings before the ICTY Appeals Chamber.⁶⁷⁰ Thus appellate proceedings at the ICTY also represent a mix of both common law and civil law legal traditions.
3. As a general rule, the same lead and co-counsel who represented the accused at trial will continue to represent him on appeal, though there are instances in which one or both counsel are replaced on appeal. The ICTY Office of the Prosecutor (ICTY OTP), however, has an appellate unit comprised of lawyers who specialize in appellate practice at the ICTY. ICTY OTP appellate counsel routinely consult and collaborate with OTP trial counsel, during trial and thereafter, in shepherding cases through the trial and appellate process.
4. Like the trial process, therefore, it is extremely important for Defence counsel to be well prepared to organize the facts and evidence at trial for purposes of putting together the appellate briefs, to present issues on appeal in a clear and convincing manner, and to plan ahead of time for presenting oral arguments.
5. This chapter will cover the basic components of the appellate process at the ICTY from the filing of the Notice of Appeal through the presentation of oral arguments after all briefs have been filed. The chapter will also hopefully provide Defence practitioners with ideas about how to creatively approach the appellate process within the specific rules and procedures in their own jurisdictions.

A. Filing a Notice of Appeal

6. In order to appeal a conviction and/or sentence, a Notice of Appeal must be filed with the Appeals Chamber advising that Chamber that some or all of the convictions and/or acquittals and/or the sentence are going to be appealed.

* This chapter was authored by Colleen Rohan, J.D., who is a member of the ADC-ICTY Executive Committee, the ICTY Disciplinary Board, and a co-founder of the International Criminal Law Bureau. She has practised as Defence counsel for 30 years and served as counsel on ICTY cases *Popović et al.* (Srebrenica) and *Haradinaj et al.* (Kosovo). She served as legal consultant to Defence teams on *Prosecutor v. Perišić* and *Prosecutor v. Karadžić*.

669 Rule 108, ICTY RPE; Article 25, ICTY Statute.

670 Rule 107, ICTY RPE.

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7. The Notice must specify:
 - 1) the date of the judgement;
 - 2) the specific provision of the Rules pursuant to which the Notice of Appeal is filed;
 - 3) the grounds of appeal, clearly specifying in respect of each ground of appeal:
 - 4) any alleged error on a question of law invalidating the decision;
 - 5) any alleged error of fact which has occasioned a miscarriage of justice;
 - 6) an identification of the finding or ruling challenged in the judgement, with specific reference to page number and paragraph number of the Trial Judgement;
 - 7) an identification of any order, decision or ruling challenged, with specific reference to the date of its filings and/or transcript page; and,
 - 8) the precise relief sought and, if relevant, the overall relief sought.⁶⁷¹
8. In other words, the Notice of Appeal must identify the specific legal and/or factual errors which will be raised on appeal.⁶⁷²
9. There are time limits which apply to filing this Notice. Rule 108 of the ICTY RPE provides that: “A party seeking to appeal a judgement shall, *not more than thirty days from the date on which the judgement was pronounced*, file a notice of appeal, setting forth the grounds”. Rule 108 also provides that the Notice of Appeal must list *all* the grounds which are going to be raised on appeal with sufficient specificity that the Appeals Chamber is aware of the nature of the error which is going to be raised and the place in the trial record where that error occurred:

“The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought.”⁶⁷³
10. This aspect of Rule 108 reflects the need for trial practitioners to preserve legal errors during trial by objecting to evidence at the time it is offered or filing motions seeking the admission or exclusion of evidence or objecting to procedures which trial counsel believes are erroneous and potentially prejudicial to the accused or to the fairness of the trial. If a legal error was not preserved during the trial proceedings that can be cause on its own for the Appeals Chamber to refuse to rule on that error by finding the error was waived.⁶⁷⁴
11. It is extremely important for practitioners to exercise sound judgement and common sense in deciding which issues are worth raising on appeal and which are not. It may well be that a significant legal error occurred in a case, for example, but that the error had no affect or very little affect on the verdict ultimately returned. In such a case, and barring some kind of unusual circumstances, the prudent decision is to not raise the error, because even a favourable resolution of it will not change the outcome for the accused. Generally speaking practitioners who raise every conceivable legal or factual error which might be argued, regardless of its actual impact on the outcome of the case, are wasting their time and, more to the point, the time of the Appeals Chamber. Among other matters, raising all possible errors, despite their ultimate lack of merit, reflects poorly

671 Rule 108, ICTY RPE.

672 Rule 108, ICTY RPE and *see* Practice Direction on Formal Requirements for Appeals From Judgements, 7 March 2002, II. Formal Requirements, “The Appellant’s Notice of Appeal” (1).

673 Rule 108, ICTY RPE.

674 This subject will be discussed more thoroughly *infra* in the section of this Chapter dealing with standards of review on appeal.

on the practitioner as it suggests the practitioner does not have good judgement or is not exercising good judgement.

12. A practitioner should also carefully consider which issues, of those which do have merit, are the strongest ones; the issues most likely to win on appeal. Although the specific circumstances of cases will vary, it is generally good practice to list the strongest issues first in the Notice of Appeal, followed by the remaining issues. The reason relates directly to the Appellant's Brief on Appeal. Under section 4 of the Practice Direction on Appeals, the "grounds of appeal and the arguments must be set out and numbered" in the Appellant's Brief is "in the same order as in the Appellant's Notice of Appeal" unless otherwise varied with leave of the Appeals Chamber. An Appellant's Brief is more likely to immediately capture the attention of the Appeals Chamber if it begins with the most meritorious issues. The Notice of Appeal should be structured with that thought in mind.



PRACTICE TIP

It is advantageous to have participation of trial counsel in drafting the Notice of Appeal.

Trial counsel and the trial team should keep a running list of potential factual and legal issues or errors as the trial progresses both for purposes of filing any Final Trial Brief and, thereafter, for drafting the Notice of Appeal.

Trial counsel should consider ahead of time how to deal with the admission or exclusion of evidence so that proper motions can be filed and/or oral objections made at trial to preserve errors for appeal.

The efficient preparation of a Notice of Appeal requires a thorough knowledge of the trial record; however that record is preserved, so counsel must be adept at gaining access to it once the trial is over.

13. As a general matter, if a potential ground for appeal is not listed in the Notice of Appeal it cannot be raised later in the briefs filed on appeal or in oral arguments before the Appeals Chamber. It is extremely important, therefore, that counsel for the Appellant list every potential issue which may be raised in the initial Notice of Appeal.
14. It is always permissible to decide, during the course of the preparation of the appeal briefs, not to raise an issue which was initially identified as a potential issue in the Notice of Appeal. The problems occur when a party fails to timely raise an issue during the appellate process. If that happens, the Trial judgement on the issues in question becomes final. The Appeals Chamber is barred from reviewing, revising or reversing a conviction or sentence where a party has failed to seize the Appeals Chamber by raising such errors on appeal.⁶⁷⁵ No new appeal, except on different grounds or potentially based on newly discovered evidence, can be brought regarding legal or factual errors which were overlooked or negligently not raised during the appeal from the Trial Chamber's judgement.⁶⁷⁶

A.1 Amending the Notice of Appeal

15. Since the Notice of Appeal must be filed within 30 days after the date of the Trial Judgement, counsel can sometimes overlook an issue or not recognize a potential issue on appeal before the time the Notice of Appeal

⁶⁷⁵ See e.g. *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, para. 202; cited in *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, Partial Dissenting Opinion of Judge Pocar, para. 2. The ICTY and ICTR share the same Appeals Chamber.

⁶⁷⁶ The manner in which new evidence may be introduced on appeal is also discussed *infra*.

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must be filed.⁶⁷⁷ As a result counsel may fail to include it in the Notice of Appeal. If this occurs counsel is not wholly without recourse. It is still possible to file a request with the Appeals Chamber seeking leave to amend the Notice of Appeal to include an issue or issues which were left out or overlooked.⁶⁷⁸

16. A party applying to vary the grounds of appeal must do so by filing a written motion which:
 - 1) states the specific Rule under which the variation is sought; and,
 - 2) the arguments which support the request to vary the grounds of appeal.⁶⁷⁹
17. Such a request will not be granted unless counsel can show good cause as to why the issue or issues were not listed in the initial Notice of Appeal.⁶⁸⁰
18. When it is necessary to file a Motion Seeking Leave to Amend a Notice of Appeal, counsel must, in that notice, explain precisely what amendments are sought and why, and, with respect to *each* such amendment, show "good cause" as to why the amendment should be allowed. Generic submissions, which are not specific on these points, may fall short of satisfying these requirements.⁶⁸¹
19. The question of whether "good cause" has been shown is necessarily resolved on a case-by-case basis, however the Appeals Chamber has identified some factors as supporting a finding of good cause including:
 - ◆ the minor nature of the variation such that it does not affect the content of the Notice of Appeal;
 - ◆ the fact that the variation has been fully addressed in the appeal and response briefs such that the opposing party will be not prejudiced if the variation is allowed;
 - ◆ the opposing party not objecting to the variation; and,
 - ◆ the fact that permitting the variation will bring the Notice of Appeal into conformity with the appeal brief.⁶⁸²
20. In addition, good cause justifying a variation to the Notice of Appeal requires a showing as to why the party seeking the amendment was unable to raise the new ground in a timely fashion. As noted in *Kupreškić*, "Appellants should not be permitted to side step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point out errors as and when they believe they have been identified."⁶⁸³
21. Requested amendments to the Notice of Appeal which do not seek to broaden the scope of the appeal beyond that raised in the original Notice of Appeal or are meant to rectify "inadvertence or negligence by an Appellant's counsel to plead a ground of appeal with sufficient clarity" will generally be allowed, upon request, as falling within the definition of "good cause" to permit the amendment.⁶⁸⁴ ICTY jurisprudence has also held that "inadvertence or negligence" by an Appellant's counsel to plead a ground of appeal with sufficient clarity should not, in any event, restrict an Appellant's right to raise that ground of appeal where

677 If the Notice cannot be filed within the initial 30 days, counsel can file a motion seeking additional time with the Appeals Chamber. The motion must demonstrate good cause to grant the additional time; *See e.g. Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Decision on Vidoje Blagojević's Motion for Extension of Time in Which to File His Notice of Appeal and on Dragan Jokic's Motion for Extension of Time in Which to File His Appeal Brief, 14 April 2005 (good cause based on appointment of new counsel on appeal; delay in getting trial record to new counsel); and *see* Rule 127(B), ICTY RPE.

678 Practice Direction on Appeals, II, 2 and 3, "Variation on the Grounds of Appeal".

679 Practice Direction on Appeals II, 2(a) and (b).

680 Rule 108, ICTY RPE provides that "The Appeals Chamber may, on good cause being shown by motion, authorize a variation of the grounds of appeal."

681 *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Decision on Dragan Jokic's Request to Amend Notice of Appeal, 14 October 2005, paras. 6-7.

682 *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, page 3.

683 *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 470.

684 *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision Granting Leave to Kariod Kordic to Amend His Grounds of Appeal, 9 May 2002, para. 5.

that ground could be of substantial importance to the success of an appeal such as to lead to a miscarriage of justice if it is excluded.⁶⁸⁵

22. Finally, the more time that elapses between the filing of the Notice of Appeal and a request for a variation to the Notice of Appeal, the less likely it will be that the Appeals Chamber will find “good cause” for permitting the amendment. However, a variation may be permitted at any point if good cause is established.⁶⁸⁶

B. Contents and Requirements of the Appellate Briefs

23. After the Notice of Appeal is filed the Appellant must prepare the Appellant’s Brief on Appeal which is the document in which any legal and factual errors will be raised for the Appeals Chamber’s consideration. Because the Prosecution can appeal from an acquittal and/or a sentence imposed by the Trial Chamber there are often two Appellant’s Briefs on Appeal; one filed by the Prosecution and one by the accused.

B.1 The Appellant’s Brief

24. The Appellant’s Brief on Appeal is, with extremely rare exception, the most important document filed on appeal. It is the document which defines the issues the Appeals Chamber will consider and it is the only opportunity for the Appellant to set forth all the arguments which are being pursued on appeal.⁶⁸⁷ Even though the Appeals Chamber will provide an opportunity for the parties to present an oral argument after all the briefing on appeal is completed appeals are usually won or lost based on the briefs that were filed. They are rarely won based on the oral arguments which are presented later on.
25. The Appellant’s Brief must be filed within 75 days of the filing of the Notice of Appeal.⁶⁸⁸ If the appeal is only raising sentencing error and no other issues, the Appellant’s Brief must be filed within 30 days of the filing of the Notice of Appeal.⁶⁸⁹ The Respondent must file his Respondent’s Brief within 40 days after the filing of the Appellant’s Brief. In an appeal which concerns only sentencing, the Respondent’s Brief must be filed within 30 days of the filing of the Appellant’s Brief.⁶⁹⁰
26. Since cases at the ICTY usually involve very complex legal and factual arguments, it is possible to obtain an extension of time to file appellate briefs, however only based upon a showing of good cause as to why the



PRACTICE TIP

Practitioners should also learn to write succinctly. It is extremely important to get to the point as quickly as possible. It is well worth the time, indeed in most cases mandatory, to edit and re-edit briefs so that the writing is as interesting as possible as well. Appeals briefs in international criminal cases tend to be very long. Judges and their clerks will more likely maintain focus and remember the brief if it succinct and interesting to read.

685 See e.g. *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Decision on Prosecution’s Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, para. 4.

686 *Prosecutor v. Jelisić*, IT-95-10-B.3. Strategic Considerations for Appellate Briefs, A, Appeals Judgement, 5 July 2001, para. 18 (amendment added during the oral argument on appeal).

687 Rule 113, ICTY RPE permits an Appellant to file a Reply Brief to respond to any arguments raised by opposing counsel in its Response Brief, but that is limited to issues raised in the Response Brief.

688 Rule 111(A), ICTY RPE.

689 Rule 111(A), ICTY RPE.

690 Rule 112(A), ICTY RPE.

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brief cannot be filed within the time limits required by the rules.⁶⁹¹ Although the cases necessarily vary significantly based on individual circumstances, in general, the following may constitute good cause for obtaining additional time to file an appellate brief:

- ◆ the substitution of new counsel on appeal;
 - ◆ the extraordinary factual and legal complexity of a case;
 - ◆ the length and complexity of the trial record;
 - ◆ the number of issues raised on appeal; and/or,
 - ◆ the legally unique character of issues raised on appeal.⁶⁹²
27. The Prosecution, whether it is the Appellant or Respondent, must include a declaration in its brief that all disclosure has been completed “with respect to the material available to the Prosecutor at the time of filing the brief.”⁶⁹³ In practice, disclosure can still continue on appeal, and must continue regarding exculpatory evidence under Rule 68, which the Prosecutor has a continuing obligation to provide to the accused throughout the proceedings, including on appeal.⁶⁹⁴
28. The Appellant, be it the Prosecution or the accused, is not required to file a Reply Brief to the Respondent’s Brief, but is permitted to do so under Rule 113. A Reply Brief must be filed within 15 days of the filing of the Respondent’s Brief. In cases involving only sentencing errors a Reply Brief must be filed within 10 days of the Respondent’s Brief.
29. All appeals must be based on the record of the trial proceedings—which is the testimony and documents which were admitted at trial. That record is certified by the Registrar.⁶⁹⁵ This means that with the exception of instances in which a showing has been made under Rule 115 to present additional evidence on appeal,⁶⁹⁶ the Appellant and Respondent must base any legal or factual arguments on the record of the trial and nothing else.
30. The purpose of the Appellate Brief is to persuade the Appeals Chamber to find a factual and/or legal error, to find the error was prejudicial to the accused and, therefore, to convince the Appeals Chamber to grant the relief the Appellant is seeking. Clear, concise, well-organized appellate briefs, which follow a logical structure are most likely to fulfil all those requirements.
31. In fact if a party’s brief is unclear or ambiguous a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include:
- ◆ an order for clarification;
 - ◆ an order for re-filing (the most likely sanction);
 - ◆ rejection of the filing; or,
 - ◆ dismissal of the submissions contained in the filing.⁶⁹⁷

691 See Practice Direction on Appeal, 7 March 2002, III ‘General Requirements’, para. 16 (“a pre-appeal judge or the Appeals Chamber may vary any time limit or recognize, as validly done any act done after the expiration of a time limit prescribed in this Practice Direction”).

692 See *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision Authorizing Respondent’s Brief to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions and Granting an Extension of Time to File Brief, 30 August 2001.

693 Rule 111(B) and 112(B), ICTY RPE.

694 Rule 68, ICTY RPE.

695 Rule 109, ICTY RPE.

696 Rule 115, ICTY RPE will be discussed in Section E of this Chapter.

697 Practice Direction, IV, ‘Non-Compliance with the Requirements’ para. 17.

32. There are formal requirements regarding the structure of the brief and the information which must be contained in it.⁶⁹⁸ The brief must contain an introduction with a concise summary of the relevant procedural history including the date of the judgement as well as the case number and date of any interlocutory filing or decision relevant to the appeal,⁶⁹⁹ the arguments in support of each ground of appeal, including, but not limited to:

- ◆ legal arguments, giving clear and precise references to provisions of the Statute, the Rules, the jurisprudence of the ICTY or other legal authorities relied on;
- ◆ factual arguments and, if applicable, arguments in support of any objections as to whether a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement;⁷⁰⁰
- ◆ arguments in support of the submitted causal link between any alleged error on a question of law invalidating the decision and/or any alleged error of fact which has occasioned a miscarriage of justice; and,
- ◆ the precise relief sought.

33. Finally any brief filed with the Appeals Chamber must contain a Book of Authorities “containing a separate compilation setting out clearly all authorities relied upon.”⁷⁰¹ The Book of Authorities must contain a Table of Contents describing each document and exhibit including the date and reference.⁷⁰² All legal authorities, other than authorities of the ICTY and ICTR must also be provided in “an authorized version of the authority in question, complete with an English or French translation, if the original is not in one of the languages of the International Tribunals.”⁷⁰³

34. Where filings of the parties refer to passages in a judgement, decision, transcripts, exhibits or other authorities, they shall indicate precisely the date, exhibit number, page number and paragraph number of the text or exhibit referred to. Abbreviations or designations used by the parties in their filings must be uniform throughout the brief. Pages and paragraphs must also be numbered consecutively from the beginning to the end of the brief.⁷⁰⁴



PRACTICE TIP

The summary should be as balanced and fair as possible. Practitioners who exaggerate, take facts out of context or fabricate will lose their credibility with the Appeals Chamber. A practitioner who lacks credibility is a practitioner who is highly unlikely to be effective in persuading anyone to accept his view of the case. Along the same lines, it is simply bad policy to attack the intelligence, integrity or fairness of the Trial Chamber or opposing counsel. Arguments should be limited to legal and factual errors based on the record. Whatever the opinions of counsel may be on the relative merit or lack of merit of the Trial Chamber members personally, such opinions should never appear in an appellate brief.

698 See Practice Direction on Formal Requirements for Appeals From Judgement, 7 March 2002, issued pursuant to Rule 19(B).

