

## Current Developments at the International Criminal Tribunals (2008)

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This article covers developments at the international criminal tribunals that occurred in the year 2008.<sup>1</sup> It provides a brief summary of the decisions and developments deemed most relevant by the authors.

### 1. Elements of Crimes

#### *1.1. The Objective and Subjective Elements of the War Crime of Pillaging*

In the decision on the confirmation of charges in the *Katanga* and *Ngudjolo Chui* case Pre-Trial Chamber I of the ICC elaborated on the definition and the requisite elements of ‘the war crime of pillaging under Article 8(2)(b)(xvi) of the ICC Statute,<sup>2</sup> which is criminalized under the Rome Statute whether it is committed in international or internal armed conflict. According to the Elements of Crimes, the war crime of pillaging requires proof of the following three elements: ‘(i) the perpetrator appropriated certain property; (ii) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; and (iii) the appropriation was without the consent of the owner’.

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\*) The views expressed here are those of the author alone and do not necessarily reflect the views of the International Criminal Tribunal for the former Yugoslavia or the United Nations.

<sup>1</sup> For developments January – November 2007, see *M.E. Badar/N. Karsten*, Current Developments at the International Criminal Tribunals, 8 *International Criminal Law Review* 2008, 353-380.

<sup>2</sup> Several provisions under Article 8 of the ICC Statute address war crimes involving the destruction, appropriation, seizure and pillage of property, see for example Article 8(a)(iv), 8(2)(b)(xiii), 8(2)(e)(xii), 8(2)(b)(xvi) and 8(2)(e)(v) ICC Statute. These provisions flow from different international instruments, and protect slightly different interests, but in practice they overlap considerably.

The Pre-Trial Chamber held that the property must belong to an “enemy” or “hostile” party to the conflict. Therefore, the pillaged property – whether moveable or immovable, private or public – must belong to “individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator”.<sup>3</sup> According to the Pre-Trial Chamber the crime encompasses both *dolus directus* of the first degree and of the second degree. The Chamber further found that the war crime of pillaging is a “specific intent” crime which requires proof of *dolus specialis* on the part of the perpetrator with regard to two elements: ‘First, the act of physical appropriation must be carried out with the intent to deprive the owner of his property. Second, the act of physical appropriation must also be carried out with the intent to utilise the appropriated property for private or personal use’.<sup>4</sup>

### 1.2. Persons Hors de Combat Can Be Victims of Both Crimes Against Humanity and War Crimes

Can persons *hors de combat* be victims of a crime against humanity? Despite the extensive case-law of the Tribunals in relation to crimes against humanity, this question had remained unsettled until October 2008 when the Appeals Chamber in the *Martić* case rendered its judgement.

In the trial judgement of 12 June 2007 the *Martić* Trial Chamber had relied on rulings of the Appeals Chamber in the *Galić* and *Blaškić* cases when dealing with the issue. It held that persons *hors de combat*, while being protected in armed conflicts through Common Article 3 of the Geneva Conventions, are not “civilians” in the context of international humanitarian law.<sup>5</sup> Since persons *hors de combat* are still members of the armed forces of a party to the conflict, they fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention and, as such, are not civilians in the context of Article 50(1) of Additional Protocol I.<sup>6</sup> In contrast, the Appeals Chamber in the *Kordić* and *Čerkez* case appeared to have expanded the term “civilian” to cover persons *hors de combat*.<sup>7</sup>

The Appeals Chamber in the *Martić* case now settled the issue. In fact, it distinguished two issues. First it held that Article 50 of Additional Protocol I does

<sup>3</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 329.

<sup>4</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 332.

<sup>5</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, paras 113-114; *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, fn. 437, quoted by *Martić* Trial Judgement, para. 55.

<sup>6</sup> Article 50 (1) of Additional Protocol I reads: 1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.

<sup>7</sup> *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras 421-422.

not only define the notion “civilian” for the purposes of Common Article 3 crimes, but also for the purposes of crimes against humanity, namely for the *chapeau* requirement “civilian population”. The Appeals Chamber reasoned that the fundamental character of the notion “civilian” both in international humanitarian law and international criminal law militates against giving it differing meanings.<sup>8</sup>

However, the question whether only “civilians” may be victims of crimes against humanity is a second issue which must be discussed separately. While the *chapeau* requirement of crimes against humanity is that the acts of the accused form part of a widespread and systematic attack directed against a *civilian* population, this requirement does not necessarily imply, in the Appeals Chamber’s view, that the criminal acts within the attack must be committed against civilians only.

