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The ICTY Legacy: A Defense Counsel's Perspective

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Abstract

The ICTY's achievements are as impressive as they are irrefutable. Less impressive is the uneven quality of procedural and substantive justice that the Tribunal has rendered. The author highlights several shortcomings at the Tribunal, including the appointment of unqualified judges, excessive judicial activism, its disparate application of law, procedure, and prosecutorial resources to different ethnic groups, and its tinkering with the rules of procedure to promote efficiency at the cost of eroding the fundamental rights of the Accused. Drawing on specific examples, from the approach adopted concerning the admissibility of testimonial evidence to specific areas of substantive law where judicial activism has been pronounced – the development of joint criminal enterprise and the requirements for provisional release at a late stage of the proceedings – this article is one defense counsel's perspective of some of the most unfortunate shortcomings of the ICTY, which regrettably form part and parcel of the Tribunal's legacy.

A. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first international court established by the international community through the United Nations Security Council to try international crimes – grave breaches of the Geneva Conventions, war crimes, genocide, and crimes against humanity. The objectives of the Tribunal are threefold: (1) to do justice; (2) to deter further crimes; and (3) to contribute to the restoration and maintenance of peace.[1] One of its goals is "promoting reconciliation and restoring true peace"[2]. By the time the ICTY closes its doors (save for

1 SC Res. 827, 25 May 1993, Preamble.

2 First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc A/49/342, S/1994/1007, 29 August 1994, para. 16: "The role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace." See also Report of the Secretary-General pursuant to Paragraph 2 of SC Res. 808, UN Doc S/25704, 3 May 1993, para. 26: "Finally, the Security Council stated in resolution 808 (1993) that it was convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of

the residual matters attendant to convicted persons serving sentences) in the next 3-4 years, the ICTY will be able to boast that, among other achievements, it has processed at least 161 cases over a period of approximately 20 years.[3]

The achievements of the ICTY are as impressive as they are irrefutable. Less impressive but equally irrefutable is the uneven quality of procedural and substantive justice rendered. The ICTY has underperformed as a judicial institution, particularly when one considers that denominating a tribunal as "international" carries a certain *caché*, invariably heightening expectations of standards and quality. Regrettably, the same can be said of the other *ad hoc* international tribunal, the International Criminal Tribunal for Rwanda (ICTR), and the so-called "internationalized" (hybrid) State tribunals, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), that have been established to try international crimes at the domestic/national level. The jury is still out on the Special Tribunal for Lebanon (STL) and the International Criminal Court (ICC) as there is little record to go by. Early indicators suggest, however, that these two institutions are equally incapable of avoiding certain fundamental mistakes made by the ICTY and other tribunals. The STL's Chambers already face criticism for engaging in judicial activism,[4]

taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace"; President Theodor Meron, Address to the UN Security Council, UN Doc S/PV.4999, 29 June 2004, 8: "We must be careful to ensure that our dedication to completing the Tribunal's mandate on time does not detract from the Tribunal's basic purposes, which are to administer justice even-handedly and to contribute to the restoration and maintenance of peace in the region".

3 See ICTY website, which indicates that the Tribunal has indicted 161 persons, has concluded proceedings for 126 Accused, and has ongoing proceedings for 35 Accused, available at http://www.icty.org/x/file/Cases/keyfigures/key_figures_111115_en.pdf (last visited 2 December 2011).

4 See K. Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?', 24 *Leiden Journal of International Law* (2011) 3, 655, 656: "the [STL Appeals] Chamber's considerations [in its Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176bis, 16 February 2011], albeit innovative and creative, are essentially *obiter*, since the applicable terrorism definition can be found, without further ado, in the Lebanese law. There is no need to internationalize or reinterpret this law; it should be applied before the STL as understood in Lebanese practice".

and at the ICC some commentators have been critical that a basic level of experience is not required of the Court's judges.[5]

All these tribunals tend to suffer, to one degree or another, from the same shortcomings, such as: the appointment of unqualified judges, excessive judicial activism in legislating from the bench, the disparate application of law and procedure, and the constant tinkering with the rules of procedure for the sake of promoting efficiency and expeditiousness while eroding the fundamental rights of the Accused. Oddly, many of these errors are easily avoidable and unnecessary; lessons from the Nuremberg trials seem to have been ignored. As significant as the Nuremburg trials were in commencing the modern development of international criminal justice, the legacy of the Nuremberg Tribunal (the International Military Tribunal, or 'IMT') is stained by its numerous deficiencies. Even back in 1945, when the IMT, soon followed by the Tokyo Tribunal (the International Military Tribunal for the Far East, or 'IMTFE'), was created, hindsight was not necessary to recognize that the tribunal was subjective. The tribunal promoted victor's justice by targeting only the vanquished (as at the ICTR, a problem which has been tolerated, if not sanctioned, by the UN Security Council), enacted a flawed system of procedural due process, applied a retroactive application of substantive law, denied equality of arms, and so on.[6] The ICTY not only repeated many of these well-recognized errors, but also went on to make more.

5 It has been argued that it was this inexperience that has caused the Appeals Chamber to stumble over the basic protections that should have been afforded by the Court in the *Lubanga* case. See M. Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts', 12 *New Criminal Law Review* (2009) 4, 529, 539-540 at fn. 16. Bohlander writes that: "The other judges in this case had mostly little experience as practitioners, let alone as judges, and although they have professional legal qualifications, much of their actual careers appear to have been spent in government-related work, academia, or diplomacy. Judge Kourula's CV lists him as having served as a district judge in 1979 [...]; Judge Kirsch has no judicial experience although he is a member of the Quebec bar and was made a QC in 1988 [...]; Judge Song was a Judge Advocate in the Korean Army from 1964 to 1967, ie, a military prosecutor for the first six months and a military judge for two and a half years [...]; Judge Nsereko has been an advocate in criminal cases since 1972, but has no judicial experience, either".

6 Telford Taylor, one of the prosecutors at Nuremberg, after some 40 years of distance and reflection recounts in his memoirs some of the difficulties the defense counsel faced in those trials, which, if one were to poll defense counsel before the *ad hoc*

This article is a defense counsel's perspective on some of the most pronounced shortcomings of the ICTY which are part and parcel of its legacy. Unsurprisingly, this author's perspective differs from the picture that the ICTY paints of itself as the judicial institution that is "bringing war criminals to justice, bringing justice to victims"[7].

B. The Noble Cause of the ICTY: Fiat Justitia Ne Pereat Mundus[8]

The establishment of the ICTY was a milestone in the advancement of international criminal justice. While the UN was celebrating its 50th anniversary, war raged in parts of the former Yugoslavia. Not since World War II had Europe experienced fighting with such raw intensity and utter disregard for accepted principles of behavior set out by various international instruments and customary international law. The international community for decades struggled with modest success to find common ground in establishing an international criminal court. It would not be until 1998, with the adoption of the Rome Statute, that the ICC would be created.[9] An imminent solution was required. Wisely, the UN Security Council, exercising its authority under Chapter VII of the UN Charter, established the ICTY on 22 February 1993 with the passage of Resolution 808.[10] This novel approach was later repeated in the creation of the ICTR.[11] Thus, the ICTY

international tribunals, are echoed today: lack of equality of arms, lack of certainty in the application of the procedure, and lack of certainty in the law. See T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). See also C. Tomuschat, 'The Legacy of Nuremberg, Symposium', 4 *Journal of International Criminal Justice* (2006), 830, 832-834.

7 This phrase is a motto of the ICTY and is displayed as a banner in the lobby of the Tribunal and on the ICTY website. See ICTY website, available at http://icty.org (last visited 2 December 2011).

8 "*Let justice be done lest the world should perish."* Then-ICTY President, Antonio Cassese, invoked these words from G. Hegel, *Elements of the Philosophy of Rights* (1821), para. 130, in the First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc A/49/342, S/1994/1007, 29 August 1994, para. 18.

9 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 90.

10 SC Res. 808, 22 February 1993.

11 SC Res. 955, 8 November 1994, para. 1, which calls for the ICTR to prosecute "persons responsible for genocide and other serious violations of international law

was born – the first international criminal tribunal since the IMT and IMTFE.

Irrespective of the ICTY's shortcomings, the Tribunal's enormous contributions to advancing international criminal law and procedure merit recognition. Until its establishment, save for the judgments from Nuremberg, Tokyo and the national courts that dealt with World War II-era cases, there was no application of international criminal law. Put differently, there was no opportunity to implement the composite body of law constituting international criminal law (which is derived from customary international law, international humanitarian law, international human rights law, and national law). Nor had the opportunity ever presented itself for the establishment of a tribunal with all the complexities envisaged. What may be taken for granted today were virtually uncharted waters in 1993. Thanks to the ICTY, the ICTR, the hybrid tribunals and the ICC have benefited, be it by referring to ICTY jurisprudence as a point of reference in resolving legal issues, or by adopting similar rules of procedure and modalities in dealing with issues prevalent in war crimes cases, or simply by tapping into the vast reservoir of institutional knowledge accumulated by the ICTY organs such as the Registry, the Victims and Witnesses Section and the Office of Legal Aid and Detention Matters. It is difficult to fully appreciate the ICTY's (and the ICTR's) contributions to international criminal justice. It is virtually impossible (save when dealing with issues related to Civil Parties) to think of any aspect touching on the investigation, prosecution, administration, defense, witnesses, outreach, procedure, or jurisprudence that has not been dealt with by the ICTY. Not only has the ICTY been the vanguard in international criminal justice, it has also become the frame of reference for all subsequent tribunals trying international crimes. These are significant contributions. Thus, while some of its jurisprudence may not stand the test of time, the ICTY will leave behind an enduring legacy as the post-Nuremberg trailblazer of international criminal justice, spanning, and in many ways nurturing, the advent of similar tribunals.

committed in […] Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994".

C. Shortcomings in Pursuit of a Lofty Ideal

The necessity of establishing the ICTY at the time it was established is beyond cavil. While some of its objectives – such as bringing reconciliation to the war-torn region of the former Yugoslavia – were unrealistic or unattainable, bringing to trial individuals suspected of committing war crimes, crimes against humanity, and genocide has indelibly influenced the international community's thinking in dealing with impunity. Lofty as the ICTY's ideals may have been, if lessons are to be learned and problems hopefully avoided in the future its successors, a critical examination is merited. The ICTY's legacy is not just the sum total of its convictions[12] or the extent of the jurisprudence it claims,[13] but also the manner in which this institution has functioned, with all its faults and misadventures. To put it viscerally, one cannot think of a 'legacy' without inquiring whether any of the institution's key actors – that is, the judges or prosecutors – if charged with the same sort of crimes, would unflinchingly submit to be tried at the ICTY, particularly given the manner in which some cases were tried or the way in which the law and procedure has sometimes been applied. Put to the test, this author surmises that very few judges and prosecutors, if any, would find the standards of most trials conducted at the ICTY to be adequate if hypothetically applied to their own case. Why is that so?