699 Practice Direction on Appeal, II, 4(a) "The Appellant's Brief".

700 *Ibid.*, and see *Prosecutor v. Halilović*, IT-01-48-A, Appeals Judgement, 16 October 2007, paras. 12, 120 (citing general rule and dismissing the Prosecution allegation that the Trial Chamber erroneously excluded probative evidence because it subjected the evidence to an inappropriate standard of proof because the Prosecution failed to refer to specific portions of the trial record in support of this contention).

701 Practice Direction on Appeal, II, "The Book of Authorities", para. 7.

702 *Ibid.*, para. 8.

703 *Ibid.*, para. 9.

704 Practice Direction, III, "General Requirements", paras. 13-14.

B.2 Respondent's Brief and Reply Brief

35. As with the Appellant's Brief, there are formal requirements for the contents of the Respondents' Brief and any Reply Brief.
36. The Respondent shall file, in accordance with the Statute and Rules, a Respondent's Brief containing each ground of appeal, in the following order:
- 1) a statement on whether or not the relief sought by the Appellant is opposed;
 - 2) a statement on whether or not the ground of appeal is opposed; and,
 - 3) arguments in support of these statements.⁷⁰⁵
37. The arguments in support of the above statements include:
- ◆ legal arguments, including clear and precise references to the relevant provisions of the Statute, the Rules, the jurisprudence of the Tribunal or other legal authorities relied upon;
 - ◆ factual arguments including, if applicable, the arguments in support of the assertion that a fact has been sufficiently proven or not, with precise reference to any relevant exhibit, transcript page, decision or paragraph number in the judgement; and,
 - ◆ arguments pertaining to the submitted causal link between any alleged error on a question of law invalidating the decision and/or any alleged error of fact which has occasioned a miscarriage of justice.⁷⁰⁶
38. The statements and the arguments must be set out and numbered in the same order as in the Appellant's Brief and shall be limited to arguments made in response to that brief. A Respondent's Brief is not a vehicle for raising substantive issues which the Appellant has not raised. However, if an Appellant relies on a particular ground to reverse an acquittal, the Respondent may support the acquittal on factual or legal grounds not raised in the Appellant's Brief, if those grounds are supported by the trial record.⁷⁰⁷
39. It is not mandatory for an Appellant to file a Reply Brief to the Respondent's Brief, however it is very rarely good practice not to do so. When an Appellant files a Reply Brief it is limited to arguing in reply to the points raised in the Respondent's Brief which must be set out and numbered in the same order as in previous briefs.⁷⁰⁸ A Reply Brief may not raise new arguments which were not raised in the Appellant's Brief or in the Respondent's Brief.



PRACTICE TIP

Since appeals are primarily decided based on the written briefs, if the accused is the Appellant, *always* file a Reply Brief responding to and rebutting any arguments raised by the Respondent. This is an extremely valuable avenue available to the Appellant to get in the "last word" as a means of persuading the Appeals Chamber to rule in the accused favour. It should certainly be done in cases in which the Respondent has overlooked or mischaracterized facts, miscited the relevant legal authorities or misconstrued the record. The Reply Brief is the opportunity to set the record straight on these issues.

B.3 Strategic Considerations for Appellate Briefs

40. Within this structure there is plenty of room for creativity and variation given the particular circumstances of an individual case. The order required by the Practice Direction simply requires that the brief begin with a

705 Practice Direction, "The Respondent's Brief".

706 *Ibid.*

707 *Ibid.*

708 Practice Direction, "The Appellant's Reply Brief".

summary of the procedural background of the case, followed by presentation of the legal and factual arguments, and concluding with a description of the relief sought. Practitioners can structure individual legal arguments in the manner which works best to present those arguments in a persuasive way.⁷⁰⁹ The only real limit in the structuring of the brief is that the grounds of appeal and the arguments must be set out and numbered in the same order as in the Appellant's Notice of Appeal, unless otherwise varied with leave of the Appeals Chamber.⁷¹⁰

41. It is important to provide a summary of the facts presented at trial to provide context for the legal errors which are raised and to show, assuming a legal error is found by the Appeals Chamber, that the error was prejudicial and requires whatever relief it is that the Appellant is seeking.⁷¹¹
42. Defence counsel should not ask the Appeals Chamber to re-weigh the significance of the facts as presented at trial and to come to factual conclusions which are different from those found in the Trial Chamber.⁷¹² The Appeals Chamber may not, within the applicable rules, re-weigh the factual evidence *de novo*.⁷¹³ If a witness was found to be credible by the Trial Chamber, for example, a practitioner cannot argue on appeal that the Appeals Chamber should find the witness was not credible. Credibility findings, with extremely rare exception, belong solely within the province of the Trial Chamber.⁷¹⁴ The facts, as found by the Trial Chamber, are to be relied upon and discussed as a means of presenting arguments that any asserted legal errors were prejudicial to the outcome in the case.
43. This leads to another important point regarding persuasive appellate advocacy. The proper standard of appellate review must be discussed in the brief. When writing an appellate brief, as opposed to other forms of written legal advocacy, the standard of appellate review can be presented (and often is) in a separate area near the beginning of the brief. It can also be discussed with each individual legal or factual issue in the section of the brief discussing that issue. As with all legal advocacy, the precise manner in which an argument is presented will depend, to some extent, on the facts of the case and the nature of the argument which is being presented. When an appellate case lends itself to such a structure, it can be good practice to present a section discussing all relevant standards of appellate review at the beginning of the appellate brief in a separate section. Thereafter, as each individual legal or factual argument is raised, reference can be made back to that section, noting in a short sentence or two which standard applies to the particular legal or factual argument in question.
44. It is also mandatory to *always* present a discussion as to why a particular legal or factual error was prejudicial to the accused. No matter how egregious a legal or factual error may be, if it had no significant effect on the outcome of the case, than it was not prejudicial to the accused and does not constitute cause to reverse a conviction or order a retrial or reduce a sentence.

709 For further discussion on how to present arguments in a persuasive way see Chapter V "Structuring a Legal Argument".

710 Practice Direction on Appeal, II, 4.

711 Examples of written appellate arguments can be found in the DVD which accompanies this Manual.

712 The only exception to this is when the issue on appeal is that the Trial Chamber engaged in a factual error; which will be separately discussed in Section C.2, "Standard applicable to errors of fact", of this Chapter.

713 See Section C.2, "Standard applicable to errors of Fact", *infra* for further discussion on this issue.

714 *Prosecutor v. Limaj*, IT-03-66-A, Appeal Judgement, 27 September 2007, paras. 12-13; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Appeal Judgement, 9 May 2007, para. 9; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 30.

C. Standards of Review on Appeal

45. The nature of the burden of proof at trial necessarily affects the manner in which claimed errors in the finding of facts are assessed in any subsequent appellate review of the Trial Chamber's factual and/or legal findings. Additionally, as will be explained below, the burden of proof on appeal is different as between the Prosecution and the Defence in establishing a factual error which could lead to a reversal of the Trial Chamber judgement; a requirement which reflects the rule that the prosecution always bears the burden of proof at trial.

C.1 Standard Applicable to Errors of Law

46. The standard for appellate review of Trial Chambers' judgements at the ICTY and ICTR are well established. A party alleging an error of law must identify the claimed error, present arguments in support of the claim of error, and explain how the error serves to invalidate the judgement. Errors of law which have "no chance of changing the outcome of a decision may be rejected on that ground."⁷¹⁵

47. The Appeals Chamber reviews the Trial Chambers' findings of law *de novo*. If the Appeals Chamber finds an error of law arising from the application of the wrong legal standard, the Appeals Chamber will articulate the correct legal standard, apply the correct standard to the evidence contained in the trial record, where necessary, and determine whether it is itself convinced beyond a reasonable doubt as to the findings challenged by the Appellant, before such findings may be confirmed on appeal⁷¹⁶ (see case box *Zigiranyirazo case - Standards of review of errors of law*).



Zigiranyirazo case - Standards of review of errors of law

In Zigiranyirazo, the accused was charged with committing crimes in a village on 8 April 1994. His alibi, presented by several witnesses, was that he was in a different village on that date. Due to the terrain and distance between the two villages, it was argued, it was not possible that Zigiranyirazo was present when the crimes occurred. Prosecution witnesses, however, identified him as one of the perpetrators.*

*In reversing Zigiranyirazo's convictions the Appeals Chamber found, among other matters, that the Trial Chamber engaged in legal error by 'misapprehending the burden of proof' regarding the defence of alibi.** The Trial Chamber found that the testimony of the accused's alibi witnesses was 'inconclusive,' or did 'not contradict' the prosecution evidence and did not 'exclude the possibility' that the prosecution witnesses were accurate.****

*The Appeals Chamber emphasized that, in presenting an alibi defence, the accused need not 'exclude the possibility' that the prosecution met its burden of proof. The accused need only raise a reasonable doubt that he was in a position to commit the crimes.**** It found, based on a de novo review of the legal error raised, that the Trial Chamber erroneously shifted the burden of proof to the accused.*

*The Appeals Chamber then considered whether, after applying the correct legal standard to the facts at trial, the conviction should be sustained. It acknowledged the long-standing presumption that a Trial Chamber has evaluated all the evidence presented to it, in the absence of any reason to find that it completely disregarded any particular piece of evidence.***** It held that this presumption was rebutted in Zigiranyirazo since, due to the legal error shifting the burden of proof, the Trial Chamber failed to consider, much less properly weigh, the circumstantial evidence of the impossibility of Zigiranyirazo travelling between the two villages on the day in question; a failure it held to be 'unacceptable.' Indeed, the Appeals Chamber emphasized that just as circumstantial evidence may properly serve as a basis of conviction, an accused may also rely on such evidence and any reasonable inferences capable of being drawn from it in his defence.*

* *Prosecutor v. Zigiranyirazo*, ICTR-01-73-A, Appeal Judgment, 16 November 2009, paras. 29-31.

** *Ibid.*, para. 39.

*** *Ibid.*, para. 41.

**** *Ibid.*, para. 42.

***** *Ibid.*, para. 45.

⁷¹⁵ *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 8; *Prosecutor v. Kvočka*, IT-98-30/1-A, Appeal Judgement, 28 February 2005, para. 16.

C.2 Standard Applicable to Errors of Fact

48. The appellate standards of review for claimed factual errors are quite different. An accused alleging errors in the factual findings made by the trial chamber must not only demonstrate the factual error but also show that the error of fact resulted in a miscarriage of justice.⁷¹⁷ The “miscarriage of justice” standard is a high one. It has been defined as “a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of a crime.”⁷¹⁸
49. The Appeals Chamber applies a standard of “reasonableness” when reviewing claimed errors of fact in the trial verdict. The appeals chamber will substitute its own factual finding for that of the trial chamber only when “no reasonable trier of fact could have reached the original decision.”⁷¹⁹ In determining whether or not a Trial Chamber’s factual finding was reasonable, the Appeals Chamber “will not lightly disturb findings of fact by a Trial Chamber.”⁷²⁰ This is so because, at the *ad hoc* Tribunals an appeal is not a new trial.⁷²¹ To the contrary, significant deference is given to the Trial Chamber’s factual determinations because the Trial Chamber has the advantage of observing the witness testimony first-hand and assessing the demeanour and relative credibility of individual witnesses.⁷²² As the Appeals Chamber in *Kupreškić* stated:

*“Pursuant to the jurisprudence of the [International] Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is ‘wholly erroneous’ may the Appeals Chamber substitute its own finding for that of the Trial Chamber.”*⁷²³

50. Put another way, an accused who has had the benefit of the application of the reasonable doubt standard throughout his trial has a very high appellate standard of review to meet when, on appeal, he seeks reversal of the Trial Chambers’ factual findings.
51. The same standard of reasonableness and the same deference to the factual findings of the Trial Chamber apply when the Prosecution brings an appeal against an acquittal or a sentence, based on alleged factual errors in the Trial Chamber. The Appeals Chamber will only hold that an error of fact was committed if it determines that no reasonable trier of fact could have made the challenged factual finding.⁷²⁴ However, since the Prosecution has the burden of proof at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.⁷²⁵

716 *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 8; *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, 22 March 2006, para. 9.

717 *Prosecutor v. Simić* IT-95-9-A, Appeals Judgement, 28 November 2006, para 10; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Appeal Judgement, 28 February 2005, para. 16; *Prosecutor v. Vasiljević*, IT-98-32-A, Appeal Judgement, 25 February 2004, para. 8.

718 *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 37; *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, Appeal Judgement, 12 June 2002, para. 39.

719 *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 9.

720 *Prosecutor v. Blagojević and Jokić* Appeal Judgement, para. 9; *Prosecutor v. Musema*, ICTR-96-13, Appeal Judgement, 16 November 2001, para. 18.

721 *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 10; *Prosecutor v. Bagilishema*, ICTR-95-1A, Appeal Judgement, 3 July 2002, para. 11.

722 *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 37.

723 *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 30; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 10.

724 *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeal Judgement, 9 May 2007, para. 9; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgement, 3 July 2002, para. 13.

XI. Appeals

52. The Appeals Chamber in *Bagilishema* held:

“Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber’s factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused’s guilt has been eliminated.”⁷²⁶

53. In this regard the Prosecution is always held, as it properly must be under the Statute of the ICTY as well as the relevant international covenants, to its burden to prove the accused guilty beyond a reasonable doubt. It is not relieved of that burden when it seeks on appeal to overturn a factual finding which is beneficial to the accused.

D. Interlocutory Appeals

54. Pursuant to Rule 72 ICTY RPE there are certain “preliminary motions” which must be made, if they are to be made at all, within a short period of time after the accused initial appearance. These include motions which:

- ◆ challenge the jurisdiction of the tribunal;
- ◆ allege defects in the form of the indictment;
- ◆ seek the severance of counts joined in one indictment or seek separate trials for accused who are joined for trial; or,
- ◆ raise objections based on the refusal of a request for assignment of counsel.⁷²⁷

55. The accused has the right to bring an interlocutory appeal from the denial of a motion challenging the jurisdiction of the tribunal, as does the Prosecution if such a motion is granted.⁷²⁸ The interlocutory appeal must be filed within 15 days of the ruling on the motion challenging jurisdiction.⁷²⁹

56. An interlocutory appeal from rulings on any of the other preliminary motions can be brought only if the Trial Chambers grants certification to appeal. The party seeking the certification must convince the Trial Chamber that the decision involves an issue that would “significantly affect the fair and expeditious conduct of the



PRACTICE TIP

Any time an important motion which may be determinative of the outcome of the case is filed, such as a motion challenging jurisdiction which could result in dismissal of the case, defence counsel should assume a ruling favourable to the accused will be appealed by the prosecution. Since the time limits for these appeals are very abbreviated, counsel should begin to draft at least a skeletal appellate argument as soon as the motion is filed, to assure a response from the defence can be timely filed with the Appeals Chamber if the motion is granted.

725 *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 11; *Prosecutor v. Krnojelac*, IT-97-25-A, Appeal Judgement, 17 September 2003, para. 14.

726 *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeal Judgement, 3 July 2002, para. 14 (emphasis added); See also *Prosecutor v. Limaj et al.*, IT-03-66-A, Appeal Judgement, 27 September 2007, para. 13; *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, para. 11.

727 Rule 72(A), ICTY RPE.

728 Rule 72(B)(i), ICTY RPE. The only permissible bases for challenging the jurisdiction of the *ad hoc* Tribunals are that the accused are not any of the persons indicated in Articles 1, 6, 7, and 9 of the ICTY Statute; the charges did not occur within the geographic area indicated in Article 1, 8 and 9 of the ICTY Statute, the charges occurred either before or after the time period which constitutes the *ad hoc* Tribunals mandate under Article 1, 8, and 9 of the Statute and/or the charges do not constitute any of the violations falling under Article 2, 3, 4, 5, or 7 of the Statute.

729 Rule 72(C), ICTY RPE.

proceedings or the outcome of the trial,” and for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings.”⁷³⁰

57. In practice, even though the remaining Rule 72 preliminary motions are not accompanied by an automatic right to an interlocutory appeal, they usually involve issues which are so fundamental to the anticipated trial—such as the sufficiency of the indictment or severance of accused due to a conflict of interest—that Defence counsel should be able to make a sufficient showing that the issues will affect the fair and expeditious conduct of the trial or its outcome and should therefore be immediately resolved by the Appeals Chamber before time and money is spent on the trial.⁷³¹
58. Trial Chamber decisions on other motions brought before or during trial are not subject to interlocutory appeal. Factual or legal errors occasioned by erroneous rulings on those motions will be resolved as part of the appeal from the Trial Judgement, assuming they resulted in prejudice to the accused and/or affected the verdict which was returned.⁷³²
59. Under Rule 73 ICTY RPE, however, if the resolution of an issue raised in such motions affects the fair and expeditious conduct of the proceedings or the outcome of the trial *and* the Trial Chamber agrees that immediate resolution of the issue by the Appeals Chamber will “materially advance the proceedings”, an interlocutory appeal may be brought,⁷³³ if the Trial Chamber, in the exercise of its discretion, agrees to certify the issue for interlocutory appeal.⁷³⁴
60. In practice, even when an important point of law is raised the effect of Rule 73(B) is to preclude certification for interlocutory appeal unless the party seeking certification establishes that both of the above conditions are met.⁷³⁵ A request for certification to bring an interlocutory appeal is not the appeal itself and is not concerned with whether the decision was correctly reasoned or not. That is a matter for the Appeals Chamber. The request is directed *only* towards demonstrating that the two requirements in Rule 73(B) have been satisfied, after which the Trial Chamber *may* decide to certify an interlocutory appeal.⁷³⁶
61. This final point is important as a party is not entitled to an interlocutory appeal from pre-trial and trial motions as a matter of right no matter how potentially significant the issue may be.⁷³⁷ The Trial Chamber’s decision to grant or deny a request for certification is within the exercise of its discretion; it is free to deny certification even if the two prongs of Rule 73(B) are met.⁷³⁸

730 Rule 72(B)(ii), ICTY RPE.

731 Examples of filings which successfully obtained leave to file an interlocutory appeal are contained on the DVD which accompanies this Manual.

732 See Section C, *supra*, describing the standards of review on appeal.

733 Rule 73(B), ICTY RPE.

734 Rule 73(B), ICTY RPE.

735 *Prosecutor v. Halilović*, IT-01-48-PT, Decision on Prosecution’s Request for Certification for Interlocutory Appeal of ‘Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment’, 12 January 2005, page 1; *Prosecutor v. Milutinović et al.*, IT-99-37-PT, Decision on Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds, 16 July 2003, page 3.

736 *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution’s Request for Certification of Appeal Under Rule 73(B), 18 January 2006, page 1; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo’s Expert Report, 30 August 2006, para. 8 (denying request to certify Trial Court’s decision to exclude expert report on basis that prosecution had failed to make a satisfactory showing as to how the resolution of that issue would “materially advance these proceedings” emphasis in original).

737 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.18, Decision on Jadranko Prlić’s Interlocutory Appeal Against the Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlić’s Defence, 20 October 2010, para. 3.