In that regard, it is worth noting that the presence of combatants within a civilian population does not necessarily deprive the population of its civilian character.<sup>9</sup> It is conceivable that criminal acts are committed against persons *hors de combat* who are present within the civilian population.

The Appeals Chamber found that the drafters of the Statute did not intend to exclude persons *hors de combat* from the purview of crimes against humanity.<sup>10</sup> It consequently held that persons *hors de combat* could be victims of crimes against humanity and found that this approach has already been implicitly followed by the Tribunal in a number of cases.<sup>11</sup>

### 1.3. War Crime of Collective Punishment (the Notion of “Punishment”)

The Appeals Chamber of the Special Court of Sierra Leone (SCSL), by majority, held that the Trial Chamber erred in law in its definition of the crime of collective punishments, and overturned *Fofana’s* and *Kondewa’s* convictions for that crime. The Appeals Chamber emphasised that the notion “punishment” is an ‘indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible’.<sup>12</sup> As such, “punishment” is distinct from the targeting of protected persons as

<sup>8</sup> *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeal Judgement, 8 October 2008, paras 299, 302.

<sup>9</sup> See i.e. *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 107, see also *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para. 50.

<sup>10</sup> *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeal Judgement, 8 October 2008, paras 305, 306.

<sup>11</sup> *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeal Judgement, 8 October 2008, paras 308, 311, 313, 314.

<sup>12</sup> *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeal Judgment, 28 March 2008, paras 223–224.

objects of attack. The targeting of protected persons as objects of war crimes and crimes against humanity may not necessarily be predicated upon a perceived transgression by such persons and therefore does not constitute collective punishment.<sup>13</sup>

Thus, the *mens rea* element of collective punishments represents the critical difference between the war crime of collective punishment and the act of targeting. While targeting takes place on account of who the victims are, or are perceived to be, the crime of collective punishments occurs in response to the acts or omissions of protected persons, whether real or perceived.<sup>14</sup>

#### 1.4. *Other Inhumane Acts / Forced Marriage*

The SCSL Appeals Chamber in the *Brima et al.* case reversed the finding of the Trial Chamber that had interpreted forced marriage as a crime of sexual nature, covered and completely subsumed in the crime of sexual slavery in Article 2(g) of the SCSL Statute. The Trial Chamber also found that Article 2(i) of the SCSL Statute, other inhumane acts, must be restrictively interpreted to exclude crimes of a sexual nature.<sup>15</sup>

The Appeals Chamber held that, while forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, forced marriage is not adequately characterised as the crime against humanity of sexual slavery. Forced marriage involves a perpetrator compelling a person through his words or conduct, or those of someone for whose actions he is responsible, into a forced conjugal association with another person. Unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife”, which could lead to disciplinary consequences for breach of this exclusive arrangement.<sup>16</sup> These distinctions imply, in the Appeals Chamber’s view, that forced marriage is not predominantly a sexual crime, but is properly characterised as inhumane acts.<sup>17</sup> It also held that acts of forced marriage were of similar gravity to several enumerated crimes against humanity.

Astonishingly, the Appeals Chamber declined to enter new convictions on that ground. The Appeals Chamber stated that ‘it is convinced that society’s disapproval

<sup>13</sup> *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeal Judgment, 28 March 2008, paras 223, 224.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 697.

<sup>16</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, paras 195, 196.

<sup>17</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, paras 199-201.

of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an “Other Inhumane Act” capable of incurring individual criminal responsibility in international law”.<sup>18</sup>

### 1.5. *Other Inhumane Acts Is Not a “Catch All Provision”*

In the case of *Katanga* and *Ngudjolo Chui* the Prosecution charged both suspects (now accused) with the commission of crimes against humanity, namely, inhumane acts of intentionally inflicting serious injuries upon civilian pursuant to Article 7(1)(k) of the ICC Statute. PTC I noted that ‘the [ICC] Statute has given to ‘other inhumane acts’ a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived “other inhumane acts” as a “catch all provision”, leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting inhumane acts and the consequence required as a result of that action’.<sup>19</sup> PTC I noted that the ICC Statute defines the conduct under Article 7(1)(k) as “*other*” inhumane acts, which according to the PTC I indicates that none of the acts constituting crimes against humanity under Article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by Article 7(1)(k) of the Statute. Thus, murder as a crime against humanity, even if in its attempted form, cannot be charged simultaneously under Article 7(1)(k) of the ICC Statute as *other* inhumane acts.<sup>20</sup>

Based on the evidence tendered by the Prosecution, the majority of PTC I found that the attack on Bogoro was conducted in indiscriminately way using machetes, firearms and heavy weapons against civilians and that the attackers had the specific intent to kill such civilians rather than the intent to cause severe injuries.<sup>21</sup> The majority of the Chamber were of the opinion that ‘the clear intent to kill persons cannot be transformed into intent to severely injure persons by means of inhumane acts solely on the basis that the result of the conduct was different from that which was intended and pursued by the perpetrators’.<sup>22</sup>

<sup>18</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, para. 202.