D. The Uneven Quality of Judges

One of the most frequent phrases one hears during ICTY proceedings when issues of procedural or substantive fairness arise (most particularly

12 *Prosecutor v. Milosevic*, Appeals Chamber Decision, IT-02-54-AR73.4, 21 October 2003, para. 22: "This Tribunal will not be judged by the number of convictions which it enters, or by the speed with which it concludes the Completion Strategy which the Security Council has endorsed, but by the fairness of its trials".

13 See 'Assessing the Legacy of the ICTY, Background Paper, Introduction' (23-24 February 2010): "The Tribunal's legacy may be conceptualised broadly as 'that which the Tribunal will hand down to successors and others', including: […] [t]he legal legacy of the Tribunal […] perhaps most significantly – its judgements and decisions […]", available at http://www.icty.org/sid/10292 (last visited 3 January 2012); 'Report of the President on the Conference Assessing the Legacy of the ICTY' (27 April 2010), para. 10: "The significance of the Tribunal's legal legacy and its contribution to the development of international criminal justice […] was recognised by the participants", available at http://www.icty.org/x/file/Press/Events/100427_legacy conference_pdt_report.pdf (last visited 3 January 2012).

when it comes to issues of evidence) is that the bench is composed of "professional judges". On its face, this label should inspire confidence and give comfort; matters of fact and law are being determined by "professional" judges, as opposed to laypersons (jurors). The use of the adjective "professional", however, has nothing to do with the judges actually being professional in the sense that these triers of fact and law were judges by profession prior to appointment at the ICTY. The truth is that many of the judges who have sat in the Trial and Appeals Chambers at the ICTY have never had any prior experience as judges. Indeed, many of them have never had any experience as lawyers or prosecutors. Several of the ICTY's judges, prior to their appointment, had no knowledge of how criminal trials are actually conducted, no experience with criminal law, and no knowledge of the procedural issues associated with any of the phases of a simple criminal trial, let alone an international criminal case of enormous complexity.[14] In other words, many of the judges appointed by the UN (after lobbying, incentive offerings or horse-trading)[15] had no actual experience

14 "There have been complaints from a former ICTY judge, a high-ranking former member of the ICTY Office of the Prosecutor and by at least one American politician, Ron Paul, the congressman for Texas, that the selection of judges for service at the ICTY produced undesirable results to the effect that there were too many judges with little or no trial or judicial experience hearing complex criminal cases, which was said to be a reason for the long and cumbersome proceedings before the war crimes tribunal." M. Bohlander, 'The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics', in M. Bohlander (ed.), *International Criminal Justice, A Critical Analysis of Institutions and Procedures* (2007), 325, 326, *citing* M. Simons, 'An American with Opinion Steps Down Vocally at War Crimes Court' (24 January 2002) available at http://www.nytimes.com/2002/01/24/world/an-american-with-opinions-steps-down-vocally-at-war-crimes-court.html?pagewanted=all&src=pm (last visited 2 December 2011). Bohlander also surveyed the data on the ICTY website as of 22 March 2006, which provided the professional experience of the permanent and *ad litem* judges in office at that time as trial and ICTY/ICTR appellate judges. He found that eight out of twenty-five judges (almost one-third) of the judges at the ICTY and the common appeals chamber with the ICTR had no prior criminal judicial experience, Bohlander at 332-354. See also ICTY website, available at http://www.icty.org/sid/151 (last visited 2 December 2011). Performing a similar survey of the professional experience of the permanent and *ad litem* judges on the ICTY website (as of on 7 October 2011) shows that 6 of the 24 judges did not have prior criminal judicial experience, so the statistics are only slightly better today than they were in 2006. (Note that one judge's past judicial experience could not be ascertained from the data on the website).

15 P. Wald, 'Running the Trial of the Century: The Nuremberg Legacy', 27 *Cardozo Law Review* (2006) 4, 1559, 1564: "The U.N. has never attempted to second guess the

that would justify the characterization of "professional" judge. The term "professional," as used at the ICTY, merely means that these individuals, who have been elevated to the status of judges, have studied law and have the minimum qualifications to sit as judges.[16] In other words, they are neither laypersons nor jurors. Thus, it has not been uncommon to have diplomats and professors, with no real trial or appellate experience, appear in court for the very first time and embark on a new career, that of a "professional" international judge.

Obviously, it would be unfair to generalize that all diplomats and professors have failed to bridge the divide between the theoretical knowledge of law and its application in a trial or appeals setting. That said, any *real* judge will readily concede that while the theory (knowledge) of law is relevant and useful during the course of trial proceedings, the art and science of judging, e.g., managing the court proceedings, dealing with procedural issues, and ruling on evidentiary matters, requires skills that can only be acquired by courtroom experience. As one former judge noted, having a professor of law act as a trial judge, without any prior experience, is like taking a professor of anatomy, placing him in the operating theater and asking him to perform brain surgery.[17] The unintended consequence of appointing clever diplomats and bright professors is that some of them are utterly unfit to sit on the bench – at least for their first trial. Until such appointees learn the judge's role and how trials are conducted, the result will be a palpable inconsistency in the quality of trials. This, as will be seen

merits of individual nominations; its members more often vote on the basis of regional concerns and tradeoffs".

16 Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res. 1877, 7 July 2009, Art. 13, Judicial Qualifications: "The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law".
See also Wald, *supra* note 15, 1564: Article 13 of the ICTY Statute embodies aspirational criteria, which has been "translated by the nominating countries as they see fit; while many of the judges at the ICTY are experienced jurists, many have not had prior judicial or criminal experience".

17 Simons, *supra* note 14: "Of course we need a mix [of judges with extensive trial experience and judges who are legal scholars or diplomats], but you wouldn't put a judge who has never been in court in charge of a big conspiracy case. You wouldn't take a professor of anatomy and put him into an operating theater and say, 'Now perform this brain surgery'".

below, is just one of the factors contributing to the disparities in trials conducted at the ICTY.

E. No Orientation or Bench Book is Offered to Judges Prior to Taking the Bench

Once judicial candidates are sworn in as judges, they are – as they must be – independent. Naturally, this is positive. However, when considering that some of these independent judges are untrained and ill-prepared to act as judges, being anointed as "independent" without any prior training, orientation or testing, poses a problem. Should an international criminal tribunal such as the ICTY be used as a vocational school or an apprenticeship for inexperienced diplomats and professors? Is it fair to the Accused and the victims in trials of such magnitude to have judges learning the art and science of judging from the bench? It cannot be assumed that successful academics and diplomats inexorably are, or will become, competent judges. There is a vast difference between lecturing students on the law, grading papers and writing academic articles, or engaging in diplomatic matters where nuance, subtlety and ambiguity are valued skills, and being a trial judge in a courtroom, where clarity and consistency are important attributes.

Another matter worth commenting on is the resultant unevenness in the proceedings when the quality of procedural justice depends on the makeup of the bench. Even experienced judges have been prone to using their independence in a manner which frustrates uniformity, consistency and predictability in the proceedings; hallmarks of a credible and reliable judicial institution.

Because the judges come from different legal traditions, it is to be expected that each will approach the various judicial functions, such as the admission or assessment of evidence, the application of the Rules of Evidence and Procedure (RPE), and the interpretation of the Statute, from his or her own frame of reference, *i.e.*, his or her own legal tradition and experiences. When considering that the procedure at the ICTY is a hybrid, a marriage of the adversarial and inquisitorial systems, this causes confusion and has resulted in conflicts amongst judges on a bench.[18] Some judges, it

[18] Here too, it should be noted that the procedure has been in a constant state of flux, with the balance tipping from adversarial to inquisitorial and *vice versa* depending on the issues involved and the respective stage of the ICTY's life-cycle.

would appear, are either reluctant to or incapable of applying the Statute and RPE based on the procedure adopted by the ICTY. Effectively, some judges apply their own judicial traditions to the Rules; that is, they try to make the Rules fit their legal tradition, as opposed to adjusting their judicial thinking and behavior to the Rules. Recognizing that the judges are inexorably prisoners of their own legal training and experiences, and that they cannot be expected to think and act as automatons, they should be expected to honor the Statute and interpret and apply the Rules as intended. Depending on the make-up of the bench and the judges' interpretation and application of the Statute and Rules, the Accused are likely to receive anything from a relatively fair trial to what could barely be considered a semblance of a trial. Of course, it is not just the Accused who feel a sense of injustice when trials are not being conducted in accordance with the Rules; the prosecution has also been left feeling frustrated at having spent an enormous amount of time and effort in preparing a meticulous case only to find itself in trials conducted by what appears to be improvisation, or worse yet, experimentation.[19] From the perspective of the Accused on trial, the end results of these trials are viewed with skepticism and cynicism, detracting from the ICTY's coveted legacy.

The ICTY, like the other tribunals, has no orientation, training or testing program for its judges. It is assumed that if someone is nominated to be a judge (even if the nominee is from a national jurisdiction in want of rule of law and judicial independence), then the nominee is fit to be sworn in, handed a fresh set of documents, given the scarlet silk robe to wear, and escorted to the courtroom, with no need to determine whether the newly minted judge has any actual knowledge of or relevant experience in being a

[19] See, *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 19 March 2007, 15852: "[Prosecutor Kenneth Scott]: A number of people asked me following last Thursday's trial day if I was feeling okay, if I was all right, as I was sitting, you may remember, at the Prosecution with my head down. […] I was so embarrassed for this institution, I was embarrassed for myself, I was embarrassed for anyone watching these proceedings. Frankly, I was even embarrassed for the Judges. […] The Prosecution is very concerned whether the victims, the Prosecution, the international community will receive a fair trial in this case. We are very, very concerned about that on a number – for a number of reasons, including the time limits placed on the case, because also repeated statements and comments by the Chamber and the President, and the way certain things have been handled". See also *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 19 March 2007, 15855-15858, where the Prosecutor discussed the examination of witnesses and the Judges' interference with the parties' questioning of witnesses.

judge, or appreciation for the manner in which the proceedings are to be conducted and the legal traditions of the ICTY. Of course, the irony is that once a candidate does get sworn in, he or she becomes an independent judge, above being instructed or tested. A simple orientation procedure or a two to four week judicial training program followed by some basic testing would, at a minimum, provide the judges with a common understanding of or exposure to what is expected of them. Along these lines, the judges could also be provided with a Bench Book that sets out in detail a step-by-step process on how judges should conduct the proceedings, perhaps even with a commentary on the Rules. Thus, a uniform procedure with clear guidelines could be made available to all judges, guiding them throughout the proceedings. This would, to the extent possible (since the judges are independent), compel judges to conduct themselves and the proceedings in a more-or-less uniform fashion. Had the ICTY adopted such a Bench Book – which many of the judges from the Anglo-Saxon tradition would be familiar with since Bench Books are common to their practice – then, even without orientation, training or testing, it is reasonable to conclude that some of the apparent disparity in the application of the Rules and conduct of the proceedings would have been minimized. It remains a mystery why the ICTY never adopted any quality control modalities to reconcile these rather obvious shortcomings.