738 The denial of a request for interlocutory appeal does not prevent raising the issue in an appeal from the subsequent verdict.

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62. The practitioners' job, if the issue is of importance to the accused's case, is to convince the Trial Chambers that certification should be granted, which is done by the filing of a written motion.⁷³⁹ The Trial Chambers at the ICTY usually grant or deny such motions without seeking any oral argument from the parties; however oral argument may sometimes be requested by the Trial Chamber if it feels argument will assist it in resolving the issue. A party is always free to ask for the opportunity to present oral argument though most Trial Chambers will resolve the issue without it.
63. There are a number of reasons why a Trial Chamber, given the particular circumstances in the case before it, may or may not elect to grant a motion to certify a legal issue for interlocutory appeal. Certification has been denied, for example, in cases involving judgements of acquittal entered under Rule 98⁷⁴⁰ or when certification was requested at an advanced stage of the proceedings.⁷⁴¹ Certification has been granted, on the other hand, when the interlocutory appeal is from a decision denying the accused's motion to replace his lead and co-counsel,⁷⁴² granting a prosecution request to re-open its case⁷⁴³ or seeking clarification of the scope of the expected trial evidence.⁷⁴⁴
64. Requests for certification to file an interlocutory appeal must be filed within seven days of the impugned decision. If the impugned decision was made orally in court, the time limit begins to run from the date of the oral decision unless:
- 1) the party challenging the decision was not present or represented when the decision was made, in which case the time limit begins to run from the date on which the party is first notified of the decision; or,
 - 2) the Trial Chamber states that a written decision will follow the oral one; in which case the time limit runs from the date of the written decision.⁷⁴⁵
65. Interlocutory appeals are intended to resolve, early on in the trial process, legal issues which may affect the entire conduct of the trial or portions of the trial or which may result in an unfair trial for one of the parties. What those issues might be varies significantly from case to case. Because interlocutory appeals which are discretionary usually arise near the beginning of the trial or during the trial itself, the time frame for raising and resolving them is short; so as to avoid any undue delay in the trial proceedings. On the other hand, interlocutory appeals serve the laudatory function of resolving legal issues, which may significantly affect the outcome of trial depending on how they are determined, at an early stage of the proceedings or before the trial has been infected by undue prejudice to a party, thereby avoiding the potential waste of time and

739 The motion must be filed within 7 days of the impugned decision, oral ruling or notice of the oral ruling. Rule 72(C), ICTY RPE.

740 *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 bis, 23 April 2004, para. 9 (Rule 73(B) applies to evidentiary and procedural matters; not judgements of acquittal returned under Rule 98 bis) and (proper procedure to appeal 98 bis acquittal is to appeal pursuant to Rule 108 regarding appeals from judgements); and See *Prosecutor v. Jelisić*, IT-95-10-T, Prosecution's Notice of Appeal, 21 October 1999 (appealing under Rule 108 from judgement of acquittal entered under Rule 98 bis).

741 *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Request for Certification to Appeal the Trial Chambers Decision on Vidoje Blagojević's Oral Request and Request for the Appointment of an Independent Counsel for this Interlocutory Appeal Should Certification be Granted, 2 September 2004, page 6 (impugned decision denying Accused his right to testify under oath arose near close of trial thus no basis to find interlocutory appeal would materially advance the proceedings).

742 *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Vidoje Blagojević's Request for Certification, 25 July 2003 (decision affects fair, expeditious conduct of trial and requires immediate resolution).

743 *Prosecutor v. Gotovina et al.*, IT-06-90-T, Decision on Cermak and Markac Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution's Case, 10 May 2010.

744 *Prosecution v Haradinaj et al.*, IT-04-84bis-PT, Decision on Application on Behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B), 3 February 2011.

745 Rule 73(C), ICTY RPE.

resources which could be occasioned by delaying resolution of such issues until the appeal brought after the final verdict.

E. New Evidence on Appeal

66. On occasion a party may first discover new evidence after a verdict has been returned and the case is already pending on appeal. Rule 115 at the ICTY allows for the presentation of new evidence on appeal, but only under certain circumstances. This is because, as noted in Section C.2 above, an appeal is not a re-trial⁷⁴⁶ and cannot be used to fill in gaps or fix mistakes, in hindsight, that could have been prevented at the time of trial.⁷⁴⁷ Rule 115 provides that a party may make a motion to the Appeals Chambers, to present new evidence during the appeal process.⁷⁴⁸ The relevant Practice Direction on Appeal requires that such a motion must “in accordance with the Statute and Rules” contain:
- 1) a precise list of the evidence the party is seeking to have presented;
 - 2) identify each ground of appeal to which the evidence relates and, where applicable, a request to submit any additional grounds of appeal based on such evidence;
 - 3) arguments in relation to the requirement of non-availability at trial; and,
 - 4) arguments in relation to the requirement that the admission of the evidence is in the interests of justice.⁷⁴⁹
67. As is clear from these rules, new evidence may not be introduced on appeal as a matter of right. The party offering the evidence must have a good reason for failing to produce the evidence at trial before it will be admitted on appeal. Generally “good cause” will be found when the evidence was:
- ◆ unavailable at trial;
 - ◆ discovered for the first time only after the trial was completed; or,
 - ◆ other good cause as to why the evidence could not have been presented during the trial proceedings.
68. The opposing party is permitted, when new evidence is admitted on appeal, to present evidence to rebut it, though a party is not required to do so. The parties are also permitted to file supplemental briefs on the impact of the additional evidence, if any, on the verdict which was returned in its absence.⁷⁵⁰
69. If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine “if it could have been a decisive factor in reaching the decision at trial.”⁷⁵¹ If it could have been decisive, the Appeals Chamber will consider the additional evidence and any rebuttal

746 This rule at the ICTY is different from many civil law jurisdictions where an appeal may well be a re-trial. For a very thorough discussion of the differences between international criminal law as currently practised and the civil law tradition see C. Buisman, M. Bouazdi, M. Costa, “Principles of Civil Law”, in *Principles of Evidence in International Criminal Justice* (K. Kahn, C. Buisman, C. Gosnell) Oxford Unveristy Press, New York 2010.

747 *Prosecutor v. Halilovic*, IT-01-48-A, Appeal Judgement, 22 March 2006, para. 10.

748 Rule 115, ICTY RPE provides: A party may apply by motion to present additional evidence before the Appeal Chamber. Such motion shall (1) clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed and (2) must be served on the other party and filed with the Registrar not later than 30 days from the date for filing of the brief in reply, *unless good cause* or, after the appeal hearing, *cogent reasons are shown* for a delay.

749 Any relevant exhibits and documents, when necessary, must also be translated into one of the official languages of the Tribunal. Practice Direction on Appeal, II “Additional Evidence”, para. 11.

750 Rule 115(A), ICTY RPE, also specifying a time limit of 15 days, from the close of new evidence on appeal, for the filing of such briefs.

751 Rule 115(B), ICTY RPE.

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materials along with that already on the record to arrive at a final judgement. The Appeals Chamber may also entertain oral argument following the receipt of the new evidence to assist it in rendering its judgement and/or to ask any questions it may have of the parties.

70. The ICTY rules also provide for a review process when new evidence is not discovered until after the appellate process is completed and the case is closed.
71. Rule 119 provides that when a new fact is discovered by a party after both the trial and appellate proceedings in a case have concluded, and that fact could not have been discovered through the exercise of due diligence prior to the final judgement, the Defence or “within one year after the final judgement has been pronounced, the Prosecutor” may ask the Appeals Chamber for review of the judgement. Proceedings under Rule 119 are not technically part of the appellate process, but rather a part of what is generally known as post-conviction review.⁷⁵²

F. Appeals Hearing

72. After all the briefs are filed on appeal it is the practice at the ICTY to provide the parties with the opportunity to present oral argument as a matter of right.⁷⁵³ The parties are informed of the date for the hearing well in advance and the amount of time which will be given to each party to present its arguments. It has been the practice for the Appeals Chamber to also advise the parties if they have any specific questions or issues it would like the parties to address during oral argument. The practice of advising the parties of such questions is of huge benefit as it permits the parties to know ahead of time what issues are of particular concern to the Appeals Chamber and to structure their oral arguments accordingly.

F.1 Strategic Considerations for Oral Argument

73. The key to presenting an effective oral argument in an appellate proceeding, as in any legal proceeding, is thorough preparation. Counsel should review the facts and legal authorities which underlie all of the issues raised on appeal. Counsel should be thoroughly familiar with the standard of review applicable to those issues, the trial record, all legal authorities relevant to his case, all those cited by the opposing party, and any authorities raised by the Appeals Chamber. When the Appeals Chamber informs counsel ahead of time of questions or issues it would like addressed during argument, counsel must always be thoroughly prepared to answer those specific questions.
74. The purpose of oral argument is to persuade the Appeals Chamber, in conjunction with the written arguments already provided to them in the appellate briefs, to rule in favour of counsel’s client. It is important, therefore, for counsel to have a clear structure and plan for his argument directed towards attaining that goal. Not every issue raised in a written brief, for example, will merit a full discussion during oral argument and, with rare exception, counsel should not expect to argue all the issues raised in the written briefs. In fact it is the practice of the Appeals Chamber for the ICTY-ICTR to tell counsel at the beginning of oral arguments that it does not want counsel to simply repeat the arguments in the written briefs, but to confine their oral remarks to other matters. In practice, of course, counsel will be repeating, at least to some extent, matters raised in the written briefs as the content of the briefs is the focus of the appeal. The point, however, is that

752 See Chapter XII “Post-Conviction”, Section E. “Post-Conviction Review” for further discussion on this issue.

753 The exception, as noted earlier, is interlocutory appeals in which oral argument is only very rarely entertained.

the Appeals Chamber will have read the briefs by the time oral argument takes place. Counsel is well advised to use the opportunity to present oral argument as a means to analyse or augment the written arguments, to clarify any issues which may remain potentially ambiguous, to make sure the Appeals Chamber agrees on the correct standard of review for the issues raised and similar matters.

75. It is good practice for counsel to plan ahead of time exactly what counsel will say as an opening to his oral argument, to catch the attention of the Chamber and to provide it with an overview of counsel's view of what the case is all about. It is often useful to tell the Appeals Chamber which issues counsel intends to argue so that the Chamber has a sense of what to expect during the course of counsel's arguments. This also provides the Chamber with the opportunity, should it choose to do so, to tell counsel whether they are interested in hearing about certain issues and not others. Counsel should also start with the strongest, most viable issues in the case since oral arguments on appeal do have time limits, counsel may be interrupted by several questions from the appeals bench and no lawyer wants to find himself in the position of running out of time before he has addressed the strongest issues in his case.
76. Some practitioners prepare for argument by writing out their proposed argument in its entirety. If this practice is useful for thorough preparation then there is no reason not to do it.⁷⁵⁴ Every lawyer will prepare in his own way. It is never good practice, however, to simply read a prepared argument. A lawyer who is reading is not looking at the individual judges on the Appeals Chamber, is losing the opportunity to maintain eye contact with them, is therefore unable to assess their reactions to the points being argued and is most likely undermining his ability to sound convincing and to persuade the court of his position.
77. This final comment raises a critical point about the argument process, which is that counsel must always be flexible regarding the structure of his oral presentation as it is likely that counsel will be interrupted by the Appeals Chamber with questions. It is extremely important to answer a question from the Chamber *when* that question is asked, regardless of what topic counsel might be discussing. There is usually a very good reason why the individual judge has asked the question at hand and if counsel puts off answering it, the opportunity to do so may never arise again depending on the time limits set for the argument or questions put to counsel from other members of the Appeals Chamber. If that occurs counsel has perhaps lost his best chance to convince that judge of his position and may, depending on the circumstances, lose credibility by appearing to be evasive or ill-prepared.
78. As with the written appellate briefs counsel must be careful to avoid exaggerating the merits of his case, denigrating his opposing counsel or the lower court or becoming angry or sarcastic. Counsel should conduct himself professionally and ethically at all times; remaining focused on the job at hand which is to convince the court of the merits of his client's case. Counsel must also be aware of when counsel is losing a point. If the Appeals Chamber appears to be against counsel on a particular point—as will often occur—there is usually no reason to continue arguing with the Chamber about it. The best strategy is to move on to the next point; using the limited and valuable time set aside for argument on those issues on which counsel appears to have a chance of prevailing.
79. Oral argument at its best can be, when all parties are well prepared, an exciting and vibrant exchange of ideas in a very dynamic area—international criminal law. Counsel who is well prepared, honest about the

754 If, during the course of argument, counsel intends to cite to specific trial exhibits, pages of the trial testimony or other matters, those citations and materials should be organized during the preparation process in such a manner that counsel will have easy access to them at the time oral argument takes place.

merits of his case and flexible in his presentation will be best positioned to maximize the likelihood that this unique experience will result in a positive outcome for his client.

Conclusion

80. There are, of course, many differences between the manner in which appeal proceedings take place at the ICTY and the manner in which they take place in other international courts and domestic jurisdictions around the world. The issues raised in this chapter are meant to provide Defence practitioners with a basis from which to consider and develop creative ideas and practices suitable to the rules and procedures which prevail in the jurisdictions in which counsel practises.

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1. Incarceration is meant to serve a number of purposes and the *ad hoc* Tribunals have spent a great deal of time articulating the justifications for international criminal law and the conviction of those accused of serious crimes. However, when an individual transitions from a person accused of crimes to one convicted of crimes, the rights and responsibilities associated with this newfound status are far less developed.*
2. This section focuses on the practical considerations a convicted person and his counsel should be aware of while the convicted person is serving his sentence in a domestic system following a conviction by the ICTY.
3. It is a fundamental tenant of international human rights law that prisoners should be treated with dignity and respect. The International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) set out a number of basic rights which cannot be ignored despite the unique nature of the system of incarceration which has developed within the international criminal legal system.⁷⁵⁵
4. These rights are encapsulated under Article 10 of the ICCPR and include that all persons deprived of their liberty shall be treated with humanity and respect, and that the penitentiary system shall ensure treatment of prisoners “*the essential aim of which shall be their reformation and social rehabilitation*”.⁷⁵⁶
5. It is with this in mind that this section will outline the procedure by which the ICTY determines the State of incarceration of a convicted person, the procedure adopted for granting early release, and the treatment of such persons while in prison. Finally, post-conviction review will be addressed.

A. Place of Incarceration

6. The State in which a convicted person will serve his sentence must be in one of the sixteen States which have signed an enforcement agreement with the ICTY.⁷⁵⁷ The convicted person shall be sent to a State in accordance with certain Practice Directions created by the ICTY.⁷⁵⁸

* This chapter was co-authored by Gregor D. Guy-Smith and Asa Solway. Gregor Guy-Smith is a former President of the ADC- ICTY, Chair of the ICTY Disciplinary Board, and a co-founder of the (ICLB) International Criminal Law Bureau. He has practised as defence counsel for over 30 years and served as counsel on the following ICTY cases: *Prosecutor v. Limaj et al.* (Kosovo); *Prosecutor v. Haradinaj et al.* (Kosovo) and *Prosecutor v. Perišić* (Sarajevo, Srebrenica, Zagreb). Asa Solway, Attorney-at-Law, is a former Expert Consultant with the Special Court for Sierra Leone; former intern with the Office of the President of the ICTY.

755 Article 10(1), ICCPR; Articles 3, 4 and 5, ECHR.

756 Article 10(3), ICCPR.

757 The following states have signed such agreements: Albania, Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Ukraine and United Kingdom.

758 See ICTY Practice Direction on the Procedure for the International Tribunal’s Designation of the State in Which A Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137/Rev. 1, 1 September 2009 (Hereafter “Practice Direction”).

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7. According to the Practice Directions, following a conviction, the Registrar of the ICTY will make a preliminary inquiry of one of the States that have signed the enforcement agreement with the ICTY⁷⁵⁹. In deciding which government to approach, the Registry takes the following factors into consideration:
 - ◆ the national law of the relevant State in relation to early release;
 - ◆ the maximum sentence enforceable by the State, and any other relevant consideration related to the ability of States to enforce a particular sentence;
 - ◆ equitable distribution of convicted persons among all the States; and,
 - ◆ any other relevant considerations related to the case.
8. When a government indicates it is willing to accept the convicted person, the Registrar prepares a confidential memorandum for the President of the ICTY indicating such willingness and containing the following information:
 - ◆ the convicted person's marital status, his dependants and other family relations, their usual place of residence, and, when appropriate, the convicted person's indigency status;
 - ◆ whether the convicted person is expected to serve as a witness in further proceedings of the ICTY;
 - ◆ whether the convicted person is expected to be relocated as a witness and, in such case, which States have entered into relocation agreements with the ICTY;
 - ◆ when appropriate, any medical or psychological reports on the convicted person;
 - ◆ the linguistic skills of the convicted person; the general conditions of imprisonment and, if available, rules governing security and liberty in the State concerned;
 - ◆ the national law of the relevant State in relation to pardon and commutation of sentence; and,
 - ◆ any other relevant considerations related to the case.
9. The President, taking into account this information and any other inquiries he chooses to make, will alone make the determination whether the convicted person shall serve his sentence in the State listed in the confidential memorandum created by the Registrar.
10. If the President determines that enforcement in that State is not appropriate, the Registrar will approach another State. Before deciding the matter, the President may consult with the Sentencing Chamber or with its Presiding Judge.
11. The President *may*, furthermore, request the opinion of the convicted person and/or of the ICTY Office of the Prosecutor. The President may decide that the designation of the State shall not be made public. The Registrar will furthermore inform the convicted person of the State that has been designated, the contents of the agreement on the enforcement of sentences between the ICTY and the State concerned, and any other issues of relevance to the matter.

759 The Registrar will also carry out a number of other logistical issues, such as the preparedness to carry out the sentence and a statement concerning how much time remains on the convicted person's sentence.

A.1 Input of the Convicted Person on the State of Incarceration

12. A convicted person has minimal input into the selection of the State where he will be incarcerated and no means of appealing the decision. The Practice Direction states that “particular consideration shall be given to the proximity to the convicted person’s relations”, as well as listing the previously mentioned conditions the Registry is to include in its report to the President. No other criteria are set out for the President’s decision, and there is no absolute right allowing the convicted person to provide a statement to the President (see case box *Martić case - Requesting a transfer to another enforcement State*).
13. In practice, the President’s authority and decision making process is largely out of the control of the convicted person.
14. While there is little information regarding the process by which the Registrar provides the President with the background for its decisions in selecting the State of incarceration, the few requests for reconsideration or transfer which have been brought have been unsuccessful.

B. Practice Directions for Early Release

15. The ICTY has developed a series of Practice Directions in conformity with the ICTY Rules of Procedure and Evidence and the Statute which provide the basic structure governing the application for and consideration of pardon, commutation of sentence or early release for a convicted person.⁷⁶⁰ A convicted person may apply for early release when he qualifies within the rules of the domestic system in which he is serving his sentence. When a convicted person becomes eligible for early release under the law of the State in which the convicted person is serving his sentence, that State has the obligation to notify the ICTY at least 45 days prior to the date of eligibility for release.⁷⁶¹

⁷⁶⁰ For the purposes of this chapter pardon, commutation of sentence or early release will be referred to generally as early release unless specifically noted. Also see section F. Post-Conviction Review

⁷⁶¹ See ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/146/Rev.3, 16 September 2010 (Hereafter “Practice Directions re Early Release”).