<sup>19</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 450.

<sup>20</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 461.

<sup>21</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 458.

<sup>22</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 463.

## 2. Individual Criminal Responsibility

### 2.1. *Stretching the Boundaries of Commission Liability*<sup>23</sup>

The ICTR Appeals Chamber, by majority, quashed the Trial Chamber's finding that Seromba, a Catholic priest at Nyange Parish, aided and abetted genocide and held that he instead *committed* genocide as well as extermination as a crime against humanity, by virtue of his role in the destruction of the church in Nyange Parish.<sup>24</sup> Pursuant to these findings, the Appeals Chamber quashed the sentence of fifteen years' imprisonment and entered a sentence of life imprisonment.

The Appeals Chamber recalled that "committing" is not limited to physical or direct perpetration and that other acts can constitute direct perpetration in the *actus reus* of the crime of genocide.<sup>25</sup> It found that the Trial Chamber applied the wrong legal standard when it held that committing required direct and physical perpetration. In the Appeals Chamber's view, the accused is a principal perpetrator of genocide if his actions were 'as much an integral part of the genocide as were the killings which [they] enabled'.<sup>26</sup> When applying this legal standard to the factual findings of the Trial Chamber, the Appeals Chamber came to the conclusion that Seromba 'approved and embraced as his own' the decision to destroy the church in order to kill Tutsi refugees and was not an aidor and abettor but became a principal perpetrator.<sup>27</sup> It held that it was irrelevant that *Seromba* did not personally drive the bulldozer that destroyed the church. What was important was that Seromba 'fully exercised his influence over the bulldozer driver' who accepted Seromba as the only authority and whose directions he followed.<sup>28</sup> As for the *mens rea*, the Appeals Chamber found that Seromba intended that the Tutsi be killed and also acted with the requisite specific intent to destroy in whole or in part the Tutsi group.<sup>29</sup> Thus, the *Seromba* Appeals Chamber

<sup>23</sup> For a critical analysis regarding the ICTR Appeals Chamber's approach to commission liability in recent case law see F. Z. Giustiniani, 'Stretching the Boundaries of Commission Liability', 6 *Journal of International Criminal Justice* (2008) 783-799.

<sup>24</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, paras 171, 172, 185, 190. Judge *Liu* dissenting.

The Appeals Chamber affirmed the Trial Chamber's finding that Seromba aided and abetted genocide in relation to the killings of Patrice and Meriam, which were separate acts from the killings resulting from the destruction of the church.

<sup>25</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, para. 161.

<sup>26</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, para. 161. See similar wording in *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para. 60.

<sup>27</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, paras 171, 172, 182.

<sup>28</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, para. 171.

<sup>29</sup> *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeal Judgement, 12 March 2008, paras 174-181. For a different assessment of the facts of the case, see Dissenting opinion of Judge *Liu*.

widened the scope of “committing”, a mode of liability that was so far mainly reserved for “hands-on perpetrators”.<sup>30</sup> The finding that “committing” must constitute *principal* perpetration is a valuable clarification of the scope of that mode of liability that goes beyond the context of genocide. Persons, who did not directly or physically take part in the commission of crimes but whose actions appear as an “integral part” of the commission of the crimes or who assume a “central role”<sup>31</sup> in the events, are adequately described as principal perpetrators.

Further, this broader understanding of “committing” has the effect that the *mens rea* becomes the distinctive criterion. While an aidor and abettor acts with the knowledge that his actions will assist the principal perpetrator in the commission of the crime, a principal perpetrator himself must have the intent to commit the crime or in the Appeals Chamber’s words must “approve and embrace” the crime “as his own”.