F. The Rules Change as the Game is Played

As noted, the judge-made Rules at the ICTY are constantly being tinkered with. Indeed, the changes in the Rules have been so extensive and the procedure has effectively been transformed to such a degree that some changes seem to transgress upon the letter and spirit of the Statute, which only the UN Security Council is entitled to amend.[20] The Rules that were

[20] D. Mundis, 'The Judicial Effects of the 'Completion Strategies' on the Ad Hoc International Criminal Tribunals', 99 *American Journal of International Law* (2005) 142, 147-148: "Despite the merits of the completion strategies as instruments for attaining the successful conclusion of the International Tribunals' mandates, they have brought forth some unintended and even unfortunate consequences. […] The amendment of ICTY Rule 28(A), giving the bureau discretion to determine whether indictees meet the standard of 'most senior leader', was adopted by the permanent ICTY judges pursuant to Rule 6 without any consultation with the ICTY prosecutor. […] It must be noted, however, that the Security Council opted not to amend the Statutes of the International Tribunals and although the ICTY judges have broad discretion in adopting and amending the Rules of Procedure and Evidence in

initially adopted and the Rules as they exist today are remarkably different. This can be attributed to the fact that when the ICTY was established, the IMT and IMTFE were its frame of reference. Many of the challenges confronted by the ICTY judges would not become known until the Rules were put to the test. Creative measures would be required. Conveniently, the judges were entrusted with writing and adjusting the Rules as they deemed necessary to meet the objectives of the ICTY and the human (fair trial) rights and obligations set out by the Statute. The only limitation imposed on the judges was that the Rules, and any amendments to them or changes to the proceedings, must be consistent with the Statute. Since there is no actual judicial oversight, the judges have been unimpeded in interpreting the contours of the Statute and defining the extent to which the Rules can be amended. In other words, no entity is judging or monitoring the judges to ensure that they are not improperly amending the Rules or instituting proceedings that violate the Statute. Such unchecked authority is vulnerable to abuse especially considering the ease with which it can be suggested that something is implied by, and thus need not be explicitly stated in, the Statute[21] or the ease in making an artful argument that justifies a desired result.

G. Excessive Judicial Activism

When the ICTY was established, it was supposed to apply what was "beyond any doubt" customary international law.[22] As previously observed, as far as actual jurisprudence, there was little to speak of other than what had been created by the post-World War II cases. Determining the extent to which customary international law had progressed and existed beyond doubt at the time of the temporal jurisdiction of the ICTY would, expectedly, become an issue to be resolved. Judges are routinely called upon to

accordance with Article 15 of the ICTY Statute and Rule 6 of the Rules, the scope of this amended rule touches on core issues involving the independence of the prosecutor and may be *ultra vires*": See also *Prosecutor v. Prlic et al.,* Trial Transcript, IT-04-74-T, 22 March 2007, 16154: "[Defense Counsel Karnavas]: Only the Security Council can amend the Statute. I know that Judge Pocar has indicated that this is a – President Pocar has indicated that this is now a Judge-controlled system, but the Statute was adopted by the Security Council and no judge-made law or judge-made rule that comes out of the Plenary Session can trump the Statute that was adopted by the Security Council […]".

21 See *infra*, section on Joint Criminal Enterprise.

22 1993 Report of the Secretary-General, UN Doc S/25704, 3 May 1993, para. 34.

determine the contours of applicable jurisprudence; there is nothing surprising or necessarily disconcerting about this. Yet when considering that a large segment of the judges come from the ranks of professors and diplomats, this is a cause for concern. Being learned in the law or versed in the art of diplomacy and nuanced linguistics can actually be an impediment, particularly if, for instance, academics who are not familiar with or do not care for the limitations of the role of a judge, are more interested in promoting their ideas as to where the law ought to be, as opposed to simply applying the law as it is. Another phenomenon that has occasionally arisen is the creation of law by judges without citation to any credible authority. Once created, of course, it is then used as precedent to justify future decisions. Just two examples will suffice in illustrating the sort of judicial activism that has been seen at the ICTY. The first example deals with the mode of liability coined at the ICTY referred to as joint criminal enterprise (JCE). The second example deals with the recent imposition of new and inventive criteria for restricting the provisional release of the Accused in certain instances when, in reality, there is no credible justification for such a restriction.

I. The Creation of JCE as a Mode of Criminal Liability

JCE was first created in 1999 by the ICTY Tadic Appeals Chamber as a distinct form of criminal liability.[23] JCE is applied to a group of people who have carried out crimes collectively. The Tadic Appeals Chamber held that participation in a common plan is implicitly recognized as a form of "committing" under Article 7(1) of the ICTY Statute.[24] It reasoned that the object and purpose of the ICTY Statute allowed the extension of the Tribunal's jurisdiction to all persons who have in any way participated in the crimes within the Tribunal's jurisdiction.[25] Furthermore, the Tadic Appeals Chamber held that the notion of common plan liability has been

23 *Prosecutor v. Tadic,* Judgment, IT-94-1-A (Appeals Chamber), 15 July 1999, paras 185-234.

24 *Id*., para. 186. Article 7(1) of the ICTY Statute provides that "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".

25 *Id*., paras 189-190.

firmly established in customary international law.[26] The ICTY Appeals Chamber identified three forms of JCE:

a. The basic form (JCE I) ascribes individual criminal liability when "all co-defendants, acting pursuant to a common design, possess the same criminal intention […] even if each co-perpetrator carries out a different role within it"[27].

b. The systemic form (JCE II) ascribes individual criminal liability when "the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan"[28].

c. The extended form (JCE III) ascribes individual criminal liability in situations "involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common plan, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose"[29].

JCE has been the most controversial form of liability to be applied at the *ad hoc* international tribunals, particularly because it has been viewed as judge-made and not grounded in customary international law.[30] Customary

26 *Id.*, para. 220.

27 *Id*., para. 196.

28 *Id*., para. 202.

29 *Prosecutor v. Vasiljevic*, Judgment, IT-98-32-A (Appeals Chamber), 25 February 2004, para. 99. See also *Prosecutor v. Tadic,* Judgment, IT-94-1-A (Appeals Chamber), 15 July 1999, para. 204.

30 See e.g., C. Damgaard, 'The Joint Criminal Enterprise Doctrine: A 'Monster Theory of Liability' or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?', in C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 129: "[T]his doctrine raises a number of grave concerns. It, arguably, *inter alia* is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the nullum crimen sine lege principle and infringes the right of the accused to a fair trial". M. Badar, ''Just Convict Everyone!' – Joint Perpetration: From Tadic to Stakic and Back Again', 6 *International Criminal Law Review* (2006) 2, 293, 301: "A major source of concern with regard to the applicability of JCE III in the sphere of international criminal law is that under both the objective and subjective standards, the participant is unfairly held liable for criminal conducts

international law is created through (i) general and consistent State practice[31] and (ii) *opinio juris*, which is the belief by a State that it is under a legal obligation to follow a certain practice.[32] In finding that JCE existed under customary international law, the Tadic Appeals Chamber only relied on a limited number of cases from a handful of jurisdictions.[33] Such a limited State survey is not representative of general and consistent legal practice and cannot justify the finding of JCE as customary international law. Moreover, most States use co-perpetration rather than JCE liability in their legal systems.[34]

that he neither intended nor participated in". W. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2002-2003) 4, 1015, 1034: "Granted these two techniques [JCE and command responsibility] facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy".

31 In relation to State practice, the International Court of Justice has held that "[t]he party which relies on custom […] must prove that this custom is established in such a manner that it has become binding on the other Party […] [and] that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question […]", *Columbian-Peruvian asylum case (Columbia v. Peru),* Judgment of November 20th, 1950, ICJ Reports 1950, 266, 276. State practice should be "extensive and virtually uniform in the sense of the provision invoked". *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands),* Judgment, ICJ Reports 1969, 3, 43, para. 74.

32 M. Shaw, *International Law*, 6th ed. (2008), 74-75.

33 In relation to JCE I, the *Tadic Appeals Chamber* merely relied on six cases in total, four from British military tribunals, one from a Canadian tribunal and one from an American tribunal: *Otto Sandrock and three others; Hoelzer et al.; Gustav Alfred Jepsen and other; Franz Schonfeld and others; Feurstein and others; Otto Ohlenforf et al.* (*Prosecutor v. Dusko Tadic*, Appeal Judgment, IT-94-1-A, 15 July 1999, paras 197-200. With respect to JCE II, the *Tadic Appeals Chamber* relied upon two cases in the body of the judgment: the *Dachau Concentration Camp* case (*Trial of Martin Gottfried Weiss and thirty-nine others)* and the *Belsen* case (*Trial of Josef Kramer and forty-four others).* For JCE III, the *Tadic Appeals Chamber* relied upon the *Essen Lynching Case, Borkum Island Case,* and numerous unpublished decisions from post-World War II Italian jurisprudence: *Repubblica Sociale Italiana; D'Ottavio et al.; Aratano et al.; Tossani; Ferrida; Bonati et al., Mannelli.*

34 In an expert opinion commissioned by the ICTY Office of the Prosecutor, it was determined most states use co-perpetration rather than JCE. See Max Planck Institute for Foreign and International Criminal Law, Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Part 1: Comparative Analysis of Legal Systems, p. 16. See also *Prosecutor v. Gacumbitsi,* Appeals Chamber Judgment, Separate Opinion of Judge Schomburg on the Criminal Responsibility for the

In addition, the Tadic Appeals Chamber relied upon two international conventions to show the customary nature of JCE: the International Convention for the Suppression of Terrorist Bombing (ICSTB)[35] and the Rome Statute of the ICC.[36] Both conventions entered into force after the date of commission of the offenses in Tadic, which affects their usefulness when evaluating customary international law at the time the crimes in Tadic were committed. Judge Liu, in his partially dissenting opinion and declaration to the Appeals Judgment in *Oric*, stated that "because customary international law has to be assessed as of the date of the commission of the offences, the fact that […] texts were adopted subsequent to these dates […] further limit their weight and usefulness as sources of customary international law at the time the crimes were committed"[37]. The ICSTB and the Rome Statute had limited value in assessing the customary status of JCE. Even if these two conventions had entered into force before the commission of the offenses in Tadic, they would not support the creation of

Appellant for Committing Genocide, ICTR-2001-64-A, 7 July 2006, 114, para. 24. "[W]hen interpreting the meaning of 'committing' based on imputed liability, it is the noble obligation of an international criminal tribunal to merge and harmonize the major legal systems of the world and to accept also other recognized developments in criminal law over the past decades".