Martić case - Requesting a transfer to another enforcement State

Milan Martić designated to serve his sentence in the Republic of Estonia, filed a motion to request a transfer which included requests to the President to reconsider and designate another State of incarceration, disclose all materials used by the President to determine the state of incarceration as well as the Registrar’s confidential memorandum pursuant to paragraph 3 of the Practice Directions on State of Incarceration, and to order the Registrar to conduct an investigation into the financial resources available to Martić’s family to visit him in Estonia. However, convicted persons rights and requests are left entirely to the discretion of the President. In the Martić decision, the President found that there is “no right conferred on a convicted person to be heard on this issue “and that the President may request opinions of the convicted person only if they so choose.** Based on these findings, the President also noted that a convicted person “has no right to directly petition me with respect to the location in which he will serve his imprisonment” and denied Martić’s request.****

*The President acknowledged the family considerations Martić raised, as well as other complaints relating to the language of the enforcing State and the practice of Martić’s religion. The President did not address the substance of those complaints and considerations in denying the application, noting that the Registrar had taken these issues into consideration and reiterating the confidential nature of the Registrar’s decision.**** The complete lack of right to appeal, and the absolute discretion of the President, has been upheld in other cases.******

* *Prosecutor v. Martić*, IT-95-11-ES, Decision on Milan Martić for Reconsideration of Order Designating State in Which He is to Serve his Sentence, 5 March 2009, para. 2.

** *Ibid.*, para. 3.

*** *Ibid.*,

**** *Ibid.*, para. 5.

***** See *Prosecutor v. Žigić*, IT-98-30/1-ES, Decision on Request of Zoran Žigić, 31 May 2006.

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16. There is also a direct petition system available to a convicted person. If a convicted person believes he is eligible for early release, he may directly petition the President to request, through appropriate State or Federal authorities, that the enforcing State inform the ICTY as to whether the convicted person is eligible for early release under domestic law.
17. Once a notification of eligibility for early release has been provided by the State of incarceration, certain obligations fall upon the Registry of the ICTY regarding the early release procedure. The Registry must first inform the convicted person that he may be eligible for early release and advise the individual of further steps to be taken. The Registry will also request reports and observations from the relevant authorities in the enforcing State concerning the behaviour of the convicted person during his period of incarceration, the general conditions under which he is imprisoned as well as requesting any psychiatric or psychological evaluations prepared on the mental condition of the convicted person. The Prosecutor will also be allowed to submit a detailed report of any cooperation the convicted person has provided to the ICTY OTP and the significance of that cooperation. Other information, as determined by the President, may also be requested by the Registry.
18. The convicted person shall be given ten days to examine information provided by and to the Registry, after which the President will hear any submissions from the convicted person through either written submissions or video or telephone link. The President will then forward to the members of the Bureau and the permanent judges of the Sentencing Chamber who remain judges at the ICTY, a copy of all information received from the enforcing State, the OTP and the President's comments regarding the convicted person's demonstration of rehabilitation and any other information the President considers to be relevant. The judges concerned shall be given a specified period of time to survey the material provided, following which appropriate consultation shall be undertaken.
19. The decision on early release is left exclusively to the President of the ICTY. However, the President, following the criteria specified in Rule 125 of the ICTY Rules of Procedure and Evidence, will take into account:
 - ◆ any other information the President considers relevant;
 - ◆ the views of the members of the Bureau; and,
 - ◆ the permanent judges of the Sentencing Chamber who remain Judges of the ICTY.
20. The decision must be rendered at least seven days prior to the date of eligibility of early release and will be made public unless the President chooses not to allow it to be made public. There are no criteria set out to determine when a decision will be made public. If the President declines to approve the early release of the applicant, the President's decision will specify the date on which the convicted person will next become eligible for consideration for early release, unless it is specified by the domestic law of the enforcing State.
21. If a convicted person is granted early release, the Registry will transmit the decision immediately to the relevant authorities of the enforcing State which will execute the terms of the decision promptly. A copy of the decision will be sent to all parties. If appropriate and at the direction of the President, the Registry will inform persons who testified before the ICTY during the trial of the convicted person, of that person's release, the destination the convicted person will travel to upon release and any other information considered relevant by the President.

C. Early Release in Practice

22. Rule 125 of the ICTY RPE provides for additional factors to be taken into account in determining whether early release is appropriate. They include:
- ◆ the gravity of the crime or crimes for which the prisoner was convicted;
 - ◆ the treatment of similarly-situated prisoners;
 - ◆ the prisoner’s demonstration of rehabilitation; as well as,
 - ◆ any substantial co-operation of the prisoner with the Prosecutor.⁷⁶²
23. While the gravity of the crime for which the prisoner was convicted, in theory, dictates the length of the sentence and plays an important consideration in the grant of early release, there is little a convicted person can control concerning how he is evaluated by the ICTY. Given that other considerations have far more bearing on early release, the gravity of crimes will only be covered in the context of rehabilitation in this section.
24. Instead, it is important to start with the treatment of similarly-situated persons. In practice, no convicted person has been released or is likely to be released prior to serving two-thirds of his sentence. This has become the adopted policy of the ICTY.⁷⁶³ Time spent while incarcerated during trial is counted towards a convicted person’s sentence. Though some States allow early release prior to serving two-thirds of a sentence, the ICTY has not allowed that given the need to treat prisoners similarly.⁷⁶⁴ While there have been overtures that other considerations should apply, which will be discussed, no public decision has granted a convicted person release prior to serving two-thirds of his sentence.⁷⁶⁵ No President has stated clearly what would be required for a convicted person to receive special consideration to allow for release prior to serving two-thirds of his sentence. For example, the ICTY has suggested that medical reasons are not the basis for early release in any of the jurisdictions in which convicted persons are serving their sentences.⁷⁶⁶
25. The ICTY has also suggested on occasion that other considerations might present a different interpretation of the presumption of serving two-thirds of a sentence, including the law governing early release in the domestic jurisdiction. For example, the ICTY has noted the “systematic incompatibility of the French system with that of the Tribunal’s, which will result in unequal treatment of French detainees compared to other Tribunal’s convicts” due to the practice in France of sentence remission.⁷⁶⁷ In this same decision the President noted that future applications may lead to a “different view”.⁷⁶⁸ Despite the potential for a change in policy, the ICTY has still consistently granted early release only after serving two-thirds of the sentence, which suggests that

762 *Prosecutor v. Vuković*, IT-96-23&23/1-ES, Decision of the President on Commutation of Sentence, 11 March 2008, para. 7.

763 See *Prosecutor v. Predrag Banović*, IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 3 September 2008, para 15 (“Notwithstanding the gravity of his crimes, I also note that Mr Banović has currently served more than two-thirds of his sentence. Considering that other convicted persons similarly situated have been granted early release after serving two-thirds of their sentences, this factor further supports his eligibility for early or conditional release”); *Prosecutor v. Tadić*, IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 4.

764 For instance, Belgium and Austria allow for early release before two-thirds of a sentence has been served. Moreover, France allows for sentence remission which would reduce the actual length of the convicted person’s sentence. See *Prosecutor v. Bala*, IT-03-66-ES, Decision on the Application of Haradin Bala for Sentence Remission, 15 October 2010.

765 This is based on publicly released decisions available on the ICTY website: <http://www.icty.org/>.

766 *Prosecutor v. Tadić*, IT-95-9, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004, para. 5.

767 *Prosecutor v. Predrag Banović*, IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 4 September 2007, para. 13.

768 *Ibid.*

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consideration of domestic systems may be a formality rather than essential to the role of sentence remission as part of a convicted person's rehabilitation.

26. Cooperation with the Prosecution, based on a report sent by the Prosecution to the President, can affect a convicted person's grant of early release. This should be considered by a convicted person if a request is made by the Prosecution. However, lack of cooperation with the Prosecution due to a failure by the Prosecution to request assistance is not held against a convicted person. Instead, where no cooperation is requested, even a non-favourable report from the Prosecution "must be considered as neutral".⁷⁶⁹
27. Nevertheless, if the convicted person concluded a plea agreement foreseeing cooperation with the Prosecution on specific cases, failure to cooperate and to abide by the plea agreement will affect the President's decision on early release.
28. The question of rehabilitation is more difficult to define. It is, by necessity, based primarily on reports by the State of incarceration and the psychiatrists or other examiners available to assess the convicted person's personal rehabilitation.⁷⁷⁰ Some convicted persons have noted that due to circumstances beyond their control, namely the prison conditions and the foreign nature of the prison system, rehabilitation has been impeded.⁷⁷¹ That this factor has been included in decisions suggests that the ICTY is willing to consider the difficulties associated with serving a sentence in a foreign prison system.
29. Ultimately, while there are a number of factors taken into consideration in the granting of early release, the overwhelming practice at the ICTY has been to allow for release of a convicted person only after he has served two-thirds of his sentence. Other considerations, while included as issues to be weighed in making a determination on a convicted person's early release, appear to ultimately prove far less important than the amount of time the individual has served. Given that such considerations are present, however, the potential for the ICTY to deny a convicted person's request based on a lack of cooperation with the Prosecution or a finding of no progress made in terms of rehabilitation, should not be ignored.

D. Difficulties in Obtaining Early Release Based on the Domestic System

30. The convicted person should also be aware that domestic systems, through their law or through negligence, can create difficulties in the early release process. Convicted persons have had to apply directly to the ICTY for reconsideration and receive special orders from the State of incarceration when they do not come up for early release even when they otherwise qualify.⁷⁷² The ICTY has proven willing to cooperate when difficulties arising from the domestic legal system create circumstances in which a convicted person may be treated unequally from other convicted persons in different jurisdictions.⁷⁷³ This includes the possibility of the ICTY ordering release and termination of the enforcement in the State of incarceration under Article 9(2) of the

⁷⁶⁹ See *Prosecutor v. Zoran Vuković*, IT-96-23&23/1-ES, Decision of the President on Commutation of Sentence, 11 March 2008, para. 10.

⁷⁷⁰ *Ibid.*, para. 9 ("the reports of the Norwegian authorities are indicative of rehabilitation").

⁷⁷¹ *Ibid.*, para. 6; *Prosecutor v. Josipović*, IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 11 ("Josipović's isolation and his inability to communicate in Spanish is the reason why he is withdrawn and unable to engage in many activities").

⁷⁷² *Prosecutor v. Drago Josipović*, IT-95-16-ES, Decision of the President on Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 6.

⁷⁷³ *Prosecutor v. Milorad Krnojelac*, IT-97-25-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009, paras. 1 - 6; *Prosecutor v. Drago Josipović*, IT-95-16-ES, Decision of the President on Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006.

Sentence Enforcement Agreement (see case box *Krnojelac* case - *Ordering release regardless of national law*).



Krnojelac case - Ordering release regardless of national law

Milorad Krnojelac, after having served two-thirds of his sentence, was technically not eligible under Italian law, which was his state of incarceration, for early release. The President thus instructed the Registry to terminate the enforcement of Krnojelac's sentence in Italy pursuant to Article 9(2), and ordered his release and return to Bosnia and Herzegovina.***

* *Prosecutor v. Krnojelac*, IT-97-25-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009, paras 1 - 5.

** *Prosecutor v. Krnojelac*, IT-97-25-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009, para 24.

E. Concerns over Prison Conditions and Legal Aid

31. Not all prisons or prison systems are created equal. Prisoners experience vastly different circumstances in the international system of incarceration. Some prisoners are entitled to a very positive experience, including involvement in “weekly excursions such as cycling trips, football matches [...] skiing trips and mountain walks.”⁷⁷⁴ Other prisoners, however, experience extremely difficult conditions which make the possibility of rehabilitation exponentially more difficult. The criteria for rehabilitation may include social reintegration, which can be based, in the international incarceration system, on integrating into an entirely different culture.⁷⁷⁵ Some inmates have been physically attacked in prison for their crimes.⁷⁷⁶ In some instances, the conditions of confinement in prison systems in States of enforcement - which are all in Europe - have failed to comport with basic respect for prisoners’ human rights in such instances as living conditions, medical care and psychiatric care.⁷⁷⁷ These issues amongst others have been investigated by international bodies.⁷⁷⁸
32. Of all the considerations which may be addressed concerning prison conditions, access to legal aid is the most universally relevant to all convicted persons. Legal aid is, by the standards of most countries, an important and necessary component to a prisoner’s rehabilitation and the realization of his rights. However, most prison systems are not prepared, nor have they had any reason to be prepared, for inmates from vastly different cultures. As a result, the ability to obtain counsel, to ensure that the rights of the individual are protected, and to ensure that prisoners have the ability to address the ICTY in an informed manner may suffer because prisoners have little to no access to legal assistance.

F. Post-Conviction Review

33. Article 26 of the ICTY Statute provides that “where a new fact has been discovered which was not known at the time of the proceedings [...] and which could have been a decisive factor in reaching the decision, the

⁷⁷⁴ *Prosecutor v. Zoran Vuković*, IT-96-23&23/1-ES, Decision of the President on Commutation of Sentence, 11 March 2008, para. 4.

⁷⁷⁵ *Prosecutor v. Predrag Banović*, Case No. IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 3 September 2008; *Prosecutor v. Josipović*, IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, para. 11; *Prosecutor v. Krnojelac*, IT-97-25-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009, para. 12.

⁷⁷⁶ This occurred with General Radislav Krstić who is imprisoned in the United Kingdom.

⁷⁷⁷ Memorandum: by Thomas Hammarberg Council of Europe Commissioner of Human Rights (Strasbourg, 20 November 2008).

⁷⁷⁸ Monitoring of European States is conducted by the Commissioner for Human Rights at the Council of Europe, with reports available at http://www.coe.int/t/commissioner/Activities/countryreports_en.asp.

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convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.” Rule 119(A) of the ICTY RPE governs requests for review and allows that “where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement.” The Appeals Chamber has found that the Statute and the rules, read together, require the moving party to establish four preliminary criteria:

- 1) there must be a new fact;
 - 2) that new fact must not have been known by the moving party at the time of the original proceedings;
 - 3) the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and,
 - 4) the new fact could have been a decisive factor in reaching the original decision.⁷⁷⁹
34. The ICTY set out a number of guidelines regarding Rule 119 in a decision on a request for review by Duško Tadić. The proper forum for filing a request for review is the judicial body which rendered the final judgement, which may be the Trial Chamber (when the parties have not lodged an appeal) or the Appeals Chamber (when the judgement has been appealed).⁷⁸⁰ The absence of judges who participated in the original decision does not eliminate the competence of the body.⁷⁸¹ Only final judgements can be the subject of review.⁷⁸²
35. The “new fact” may be defined as “new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings”.⁷⁸³ It does not matter whether new fact existed prior to or during the proceedings; what is ultimately relevant is “whether the deciding body and the moving party knew about the fact or not.”⁷⁸⁴ In regards to the second and third parts of the test, the Appeals Chamber has found that “[i]t is only when the decision made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice” that a Chamber will not hold an accused accountable for the conduct of his counsel.⁷⁸⁵ Moreover, if the evidence was not put to the Trial Chamber due to lack of due diligence the accused must establish that its exclusion would lead to a miscarriage of justice.⁷⁸⁶
36. In the case of *Tadić*, the tribunal did consider a contempt judgement against Tadić’s counsel to be a new fact meeting the threshold requirement for a request for review.⁷⁸⁷ However, the Appeals Chamber concluded that none of the findings of contempt against Tadić’s prior counsel could be considered either as a “decisive factor” affecting the final judgement or as meeting the requirements set out by parts two and three of Rule 119.⁷⁸⁸

779 *Prosecutor v. Tadić*, IT-94-1-R, Decision on Motion for Review, 30 July 2002, para. 20.

780 *Ibid.*, para. 22.

781 *Ibid.*, para. 23.

782 *Ibid.*, para. 24.

783 *Prosecutor v. Tadić*, IT-94-1-R, Decision on Motion for Review, 30 July 2002, para 25. citing *Prosecutor v. Goran Jelisić*, IT-95-10-R, Decision on Motion for Review, 2 May 2002, page 3.

784 *Ibid.*, citing *Prosecutor v. Hazim Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, page 7.

785 *Prosecutor v. Tadić*, IT-94-1-R, Decision on Motion for Review, 30 July 2002, para 26 citing *Prosecutor v. Hazim Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002, page 15.

786 *Ibid.*

787 *Ibid.*, para 29.

788 *Ibid.*, paras 29 -57.

Conclusion

37. On 22 December 2010 the United Nations Security Council adopted the International Residual Mechanism for Criminal Tribunals (the Mechanism) which is to begin functioning on 1 July 2013 at the ICTY.⁷⁸⁹
38. This body will be responsible for carrying out a number of essential functions of the *ad hoc* Tribunals after their closure, including the trials of fugitives who are among the most senior leaders suspected of being most responsible for war crimes crimes against humanity and genocide.⁷⁹⁰
39. It will also be responsible for conducting review proceedings, supervising the enforcement of sentences and rendering decisions on applications for pardon or commutation of sentences.⁷⁹¹ The establishment of offices for Judges, the Registry and Prosecution are set forth in the resolution.⁷⁹² The resolution is silent regarding the contemplated mechanism for Defence participation.
40. Pursuant to the resolution, a draft Rules of Procedure and Evidence of the Mechanism, based on the *ad hoc* Tribunals existing rules, will be submitted by the Secretary General.⁷⁹³ These rules will take effect after they are adopted by the judges for the Mechanism.⁷⁹⁴
41. The Resolution emphasizes that the nature of the residual functions will be substantially reduced and therefore “the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions.”
42. It is therefore expected that the procedures addressing post-conviction issues presently in place will remain the same and the access to, and remedies for, persons convicted at the *ad hoc* Tribunals will not change substantially, if at all, when rules are adopted by the Residual Mechanism.

789 UNSC, S/RES/1966(2010).

790 *Ibid.*, Article 1.

791 *Ibid.*, Articles 24, 25 and 26.

792 *Ibid.*, Articles 8-12 (Judges); Article 14 (the Prosecution); Article 15 (the Registry).

793 *Ibid.*, Articles 5 and 6.

794 *Ibid.*, Article 13.