## 2.2. *Joint Criminal Enterprise Objective Need Not Be Criminal as Long as the Means Contemplated to Achieve It Are Crimes Within the SCSL Statute*

The SCSL Appeals Chamber in the *Brima et al.* case reversed the finding of the Trial Chamber that the Prosecution had not properly pleaded joint criminal enterprise.<sup>32</sup> The Trial Chamber had found, in particular, that a common purpose to ‘gain and exercise political power and control over the territory of Sierra Leone’ was not an international crime or a criminal purpose recognised by the Statute.<sup>33</sup> The SCSL Appeals Chamber held that the criminal purpose underlying the joint criminal enterprise need not derive from its ultimate objective, but may also derive from the means contemplated to achieve that objective.<sup>34</sup> Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, in the Appeals Chamber’s view, the actions contemplated as a means to achieve that objective were crimes within the Statute. Nevertheless, the Appeals

<sup>30</sup> It should also be noted that the participation in a joint criminal enterprise is implicit in Article 7(1) (*Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgement, 17 July 1999, paras 188-191). In the absence of alleged participation in a joint criminal enterprise, an accused, who did not physically or directly took part in the commission of the crimes, could be found to have “encouraged”, “assisted” or instigated the commission of the crime.

<sup>31</sup> *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeal Judgement, 7 July 2006, para. 206.

<sup>32</sup> See M. Badar/N. Karsten, Current Developments in International Criminal Tribunals, 8 ICLR 2008, 353-380.

<sup>33</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Judgment, 20 June 2007, para. 67.

<sup>34</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, paras 76, 80.

Chamber did not see any need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interests of justice.<sup>35</sup>

It is worth pointing out that the finding of the Appeals Chamber that joint criminal enterprise is a means of committing a crime and not a crime in itself is in line with the jurisprudence of other international tribunals.<sup>36</sup>

### 2.3. Control Over the Crime Approach: The Katanga Decision

In *Katanga and Ngudjolo Chui* the PTC I analysed principal responsibility under Article 25(3)(a) of the ICC Statute (see Chart no. 1 below). Based on the *Lubanga* Decision,<sup>37</sup> the PTC I found that ‘when a criminal offence is committed by a plurality of persons, the definitional criterion of the concept “joint commission” is linked to the distinguishing criterion between principals and accessories to a crime’.<sup>38</sup>

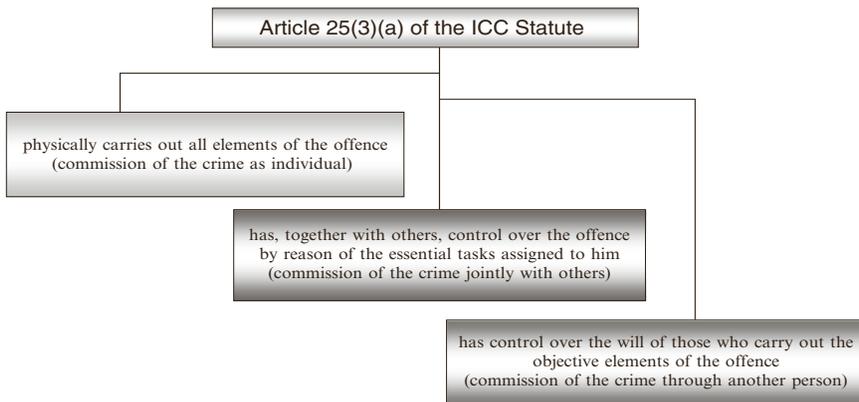


Chart no. 1

<sup>35</sup> *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, paras 84, 87.

<sup>36</sup> See e.g. *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005, para. 91 referred to in *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Appeal Judgement, 22 February 2008, paras 77, 78.

<sup>37</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007 (Lubanga decision on the confirmation of charges).

<sup>38</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 480.

#### 2.4. *Commission Through Another Person – Perpetrator Behind the Perpetrator by Means of Control Over an Organisation*

In defining the elements for the commission of the crime through another person the *Katanga and Ngudjolo Chui* PTC I based its findings mainly on German law and literature (*mittelbare Täterschaft*).<sup>39</sup> *Mittelbare Täterschaft* or perpetration by means, also known as ‘indirect perpetration’ or ‘indirect perpetratorship’, is characterized by the predominance of the *perpetrator-by-means* (*Hintermann*), who uses the person that physically carries out the crime (*Tatmittler*) as his instrument.<sup>40</sup> The perpetrator by means “controls the situation because he has superior knowledge or superior powers in relation to the agent”.<sup>41</sup> However, ‘indirect perpetratorship’ is not limited to situations where the physical perpetrator is an innocent agent, or has a defence such as insanity or infancy. In such cases, an innocent agent is a “mere machine whose movements are regulated by the principal”.<sup>42</sup> Rather, the notion of indirect perpetration also applies even where the direct and physical perpetrator is criminally responsible (‘indirect’ perpetrator behind the ‘direct’ perpetrator or *Täter hinter dem Täter*).<sup>43</sup> According to the *Katanga* PTC this latter scenario, *Täter hinter dem Täter*, is the most relevant to international criminal law “in which the perpetrator behind the perpetrator