35 *International Convention for the Suppression of Terrorist Bombing*, 12 January 1998, 2149 U.N.T.S. 256.

36 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3.

37 See *Prosecutor v. Oric*, Appeals Chamber Judgment, IT-03-68-A, 3 July 2008, 82, para. 26, referring to the texts of the Draft Code of Crimes Against the Peace and Security of Mankind and Article 28 of the ICC Statute being adopted subsequent to the adoption of the ICTY and ICTR Statute. See also *Prosecutor v. Hadzihasanovic & Kubura*, Appeals Chamber Decision, Partially Dissenting Opinion of Judge Shahabuddeen, IT-01-47-AR72, 16 July 2003, para. 21, where Judge Shahabuddeen noted that "weight has of course to be given to the texts as indicative of the state of customary international law as it existed when they were adopted. But, as the texts [Draft Code of Crimes Against the Peace and Security of Mankind] were adopted subsequent both to the making of the Statute of the Tribunal and to the dates on which the alleged acts […] were committed, on the question what was the state of customary international law on these occasions they do not seem to speak with the same authority as do the earlier provisions […] of the 1977 Additional Protocol I to the Geneva Conventions 1949".

JCE liability. The ICSTB deals with different crimes from those in the ICTY Statute, and the ICC has soundly rejected the application of JCE.[38]

The cases the Tadic Appeals Chamber used in holding that JCE is custom are inconsistent or do not support this form of liability. A review of these cases demonstrates, *inter alia*, that the *mens rea* was inconsistently applied, or that there was a failure by the Judge Advocate to state the law. In its analysis of certain cases, the Tadic Appeals Chamber assumed that the prosecution's arguments relating to criminal liability were followed because the Accused was convicted.[39] The Chamber relied on cases that provide "almost no support for the most controversial aspects of contemporary joint criminal enterprise doctrine"[40].

38 See *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Lubanga Dyilo,* Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 29 January 2007; See *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Katanga & Ngdujolo*, Decision on Confirmation of Charges, ICC-01/04-01/07 (Pre-Trial Chamber I), 30 September 2008.

39 For example, in reviewing the *Essen Lynching* case, the Appeals Chamber inappropriately assumed that because the Defendant was convicted, the court must have accepted the prosecution's arguments in respect of criminal liability. The ECCC Pre-Trial Chamber found that "there is no indication in the case that the Prosecutor even explicitly relied on the concept of common design and this case alone would not warrant a finding that JCE III exists in customary international law." *Case of Nuon Chea et al.,* Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OCIJ (PTC35) (Pre-Trial Chamber), 20 May 2010, D97/14/15, para. 81. As Professor Ohlin poignantly explains: "The first problem with these cases [relied upon by the *Tadic* Appeals Chamber] is that neither case produced a written decision from the judges, and so the written material consists only of submissions from the prosecutor and defense counsel. One is left to infer agreement with the prosecutor's doctrine on the basis of the judges' decision to issue convictions. This is problematic purely as a matter of legal reasoning. Second, and more importantly, neither case involved a situation where a defendant explicitly agreed to a criminal plan but was convicted for the actions of confederates that extended beyond the scope of the criminal plan. Rather, these were lynchings where the deaths were attributed to the defendants by the judicial system, even though the prosecutors could not prove who had killed whom (by delivering the fatal blows). Indeed, there is not a single *international* case cited in the Tadic opinion that includes the language of liability for actions that were reasonably foreseeable". J. Ohlin, 'Joint Intentions to Commit International Crimes', 11 *Chicago Journal of International Law* (2011) 2, 693, 708.

40 "The cases cited in Tadic […] do not support the sprawling form of JCE, particularly the extended form of this kind of liability, currently employed at the ICTY. Instead, the cases discussed in Tadic fall into one of two types. The first involves unlawful

JCE has been roundly criticized as judge-made law that has no basis in customary international law. Affirming this criticism, the Pre-Trial Chamber and the Trial Chamber of the ECCC recently have shown conclusively that JCE III did not exist as a mode of criminal liability in 1979 under customary international law. Save for its rejection as a mode of liability at the ICC, there have been no changes in the status of JCE III under customary international law since 1979; thus, it still does not exist as a mode of liability in customary international law.

In these Decisions, the ECCC Pre-Trial Chamber and Trial Chamber thoroughly examined the international instruments and case law relied on by the Tadic Appeals Chamber and found that the materials cited did not support the existence of JCE III under customary international law (the Trial Chamber additionally considered whether JCE III existed as a general principle of law and concluded that it did not).[41]

As Tanya Pettay and Helen Sullivan explain:

> "[t]he Trial Chamber […] considered the post-World War II cases cited in the Tadic Appeals Judgement as well as two additional World War II era cases, U.S. v. Ulrich and Merkle and U.S. v. Wuelfert, cited in the STL Decision [which was relied upon by the prosecution to support the existence of JCE III]. Both U.S. v. Ulrich and Merkle and U.S. v. Wuelfert involved businessmen who were held responsible for the mistreatment of prisoners at their factories and the Dachau concentration camp. In reviewing the judgements, the Trial

killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople. The second group of cases concerns concentration camps. […] [T]here is no indication in [*Essen Lynching*] that the prosecutor explicitly relied on the concept of common design, common purpose, or common plan. The Tadic court nevertheless cited this case as support for Category Three of JCE". A. Danner & J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 1, 75, 110-11.

41 See *Case of Nuon Chea et al.,* Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 002/19-09-2007-ECCC/OCIJ (PTC35) (Pre-Trial Chamber), 20 May 2010, D97/14/15; *Case of Nuon Chea et al.*, Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007-ECCC/TC (Trial Chamber), 12 September 2011, E100/6.

> Chamber found that the cases appeared to support JCE I and JCE II, because the Accused were part of the concentration camp structure and participated personally in the mistreatment of prisoners, but did not necessarily support findings of guilt based on JCE III. The Trial Chamber observed that '[a]gain, the Interlocutory Decision of the Special Tribunal for Lebanon cites review judgements which do not provide the legal reasoning behind the affirmed convictions.' Since the legal basis for conviction was not clear in either of the cases, the Trial Chamber found that the cases could not support a conclusion that JCE III had emerged as a principle of customary international law by 1975-1979."[42]

The findings of the ECCC Pre-Trial and Trial Chambers, while definitively excluding JCE III as a mode of liability, also raise questions about the validity of JCE I and JCE II as a mode of liability under customary international law. The Tadic Appeals Chamber did not rely upon any more cases to support its finding that JCE III has a basis in customary international law than were relied on to support a finding that JCE II has such a basis.[43] Consequently, "it is dubious whether the jurisprudence [relied on in Tadic to support the customary status of JCE III, i.e. the *Borkum Island* and *Essen Lynching* cases] involves significantly more inference than the other post-World War II jurisprudence that led the [ECCC Pre-Trial Chamber] to find 'without a doubt' that JCE 1 and JCE 2 were customary law"[44].

42 T. Pettay & H. Sullivan, 'The Belated demise of JCE III: The ECCC debunks the myth created by the ICTY in Tadic that JCE III exists in customary international law' ADC-ICTY Newsletter, Issue 21, 31 October 2011 (internal citations omitted).

43 D. Scheffer & A. Dinh, 'The Pre-Trial Chamber's Significant Decision on Joint Criminal Enterprise for Individual Responsibility', *Cambodia Tribunal Monitor* (3 June 2010), available at http://www.cambodiatribunal.org/images/CTM/ctm%20scheffer%20dinh%20jce%20commentary%203%20june%202010.pdf (last visited 16 November 2011), 5.

44 Scheffer & Dinh, *supra* note 42, 5. This statement equally applies to the two additional World War II-era cases, *U.S. v. Ulrich and Merkle* and *U.S. v. Wuelfert,* recently relied on by the STL Appeals Chamber in its decision reaffirming the existence of JCE in customary international law. See *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1 (Special Tribunal for Lebanon), 16 February 2011, para. 237. As with the other cases, the Judgments in *Ulrich and Merkle* and *Wuelfert* do not provide the legal reasoning behind the convictions. *Prosecutor v. Nuon Chea et al.*,

After creating JCE as a mode of criminal liability, the Appeals Chamber of the ICTY has so far refused to entertain challenges to its findings in Tadic on the customary nature of JCE.[45] Although cogent reasons abound,[46] overturning the JCE holding from Tadic would have a catastrophic effect on ICTY prosecutions – and the legacy of the Tribunal – due to the sheer number of prosecutions and convictions that have been based on JCE.[47] The major question that now arises, particularly in light of the ECCC Decisions, is whether the judges at the *ad hoc* tribunals will have the intellectual integrity to reevaluate whether JCE liability as a whole has a place in international criminal law and, at the very least, re-examine whether JCE III may legitimately be applied in future cases and revisit past convictions based on this form of liability. As Pettay and Sullivan have noted, a question that begs an answer is whether the Judges at the ICTY "will have the intellectual integrity to hold that JCE III is not a legitimate form of liability to be applied in future cases and, more importantly, to revisit and reverse past convictions based in whole or in part on JCE III. Given the impact that the erroneous use of JCE III liability has on the legacies of the *ad hoc* Tribunals, […] Judges should take immediate steps to redress the egregious mistake made more than ten years ago by the Tadic

Decision on the Applicability of Joint Criminal Enterprise, 002/19-09-2007-ECCC/TC (Trial Chamber), 12 September 2011, E100/6, para. 34.

45 When the customary law basis of JCE liability was challenged by the Defense in *Prosecutor v. Milutinovic et al.*, the Appeals Chamber simply asserted that it "does not propose to revisit its finding in *Tadic* concerning the customary status of this form of liability. It is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when Tadic committed the crimes for which he was eventually convicted". *Prosecutor v. Milutinovic et al.*, Appeals Chamber Decision, IT-99-37-AR72, 21 May 2003, para. 29.

46 The *Aleksovski* Appeals Chamber has stated that "the Appeals Chamber should follow its previous decisions, but should be *free to depart from them for cogent reasons* in the interest of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a *wrong legal principle* or cases where a previous decision has been given *per incuriam*." *Prosecutor v. Aleksovski*, Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, paras 107-108 (emphases added).