XIII. The Association of Defence Counsel Practising Before the ICTY (“ADC-ICTY”)

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1. As in any other court of law, the Defence plays a crucial role at the *ad hoc* Tribunals.^{*} An individual accused of a crime is presumed to be innocent, is entitled to a fair trial without undue delay and to the assistance of counsel and “adequate time and facilities for the preparation of his defence”.⁷⁹⁵ The right of the accused to a fair trial is not only a fundamental human right but also one of the basic principles of criminal justice.
2. Defence counsel who take on the formidable task of defending an individual accused of international crimes at the ICTY are, along with all other parties operating within the ICTY’s system, responsible for protecting these rights on behalf of the accused, in addition to the responsibility of providing the accused with a vigorous defence.
3. During the early years at the ICTY, Defence counsel were essentially excluded from the work of the ICTY, other than that required for the preparation of their own individual cases. Defence counsel had no individual or collective voice in the development of ICTY rules, procedures and practices, though the Defence was and remains an essential component of the trial process.
4. Defence counsels’ experience differed significantly from that of the Prosecution or staff at the ICTY. They were not allowed access to the ICTY building excepts for the public lobby, one Defence room and the courtrooms when trial proceedings were taking place. Defence counsel were not, for example, allowed access to the cafeteria or the law library. The Defence room had limited facilities, though it did include telephones, computers and a photocopying machine.
5. A major challenge faced by Defence counsel, in addition, is that they do not have the opportunity of entering into and remaining in an established law office throughout the pre-trial and trial proceedings. In contrast, lawyers from the ICTY Office of the Prosecutor (ICTY OTP) are able to work at the seat of the ICTY, with the guidance and assistance of experienced trial lawyers, appellate lawyers, and trial support staff located in that office.

* Chapter authored by Dominic Kennedy, JP, LL.B (Hons), LL.M, Head of Office for the Association of Defence Counsel practising before the ICTY and Justice of the Peace in England and Wales. Mr Kennedy would like to thank ADC-ICTY intern Isabel Düsterhöft for her contributions to this chapter.

795 Article 21, ICTY Statute; Article 14, International Covenant of Civil and Political Rights (ICCPR) and Article 6, European Convention on Human Rights (ECHR).

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6. These circumstances have improved gradually over the years as the Defence gained an increased opportunity to contribute to the resolution of issues which directly affect the Defence function at the ICTY. This progress was made with the substantial support and assistance of the Office of Legal Aid and Detention Matters (OLAD), and included increased access to resources critical to the ability of Defence counsel to adequately represent the accused.
7. In 2002, the Association of Defence Counsel Practising Before the ICTY (ADC) was established as a result of a rule change by the ICTY judges, requiring that all Defence counsel appearing before the Chambers belong to an officially recognised association of counsel.⁷⁹⁶ This chapter will explore the challenges faced by Defence counsel, describe how the ADC-ICTY was created, and explain how this Defence organization functions to address these challenges.

A. The ADC-ICTY

8. When the ICTY was established there were no lawyers’ associations to represent Defence counsel who were practising there. Consequently, there was no collective voice for the Defence as a whole. Each individual Defence team had to liaise with the ICTY Registry on its own to negotiate for its resources. In 2002, the judges at the ICTY instigated the creation of the ADC-ICTY as the existing structures were deemed unsatisfactory. The judges felt there was a need to have an association that could ensure a highly qualified Defence counsel group and to make collective representations to the organs of the ICTY on behalf of all Defence counsel involved in the cases. It was also deemed necessary to have a Defence association in the context of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal. In September 2002, pursuant to a decision made at the July 2002 plenary, the Association of Defence Counsel was established. A working group of four Defence counsel, one Dutch Bar member and a Registry representative drafted the ADC-ICTY’s Constitution which was adopted at that plenary session.⁷⁹⁷
9. The ICTY Rules of Procedure and Evidence (ICTY RPE) were amended to require that each Defence counsel “is a member in good standing of an association of counsel practising at the Tribunal recognised by the Registrar”.⁷⁹⁸ The Registrar officially recognised the ADC-ICTY on 4 October 2002.⁷⁹⁹ This provision meant that compulsory membership in the ADC-ICTY was required before counsel could practise at the ICTY and that they had to remain in good standing under the terms of the Constitution of the ADC-ICTY. The ADC-ICTY was established under Dutch law as an independent Bar Association and registered with the Dutch authorities, therefore remaining independent from the ICTY itself.
10. In the first year the ADC-ICTY engaged in important groundwork for future developments, including creating a website, establishing member services and procedures for applications, finding part-time support staff, requiring active participation of members in the various committees of the Association and involving itself in the technological developments within the ICTY. In its second year the ADC built on previous developments by employing a full time staff member as its Head of Office and by addressing a long list of issues; both practical problems as well policy related questions.

796 See Tenth Annual Report of the ICTY, UN Doc. A/58/297-S/2003/829, Annex, para. 11.

797 Constitution of the ADC-ICTY, available at: <http://adc-icty.org/adcdocuments.html>

798 Rule 44(A)(iii), ICTY RPE.

799 See Tenth Annual Report of the ICTY (2003), para. 321.

11. The ADC-ICTY has managed to build bridges between the Defence and the ICTY which in turn has given the Defence an increased participation in the functioning of the ICTY. As a result it has also been able to break down some of the perceived barriers between the three official organs of the ICTY⁸⁰⁰ and the Defence, which is not an official organ of the ICTY.
12. Although the ADC-ICTY is not institutionally an organ of the ICTY, in recent years the ICTY Registrar has involved the ADC in Tribunal-wide committees and projects. The Registrar, for example, now consults with the ADC prior to adopting major policies affecting the work of Defence teams. Notably, the ADC was consulted prior to adopting the pre-trial and trial legal aid policies. In addition, the ADC was involved in the complete review of the Directive on the Assignment of Defence Counsel in 2006. The ADC also keeps its members informed on relevant practical and procedural issues which enable individual counsel to strengthen the effectiveness of their performance. However, despite the many achievements of the ADC-ICTY, it remains under staffed and under resourced. It receives no funding from the ICTY budget and must survive on membership dues.

A.1 Objectives of the ADC-ICTY

13. The objectives of the ADC-ICTY are numerous and include the following:⁸⁰¹
 - 1) to support the function, efficiency and independence of Defence Counsel practising before the ICTY;
 - 2) to promote and ensure the proficiency and competence of Defence Counsel practising before the ICTY in the fields of advocacy, substantive international criminal law and information technology systems relevant to the representation of persons Accused before the international Tribunal;
 - 3) to offer advice to the President, the Judges and the Registrar of the international Tribunal in relation to modifications to the ICTY Rules of Procedure and Evidence and all Regulations, Practice Directives and Policies related to the work of Defence Counsel, such as *inter alia* the Directive on the Assignment of Counsel, Code of Professional Conduct for Counsel Appearing Before the International Tribunal and legal Aid Policies; and,
 - 4) to oversee the performance and professional conduct of Defence Counsel, in so far as it is relevant to their duties, responsibilities and obligations pursuant to the ICTY Statute, the Rules of Procedure and Evidence, the Code of Professional Conduct for Counsel Appearing Before the International Tribunal, the Directive on the Assignment of Defence Counsel and the Detention Rules and Regulations of the ICTY.

A.2 Membership

14. One of the fundamental challenges facing Defence counsel at the ICTY is that the jurisprudence at the ICTY involves a mix of traditional civil and common law principles. Therefore, the ADC and the ICTY require that Defence counsel meet certain minimum qualifications before they will be assigned to represent an accused. The ADC-ICTY has a Membership Committee which is comprised of five full members of the Association.⁸⁰² The role of this committee is to determine if applicants to the ADC fulfill all the criteria for full membership in the ADC.
15. If the Membership Committee determines that a lawyer does not meet the minimum qualification criteria this will prevent that individual from being accepted on the Rule 45 list of counsel maintained by the Registry; the

800 The three official organs of the ICTY are the Registry, Chambers and the Prosecution.

801 Article 2, Constitution of the ADC-ICTY.

802 Article 4, Constitution of the ADC-ICTY.

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list from which counsel are selected by accused who are in need of legal aid. In practice this means that the ADC has the ultimate responsibility to determine who is qualified to represent an accused and not the Registry. Any decision issued by the Membership Committee can be appealed before the Executive Committee of the ADC whose decision will be final.⁸⁰³ Hence the ADC performs the important function of assisting in ensuring that counsel for the accused will be sufficiently qualified to provide the accused with competent representation.

A.3 Qualifications of Defence Counsel

16. A competent Defence enforces one aspect of the principle of equality of arms between the Prosecution and the Defence, thereby facilitating the fairness of trial proceedings. Furthermore, a vigorous and qualified defence contributes to positive perceptions of the ICTY’s overall credibility and legitimacy in the eyes of the international community. The confidence the public has in the outcome of ICTY trials depends on the fairness of those trials. Therefore, Defence counsel are required to be highly experienced and competent to represent those accused of war crimes, crimes against humanity and genocide.
17. The requirements to be admitted as a member of the ADC-ICTY are:
 - 1) counsel is admitted to the practice of law in a state, or is a university professor of law;
 - 2) counsel possesses established competence in criminal and/ or international criminal law/ international humanitarian law/ international human rights law;
 - 3) counsel possesses at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings;
 - 4) counsel has written and oral proficiency in one of the two working languages of the ICTY or has obtained a waiver pursuant to Rule 44 B of the Rules of Procedure and Evidence;
 - 5) counsel has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against counsel where he is admitted to the practice of law or is working as a university professor of law; and,
 - 6) counsel has not been found guilty in relevant criminal proceedings against him.⁸⁰⁴
18. The requirement for seven years’ experience may be waived for a counsel retained by the accused, as opposed to counsel assigned by the Tribunal.
19. Once a person is admitted as a full member of the ADC-ICTY he must also fulfill a similar set of criteria codified in Articles 44 and 45 of the ICTY Statute. These requirements are comparable to those stipulated by the ADC with the addition that all Defence counsel must remain in good standing with the ADC to be eligible to practise before the ICTY. To remain in good standing, members of the ADC must pay annual membership fees and those assigned to a current case must also pay monthly membership dues.⁸⁰⁵ The Registry is vested with the power to decide if applicants to the Rule 45 list of counsel eligible to be assigned to cases fulfill the requirements of Articles 44 and 45 of the ICTY Statute. Once applicants meet all the qualification requirements they will be added to that list.⁸⁰⁶

803 Article 4(4), Constitution of the ADC-ICTY.

804 Article 3, Constitution of the ADC-ICTY.

805 The annual membership fees for 2011 are €120 and an additional €40 per month for counsel in trial phase and €20 per month for counsel in pre-trial or appeal stage.

806 Rule 45(C), ICTY RPE.

20. The qualification requirements are an important framework in which the accused's right to counsel is protected and ensure that individual accused will have counsel already possessed of sufficient competency to effectively represent them during ICTY trial proceedings.

A.4 Disciplinary Council

21. The ADC-ICTY Disciplinary Council (Council) is comprised of five full members of the ADC.⁸⁰⁷ The role of the Council is to provide a complimentary safeguard for the values of the ICTY Code of Conduct. It is charged with governing the conduct of the members of the ADC. Unlike all other ADC committees it is independent from the Executive Committee. It has three main duties:
- 1) monitoring the conduct of members of the association in their representation of those accused by the Tribunal;
 - 2) adjudicating complaints received against members of the ADC-ICTY for alleged misconduct; and,
 - 3) providing advisory opinions on matters relating to the Code of Professional Conduct, the Directive on the Assignment of Counsel as well as the interpretation of the ADC-ICTY Constitution.⁸⁰⁸
22. Complaints against members of the ADC-ICTY for alleged misconduct can be brought by another full member, by an accused or by staff members of the ICTY, whose rights or interests are affected by the alleged professional or ethical misconduct.⁸⁰⁹
23. The Council may:
- ◆ mediate between the parties to the disagreement;
 - ◆ issue a formal warning to the respondent for his conduct;
 - ◆ refer the complaint to the Disciplinary Panel of the ICTY; and,
 - ◆ terminate a counsel's membership in the ADC-ICTY.⁸¹⁰
24. If any Defence counsel is found to be in breach of the Code of Professional Conduct the Council can recommend his removal from membership in the ADC. In such a case, the lawyer in question will no longer be in good standing with the ADC and therefore will no longer meet the pre-requisite for being on the Rule 45 list of counsel eligible to practise before the ICTY.
25. The Executive Committee of the ADC also nominates one of the members of the Disciplinary Council to represent the ADC on the ICTY Disciplinary Panel and two ADC members to represent the organization on the ICTY Disciplinary Board.⁸¹¹
26. In addition the Disciplinary Council performs the extremely important function of providing individual Defence counsel with support and guidance regarding any ethical questions or dilemmas which may arise in an individual case. If the Council is approached by individual counsel seeking such guidance it will provide counsel with a confidential advisory opinion to assist counsel in resolving such quandaries. The Disciplinary Council has also been appointed as *amicus curiae* by Trial Chambers to assist Trial Chambers in the resolution of ethical issues related to Defence counsel.⁸¹²

807 Article 15, Constitution of the ADC-ICTY.

808 See Articles 16, 18 and 19, Constitution of the ADC-ICTY.

809 Article 18, Constitution of the ADC-ICTY.

810 Articles 15-18, Constitution of the ADC-ICTY.

811 Article 40, Code of Professional Conduct for Counsel Appearing Before the International Tribunal.

812 See, e.g. *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision Subsequent to the Amicus Curiae Report, 3 November 2009.

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A.5 Rules Committee

27. The ICTY Rules of Procedure and Evidence are frequently amended; a process which takes place at the Plenary of Judges.⁸¹³ A proposal is first made to the ICTY Committee on Rules of Procedure and Evidence⁸¹⁴ which is comprised of at least three permanent judges and non-voting representatives from the OTP and Defence. The Rules Committee must submit a report on proposed amendments to the last plenary session of each calendar year for consideration.
28. The ADC has a Rules Committee which is comprised of three full members of the ADC-ICTY. It was created to liaise with and take part in the ICTY Committee on the Rules of Procedure and Evidence; an important development for the ADC as it constitutes an opportunity for the Defence to have a voice in the development and changes to ICTY RPE which can directly affect the procedures at trial and the Defence function. The ADC Rules Committee members are permitted to submit proposals for amendments to the ICTY RPE and to present the views of the Defence on proposed amendments. This participation is a noticeable improvement from the early year at the ICTY when the ICTY Committee on Rules of Procedure and Evidence was comprised solely of the Judges of the Tribunal and did not have a mechanism which permitted any input from the community of Defence counsel.

A.6 Amicus Curiae Committee

29. The *Amicus Curiae* Committee was created by the ADC-ICTY to have a group of Defence counsel on hand to prepare and submit *amicus curiae* briefs, when requested, in matters which are considered to be important to all Defence counsel practising before the Tribunal. *Amicus* Briefs and requests to submit *Amicus* Briefs have been filed on numerous occasions by the ADC in support of individual Defence teams. These briefs have included submissions on both substantive legal issues⁸¹⁵ and funding issues.⁸¹⁶
30. The ADC-ICTY has also been requested to file *Amicus* Briefs in support of the Defence in other international courts such as the International Criminal Tribunal for Rwanda (ICTR).⁸¹⁷ To obtain the assistance of the Amicus Committee, Defence teams can approach the ADC Head of Office and request such assistance from the ADC. The final decision as to whether the issues in question should be collectively supported by the ADC is made by majority vote of the Executive Committee members. The aim of filing such briefs is to provide collective support for Defence teams and ultimately the accused. The contents of the *Amicus* Briefs prepared by the *Amicus* Committee are also subject to approval by the Executive Committee before submission to the respective Trial or Appeals Chamber.

A.7 Ad Hoc Committees

31. The ADC-ICTY Executive Committee and General Assembly have the power to create committees as deemed necessary to address matters relevant to the Defence function which may arise from time to time. These

813 Rule 6, ICTY RPE.

814 See Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunal (Rev. 2, 24 January 2002).

815 See *Prosecutor v. Brđanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel - ICTY, 5 July 2005.

816 See *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 21 February 2011; and *Prosecutor v. Prlić et al.*, IT-04-74-T, Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 10 December 2010.

817 See *Prosecutor v. Kanyarukiga*, ICTR 02-78-A, Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 18 April 2011.

Committees have, for example, included a Legacy Committee, a Post-Conviction Committee, and with the recent establishment of the Residual Mechanism for the *ad hoc* Tribunals, a committee organized to study that development and potential Defence input regarding the future functioning of the Residual Mechanism. The aim of these committees is to represent the ADC on particular areas of importance to the association and to provide a means for representing the Defence perspective and experience regarding such issues to the ICTY or the UN Security Council. These committees are meant to develop and reflect to the extent possible the common view amongst Defence counsel on the topics in question.

A.8 Training

32. The cases brought before the ICTY necessitate that Defence counsel acquire a unique understanding of military, cultural, and political issues that require case preparation, investigation and management quite distinct from cases in national jurisdictions. In addition, the combination of both civil and common law traditions in the ICTY RPE and case law is also a formidable challenge for Defence counsel to meet and overcome. Therefore, it is essential that adequate, continuous training is provided to Defence counsel.
33. Defence counsel come from all over the world and often have little to no contact, particularly prior to trial, with other Defence counsel working at the ICTY on cases different from their own. Due to the ICTY's funding policies, counsels are also not able to be consistently present in The Hague throughout the pre-trial preparation of their cases.
34. Unfortunately, there has been no consistent policy at the ICTY for providing training for Defence counsel despite the need for such training and its clear benefits. The ADC therefore created a Training Committee charged with the significant responsibility of organising substantive training courses for Defence counsel. In 2004 and 2005, training was provided for Defence counsel new to the ICTY, as well as members of their legal teams, in certain technological tools critical to any counsel's ability to organise and prepare cases involving international crimes at the ICTY, such as how to access the Judicial Database (JDB) and the Electronic Disclosure System (EDS). Other training events have been organised for all members of the ADC on matters considered vitally important for practising at the ICTY, such as practical exercises for conducting direct and cross-examination at trial, case management and organization, and issues involving the substantive law.
35. OLAD has a limited biennial budget for the provision of training for Defence counsel however the Registry is not in a position to offer all counsel the possibility of travelling to The Hague for the training and concentrates only on counsel already practising at the ICTY. The training itself, however, is done by the ADC which, as mentioned, has organised various comprehensive training programs for its members from time to time. Due to lack of resources it has not been able to do so on a consistent basis.
36. The Registry provides some limited training for counsel, right before the scheduled beginning of trial, regarding essential technology used in court during trial and appeal (for example, Ringtail; LiveNote and eCourt systems) and on issues such as the bureaucratic steps which must be taken to get documents translated at the ICTY and the function and role of the Victims and Witnesses Section (VWS).

A.9 Representation and Outreach

37. Recently the ADC-ICTY has been requested to participate in some events organised by the ICTY and external institutes from which it had previously been excluded. This progress is an encouraging step towards increased representation of the Defence perspective on issues critical to the fair and balanced development of international criminal law. The Outreach section of the ICTY now regularly seeks Defence counsel

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representatives to participate in academic discussions and official visits to the ICTY; something which did not occur in years past. This representation is important, among other matters, to educate the public by showing that there is an active Defence group at the ICTY which is as concerned with the protection of human rights as other entities in the international community, including the rights of the accused and to present the Defence view of issues pending before the ICTY. Additionally, members of the ADC are now actively involved in capacity building activities in the region of the former Yugoslavia as experts and trainers to transfer what knowledge and skills they have acquired during the course of practising at the ICTY.