<sup>39</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, paras 495-518. The second clause of § 25(1) of the *dStGB* (German Criminal Code) is concerned with the principal by means (*mittelbarer Täter*) a person who acts through the agency of another (*Tatmittler*). See Michael Bohlander, *Principles of German Criminal Law*, (Oxford: Hart Publishing, 2009) at 156.

<sup>40</sup> Albin Eser, ‘Individual Criminal Responsibility’, in Antonio Cassese et al., (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: OUP, 2002) 793-95.

<sup>41</sup> Michael Bohlander, *Principles of German Criminal Law*, (Oxford: Hart Publishing, 2009) 156. See also para. 497 of the *Katanga & Ngudjolo Chui* decision on the confirmation of charges: “The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator [*Täter hinter dem Täter*] is responsible because he controls the will of the direct perpetrator”.

<sup>42</sup> Glanville Williams, *Criminal Law: The General Part*, 2nd edn., (London: Stevens & Sons, 1961) 349-350. As noted by Professor Michael Bohlander – *Principles of German Criminal Law* (2009) at 156 – German jurisprudence and commentators have acknowledged five categories according to which a person can be considered as an instrument:

- a) The agent is not fulfilling either the *actus reus* or *mens rea* of the offence.
- b) The agent lacks a specific *mens rea* component or has a *mens rea* for a different offence.
- c) The agent is acting objectively lawfully (*rechtmäßig*) under an accepted defence.
- d) The agent is acting without personal guilt (*schuldlos*) under an accepted defence.
- e) The agent lacks criminal capacity.

<sup>43</sup> Kai Ambos, ‘Individual Criminal Responsibility’, in Otto Trifflerer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 478, margin 9.

commits the crime through another by means of ‘control over an organisation’ (*Organisationsherrschaft*)”.<sup>44</sup>

The PTC I found that the commission of the crime through another person – the third variant of principal liability under Article 25(3)(a) of the ICC Statute – encompasses the perpetrator behind the perpetrator by means of control over an organisation.<sup>45</sup>

In the Chamber’s view, it was the intention of the drafters of the ICC Statute that Article 25(3)(a) encompasses commission “through a non-innocent individual” acting as an instrument, and also perpetration by means of control over an organisation.<sup>46</sup> According to the Chamber, the framework of the Statute, by specifically “regulating the commission of a crime through another responsible person,” targets the category of cases which involves a perpetrator’s control over the organisation”.<sup>47</sup> Moreover, national jurisdictions such as Germany have relied on the concept of perpetration through control over an organisation in order to hold the leaders or highest authorities within an organisation responsible as a principal perpetrator.<sup>48</sup> Further, the Pre-Trial Chamber takes the *Stakić* Trial Judgement as proof of the application of the doctrine, although the judgement was overturned on appeal on the ground that the doctrine did not form part of customary international law. In the Pre-Trial Chamber’s view, the question whether the “perpetrator behind the perpetrator” and “perpetration through control over an organisation” doctrine was part of international customary law was “not relevant” for the ICC since the ICC Statute, forming the first source of applicable law for the ICC according to Article 21, expressly provided for that specific mode of liability.<sup>49</sup> Finally, the Pre-Trial Chamber referred to the Pre-Trial Chamber in the *Bemba Gomba* case which endorsed the mode of liability.<sup>50</sup>

The Pre-Trial Chamber went on defining the requirements of perpetration by means of control over an organisation. It held that the organisation must be based on hierarchical relations between superiors and subordinates and that the organisation must consist of sufficient subordinates to guarantee that superior’s orders will inevitably be carried out, if not by one subordinate, then by another.<sup>51</sup> In addition, the Chamber held that the main characteristic of this kind of organisation is a mechanism that enables its highest authorities to ensure

<sup>44</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 498.

<sup>45</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, paras. 500-518.

<sup>46</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, para. 499.

<sup>47</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 501.

<sup>48</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, paras 500-505.

<sup>49</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, para. 508.

<sup>50</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, para. 509.