47 Danner & Martinez, *supra* note 40, 107: "The first indictment to rely explicitly on JCE was confirmed on June 25, 2001 – eight years into the ICTY's work. Of the forty-two indictments filed between that date and January 1, 2004, twenty-seven (64%) rely explicitly on JCE".

Appeals Chamber and blindly, if not obsequiously, repeated by subsequent Chambers."[48] The failure to honestly assess the creation of JCE liability by the Tadic Appeals Chamber and its impact over the last twelve years on prosecutions at the ICTY will be a tremendous stain on the legacy of the Tribunal.

II. The Judicially-Created Requirement of a Showing of Sufficiently Compelling Humanitarian Reasons before Granting Provisional Release

In October 2011, it was proposed that the Plenary Meeting of judges at the ICTY consider whether Rule 65(B) should be amended to either require or permit a showing of "sufficiently compelling humanitarian reasons" for provisional release at a late stage of the proceedings, and in particular after the close of the prosecution's case.[49] The codification of this additional criterion to make its application mandatory would have created a high standard for the provisional release of an Accused, making it exceptionally difficult for an Accused to be provisionally released after the close of the prosecution's case, despite having satisfied the criteria enumerated in Rule 65(B). The proposed amendment to require a showing of sufficiently compelling humanitarian reasons meant that an Accused could remain incarcerated throughout the often long period of time needed for the ICTY Trial and Appeals Chambers to render their judgments. For example, in *Prlic et al.*, applying the additional criterion could lead to the unjust result that the six Accused be held in provisional detention for nearly two years while awaiting the Trial Chamber's judgment.[50] This standard is

48 T. Pettay & H. Sullivan, 'The Belated demise of JCE III: The ECCC debunks the myth created by the ICTY in Tadic that JCE III exists in customary international law', 21 *ADC-ICTY Newsletter* (2011).

49 Prior to its amendment by the Plenary on 28 October 2011, Rule 65(B) of the Rules of the Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, UN Doc IT/32/Rev. 46, stated that provisional release "may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person".

50 See, e.g., *Prosecutor v. Prlic et al.*, IT-04-74, Decision on Jadranko Prlic's Motion for Provisional Release, 21 April 2011 [*Prlic et al.* 21 April 2011 Decision], para. 35. See also Letter dated 12 May 2011 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International

in direct conflict with the presumption of innocence because Accused, who have not been convicted, are being punished as if they were already guilty. Moreover, this standard resulted from recent Appeals Chamber jurisprudence and has no basis in either the Rules, the Statute, or in customary international law.

On 11 March 2008, the Appeals Chamber[51] overturned the Trial Chamber's Decisions[52] to provisionally release five of the accused during a recess in the trial following the close of the prosecution's case.[53] The Appeals Chamber considered that a Rule 98*bis* (Judgment of Acquittal) ruling warranted the "explicit consideration" of the risk of flight posed by the Accused pursuant to Rule 65(B),[54] and concluded that the humanitarian grounds put forward as justification for the short period of provisional release (such as to visit ailing relatives) were not "sufficiently compelling, particularly in light of the 98*bis* Ruling, to warrant the exercise of the Trial Chamber's discretion in favor of granting the Accused provisional release"[55]. The *Prlic et al.* 11 March 2008 Decision repeatedly emphasized the specific circumstances "in this case" and "the present context of the proceedings"[56]. Judicial inquiry has followed regarding whether the *Prlic et*

Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN Doc S/2011/316 (18 May 2011) available at http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_18may2011_en.pdf. (last visited 2 December 2011), paras 33-35. President Robinson projects that the Judgment will be issued in June 2012; however, current predictions show it is more likely to be issued at the end of 2012 or the beginning of 2013.

51 Constituted by Judges Pocar, Liu, Vaz, Meron and Schomburg.

52 *Prosecutor v. Prlic et al.*, Decision on the motion for provisional release of the accused Prlic, IT-04-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused Stojic, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused *Praljak*, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused *Petkovic*, IT-05-74-T, 19 February 2008; *Prosecutor v. Prlic et al.*, Decision on the Motion for Provisional Release of the Accused Coric, IT-05-74-T, 19 February 2008.

53 *Prosecutor v. Prlic et al.*, Appeals Chamber Decision, IT-04-74-AR.65.5, 11 March 2008 [*Prlic et al.* 11 March 2008 Decision], paras 19-20.

54 *Id.*, para. 20.

55 *Id*., para. 21.

56 *Id.*, paras 19-21. See also *Prosecutor v. Stanisic & Zupljanin*, Decision Denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 17.

al. 11 March 2008 Decision intended to add an additional criterion to Rule 65(B) at all.[57]

However, on 21 April 2008, a majority of the *Prlic et al.* Appeals Chamber,[58] constituted to decide the prosecution's appeal against granting provisional release to Milivoj Petkovic, relied on *Prlic et al.* 11 March 2008 Decision when concluding that "provisional release should only be granted at a late stage of the proceedings when sufficiently compelling humanitarian reasons exist"[59]. The Appeals Chamber further premised its conclusion on the potential prejudice victims and witnesses could suffer if accused persons were provisionally released to the same regions in which victims and witnesses live.[60] On 23 April 2008, in another decision in *Prlic et al.* regarding provisional release for Berislav Pusic, the Appeals Chamber held that Rule 65(B) of the Rules does *not* mandate humanitarian justification for provisional release.[61] Yet on 15 May 2008, the Appeals Chamber returned to the "sufficiently compelling humanitarian reasons" standard when deciding requests for a custodial visit by Ljubomir Borovcanin and provisional release by Milan Gvero and Radivoje Miletic in *Popovic et al.*[62]

The Appeals Chamber thus set a faulty pattern by upholding the *Prlic et al*. 21 April 2008 Decision. More recently, the Trial Chamber and

57 See *Prosecutor v. Stanisic & Zupljanin*, Decision Denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 17. See also Partially Dissenting Opinion of Judge Liu in *Prosecutor v. Popovic et al.*, Appeals Chamber Decision, IT-05-88-AR65.4, AR65.5 and AR65.6, 15 May 2008, para. 6. The *Prlic et al.* 11 March 2008 Decision "was specific to the circumstances of that particular case and was made in light of the arguments presented. It was not creating a general principle by assessing whether the Trial Chamber had erred in finding humanitarian reasons". See also *Prosecutor v. Prlic et al*., Appeals Chamber Decision, IT-04-74-AR65.6, 23 April 2008 ("*Prlic et al.* 23 April 2008 Decision"), paras 14-15.

58 Judges Pocar, Shahabuddeen, Vaz and Meron, *Prosecutor v. Prlic et al.*, Decision on "Prosecution Appeal from Décision relative à la demandede mise en liberté provisoire de l'accusé Petkovic dated 31 March 2008", IT-04-74-AR65.7, 21 April 2008 [*Prlic et al.* 21 April 2008 Decision]; Judge Güney partially dissenting.

59 *Prlic et al.* 21 April 2008 Decision, para. 17.

60 *Id.*

61 *Prlic et al.* 23 April 2008 Decision, para. 14.

62 *Prosecutor v. Popovic et al.*, Appeals Chamber Decision, IT-05-88-AR65.4, IT-05-88-AR65.5, IT-05-88-AR65.6, 15 May 2008 [*Popovic et al.* 15 May 2008 Decision], para. 24.

Appeals Chamber in *Prlic et al.* upheld this new standard in their decisions to refuse Dr. Jadranko Prlic's post-trial application for provisional release during the Trial Chamber's deliberations.[63] Even though the Trial Chamber found that all of the requirements of Rule 65(B) were met,[64] it considered "itself constrained in its analysis" by the Appeals Chamber's requirement to determine whether sufficiently compelling humanitarian reasons existed.[65] In June 2011, the *Stanisic & Zupljanin* Trial Chamber questioned the new standard,[66] and on appeal the "sufficiently compelling humanitarian reasons" criterion would have been reversed but for Judge Liu's decision to "defer to the outcome" of the majority decision, notwithstanding "his well-documented antipathy towards the case law in this regard"[67].

The "sufficiently compelling humanitarian reasons" criterion was built on nothing more than a dubious amalgamation of Tribunal case law. As ICTY President Judge Robinson has opined, that release "may" be ordered by a Trial Chamber pursuant to Rule 65(B) "does not mean that a Chamber is free to refuse an application for reasons other than those set out in the text; if it does so, it would have acted arbitrarily and unlawfully. All that the word 'may' means [in Rule 65(B)] is that the Chamber has the power, that is, it is competent to grant bail […]. In sum, the word 'may' imports not so much discretionary power as jurisdictional competence"[68].

Turning to the Appeals Chamber jurisprudence which created this additional criterion, the reliance placed by the majority in the *Prlic et al.* 21 April 2008 Decision on the *Prlic et al.* 11 March 2008 Decision "was

63 *Prlic et al.* 21 April 2011 Decision, paras 35-39.

64 *Prlic et al.* 21 April 2011 Decision, paras 16-22, 26, 38-39. See also *Id.*, Dissenting Opinion of Presiding Judge Antonetti, paras 9, 15, 17; *Prosecutor v. Prlic et al.*, Decision on Slobodan Praljak's motion for provisional release, IT-04-74, 21 April 2011.

65 *Prlic et al.* 21 April 2011 Decision, para. 39.

66 *Prosecutor v. Stanisic & Zupljanin*, Decision denying Mico Stanisic's Request for Provisional Release During the Upcoming Summer Recess, IT-08-91-T, 29 June 2011, para. 30.

67 *Prosecutor v. Stanisic & Zupljanin*, Appeals Chamber Decision, IT-08-91-AR65.2, 29 August 2011, Declaration of Judge Liu, para. 2.

68 *Prosecutor v. Krajisnik & Plavsic*, Decision on Momčilo Krajisnik's Notice of Motion for Provisional Release – Dissenting Opinion of Judge Patrick Robinson, IT-00-39 & 40-PT, 8 October 2001 [*Krajisnik & Plavsic* 8 October 2011 Decision – Dissenting Opinion of Judge Robinson], paras 27-28. See also *Prosecutor v. Stanisic & Zupljanin*, IT-08-91-AR65.2, 29 August 2011, paras 7-9.

misplaced"[69]. As Judge Liu has observed, the *Prlic et al.* 11 March 2008 Decision "was specific to the circumstances of that particular case […] [i]t was not creating a general principle"[70]. The *Prlic et al.* 21 April 2008 Decision cited *Ademi* to support the notion that provisional release in later stages of a case requires sufficiently compelling humanitarian reasons.[71] Yet nowhere did the *Ademi* Trial Chamber suggest that sufficiently compelling humanitarian reasons should become *the* pre-requisite for provisional release.[72]

Due to its grave impact on the presumption of innocence and a person's human right to liberty, Rule 65(B) is no mere procedural rule. Its terms must be consistent with both the Statute *and* customary international law. The Tribunal must fully respect internationally recognized standards

69 *Popovic et al.* 15 May 2008 Decision, Partially Dissenting Opinion of Judge Liu, para. 6. See also *Prlic et al.* 21 April 2008 Decision, Partially Dissenting Opinion of Judge Güney, para. 7: "Superfluously, I wish to underline that most of the references quoted in support of the majority finding 'that the development of the Tribunal's jurisprudence implies that an application for provisional release brought at a late stage of proceedings, and in particular after the close of the Prosecution case, will only be granted when serious and sufficiently compelling humanitarian reasons exist' are to decisions based on the Decision of 11 March 2008. The other decisions cited are no more than consideration by a Trial Chamber of the two requirements of Rule 65(B) of the Rules and the usual exercise of its broad margin of discretion".