B. Setting Up a Defence Team

38. In order to competently and adequately prepare and present the defence in complex cases involving international crimes there is a need to put together a team of lawyers and support staff to represent the accused. A team is necessary to divide up the myriad tasks associated with the pre-trial and trial proceedings. A well balanced and qualified team is also imperative to ensure that a variety of skills are available to adequately represent the accused.
39. Cases at the ICTY involve, at minimum, hundreds of thousands to a million or more documents of disclosure as well as other types of material, including photographs and videos, which will be electronically disclosed to the Defence by the Prosecution during the pre-trial stage. Defence teams must filter this mass of disclosure as it is relevant to the case, though the majority of it may never be offered in evidence by the Prosecution at trial.
40. Over the years, Defence counsel practising at the ICTY have learned, from their own experiences and the experiences of colleagues, how to put together a Defence team. These teams should be able to prepare and present the Defence case within the constrictions of the finite amount of resources which are made available to the accused.
41. Usually two Defence counsel are assigned to each accused at the ICTY. The practice has developed of combining a lawyer from the same region as the accused, which at the ICTY will usually mean a lawyer trained in the civil law tradition who speaks the same language as the accused, with an attorney trained in the common law system. This combination maximises the team’s ability to absorb and function within the mixed legal system at the ICTY and will generally obviate the need to employ a translator for meetings with the accused. This is not done in every case, nor is it required. There are successful teams comprised of two lawyers from the region and successful teams comprised of two lawyers who are not from the region. Each lead counsel appointed to a case is free to create the kind of legal team which best fits the circumstances of his client’s case.
42. The majority of Defence teams employ a “case manager”. This individual can have many different functions, however a primary one is to organise the massive amount of disclosure which will take place in each case. Case managers are trained in the use of various technological systems for the organisation of the high volume of materials. As the case proceeds and additional disclosure is served on the Defence, the case manager is responsible for continuing to organise that disclosure within the system used by the team, so that it is accessible to counsel or other members of the team when it is needed. Some case managers will also organise all written motion work from the Prosecution and Defence in a similar manner. Although the practice varies, many teams have their case manager present in court through all trial proceedings so that when counsel requires a document or reference to a transcript page, the case manager is there to immediately provide that

information. The ability to use technological systems and have understanding of the law constitutes an optimal asset for a case manager.

43. Defence teams usually employ legal assistants responsible for doing factual and legal research. Most legal assistants are law students or law school graduates. Legal assistants' varied duties may include drafting motions and assisting investigators in the field with the on-the-ground work there. Many legal assistants also participate in review of disclosure, applying their legal knowledge to these factually oriented materials. As with a case manager, the specific tasks assigned to a legal assistant are varied and depend on the case.
44. Defence investigators are employed by many defence teams in order to gather and analyse evidence, intelligence reports and information on witnesses. This includes interviewing witnesses and taking official witness statements. The investigators work in close cooperation with other team members, however it is usually more advantageous if they are actually based in the region during their investigations both to save resources and to become well acquainted with the area.
45. Team members from the region who speak one of the working languages of the Tribunal and can also speak the accused's language are invaluable in assisting with the adequate and proper preparation and presentation of the Defence case pre-trial and at trial. As the team works together over time, all team members, whatever their legal background, will learn a combination of the skills required in civil and common law systems. Each Defence team usually also enlists a number of highly qualified interns to alleviate some of the workload from the defence team and given the very limited resources available to many Defence team. These interns are considered a vital part of most defence teams.

C. Defence Counsel and OLAD

46. The Registry's Office for Legal Aid and Detention Matters (OLAD) determines whether an accused is indigent, administers payment to the accused's Defence team and has financial investigators to ensure that the legal aid system functions effectively. The Registry works to ensure that it provides financial support to those accused who need it. OLAD is also the key mediator between Defence counsel and other sections of the ICTY. The office is the first point of contact for most Defence counsel upon arrival at the ICTY and is responsible for ensuring that Defence counsel are provided with help and assistance with issues such as resources, translators and assignment of defence staff.

C.1 Legal Aid

47. Accused persons who cannot afford to fund counsel are entitled to assigned counsel, paid for by the ICTY. If the accused has means to partially remunerate counsel, the ICTY will only cover that portion of the costs of the defence which the accused cannot bear.
48. The amount the Registry pays to a Defence team depends principally on the phase of the accused's case (whether it is in pre-trial, trial or appeal), and how complicated the case is. In determining the difficulty of a case, the Registry takes into account a number of factors, including:
 - ◆ the accused's position within the political or military hierarchy;
 - ◆ the number and nature of counts in the indictment;
 - ◆ the number and type of witnesses and documents involved;

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- ◆ whether the case involves crimes committed in a number of municipalities; and,
 - ◆ the complexity of legal and factual arguments involved in the case.
49. Payment to the accused's Defence team covers all aspects of preparing and presenting the Defence case, including reviewing the indictment, the supporting materials and all other documents provided by the Prosecution or gathered through Defence investigation, filing motions, interviewing witnesses, research and presenting the case at trial and on appeal.
50. The Legal Aid Policies⁸¹⁸ delineate the rules governing the payment of Defence teams. The creation of these policies involved negotiations between members of the Registry and representatives from the ADC-ICTY. Sufficient remuneration for Defence teams has always been a difficult and contentious issue at the ICTY. Initially counsel were remunerated on an hourly basis; a practice which was not considered sufficient compared with domestic practice. The current legal aid policies incorporate a “lump sum” payment method where payment is given, in a lump sum, for each separate phase of the proceedings. The aim of the lump sum system was to distinguish between the levels of difficulty of various cases by providing a larger amount of funding for the more complex cases. It removed the detailed hourly invoices which were previously required of Defence counsel and replaced that process with requiring an end of stage report, for each pre-trial and trial stage, describing in detail the work performed during the stage in question and attaching hourly time sheets from each team member.
51. Despite best efforts to streamline the payment system, Defence counsel still encounter problems with obtaining sufficient, timely remuneration for their Defence teams: This is a problem which, in the more extreme cases when money is not forthcoming during a critical stage of the proceedings, (for example, when final trial briefs must be prepared), it may directly and detrimentally impact on the accused right to equality of arms.

C.2 Decision on Indigency

52. All accused who claim to be indigent must provide the ICTY with information about their financial assets as well as those of the members of their household. An accused who claims indigence has a legal duty to update his declaration of means at any time a change relevant to his financial status occurs.
53. OLAD determines whether an accused is indigent and will administer payment to the accused's defence team and employ financial investigators to ensure that the legal aid system functions effectively.
54. The Registrar shall determine to what extent an accused can remunerate his counsel and Defence related expenses, by taking various assets into consideration, such as:
- ◆ direct income;
 - ◆ bank accounts;
 - ◆ real or personal property;
 - ◆ pensions;
 - ◆ stocks bonds; and,
 - ◆ other assets held.⁸¹⁹

818 Defence Counsel - Pre-Trial Legal Aid Policy, 1 May 2006; and Defence Counsel - Trial Legal Aid Policy - 1 November 2009, available at: <http://www.icty.org/sid/169#olad>.

819 See Article 10(A), Directive on Assignment of Defence Counsel, 2006.

55. The Registrar also has the right to take into account “the means of the spouse of a suspect or accused, as well as of those persons with whom he habitually resides”.⁸²⁰ Chambers have commented on how far the scope of Article 10(A) of the Directive on Assignment of Defence Counsel extends generally and in the case of *Zoran Žigić*, the Appeals Chamber noted that this article permits “the Registrar to take into account the means of those with whom an Accused habitually resided before entering detention and/or those with whom he would be residing if he were not in detention”.⁸²¹ In the same case, the Appeals Chamber found that when assessing the means of an accused, the Registrar may “take into account the value of assets in the hands of other persons [sic] where those assets have been purchased with means which the accused has freely disposed of”.⁸²² In *Krajišnik*, the Trial Chamber noted that not all assets of members of the household should be taken into account, especially if they are not a close family member to the accused.⁸²³
56. Chambers have also commented on how far the scope of Article 10(A) extends in relation to the means of specific individuals.
57. With regard to the parents of the accused, it is stated that if the parent was receiving income from property (partly) owned by the accused or if the accused had transferred means to his parents in order to conceal the extent of his own means, the parents must contribute to the Defence or to their child.⁸²⁴ Concerning the pension of an accused’s parents, it was stated in *Šainović*, that if the pension is insufficient to meet the parents’ own needs, account shall not be taken of that pension.⁸²⁵
58. The Trial Chamber in *Šainović* held that account may be taken of the a spouse’s income, unless the accused satisfies the Registrar that the income does not constitute means in respect of which the accused has direct or indirect enjoyment or of which he freely disposes.⁸²⁶ Concerning shares in a company or immovable objects, the Trial and Appeals Chambers in *Žigić* and *Martić* found that they were relevant to the assessment of the accused’s means.⁸²⁷ If a child forms part of the accused’s household, it is not unreasonable to take the child’s assets into account.⁸²⁸
59. If the Registry finds that the accused is able to pay part of his defence costs, it will indicate which costs should be covered by the accused and which ones by the ICTY. The Registry should ensure that the accused’s defence does not exhaust his household’s financial means and result in his dependants losing support.

C.3 Choice of Defence Counsel

60. All persons indicted by and appearing before the ICTY have the right to be represented by counsel. If an accused wishes to be represented by counsel, he can either choose his own or be assigned counsel by the

820 *Ibid.*

821 *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid From Zoran Žigić, 7 February 2003, para. 16.

822 *Ibid.*, para. 47.

823 *Prosecutor v. Krajišnik*, IT-00-39-PT, Decision on the Defence’s Motion for an Order Setting Aside the Registrar’s Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20 January 2004, para. 22.

824 *Ibid.*, para. 22.

825 *Prosecutor v. Šainović*, IT-05-87PT, Decision on Defence for Review of Registrar’s Decision, 19 February 2003, page 4.

826 *Ibid.*

827 *Prosecutor v. Kvočka et al.*, IT-98-30PT, Decision on Review of Registrar’s Decision to Withdraw Legal Aid From Zoran Žigić, 7 February 2003, para. 47; and *Prosecutor v. Martić*, IT-95-11PT, Decision on the Appeal of the Defence Against Registry Decision, 25 September 2002, 3 December 2002, page 2.

828 *Prosecutor v. Krajišnik*, IT-00-39-PT, Decision on the Defence’s Motion for an Order Setting Aside the Registrar’s Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20 January 2004, para. 23.

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Registrar. If the accused is funding his own defence he is permitted to choose any counsel.⁸²⁹ If the accused’s defence will be funded through the legal aid policy he can choose counsel who are qualified and admitted to the Rule 45 list of counsel or the Registrar can assign counsel if it is in the interests of justice. In the *Blagojević et al.* case the Trial Chamber ruled that the “right to free legal assistance of counsel does not confer the right to counsel of one’s own choosing. The right to counsel applies only to those Accused who can financially bear the costs of counsel”.⁸³⁰ Article 21(4)(d) of the ICTY Statute also states that the right to assigned counsel is not specifically a right to counsel of the accused’s own choosing.⁸³¹ Thus, there is no absolute right for an accused to choose his assigned counsel. It is within the Registrar’s discretion to determine whether there are relevant and sufficient grounds to allow or override the wishes of an accused in the interest of justice.⁸³² The Registrar does not have to be bound by the wishes of an indigent accused but will, as a matter of practice give significant consideration to the accused’s choice.⁸³³

61. Although this decision is primarily the decision of the Registrar, a Trial Chamber can review this decision due to its inherent power to ensure that the accused have a fair and expeditious trial.⁸³⁴

C.4 Withdrawal of Counsel

62. In *Mucić et al.*, the Trial Chamber stated that an accused should only be allowed to seek withdrawal of his assigned counsel if he can establish good cause. The burden of proof to establish good cause lies with the person requesting the withdrawal of counsel.⁸³⁵ The Trial Chamber must examine these reasons and be satisfied that they are genuine and not frivolous.⁸³⁶ In the *Blagojević et al.* case, the Trial Chamber held that grounds for genuine and good reasons include, but are not limited to:

- ◆ fulfilment of professional obligations and responsibilities;
- ◆ satisfaction of qualification requirements pursuant to the rules of the Tribunal;
- ◆ the existence of a conflict of interest;
- ◆ engagement in any form of misconduct; and,
- ◆ performing responsibilities with diligence, competence and loyalty towards the client.⁸³⁷

63. A lack of trust in counsel is not automatically good cause to withdraw counsel.⁸³⁸ Moreover, an accused’s refusal to cooperate with his counsel is insufficient grounds for a withdrawal of counsel.⁸³⁹
64. With regard to the accused’s right to an expeditious trial, only the most exceptional motions for withdrawal of counsel will be granted, especially if it is requested immediately before or during the trial.

829 Article 21, ICTY Statute provides the right for counsel of the accused’s choosing.

830 *Prosecutor v. Blagojević et al.*, IT-02-60-PT, Decision on Oral Motion to Replace Co-Counsel, 9 December 2002, para. 61.

831 *Prosecutor v. Mucić et al.*, IT-96-21-T, Decision on request by Accused Mucić for Assignment of New Counsel, 24 June 1996, para 2.

832 *Prosecutor v. Blagojević et al.*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s motion to instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 117.

833 *Ibid.*, para. 62.

834 *See Prosecutor v. Mejakić et al.*, IT-02-65-T, Decision on Accused’s Request for a Review of the Registrar’s Decision as to Assignment of Counsel, 6 September 2002.

835 *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s motion to instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 116.

836 *Prosecutor v. Mucić et al.*, IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, 24 June 1996, para. 3.

837 *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Decision on Independent Counsel for Vidoje Blagojević’s Motion to Instruct the Registrar to Appoint New Lead and Co-Counsel, 3 July 2003, para. 116.

838 *Ibid.*, para. 120.

839 *See Prosecutor v. Slobodan Milošević*, IT-02-54, Decision Affirming the Registrar’s Denial of Assigned Counsel’s Application to Withdraw, 7 December 2004.

65. Article 20(A)(ii) of the Directive on Assignment of Counsel states that “where a request for withdrawal of counsel, made pursuant to paragraph A, has been denied the person making the request may seek the President’s review of the decision of the Registrar within two weeks from the notification of the decision to him”.⁸⁴⁰ This article provides that it is for the President to review a refusal to withdraw counsel.
66. Pursuant to Article 9(B) of the Code of Conduct for Counsel Practising Before the ICTY, counsel may request withdrawal if such termination could be accomplished without material adverse effect on the interests of the client. Counsel can also request withdrawal when it will have a material adverse effect on the interests of his client, if a good cause for withdrawal exists and if it is “in the interest of justice”.⁸⁴¹ In general counsel will not be permitted to actually withdraw until new counsel has been assigned to the accused. When that occurs counsel has the ethical obligation to immediately transfer all disclosure, records and other matters relevant to his client’s case to the newly assigned counsel.

D. Functional Immunity

67. According to the Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters of the ICTY, only the judges, the Prosecutor and the Registrar shall enjoy personal inviolability, immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention and inviolability of all papers and documents.⁸⁴² The Defence is neither included in this provision, nor in the provisions of Articles 30(1), 30(2) and 30(3) of the ICTY Statute, but is solely protected under Article 30(4), which states: “Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal”.⁸⁴³
68. However, in February 2011, the Appeals Chamber proclaimed a landmark decision in the *Gotovina et al.* case, ruling that Defence counsel and their teams enjoy functional immunity from investigations and prosecution regarding matters arising from and related to their representation of accused before the ICTY. This marks a milestone in the history of Defence teams working at the ICTY.⁸⁴⁴
69. This ruling arose because in 2008, the Trial Chamber ordered Croatia to intensify its search for Operation Storm documents, leading to the Defence’s requests for temporary and permanent restraining orders against the Croatian authorities, pursuant to Rule 73 of the ICTY RPE. The Defence team requested that Croatia cease all criminal investigations and prosecutions against current and former members of the *Gotovina* Defence.
70. The Trial Chamber denied the request for restraining orders against Croatia and found that while Defence investigators should benefit from protection under Article 30(4) of the Statute, this article did not provide for personal or functional immunity for other members of the Defence team, as it did not refer to the Vienna Convention on Diplomatic Relations or to the Convention on privileges and immunities of the United Nations.⁸⁴⁵

840 See Article 20 (A) (ii), Directive on Assignment of Defence Counsel.

841 *Prosecutor v. Milutinović et al.*, IT-99-37-PT, Decision of the Registrar withdrawing Mr. Livingston as lead counsel for Milutinović, 9 September 2003.

842 See Article XIV, Agreement Between the United Nations and the Kingdom of the Netherlands Concerning the Headquarters 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. S/1994/848), UN Secretary-General, 14 July 1994.

843 See Article 30(4), ICTY Statute.

844 See *Prosecutor v. Gotovina et al.*, IT-06-90-AR73.5, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia - ICTY, 14 February 2011, para. 71.

845 *Ibid.*, para. 19.

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The Trial Chamber recalled that treatment of members of the Defence has not been defined by a resolution of the Security Council, a multilateral treaty or a bilateral agreement with Croatia. Moreover, the Trial Chamber took into consideration an opinion by Larry Johnson, Assistant Secretary-General for the Office of Legal Affairs of the United Nations, which addressed Defence investigator immunity at the ICTR and found that Johnson’s Legal Opinion did not conclude that members of the Defence enjoyed functional immunity under Article 29(4) of the ICTR Statute, mirroring Article 30(4) of the ICTY Statute.⁸⁴⁶

71. Gotovina argued six grounds of appeal and the Appeals Chamber found that, under Article 30(4) of the ICTY Statute, members of the *Gotovina* Defence, including investigators, were entitled to functional immunity to allow them to independently exercise their official functions and assist the accused with his defence. The Appeals Chamber noted that Prosecution investigators are given functional immunity for their actions in fulfilment of their official functions before the ICTY under Articles 30(1) and 30(3) and therefore the Defence should be afforded the same right.⁸⁴⁷
72. At the ICTR, functional immunity for Defence teams is still a highly debated and controversial issue. Peter Erlinder, Defence counsel for Aloys Ntabakuze, was arrested in May 2010 in Kigali, under Rwanda’s “genocide ideology” laws and accused of negating and denying genocide during his closing arguments in *Ntabakuze*’s case. Erlinder’s arrest raised issues of the accused’s right to counsel and of the independence of counsel practising before the ICTR; in particular counsel’s ability to present proper legal and factual arguments on behalf of the accused.⁸⁴⁸
73. The Appeals Chamber found that Defence counsel possess immunity from personal arrest or detention while performing their duties as counsel and also regarding written or spoken words and acts done by them in the course of the performance of their duties before the Tribunal.⁸⁴⁹ The Appeals Chamber decided that the proceedings against Erlinder on the basis of words spoken or written in the course of *Ntabakuze*’s closing arguments before the ICTR directly violated his functional immunity and interfered with the proper functioning of the Tribunal.⁸⁵⁰
74. In contrast to the ICTY and ICTR provisions relating to privileges and immunities of Defence counsel, the International Criminal Court Agreement on the Privileges and Immunities, authorises Defence counsel and assisting staff to conduct their own investigations without running the risk of arrest for doing so.⁸⁵¹
75. These events reflect that although the ICC’s Agreement on the Privileges and Immunities grants functional immunity to Defence counsel practising before the ICC, this principle is still not universally recognised at all international tribunals, which may impede a safe working environment, independence for Defence and the efficient functioning of the trial court process itself.