70 *Popovic et al.* 15 May 2008 Decision, Partially Dissenting Opinion of Judge Liu, para. 6.

71 *Prlic et al.* 21 April 2008 Decision, n. 52,

72 *Prosecutor v. Ademi*, IT-01-46-PT, Order on Motion for Provisional ReleaseTrial Order, 20 February 2002, para. 22, cited in para. 17 of the *Prlic et al.* 21 April 2008 Decision, states that the Trial Chamber "agrees with the interpretation that a Trial Chamber will still retain a discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose a danger to any victim, witness or other person. This applies even if the Prosecution does not object to the application for release. Consequently, the express requirements within Rule 65 (B) should not be construed as intending to exhaustively list the reasons why release should be refused in a given case. There may be evidence of obstructive behaviour other than absconding or interfering with witnesses, which a Trial Chamber finds necessary to take into account. For example: the destruction of documentary evidence; the effacement of traces of alleged crimes; and potential conspiracy with co-accused who are at large. In addition, factors such as the proximity of a prospective judgement date or start of the trial may weigh against a decision to release. The public interest may also require the detention of the accused under certain circumstances, if there are serious reasons to believe that he or she would commit further serious offences" (internal citations omitted).

that protect the rights of the Accused at all stages of the proceedings, particularly those in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[73] Principles taken from the European Convention on Human Rights and the ICCPR are a part of international law and Rule 65(B) should be construed in light of them.[74] Pursuant to these instruments, provisional detention is considered to be the exception rather than the rule,[75] and all Accused are presumed innocent until proven guilty.[76] Derogation from customary international law must be authorized by the Tribunal's Statute.[77] As the Statute does not derogate from these principles, the additional criterion's effect (by making provisional release exceptional) contravenes international human rights law.[78] It bears repeating that

[73] 1993 Report of the Secretary-General, para. 106.

[74] *See Prlic et al.* 21 April 2011 Decision, para. 30, citing *Prosecutor v. Limaj*, Appeals Chamber Decision, IT-03-66-AR65, 31 October 2003, para. 12.

[75] Article 9(3) of the ICCPR reflects a customary norm that detention shall not be the general rule. *See also Prlic et al.* 21 April 2011 Decision, para. 32: "The Chamber also wishes to recall that the jurisprudence of the European Court of Human Rights ('EHR Court') has spoken to the circumstances where measures of lengthy provisional detention may be enforced: 'According to the settled jurisprudence of the Court, it falls first to national judicial authorities to ensure that in any given case, the length of provisional detention of an accused does not exceed the bounds of what is reasonable. For this purpose, they must examine all of the circumstances likely to reveal or to rule out whether the requirements of the public interest regarding the presumption of innocence, would warrant making an exception to the rule of respect for individual liberties and to take this into consideration in their decisions with respect to any release. It is principally on the basis of the grounds appearing in these decisions, as well as of uncontested facts signaled by the appellant in his appeals that the Court must determine whether or not there has been a violation of Article 5 § 3 of the Convention.' /Registry translation", citing *Prencipe v. Monaco*, ECHR. (2009) No. 43376/06, paras 74 and 75.

[76] Article 21(3) of the Statute of the ICTY states: "The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute." Article 14(2) of the ICCPR states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

[77] For example, Article 21(2) authorizes a derogation from the Accused's right to a public hearing in the interest of the protection of victims and witnesses. *See Krajisnik & Plavsic* 8 October 2001 Decision – Dissenting Opinion of Judge Robinson, para. 10.

[78] See *Krajisnik & Plavsic* 8 October 2001 Decision – Dissenting Opinion of Judge Robinson, para. 12. See also *Prlic et al.* 21 April 2011 Decision, paras 31-34; *Prosecutor v. Stanisic & Zupljanin*, Trial Decision, IT-08-91-T, 25 February 2011, para. 18: "The Trial Chamber notes in this context that post-2008 Appeals Chamber decisions [on provisional release] do not contain references to the [ICCPR] and the

applying this judge-made additional criterion could lead to unjust results such as where an Accused, when presumed innocent, is held in provisional detention for nearly two years between the end of closing arguments and a Trial Chamber judgment.[79] The Trial Chamber noted in its decision on Dr. Jadranko Prlic's application for provisional release that "the length of detention already served by the Accused removed all justification for the further criterion of compelling humanitarian circumstances", although it felt compelled to continue his detention anyway.[80]

The Appeals Chamber had cited public policy considerations to justify this state of affairs, i.e. that "an accused's provisional release after a decision pursuant to Rule 98*bis* of the Rules could have a prejudicial effect on victims and witnesses"[81]. Yet even if an Accused's provisional release after a Rule 98*bis* decision could be considered to have a prejudicial effect on victims and witnesses, public policy considerations do not justify the creation of additional criteria lacking legal foundation and cannot compensate for deleterious effects on the human rights and dignity of the Accused.[82] Simply, public policy considerations, however compelling,

European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), or to the principle of presumption of innocence but, instead, emphasize policy considerations, such as the perception of the Tribunal and its work in the former Yugoslavia, particularly by the victims of the crimes charged". See also *Prosecutor v. Popovi*c *et al.*, Trial Decision, IT-05-88-T, 17 December 2009, Judge Prost's Separate Declaration, para. 4: "[…] I feel compelled to maintain my dissent on this essential legal issue, despite the subsequent Appeals Chamber ruling, as I consider the 'reading in' of such a requirement to be in direct contravention of Article 21 (3) of the Statute which accords to Gvero a right to be presumed innocent until proven guilty." In addition, at the national level, many national jurisdictions will look at a range of factors when considering whether to grant bail during criminal proceedings. Generally limiting temporary release or bail to all but the most exceptional of circumstances does not feature in most national jurisdictions. See, e.g., The Bail Act 1976, England and Wales; Moore's Federal Practice–Criminal Procedure para. 646.11 Terms of Release After Trial Begins, Matthew Bender & Company (2009); United States Fed. R. Crim. P. 46(b); Canadian Charter of Rights and Freedoms, para. 11(e), Canada Constitution Act 1982; Criminal Procedure Code of Bosnia and Herzegovina, para. 5, Art. 137; German Criminal Procedure Code, para. 117.

79 See, *supra* note 50.

80 *Prosecutor v. Prlic et al.*, Decision on Jadranko Prlic's Motion for Provisional Release, IT-04-74-T, 21 April 2011, paras 17, 38.

81 See, e.g., *Prosecutor v. Prlic*, Appeals Chamber Decision, IT-04-74-AR65.24, 8 June 2011, para. 9. See also *Prlic et al.* 21 April 2008 Decision, para. 17.

82 The protection of human rights rests "directly on a moral foundation, the belief that every human being, simply by virtue of his or her existence, is entitled to certain very

cannot cure the additional criterion's lack of legal basis, i.e. its incompatibility with the Statute and customary international law.[83] Nor can they justify a standard which violates an Accused's fundamental fair trial rights.

Furthermore, the "sufficiently compelling humanitarian reasons" criterion is premised on a fundamental misunderstanding of the significance of dismissal of a Rule 98*bis* motion. The apparent justification for the criterion's creation was that following a Rule 98*bis* Decision, the Accused's flight risk increases. This is wrong. The "position in law is that the dismissal of a motion for acquittal under Rule 98*bis* of the Rules does not place the accused any nearer to a conviction than an acquittal"[84]. Prior to its amendment on 8 December 2004, Rule 98*bis* compelled Trial Chambers to review, *in toto*, all of the evidence adduced during the prosecution's case-in-chief to determine the sufficiency of its case and whether, based on the evidence, the trial should proceed in whole or in part.[85] However, in Rule

basic, and in some instances unqualified, rights and freedoms". T. Bingham, *The Rule of Law* (2010), 116. Human dignity is "a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain instrinsically valuable aspects of being human. […] [This] inherent dignity cannot be replaced by anything else, and it is not relative to anyone's desires or opinions". A. Gewirth, 'Human Dignity as the Basis of Rights', in W. Parent (ed.), *The Constitution of Right: Human Dignity And American Values* (1992), 10, 12-13. The rights guaranteed by the ICCPR "derive from the inherent dignity of the human person." ICCPR, Preamble.

83 Further, as observed by Judge Robinson, "a Trial Chamber which has evidence that the release of an accused could have a 'prejudicial effect on victims and witnesses,' […] would be properly exercising its discretion under Rule 65(B) of the Rules if it refused an application for provisional release made at any stage of the trial on that ground, because such a refusal would be covered by the second limb of the Rule. Indeed, it would be an improper exercise of the discretionary power to grant provisional release in those circumstances". *Prosecutor v. Stanisic & Zupljanin*, Appeals Chamber Decision, IT-08-91-AR65.2, 29 August 2011, Dissenting Opinion of Judge Robinson, para. 15.

84 *Id.*, para. 13.

85 Prior to amendment on 8 December 2004, Rule 98*bis* stated: "(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that *the evidence is insufficient to sustain a conviction* on that or those charges". The current version of Rule 98*bis* states: "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*" (emphasis added).

98*bis*'s amended version, only the prosecution's evidence is considered. Also, only a preponderance of evidence standard (as opposed to proof beyond a reasonable doubt) is applied. Thus, the current Rule 98*bis* procedure is nothing more than a reconfirmation of the indictment; it is intellectually disingenuous to interpret the impact of dismissal of a Rule 98*bis* motion as increasing the likelihood of a conviction in any given case, and thereby enhancing an Accused's flight risk.

Codification of the additional criterion to make its application mandatory would have risked further staining the Tribunal's legacy. The standard was judge-made, had no basis in law or the Rules, and was an assault on the presumption of innocence. In effect, even if an Accused satisfied the criteria in Rule 65(B), the "sufficiently compelling humanitarian reasons" standard could, nonetheless, prevent the Accused from being provisionally released, save for exceptional circumstances. To use the procedure for amending the Rules retroactively to legitimize a judge-made criterion that manifestly transgresses the fair trial rights of the Accused and denies individuals their right to bail, sends the message that all Accused are presumed guilty and that provisional detention is a form of punishment.