846 *Ibid.*, para. 20.

847 *Ibid.*, para. 34.

848 See *Théoneste Bagosora, Aloys Ntabakuze, Anatole Nsengiyumva v. Prosecutor*, ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder - ICTR, 6 October 2010, para. 18.

849 *Ibid.*, para. 26.

850 *Ibid.*, para. 29.

851 See Article XIX Agreement Between the United Nations and the Kingdom of the Netherlands concerning the Headquarters 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. S/1994/848), UN Secretary-General, 14 July 1994; Article XIX Agreement between the United Nations and the United Republic of Tanzania concerning the headquarters of the International Tribunal for Rwanda, Annex to ICTR First Annual Report (UN Doc. A/51/399-S/1996/778), 24 September 1996; Article 18 Agreement on the Privileges and Immunities of the International Criminal Court (ICC-ASP/1/3), 9 September 2002.

Conclusion

76. Defending cases involving international crimes presents numerous challenges both practically and procedurally. Since the establishment of the ICTY, measures have been implemented which have alleviated some of these challenges. Despite this progress there are still many obstacles which Defence counsel face. The creation of the ADC-ICTY has assisted Defence counsel at the ICTY in managing some of these institutional challenges, but has not yet resolved many ongoing issues, such as the adequacy of Defence team funding and the lack of consistent training for Defence counsel
77. The ADC-ICTY is in the unique position of being the only bar association officially recognised by an international court or tribunal in which membership is compulsory for lawyers practising before the ICTY. In comparison, the Association Des Avocats de la Defense (ADAD)⁸⁵², created by lawyers practising at the ICTR, is a voluntary bar association; membership is not required under the ICTR Rules. The ICC has an Office of Public Counsel for the Defence (OPCD), which is not a Defence bar association but is part of the Registry section of the court. The most recent development regarding the Defence in the international courts is the creation of the Defence Office at the Special Tribunal for Lebanon. This is the first Defence Office to be established as an organ of an *ad hoc* Tribunal. Whether this new development reflects an improvement for the position of Defence and a recognition of the importance of the Defence function is not yet known as the STL is new and has not yet conducted a trial. Ideally, a Defence office would have the means and resources to assist all Defence teams with administrative tasks and work in collaboration with defence teams for the benefit of the accused.
78. The experience of Defence counsel at the ICTY illustrates the requirement that Defence teams have access to adequate resources and facilities to properly represent their clients and the opportunity to meaningfully participate in the day-to-day functions of the courts which directly impact on the Defence function. Although significant progress has been made since the opening of the international courts there is still much room for improvement which must occur to ensure that trial proceedings are both fair and seen to be fair, and that the rights of the accused are adequately protected.

852 See <http://www.adadict.org>.

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1. Since the establishment of the ICTY in 1993, the international community has become actively involved in the prosecution and adjudication of international crimes cases, both at the international and national level. Especially in countries under the jurisdiction of the international tribunals, we have seen a general shift towards a mixed system of criminal justice, one that is between inquisitorial and accusatorial. This has resulted in an increasing recognition of the role of the Defence in ensuring that the rights of persons accused of such grave crimes are respected, in compliance with international treaties and conventions. Additionally, it has often been pointed out that these trials are extremely important reconciliation instruments in war stricken regions. However, in order for trials to be effective tools for reconciliation, it is critical for defendants' home communities to feel adequately represented with access to the best possible defence.*
2. The increasing recognition of the role of the defence counsel is reflected in current tendencies towards support systems for the counsel in international criminal cases. These formally recognized institutions are either integral to court systems⁸⁵³ or independent⁸⁵⁴ of them.
3. The aim of this Chapter is to introduce the reader to the benefits of having institutionalized Defence support organizations in international crimes cases, with a particular emphasis on the trials held before national jurisdictions of the countries of the former Yugoslavia. Recommendations and good practices described in this Chapter are not, however, limited to the countries of the former Yugoslavia, or for that matter, to trials dealing with international crimes. Although most of the Chapter will deal with issues related to trials involving international crimes, these guidelines can be adapted to Defence support organizations in general. In regards to capacity building, in most instances Defence often remains overlooked by policy makers. Accordingly, all of the practices introduced in this Manual are applicable to other cases as well, and should be not be seen as exclusively within the spectrum of trials involving international crimes.
4. Of all the Yugoslav successor states, only Bosnia and Herzegovina (BiH) has established an organization providing support for defence counsel: the Criminal Defence Section (known by its local acronym as OKO). The first part of this Chapter briefly describes the national judiciaries and the legislative reforms that have been undertaken in the various jurisdiction of the former Yugoslavia. Then, the establishment and functioning of the Criminal Defence Section of the Sector for Judicial Bodies of the Ministry of Justice of Bosnia and

* This chapter was authored by Nina Kisić, Legal Advisor to Criminal Defence Section of the Ministry of Justice of Bosnia and Herzegovina. Ms Kisić would like to thank Aida Trožić, Senior Professional Associate, CEST FBiH.

853 Extraordinary Chambers in the Courts of Cambodia - Defence Support Section (<http://www.eccc.gov.kh/en/dss/defence-support-section-dss>); International Criminal Court - The Office of Public Counsel for the Defence (<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Defence/Office+of+Public+Counsel+for+the+Defence/>), Special Tribunal for Lebanon - Defence Office (<http://www.stl-tsl.org/sid/28>).

854 Association of Defence Counsel practising before the International Criminal Tribunal for the former Yugoslavia (<http://adc-icty.org/>). For more details on the Association of Defence Counsel practising before the International Criminal Tribunal for the former Yugoslavia, see Chapter X.

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Herzegovina is discussed. In presenting this institution, this Chapter refers to the challenges that are faced by defence counsel in the region of the former Yugoslavia.

A. The National Judiciaries of the Former Yugoslavia: Overview

5. In order to fully appreciate the need to offer support to defence counsel in the region of the former Yugoslavia, it is necessary to take into account the unique situation in which the domestic judiciaries find themselves. As described below, these countries are undertaking strong legislative reforms that move them from a fully inquisitorial towards a more adversarial system. Furthermore, the former Yugoslavian countries will have to cope with an outstanding number of cases to be processed. It is expected that the BiH judiciary will have to prosecute and adjudicate the majority of the international crimes cases that remain to be processed in the region. Serbia, Kosovo and Croatia will have a significant case load of war crimes cases as well, while it is envisaged that Montenegro and Macedonia will have to deal with a somewhat smaller case load. However, one must bear in mind that some cases are being and will be tried by judiciaries of countries outside the region of the former Yugoslavia.
6. With the highest number of international crimes cases, BiH faces a particularly onerous task of providing effective and quality defence in processing its cases. Similar to its regional counterparts, the BiH justice system has cases that range from those in which perpetrators are identified, to those wherein only a criminal offence against and unknown assailant exists. Although there were some attempts in the past of elaborating a state centralized approach to these cases, they appeared inappropriate because of the volume and complexity of cases to be processed. In order to manage this situation, the Council of Ministers adopted, the National Strategy for Processing of War Crimes Cases⁸⁵⁵ in 2008. The Strategy provides mechanisms and criteria for dealing with the high number of cases the country is facing, a large part of which involve complex factual and legal issues. In particular, a system of transferring cases of minor complexity from the Court of BiH (the State level judicial body) to lower level courts was established. Similarly, the Court of BiH can also order the lower level courts to refer a case to the state level if the case is highly complex. One notable restriction within the OKO's capacities is that it is only authorized to provide support to defence counsel that appears before the Court of BiH.⁸⁵⁶
7. From 2003 to 2009, the War Crimes Chamber of the Belgrade District Court had jurisdiction to adjudicate crimes against humanity and violations of international law as set out in the Serbian Penal Code, as well as serious violations of international humanitarian law that occurred on the territories of the former Republic of Yugoslavia since 1 January 1991. Following judicial reform in 2010, it continued its existence as the War Crimes Department of the Belgrade Higher Court. So far, the Office of the War Crimes Prosecutor has processed 383 individuals and indicted 134 individuals.⁸⁵⁷
8. Most war crime cases in the region of former Yugoslavia were processed in Croatia: in the period between 1991 and 2010 a total of 3,655 individuals were processed. There were 1,878 indictments, 563 convictions and

855 English version of the National War Crimes Strategy can be found at the following hyperlink: http://www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf. B/C/S version of the National War Crimes Strategy can be found at the following link: <http://www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategije%20za%20rad%20na%20predmetima%20RZ.pdf>.

856 On 3 July 2002 the Parliament of BiH adopted the Law on the Court of BiH, promulgated on 12 November 2000 by the High Representative in BiH. The Court was formally established by the Decision of the High Representative, dated 8 May 2002, which is when the first seven judges of the Court were appointed.

857 As of April 16, 2011: http://www.tuzilastvorz.org.rs/html_trz/index.html.

719 acquittals, or changes in legal qualification.⁸⁵⁸ In 2003, new chambers specialized in highly complex cases were established within the County Courts of Osijek, Rijeka, Split and Zagreb. They exercise a non-exclusive jurisdiction over war crimes, crimes against humanity, and genocide.

9. In Kosovo,⁸⁵⁹ criminal investigations related to international crimes are to be undertaken by the Special Prosecution Office of Kosovo and in particular by its War Crimes Unit. On the other hand, no special court for war crimes, crimes against humanity, and genocide has been established, rather the national law dictates that district courts have the jurisdiction to preside over such cases. Cases falling under the competence of the War Crimes Unit of the Special Prosecution of Kosovo are adjudicated by mixed panels composed of both local and EULEX judges. Appeals from the district court are heard before the Supreme Court of Kosovo.
10. In Montenegro, international crimes cases are assigned to the Department for Prevention of Organized Crime, Terrorism and War Crimes. As of December 2010, there were investigations against 23 individuals for war crimes and indictments against 7 individuals for crimes against humanity.⁸⁶⁰
11. As described, most countries of the region have to process high numbers of cases involving international crimes while undergoing the most significant change to the procedural legal system in recent history.

A.1 The Legislative Reforms in the Region

12. Until the disintegration of the Socialist Federal Republic of Yugoslavia⁸⁶¹ (SFRY) in 1991, the criminal justice systems of the various Republics were founded on the continental civil law tradition.⁸⁶²
13. After the independence of the various Republics that were part of the SFRY, a shift towards a mixed inquisitorial-adversarial system can be identified as a general trend.
14. In BiH a new Criminal Procedure Code was enacted in 2003⁸⁶³. While in Serbia, the new Criminal Procedure Code is in the midst of discussions for finalisation and implementation. In Croatia, the structure of the criminal justice system was reformed via a new Criminal Procedure Code, which has gradually been enforced (with some provisions having been applied in the summer of 2009, while others are anticipated for September 2011). On 6 July 2003 in Kosovo, UNMIK⁸⁶⁴ promulgated a new legislation for the courts including the Provisional Criminal Code of Kosovo⁸⁶⁵ and the Provisional Criminal Procedure Code of Kosovo. The new codes have transformed the criminal justice system by introducing elements typical of the adversarial tradition.⁸⁶⁶ On 1 June 2010 the Assembly of EULEX Judges approved the Agreement on the organization of the public main

858 According to the Report of the Prosecutors office of Croatia, Davorka Radalj, <http://www.dorh.hr/PostupanjeUPredmetimaRatnih>

859 All references to Kosovo refer to Kosovo under UNSC Resolution 1244/1999. All references to Kosovo institutions refer to the Provisional Institutions of Self Government.

860 <http://www.tuzilastvocg.co.me/lzvjestaj%20za%202010.%20godinu.pdf>.

861 The Socialist Federal Republic of Yugoslavia was a federal state consisting of six republics, Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Montenegro and Serbia (two autonomous provinces, Vojvodina and Kosovo).

862 Main characteristic of the civil law system is that precedents rarely apply (mostly as guidance and never as a rule) and most legal issues are covered by codes.

863 Criminal Procedure Code of Bosnia and Herzegovina, (entered into force on March 1, 2003) Official Gazette of Bosnia and Herzegovina No. 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09; B/C/S version can found at the following link: http://www.tuzilastvobih.gov.ba/files/docs/Zakon_o_kvivicnom_postupku_BiH_-_preciscena,_nezvanicna_verzija_najnovije.pdf, ENG version can found at the following hyperlink: http://www.tuzilastvobih.gov.ba/files/docs/Criminal_Procedure_Code_of_BH_-_consolidated_version_dec2009.pdf.

864 UNMIK is United Nations Interim Administration Mission in Kosovo, established by UN Security Council Resolution 1244 on June 10th, 1999. UNMIKs main mandate is to act as the transitional administration for the region.

865 UNMIK Reg. No. 2003/25, on the Provisional Criminal Code and the Provisional Criminal Procedure Code for Kosovo.

866 <http://www.tuzilastvocg.co.me/tuzilacka%20organizacija/organizacija.htm>.

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trials in criminal cases.⁸⁶⁷ In Montenegro, since 26 August 2010, in accordance with a new Criminal Procedure Code, international crimes are now investigated by a Prosecutor (as in most countries in the region).

15. The reforms chronicled above have influenced the presentation of evidence in court proceedings, in a manner that appears as follows:
- 1) prosecution's evidence;
 - 2) defence's evidence;
 - 3) prosecution's rebuttal;
 - 4) defence's rejoinder;
 - 5) evidence ordered by the judge or panel; and,
 - 6) all relevant information for sentencing if the defendant is found guilty.⁸⁶⁸
16. Furthermore these changes in the procedural systems have prompted a new development of the role of judges. They are now perceived to operate in a manner more representative of the common law system, or more similar to that of the ICTY.

B. Establishment of OKO and Transition

17. The Criminal Defence Section (OKO) and its relevant procedural rules were proposed by the Registry of the Court of BiH⁸⁶⁹ and adopted by the Court of BiH on 30 June 2005.⁸⁷⁰ It was established pursuant to the Additional Rules of Procedure for Defence Advocates appearing before Section I and Section II of the Criminal Division and Section I and Section II of the Appellate Division of the Court of BiH (hereinafter referred to as "Additional Rules").⁸⁷¹
18. The director of OKO was appointed by the Registrar, in consultations with the President of the Court. The first two Directors of OKO were international lawyers, and every Defence support team originally had international fellows as members. Nowadays, OKO is composed only by national staff (except for international consultants hired occasionally and temporarily by OKO for the purposes of training).
19. On the 1 June 2009, OKO underwent a change of authority from the Registry of the Court of BiH to the Ministry of Justice of BiH. Staffed with five counsel, two administrative staff, and a director, OKO has

867 <http://www.eulex-kosovo.eu/docs/justice/agreements/Agreement%20scanned%20in%20three%20languages.pdf> (This agreement was adopted by the President of the Assembly of EULEX Judges, Chief EULEX Prosecutor and the President of the Kosovo Chamber of Advocates on June 24, 2010. This agreement provides for preparation of the main trial (preliminary conference, prevention of the Adjournment of Sessions, the Unrestricted Access to case Files, Priority of Cases, Guarantee to Communicate with the Accused), court in session (timely presence in the court, unjustified delays, prevention of delays, impermissible conduct in the session, special rules for conduct in the session, delegation of legal substitutes, requests for extension of time for sufficient preparation, measures for resolution of conflicts).

868 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, at Article 261(2)(a)-(f); Criminal Procedure Code of Croatia (NN 152/08, 76/09, at Article 419 (2) 1-6; Criminal Procedure Code of Serbia, "Sl. list SRJ", br. 70/2001 i 68/2002 i "Sl. glasnik RS", br. 58/2004, 85/2005, 115/2005, 85/2005 - dr. zakon, 49/2007, 20/2009 - dr. zakon, 72/2009 i 76/2010, at Article 328; Kosovo Criminal Procedure Code, Službene novine, Zakon br.03/L-003, 2003/26, Article 165.

869 Registry for Section I for War Crimes and Section II for organized crime, economic crime and corruption of the Criminal and Appellate Divisions of the Court of BiH.

870 At the plenary session, in accordance with article 12 para. 5 of the Law on Court, pursuant to article 22 (2) (b) of the Law on Court.

871 Initially part of the Registry of the Court of BiH, OKO's personnel was employed by the Registry.

effectively fallen under the tutelage of the Ministry's Sector for Judicial Bodies. At the moment, OKO is governed by the Rules of the Court of Bosnia and Herzegovina, as amended in 2011.

B.1 Legal Advice

20. The primary role that a Defence support institution can and should play in complex crimes cases is to provide legal advice to Defence counsel. This is one of the major tasks of OKO legal advisers, who are lawyers with previous experience in international criminal law. The OKO legal advisers are divided into several Defence support teams. The current organization of OKO's Defence support teams is geographically oriented.⁸⁷²
21. Geographical division of the areas of the country, allows the counsel of OKO to develop an understanding of the factual issues related to a specific territory (e.g. military and paramilitary formations present in that area, existence of detention camps, military and political structures of power, etc.), a detailed knowledge of the evidence that is relied upon, and an ability to advise defence counsel on the likely issues in each new case in that particular geographical area. Another option on how to internally organize Defence support institutions would be to divide the work among the Defence support teams according to the legal issue involved, so that every Defence support team would develop expertise in specific areas of international criminal law (camp cases/JCE II, crimes against humanity, genocide, and command responsibility). A third option is to have defence support teams that focus on certain stages of proceedings (custody, main trial/collection of evidence, appeals), and provide support to all cases in that stage. All of these approaches have pros and cons, and it is arguable that the best approach is geographical division, or a mix of the three possibilities.
22. An institutionally sound structure of Defence support teams is critical to levelling the playing field between the Defence and Prosecution in international crimes cases. Ultimately the goal should be to match the international expertise that is made accessible to the Prosecutor's Office of BiH and the ICTY Office of the Prosecutor.
23. OKO supports the processing of cases through a variety of means. It provides assistance to defence counsel appearing before the Court of BiH by contributing quality research on international courts jurisprudence, coordination with national, regional and international bodies (such as the ICTY) in order to obtain and certify evidence. In addition, OKO provides direct assistance and advice to defence counsel at trials.
24. Legal cooperation between OKO and defence counsel, in specific criminal cases, has to be in accordance with the following:
 - 1) defence counsel signs a Power of Attorney to OKO; and,
 - 2) OKO files this Power of Attorney with the Court of BiH.
25. On the basis of the Power of Attorney, OKO should receive all case-related materials under the same provisions as the defence counsel presiding over cases of the accused. Ergo, impediments to direct access to case-files is one of the most important issues to be resolved for any Defence support office, as they have proven to be a barrier to effective consultations.