The Plenary's decision on 21 October 2011 to amend Rule 65(B) so that "release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement", and that "[t]he existence of sufficiently compelling humanitarian grounds *may* be considered in granting [provisional release to an Accused]"[86], is to be cautiously welcomed as a

A. Cayley & A. Orenstein, 'Motion for Judgement of Acquittal in the Ad Hoc and Hybrid Tribunals, What Purpose If Any Does it Serve?', 8 *Journal of International Criminal* Justice (2010) 575, 581, citing A. Klip & G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal For The Former Yugoslavia*, Volume 15 (2003), 138, concludes that the amendment "seems to place a different (lower) threshold requirement on the prosecution". But see *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, SCSL-04-16-T, 31 March 2006, para. 8: "In our view, there is no contextual difference between 'no evidence capable of supporting a conviction' and 'evidence in sufficient to sustain a conviction'".

86 Amendments to the Rules of Procedure and Evidence, IT/275, 21 October 2011, 4 (emphasis added). Pursuant to Rule 6(D) of the Tribunal's Rules of Procedure and Evidence, the amended rule entered into force on 28 October 2011. *Id.*, 2. Rule 65(B), as amended, states: "Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released,

constructive attempt to resolve the difficulties caused by the creation of the additional criterion. Unfortunately, however, the amended rule's language is in certain respects superfluous and risks giving rise to questions of interpretation causing confusion and time-consuming litigation.

The addition of the words "at any stage of the trial proceedings prior to the rendering of the final judgement" is unobjectionable but redundant. From the language of Rule 65(B) as it was previously drafted, it was axiomatic that provisional release may be ordered at any stage prior to final judgment and, in the event of a conviction, that Rule 65(I) becomes operative.

The express addition of language to permit consideration of the existence of the additional criterion serves to legitimate the questionable jurisprudence upon which it was based. The revised rule's language may also be (erroneously) interpreted as granting a *power* to consider sufficiently compelling humanitarian reasons when considering applications for provisional release, and suggesting that there are occasions where a showing of "sufficiently compelling humanitarian grounds" is *necessary*, when in fact Trial Chambers retain a *discretion* to consider whether humanitarian grounds are sufficiently compelling to warrant provisional release notwithstanding as accused's flight risk or danger to victims or witnesses. Following the Appeals Chamber's decision on 15 December 2011 to affirm the Prlic Trial Chamber's Decision of 24 November 2011 to release Dr. Jadranko Prlić for three months with the possibility of extension,[87] paving

will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release".

87 Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic, IT-04-74-A65.26, 15 December 2011. See also Joshua Kern, 'Provisional Release Precedent set for ICTY Accused Awaiting Final Judgement,' (16 December 2011) available at http://www.internationallawbureau.com/blog/?p=3707: "The decision is a watershed as it provides the first indication of how the Appeals Chamber will interpret the amended version of Rule 65(B) of the ICTY's Rules of Procedure and Evidence, which governs provisional release. […] The 15 December 2011 Prlic decision is of particular interest as it provides the first appellate clarification that under the newly amended Rule 65(B) there is 'no absolute requirement for a Trial Chamber to take into account the existence of [sufficiently compelling humanitarian] grounds before ordering a release' (para. 12). Further, it establishes that a procedure where an accused may apply to the Trial Chamber for his release to be prolonged prior to the expiry of his release period does not constitute a grant of 'indefinite provisional release' and is not an abuse of the Trial Chamber's discretion (para. 17)."

the way for Accused at the ICTY to be granted provisional release for extended periods pending final judgement in their cases, it can be hoped that this distinction will continue to be recognized and ruled upon correctly by the Appeals Chamber in decisions interpreting Rule 65(B) going forward.

H. The Impact of the Completion Strategy on the Rights of the Accused

Over the years one of the criticisms of the ICTY has been the enormous amount of time it takes to complete a case, particularly during the trial proceedings. This is in part due to the practice of judges confirming overly broad indictments, with insufficient attention being paid to the actual evidence available to justify such expansive indictments or to the time and resources required for litigation. It is only recently that the judges have come to the realization that this practice is excessive and counterproductive, particularly if the idea is to ensure that the Accused receive an expeditious trial, as many judges claim.

Since 2004, the trials at the ICTY have been conducted under the shadow of the Completion Strategy, which, at least at the time, called for all trials to be completed by 2008 and all appeals to be completed by 2011-2012. Having confirmed these mega-indictments, some Chambers instituted modalities to speed up the trial proceedings, such as using what is best characterized as a litigation by stop-watch approach: imposing time limitations on the parties for presenting evidence.[88] In some cases, for instance, the total amount of cross-examination time allotted to the Accused would be more or less equivalent to the time allotted to the prosecution for

88 J. Turner, 'Defense Perspectives on Law and Politics in International Criminal Trials', 48 *Virginia Journal of International Law* (2008) 3, 529, 590: "Perhaps the greatest recent challenge to the perception of judicial independence has been the so-called 'Completion Strategy' – the mandate that the tribunals complete their work in the next several years. To fulfill this mandate, judges have been limiting both parties' time to examine witnesses and present evidence, and have been making greater use of affidavits while relying less on oral testimony. They have also been more willing to demand that prosecutors trim the indictments and to take judicial notice of certain historical facts of common knowledge. A number of commentators, including defense attorneys and former tribunal judges, have argued that in the aim to fulfill the completion mandate, judges have unduly prioritized efficiency over fairness".

direct examination.[89] In other words, if the prosecution were to spend 60 minutes on direct examination, the amount of time the Accused would have would also be approximately 60 minutes. Thus, if there were 4 or 6 Accused, they would each be granted 10-15 minutes (or sometimes less) for questioning, unless they could agree amongst themselves how to best allocate the time.[90] Since only some of the Chambers have adopted this approach to trial management, the perspective of some of the Accused and defense counsel is that there is a lack of equality of arms in the proceedings.[91] In some cases, the defense has adequate time and facilities for challenging the evidence and putting on evidence, while in other cases the defense is unfairly restricted. When considering that individual trials at the ICTY are associated with single ethnic/national groups of the former Yugoslavia, it is not unreasonable for an Accused to perceive that he is not receiving equal treatment as another Accused of a different ethnic/national group. The disparity in which cases are tried, and the treatment of the Accused resulting from this disparity, give rise to conclusions that a particular ethnic/national group is being afforded fewer fair trial rights. While these are only perceptions, they do contribute to the legacy of the ICTY in that they undermine the supposed objective of promoting and fostering reconciliation.

I. Questionable Evidence Permitted by the Judges

By adopting a hybrid system, the ICTY avoided having to design and follow cumbersome rules of evidence as mostly seen in the adversarial system, where the screening of the admission of evidence is done either before or during the presentation of the evidence, as opposed to at the end of the trial. The ICTY's flexible approach, which is based on the Civil Law tradition, has distinct advantages, particularly in large and complex cases where it is challenging to appreciate the actual significance (or lack thereof)

89 See, e.g., *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 7 June 2007, 19707-19709.

90 See, e.g., *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 10 December 2007, 25431-25435.

91 See, e.g, *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 14 March 2007, 15632: "[Defense Counsel Karnavas]: [The Accused] deserve to have a fair trial. We're not saying it's unfair, but the process is – is to the point where it appears unfair, and in my opinion we're dangerously coming to the point where it is becoming unfair because we are unable, the parties are unable to put their cases forward in the manner which they prepared".

of pieces of evidence until all of the evidence is admitted and considered as a whole. Here again there is no universal approach as to what sort of evidence should be freely admitted during the trial, though a consensus seems to have emerged that lends sufficient certainty. A mere *prima facia* showing that the evidence is authentic, reliable and relevant will suffice.[92] Certainty as to what may be admitted may not necessarily lead to a measure of comfort that what is being admitted is trustworthy or of any evidentiary value or weight. For instance, having newspaper articles that describe events published by news wires (where the actual observer of the event is not known) admitted as proof of an event,[93] or admitting unverifiable documents simply because they were found in an archive, or having a witness comment about documents when the witness is not competent to testify, does not indicate that the evidence is trustworthy or of value to the trial.

The most troublesome sort of evidence created by the prosecution, and warmly received by many judges, are witness statements that are compiled over a series of interviews.[94] These types of statements tend to be in a

92 See RPE, Rule 89: "(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence [...] (C) A Chamber may admit any relevant evidence which it deems to have probative value. (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (E) A Chamber may request verification of the authenticity of evidence obtained out of court".

93 See C. Gosnell, 'Admissibility of Evidence', in K. Khan, C. Buisman & C. Gosnell (eds), *Principles of Evidence in International Criminal Justice* (2010), 375, 408-409: "[M]edia reports are understood to be fraught with ambiguous reliability. Some local media outlets are no more than platforms for propaganda whose reports, as one chamber has commented, are 'notoriously a servant of morale rather than truth.' Even the most objective journalism often relies on a confection of unidentified sources that is 'double or triple hearsay'. The ICTY Appeals Chamber in another context has warned against reliance upon such information. Allowing media reports into evidence without requiring the journalist's testimony means that the substance is inserted onto the record without any further clarification of sources. No prejudice will likely arise where the reports are general in nature; […] the ambiguity assumes much greater significance when the conduct is specific and highly incriminating, and may not be subject to corroboration or contradiction by other sources. Some chambers have responded to these concerns by treating contemporaneous media reports as documentary evidence, but then excluding them as not meeting the requisite threshold of probative value".