872 OKO's organization reflects the internal organization of the BiH Prosecutors office.

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26. Additionally, OKO plays an important role⁸⁷³ with regard to the application of the Law on Transfer of Cases,⁸⁷⁴ since according to this law, varying types⁸⁷⁵ of documentary and material evidence that are collected by and/or tendered before the ICTY in accordance with its Rules of Procedure and Evidence, can be proffered in cases before the Court of BiH.⁸⁷⁶ This practice could be detrimental not only to the accused in question, but also to the overall fairness of the trials.⁸⁷⁷ The ICTY Rules of Procedure and Evidence differ significantly from the BiH Criminal Procedure Code,⁸⁷⁸ to the extent to which certain evidence tendered before the ICTY may not necessarily be admitted before BiH courts. Moreover, the procedural system of BiH stipulates that decisions taken at the Trial stage have no legal remedy,⁸⁷⁹ until the final judgement is appealed. Ultimately, the non existence of interlocutory appeals at the national level renders the whole trial dubious for two reasons: fairness of the proceedings⁸⁸⁰ and expediency of the proceedings⁸⁸¹
27. Furthermore, many mid and high level witnesses, as well as victim/witnesses testified at the ICTY. The transcripts of testimonies provided to the ICTY can serve as potential evidence to be brought before the Court of BiH in accordance with Article 5 of the Law on Transfer.⁸⁸² OKO staffs have access to the ICTY's collection of documents through Court Archive⁸⁸³ and EDS⁸⁸⁴. In assisting the counsel, the organization conducts research through all available databases either through a comprehensive inquiry of all terms related to a particular case, or by investigating documents that are specified by the defence counsel in question. Other documentation analysis is conducted through the close examination of every new case, with searches being performed using the name of the suspect, incident, victim(s) and witnesses. This investigative role is extremely important, because although disclosure rules in the Criminal Procedure Codes of all countries

873 OKO provides assistance to defence counsel by searching ICTY databases in order to identify evidence that can be tendered in accordance with Law on Transfer, and in addition acts as a liaison between ICTY and defence counsel before the Court of BiH when it comes to electronic certification of this evidence.

874 Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the use of evidence collected by ICTY in proceedings before the courts in BiH, Official Gazette of Bosnia and Herzegovina No. 61/04, 46/06, 53/06, 76/06.

875 There is documentary evidence which shows a historical record of what was said, done, ordered and reported at the time: diaries, journals and books, military reports, situation reports ("sitreps"), dispatches, minutes of government sessions, command and control documents, international reports, photographs and videos, intercepts and open sources. Other forms of evidence include computer equipment, clothing, ballistic and trace metals and firearms, found at crime scenes and at other locations.

876 Also, before the other courts in Bosnia and Herzegovina that are to hear war crimes cases-note that the provisions of Law on Transfer read "courts in Bosnia and Herzegovina", rather than Court of Bosnia and Herzegovina.

877 Fairness of trial is fundamental in any country, even more so in war crime cases in post conflict societies, where war crime trial do not only have a goal of punishing the perpetrators, but are also set to bring reconciliation to the communities.

878 For example: under ICTY RPE Rule 90 (E) witness may be compelled by the Trial Chamber to make a statement that might incriminate him, while under the Code of criminal procedure of Bosnia and Herzegovina this is strictly forbidden; other example would be intercept evidence-there were instances at the ICTY when those went into evidence, although they were obtained illegally (*Haraqija* and *Morina* case, Trial Chamber Judgement, par. 14, and *Haraqija* and *Morina* case, Appeals Chamber Judgement, par. 28); such evidence could not go into evidence before courts in BiH, as that would be opposed to ECHR.

879 Contrary to the Rule 73 (B) ICTY RPE which foresees the possibility of interlocutory appeals on interlocutory appeals at the ICTY are appeals brought during the pre-trial or trial phase against the trial chambers' decisions, as opposed to appeals from trial judgements.

880 Appealing decisions adopted under Law on Transfer only in an appeal on a judgement is lodged too late. Adjudicated facts decisions, or decisions on acceptance of transcripts of a testimony of certain witnesses significantly shape defence strategy in a case.

881 Appeals Chamber should be able to make decisions, or to revoke certain decisions of trial chambers, as part of expedient trial rules. It is possible that the whole judgement would have to be revoked and the case retried before Appeals Chamber just because of one procedural decision that was based on Law on Transfer had to be revoked.

882 Article 5, Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the use of evidence collected by ICTY in proceedings before the courts in BiH : *Evidence provided to ICTY by witnesses (1) Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue.*

883 Easily accessible on the internet, and they provide access to all public court records.

884 Not available to the defence in the countries of the region at the moment. However, OKO has access to EDS and can provide documents to the defence.

within the region are formally sanctioned, in practice, accessing records is more onerous. In order to properly equip defence counsel with the necessary analytical tools, as a part of its legacy, the ICTY should institute an appropriate mechanism that enables access to testimonial databases throughout all countries within the region.

28. Given all of the reasons enumerated above, it can easily be inferred how the Law on Transfer is a powerful tool for the Prosecution. However it can also be used to the Defence's advantage. For example, courts may be reluctant to bear the costs of employing different experts for the preparation of defence counsel reports. So to circumvent this hurdle, counsel can access already-prepared expert reports that have been used before the ICTY, and tender them under this law.⁸⁸⁵ Furthermore, a significant number of witnesses that testified before the ICTY in the past are testifying in trials before the Court of BiH. While this practice is most commonly exercised by the Prosecution (tendering in transcript of the testimonies that were given at the ICTY), witnesses have shown to occasionally amend their testimonies. Defence counsel can use ICTY transcripts to identify inconsistencies in the witnesses' accounts and thus, prepare for effective cross-examination.

B.2 Access to Evidence from State Bodies and Defence Support Institutions

29. State-founded defence support institutions have a greater capacity to obtain access to evidence from state bodies, (as they are more likely to respond positively to intra-governmental requests,) than a single counsel requesting for information on his or her own. This is an essential characteristic of Defence support organizations because the disclosure of evidence has proven to be problematic for defence counsel within the entire region. In BiH for example, based on the Freedom of Access to Information Act,⁸⁸⁶ the Defence is authorized to address ministries and various investigative bodies⁸⁸⁷ and file a request for access to information to the competent authority. However in practice, said state institutions respond with varying degrees of adherence to Defence requests. In instances of non-compliance, Defence counsel may be compelled to request the court to issue an order for access to archived materials.

B.3 Providing Training to Defence Counsel

30. Any Defence support organization, in the former Yugoslavia or elsewhere, must prioritize an ongoing educational scheme for legal practitioners disputing complex crimes cases. Counsel appearing before the Court of BiH in trials involving international crimes are obliged by the "Additional Rules"⁸⁸⁸ to attend

885 Article 6, Law on Transfer, Statements by expert witnesses made before ICTY:

(1) The statement of an expert witness entered into evidence in any proceedings before a Trial Chamber of the ICTY shall be admissible as evidence in domestic criminal proceedings, whether or not the person making it attends to give oral evidence in those proceedings.

(2) The statement of an expert witness falling under paragraph 1 above, when admitted, shall be evidence of any fact or opinion of which the person making it could have given as oral evidence.

(3) Pursuant to article 3 of this Law, the courts shall admit an expert witness' testimony by using the transcript of the testimony he/she gave before a Trial Chamber of the ICTY in any other case, providing that he/she had been previously warned about his rights and obligations regarding his testimony, and providing the testimony relates to the existence or non-existence of facts which themselves relate to the case in question.

(4) Nothing in this provision shall prejudice the defendant's right to request the attendance of an expert witness as referred to in Paragraph 1 of this Article for the purpose of cross-examination or to call an expert witness of his own to challenge the statement of an expert witness given before the ICTY. The decision on the request shall be made by the court.

886 Freedom of Access to Information Act for Bosnia and Herzegovina (entered into force on November 27, 2000) Official Gazette of Bosnia and Herzegovina No. 28/00.

887 For example, the State Investigation and Protection Agency-SIPA (<http://www.sipa.gov.ba/>), Intelligence Security Agency of BiH-OSA (<http://www.osa-oba.gov.ba/>), and different courts in which witnesses have previously testified or given statements.

888 The 'Additional Rules of Procedure' outline the procedure for admissions to the list of advocates, and also deal with the appointment of additional advocates and the special admission of foreign advocates. http://www.okobih.ba/files/docs/OKO-Additional_Rules_of_Procedure

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continuing professional training.⁸⁸⁹ In tandem with this training, one of OKO's main functions is to provide courses for counsel that enable them to meet the criteria for admission to the list of advocates.⁸⁹⁰

31. Bosnia and Herzegovina is the only country in the region to prescribe rules regarding the training of Defence counsel who appear in trials involving international crimes. In order to ensure fair trials of the accused, it is considered essential that counsel undergo basic training before defending their first cases, and similarly that they continue with their professional education to further develop their skills, as this is becoming an increasingly standardized practice. As a requirement for counsel who wish to be admitted to the List of Advocates, OKO organizes a Basic Training Course that authorizes counsel to appear before the Court of BiH. The Course is comprised of two parts, one in Criminal Procedure⁸⁹¹ and the other in International Humanitarian Law.⁸⁹²
32. Moreover, based on the carefully examined needs of domestic Defence counsel in BiH, OKO has developed a training curriculum that is annually adjusted according to changing local requisites. Thus, OKO organizes its continuous professional training⁸⁹³ activities in three segments: skills training, substantial law (international and/or domestic criminal law) and human rights training. Following the needs of Defence community, when compared to the previous year, training events in 2010 were more focused on the continuous professional education and less on core training. It is anticipated that this will be an ongoing trend given that the list of certified counsel becomes more comprehensive and the legal community foresees no major substantive changes.⁸⁹⁴
33. Skill training is essential, especially for defence counsel in the region, now that the procedural law system was completely changed. With the introduction of a party driven system, counsel had to learn how to perform direct examinations, cross-examinations, how to object, how to deal with objections by the other side, and how to negotiate and conclude a plea agreement, to name a few of skills required by the defence in the countries of the former Yugoslavia. With the overhaul of the system of procedural law, skills-training has proven to be essential particularly for Defence counsel within the region. With the introduction of a party-driven system, Defence counsel have had to apprehend a number of novel skills such as: performing direct examinations, cross-examinations, procedural rules to objecting, the management of objections from the opposing side, and how to negotiate and conclude a plea agreement, just to name a few. Training in this area should be organized mostly in a way of mock trials, and this is not to say that a certain amount of academic lectures are inappropriate. Participants should get some pointers, and best practices on the topic should be presented to them, before they are asked to participate in a mock trial.⁸⁹⁵

[%5BENG%5D.pdf](#). The same provisions providing for training can be found in the recently amended Rules of the Court of Bosnia and Herzegovina.

889 Article 2.2.3.h of the Additional Rules.

890 Criteria set forth in Article 3.2 of the Additional Rules of Procedure require that applicants must be current and valid members of either of the Bar Associations, and must possess as an advocate, judge or prosecutor at least seven years of relevant working experience on legal matters in order to be appointed as the only advocate or the primary advocate. Article 3.2(3) of the Additional Rules provides that applicants must possess knowledge and expertise in relevant areas of law in accordance with the criteria published by OKO. Article 3.4(4) of the Additional Rules sets forth the criteria for advocates to be 'specially admitted' where they do not fulfill the normal requirements for appearing before the Court.

891 Issues that are addressed include: custody, direct and cross-examination, opening and closing statements.

892 Issues that are addressed include: modes of liability (command responsibility and JCE included), elements of war crimes, crimes against humanity and genocide, basic defence strategy.

893 During 2010, OKO organized twenty (20) training events that totalled to approximately 192 hours of training.

894 Annual Report of the Registry for 2010, p.57 (English version).

895 One of the best examples of these trainings is a series of trainings organized by OKO with ICTY Judge Moloto as lecturer/trainer. Some of these training sessions have been organized as parts of the ODIHR-ICTY-UNICRI War Crimes Justice Project. These trainings consist of Basic Advocacy Training, where participants have an opportunity to hear short lectures on Opening Statement, Direct and Cross-Examination and Closing Arguments, and after these lectures exercise is done in all four areas using a hypothetical case; and Advanced Advocacy Training, where participants hear short lectures on tendering evidence and dealing with expert witnesses, after which they do exercise using a hypothetical case.

34. With regards to the legal themes of training topics, OKO's experience has shown that it is critical to adapt materials to the ongoing legislative and jurisprudential developments. A pertinent example of this is the case of plea bargains. Defence counsel' first introduction to this legal practice was when it was first introduced into the legal system of BiH. Without a domestic precedent, the initial training was mostly theoretical, providing participants with exposure to ICTY's jurisprudence on the issue and the legal provisions of the new mechanism. This background instruction was followed by practical trainings that allowed counsel to practise plea bargaining in a controlled environment.
35. Additionally, it is crucial to organize trainings and events on the ICTY case law, given the influence the ICTY jurisprudence is having on trials involving international crimes in the region of former Yugoslavia. This jurisprudence is new for most of defence counsel. There is hardly any judgement of the Court of BiH that does not make heavy use of ICTY jurisprudence (e.g. modes of liability, the existence of an armed conflict, joint criminal enterprise).
36. Regardless of the varying legal purviews of the judiciaries of individual states, it is critical to establish a well-trained cadre of practitioners who are attuned to the proper practice and application of international criminal and humanitarian law. Furthermore, the thorough training of counsel is noteworthy when considering their legal efforts as representative of the extra-regional commitments of their states. As signatories to the European Convention on Human Rights (ECHR), cases originating from all of the countries of the former Yugoslavia are subject to review by the European Court for Human Rights (ECtHR). This segment is all the more important in Bosnia and Herzegovina (especially for the cases tried before the Court of BiH), because BiH does not have a state-level Supreme Court,⁸⁹⁶ and the Constitutional Court of BiH is the only available legal remedy.⁸⁹⁷

B.4 Other Activities of Defence Support Offices

37. OKO conducts other activities in the legal community within the region to ensure a widespread dissemination of information regarding international crimes, while providing support to others within the legal field. Because war crimes related issues are still new to the region's legal practitioners, one of the major barriers faced by counsels is the dearth of literature on international criminal law.
38. One of the major barriers to regional information sharing is linguistic in nature. While there have been efforts by multiple organizations to translate documents into their local languages, the most relevant jurisprudential and other materials are published in French and English. Ultimately, this is problematic because there is a dearth of counsel who understand these two dominantly published languages enough for use in legal matters. One solution that OKO has put forth is its publication and dissemination of a regional magazine on international crimes entitled, *OKO War Crimes Reporter*.

B.5 Defence Support Institutions and Legal Aid

39. OKO does not administer the legal aid system, which is provided directly by the relevant governmental departments, and this is to be recommended. It is clear that the institutions that are to support defence

⁸⁹⁶ There are entity supreme courts.

⁸⁹⁷ Court of BiH organization mirrors ICTY organization in a sense that there are Trial Chambers that try cases, and Appeal Chambers that decide appeals. However, it is enshrined in a legal culture of the region that final appeals are supposed to be decided by the Supreme Court. Constitutional Court of BiH is dealing with appeals that have to do with human rights violations.

XIV. Defence Support Institutions

should not deal with legal aid system,⁸⁹⁸ as managing legal aid is an entirely different function than providing legal advice and training.

40. Mixing legal aid and legal services might endanger the functioning of both of these components. Institutions that are to deal with support to defence can and should at all times support any rights of defence, including legal aid system, but it should not administer it. These defence support organizations should deal with legal advice, collecting evidence, and training for defence counsel.

B.6 Privilege and Independent Position

41. Independence is perhaps of paramount importance to the establishment and functioning of any Defence support organization. When providing legal advice to a Defence team, any such organization will undoubtedly be informed of the Defence theory and strategy. In doing so, Defence support offices will be privy to the names of the witnesses the Defence intends to call, and to the documents it may submit within a case. In order to have access to all these information, there has to be a contract between the Defence team and the Defence support organization obliging staff of the latter to treat all the information as legally privileged.
42. Defence counsel are most commonly organized through bar associations. Every country within the region has its own bar association: Bar Association of Serbia,⁸⁹⁹ Bar Association of Croatia,⁹⁰⁰ Chamber of Advocates of Kosovo, Bar Association of Montenegro,⁹⁰¹ and, in Bosnia and Herzegovina two entity Bar Associations, Bar Association of Federation of BiH⁹⁰² and Bar Association of Republika Srpska.⁹⁰³
43. There are a number of options for the systemic organization of Defence support institutions. The primary consideration for the *modus operandi* of the institutions should be within the bar associations. Bar associations are the ideal home for the institutional support of Defence counsel, because they are independent enough to fulfil their mandate. However one of their disadvantages is their inability to access funding. Bar associations tend to be funded by their memberships without state subsidies, which ultimately limits their capacities to engage in extensive trainings and activities. Another option discussed within the legal community is that of established Defence support offices within the non-governmental sector as NGOs. Similarly, this may result in even greater inconsistencies within an organization's fiscal and budgetary means, and arguably would lack institutional support. A final consideration may be given to institutionalising Defence support organization within the court system itself. However, such organizations would have to establish a mandate in which every issue arising throughout case proceedings would have the capacity to be challenged. Furthermore, if the Defence support organization was party to the court system, its independence would consistently come into question and undergo both internal and public scrutiny.

Conclusion

44. As discussed in the introduction to this chapter, Defence support institutions are a valuable investment towards the fairness and effectiveness of trials involving international crimes in all of the countries of the former Yugoslavia.

898 Having an Office for Legal Aid and Detention Matters (OLAD) like institution in the countries of the region of former Yugoslavia would be extremely important, in order to establish proper and consistent system of legal aid. For more details on OLAD see Chapter XIII.

899 <http://www.advokatska-komora.co.rs/>.

900 <http://www.hok-cba.hr/Default.aspx>.

901 <http://www.advokatskakomora.me/naslovna.html>.

902 <http://www.advokombih.ba/>.

903 <http://www.advokatska.com/>.

45. With what has essentially been the rebirth of procedural law within the entire region, new modes of liability have been introduced into trials dealing with international crimes (for example, JCE), with cases being more complex with copious amounts of evidence and sources to be examined. The management of these cases has become an elaborate process beset with roadblocks, particularly for counsel in regions where Defence teams are not present. Having an office that provides support and training for defence counsel may be the first step in streamlining the process, and balancing the asymmetrical access to resources between the Prosecution and Defence.

List of Acronyms

ADC-ICTY	Association of Defence Counsel practising before the ICTY
BCS	Bosnian/Croatian/Serbian
BiH	Bosnia and Herzegovina
BiH-OSA	Intelligence-security Agency of Bosnia and Herzegovina
ECCC	Extraordinary Chambers in the courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
EDS	Electronic Disclosure System (ICTY)
JDB	Judicial Database (ICTY)
JCE	Joint Criminal Enterprise
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE, Rules	ICTY Rules on Procedure and Evidence
IRAC	Issue, Rule, Analysis, Conclusion
NGO	Non-Governmental Organization
OKO	Criminal Defence Section (BiH)
OLAD	Office of Legal Aid and Detention Matters
OPCD	Office of Public Counsel for the Defence (ICC)
OTP	Office of the Prosecutor
SCSL	Special Court for Sierra Leone
SIPA	State Investigation and Protection Agency (BiH)
UNICRI	United Nations Interregional Crime and Justice Research Institute
VWS	Victims and Witnesses Section (ICTY)