94 C. Rohan, 'Rules Governing the Presentation of Testimonial Evidence', in Khan, Buisman & Gosnell, *supra* note 93, 499, 522: The ICTY Rules "allow for the admission of written witness statements or prior testimony as part of a party's case-in-

narrative (story telling) format with headings and subheadings. No tape recordings exist so there is no way to verify what questions were asked, the format of the questions (open-ended or leading), what the answers were, what may have been suggested or commented upon by the prosecution's investigators, or what documents may have been used to coax or refresh the witnesses' memories. The narrative is drafted by the investigator, and though it is a composite of a series of interviews, the text reads as if it was the actual words spoken by the witness. This poses significant challenges to the defense since there is no concrete way of knowing what was actually done and said while the narrative was being drafted.[95] By admitting and relying on this sort of statement, the Chambers are circumscribing the Accused's right of confrontation. While recognizing the independence of the prosecution to conduct its investigation as deemed fit, nothing prevents

chief, in lieu of or in conjunction with the presentation of *viva voce* testimony at trial". Rule 92*ter* of the ICTY Rules and Evidence allows for "the introduction of written witness statements in lieu of direct examination, in whole or part, when the witness will appear in court and be available for cross-examination by the opposing party or questioning by the trial chamber". See also RPE, Rule *92bis*, allowing the admission of written statements and transcripts in lieu of oral testimony under certain circumstances, and Rule 92*quater*, allowing in "[t]he evidence of a person in the form of a written statement or transcript 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" under certain circumstances. See also Wald, *supra* note 15, 1588-1589: Although the ICTY Rules initially stated a clear preference for live testimony, they have always contained more liberal allowances than the American system for depositions, video testimony, transcripts of prior testimony, and judicial notice of 'adjudicated facts'. In the early years, ICTY appeals chambers […] insisted that written testimony contain indicia of credibility and reliability [...] In recent years, however, the Rules have been liberalized specifically to allow admission of written witness statements so long as they do not go to the core of the challenged conduct or role of the accused. The latest decisions have permitted written statements to be introduced across-the-board so long as the witness is held available on request for cross-examination.

95 *Prosecutor v. Prlic et al*, Trial Transcript, IT-04-74-T, 14 February 2011, 52195-52196: [Defense Counsel Karnavas]: Over a period of four days, the Prosecution sits with the witness […] provides the witness documents the witness has never seen, and then over a period of four days a narrative with titles, subtitles […] is prepared. There is a draft, there is another draft, until we just get it right. Now, we then present that statement here, and we move it into evidence because we're going to save some time. Major witness; save some time. Four days getting that statement just right. Comma in the right place, right adjective. Here's a document, and if you haven't seen it, who knows, it might help you refresh your memory. And I submit that if this were to occur in any of our jurisdictions, that statement would be thrown out of court".

the Chambers from denying the admission of this sort of evidence and demanding that statements be taken in the most reliable fashion: on tape where the questions and answers are accurately recorded and there is full transparency. By admitting and relying on such statements, the Chambers have effectively given the green light to the prosecution to simply carry on with business as usual.

J. A Reconciliation Failure: Selective Prosecution and Disparity among Prosecuting Teams

A component of the ICTY legacy that bears highlighting, especially when considering the objective of advancing or contributing to reconciliation in the war-torn region of the former Yugoslavia, is the prosecution's selective process when determining who to indict as well as the prosecution teams and resources that are allocated to those tried. A careful analysis reveals that the prosecutions have not been even-handed. The differences in practice – that is, in the inconsistent application of the Rules by the various Trial Chambers – have created differences in the fairness of trials from one courtroom to the next,[96] resulting in unintended and very unfortunate consequences that Accused of different ethnicities are perceived as receiving varying degrees of fairness.[97]

Setting aside where blame should lie for the events in the former Yugoslavia, the prosecution appears to have selectively targeted one or two ethnic/national groups while nominally prosecuting others. For example,

[96] *Prosecutor v. Prlic et al.*, Trial Transcript, IT-04-74-T, 14 March 2007, 15628: "[Defense Counsel Karnavas]: I think that this trial has to be conducted the way other trials are being conducted in this Tribunal in the sense that the parties should be allowed to ask questions. That is the procedure that is adopted at this Tribunal. […] That is the procedure that is followed in every court except this one. […] I think that everybody that is sitting in the dock is entitled to the same trial process as everyone else in this Tribunal". *Id.*, 15630: "Are we going to have a new system that is independent and different from other Trial Chambers or are we going to fall in line with the other Trial Chambers with some slight modifications but not so dramatic in this particular case"; *Prosecutor v. Prlic et al.*, Trial Transcript, 22 March 2007, 16148: "[Defense Counsel Karnavas]: I think a mature legal system, and this one has to be mature because it's been in existence for at least 10 years, should have a uniform procedure whether you go to courtroom I, courtroom II, courtroom III. Whether you have a continental bench or an adversarial bench or a mixed bench, the procedure should be by and large the same".

[97] Wald, *supra* note 15, 1589.

when it comes to the events in Bosnia and Herzegovina (BiH), the most underrepresented group has been the Muslims/Bosniaks.[98] None of the Muslim/Bosniak political leaders who were front and center in the policy and decision making process and/or who were in positions to command and control military commanders have been indicted. Moreover, when examining who was indicted and considering the overall authority and responsibility they held, it would appear that the indictments are not truly representative. Recognizing that resources are finite and that it is generally impracticable to charge all of those most responsible for all the crimes for which they may have been responsible, it nonetheless does appear that the decisions not to prosecute or to minimally prosecute were based on politics, or worse yet, prosecutorial bias.[99] The sad reality is that the ICTY, as with other such tribunals, is not beyond politics; denying this fact is absurd.

By selectively prosecuting individuals, the narrative that has emerged from the ICTY as to what may have happened, and who may have been responsible and held accountable, is unreliable and misleading. This is significant because, rather than fostering a better understanding of the events, the ICTY is establishing or making findings of fact that contribute to a false narrative. This could potentially be unsettling for national politics in places such as BiH, where many of the issues which were at the forefront of the conflict, such as the political and administrative division of authority

98 Turner, *supra* note 87, 579: "At the ICTY, too, some alleged selective prosecution and claimed that prosecutors were not as strict with their charges against Bosnian and Kosovar Muslims as they were with Serbs".

99 See R. Hayden, 'Biased 'Justice': Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia', 47 *Cleveland State Law Review* (1999) 4, 549, 551-52: "This article […] finds that the ICTY delivers a 'justice' that is biased, with prosecutorial decisions based on the national characteristics of the accused rather than on what available evidence indicates that he has done. Evidence of this bias is found in the failure to prosecute NATO personnel for acts that are comparable to those of Yugoslavs already indicted, and of failure to prosecute NATO personnel for *prima facie* war crimes. This pattern of politically driven prosecution is accompanied by the use of the Tribunal as a political tool for those western countries that support it, and especially the United States: put bluntly, the Tribunal prosecutes only those whom the Americans want prosecuted […] Further, judicial decisions by the ICTY render it extremely difficult if not impossible for an accused to obtain a fair trial, while the Tribunal has also shown a lack of interest in the investigation of potential prosecutorial misconduct." (citations omitted).

amongst the three constituent nations (Muslim/Bosniak, Serb and Croat), have yet to be fully resolved.[100]

The prosecution's selective prosecution has also undermined the credibility of the ICTY as an objective and impartial tribunal. This, of course, undermines the ICTY's objective of reconciliation. Certain ethnic/national groups in BiH, for instance, are less likely to accept the results (and the attendant narrative) of the ICTY. Lasting reconciliation is only likely to be achieved if all stakeholders perceive that the prosecution has executed its mandate with equal zeal and commitment against all who fall within the ICTY's jurisdiction.

K. Quality of Prosecution Teams

It would appear that there is a disparity in prosecutorial competence and overall resources allocated to cases depending on the ethnicity/national background of the Accused. While this impression cannot be quantified, it nevertheless appears that a pattern has emerged over the years suggesting that the best trial lawyers from the prosecution are dedicated to cases involving the Serb and Croat Accused. The second and third tier prosecuting lawyers are placed on cases involving Accused from other ethnic/national backgrounds. Naturally, with better lawyers, more resources tend to be allocated, resulting in better or more robust prosecuting. While it may just be serendipitous that this pattern appears to have emerged, it certainly gives rise to the suspicion that there is less of a commitment to prosecute some ethnic/national groups than others. Again, from an equal protection point of view, as well as fairness which, no doubt, is an indispensable ingredient in promoting reconciliation, this disparity negatively impacts on the legacy of the ICTY. Unlike at the ICTR, where the prosecution was forbidden, rather

[100] For example, Milorad Dodik, the prime minister of the Serb part of BiH, the Republika Srpska, was quoted in April 2011 as stating: "There are many who still seem to believe [that BiH may yet break up] – some, perhaps even in the lower reaches of our own Foreign Office. Others can be heard whispering that it is all too much – what would it matter if Bosnia did break up? Surely now, it would do so peacefully? The answer to that is a resounding no. The place is awash with arms and with veterans still fit enough to fight. I just cannot see the Muslim Bosniaks allowing themselves to be trapped into a tiny pocket in central Bosnia, isolated, let down by Europe yet again and surrounded on all sides by their enemies. They did not allow it 20 years ago against far greater odds and they will not allow it now". T. J., 'Two visions for Bosnia' (13 April 2011) available at http://www.economist.com/blogs/easternapproaches/2011/04/bosnias_gridlock (last visited 2 December 2011).

hypocritically by the Rwandan and UN donor nations, from prosecuting Tutsis with equal zeal as it has prosecuted Hutus,[101] the ICTY prosecution has not had any apparent limitations placed upon it which would have prevented the allocation of personnel and resources for the prosecution of all Accused on an equal basis. Thus, while there may not have been a policy to target a select ethnic/national group while pretending to prosecute others, that is exactly what is perceived by close observers of the prosecutions at the ICTY. There can be no acceptable reason for this disparity, other than that there has been a lack of commitment by the prosecution to prosecute some of the ethnic/national groups. This lack of commitment has also negatively influenced the narrative of what may have occurred during the conflicts in the former Yugoslavia. By not prosecuting with equal zeal all ethnic/national groups and by allowing weak prosecutions of some, which has resulted in partial or total acquittals of those individuals, the narrative is manipulated. Blame and responsibility are affixed inaccurately to the conflict.

L. The Likely Legacy Left by the ICTY

Despite all of its shortcomings, the ICTY will be remembered for making invaluable contributions to international criminal law – substantively, procedurally and administratively. It is regrettable that the ICTY has been unable or unwilling to engage in introspection; a modicum of self-criticism may have induced meaningful measures to diminish, if not eliminate, many of the shortcomings identified above. It is not that these shortcomings were not apparent or appreciated, but rather, much like many UN organs, there seems to have been a lack of political and institutional will to tackle inconvenient truths. There can be no justifiable reason for an international tribunal to have acquiesced to mediocrity, to have creatively transgressed the principle of legality through excessive judicial activism, and to have tolerated inequity in the prosecution of Accused of different ethnic/national groups, however unintended these consequences may be. Hopefully, when discussing the legacy of the ICTY as it winds down its

[101] T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals', 100 *American Journal of International Law* (2006) 551, 561: "The ICTR has enjoyed the solid support of the government of Rwanda, except when the ICTR prosecutor has tried to investigate crimes allegedly committed by the Tutsi. This stance further reveals how national-political considerations continue to affect the work of the tribunals".

affairs, the dialogue will include an examination of what went wrong, what errors were committed, what lessons can be drawn, what solutions were available but not sought, and what other future tribunals, including the ICC, can learn from the shortcomings of the ICTY.