<sup>51</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 512.

automatic compliance with their orders.<sup>52</sup> In the words of Professor *Roxin*: “Such Organisation develops namely a life that is independent of the changing composition of its members. It functions, without depending on the individual identity of the executant, as if it were automatic”.<sup>53</sup> The leader’s ability to secure this automatic compliance with his orders is the basis for his liability as a principal. According to the Chamber “[t]he highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed”.<sup>54</sup>

The Chamber also held that automatic compliance with the orders may also be achieved “through intensive, strict, and violent training regimens”, thus opening the mode of liability to include perpetrators like *Katanga* and *Ngudjolo Chui* who are charged with the crime of using children under the age of fifteen to take actively participate in the hostilities and who have allegedly secured compliance with their orders through the abduction of minors who were subjected to punishing training regimens in which they were taught to commit crimes.<sup>55</sup>

As regards the mental elements, the Chamber held that the persons must be aware of the factual circumstances enabling them to exercise control over the crime through another person, such as the character of the organisation, their authority within the organisation, and the factual circumstances enabling near-automatic compliance with their orders.<sup>56</sup> The mode of liability “commission of a crime through another person by means of control over an organisation” has the potential to become most relevant to international criminal law, in particular since the PTC held that it can also be committed “jointly”.<sup>57</sup> It appears that it may even substitute the JCE liability which is extensively used by the ad hoc Tribunals but in relation to which the ICC has already raised reservations.<sup>58</sup>

## 2.5. Superior Responsibility

In 2008 the Appeals Chamber of the ICTY issued three important judgements, in which it further refined the requirements for superior responsibility, namely, in *Orić*, *Hadžihasanović & Kubura*, and *Strugar* cases.

<sup>52</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 517.

<sup>53</sup> C. Roxin, *Täterschaft und Tatherrschaft*, 8th edn., (Berlin: De Gruyter, 2006) 245, quoted in *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 517.

<sup>54</sup> *Katanga & Ngudjolo Chui* decision on the confirmation of charges, para. 518.

<sup>55</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, para. 518.

<sup>56</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of the charges, 30 September 2008, paras 534, 538.

<sup>57</sup> *Id.*, paras. 491–494.

<sup>58</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, paras. 334 et seq.

### 2.5.1. Identification of Subordinates

The Appeals Chamber in the *Orić* case held that, while it is not necessary to identify the subordinates in person, at least “their existence” must be established before superior responsibility can arise.<sup>59</sup> The Appeals Chamber reversed the conviction of *Naser Orić* for crimes committed by the Military Police because the Trial Chamber did not mention the potentially culpable members of the Military Police but only established the existence of the Military Police as an entity.<sup>60</sup>

The identification of the subordinates and finding of their criminal responsibility is particularly important in cases where subordinates of the accused are alleged to be criminally responsible for the crimes of direct perpetrators who are not subordinates of the accused.<sup>61</sup>

### 2.5.2. Effective Control - No Reversal of the Burden of Proof in Case of a De Jure Superior

In the seminal *Čelebići* case, the Appeals Chamber held that in general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced”.<sup>62</sup> The Appeals Chamber in the *Hadžihasanović & Kubura* case confirmed the finding in the *Čelebići* case, but clarified that there is no legal presumption and no reversal of the burden of proof.<sup>63</sup> The Appeals Chamber in the *Orić* case also stated that *de jure* authority is not synonymous with effective control. While the possession of *de jure* authority may suggest a material ability to prevent or punish, it may be neither necessary nor sufficient to prove such ability. *De jure* authority only provides “some evidence” of effective control.<sup>64</sup>

It is noteworthy that the Appeals Chamber in the *Hadžihasanović and Kubura* case even declined to address whether one of the accused had *de jure* authority

<sup>59</sup> *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeal Judgement, 3 July 2008, para. 35.

<sup>60</sup> *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeal Judgement, 3 July 2008, para. 35. The Trial Chamber had only identified one member of the Military Police as a subordinate of Orić, but failed to establish on what basis this person was criminally responsible for the crimes committed by the principal perpetrators, *see* paras 36-49.

<sup>61</sup> As confirmed by the Appeals Chamber, superior responsibility is not only imposed when the subordinates physically committed crimes, but also for either the omissions of subordinates or crimes perpetrated by subordinates by means of modes of liability other than ‘committing, *see Prosecutor v. Blagojević & Jokić*, Case No. IT- IT-02-60-A, Appeal Judgement, 9 May 2007, paras 280, 281; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Appeal Judgement, 28 November 2007, para. 485-486.

<sup>62</sup> *Prosecutor v. Delalić et al.*, Case No. IT-96-21-A, Appeal Judgement, 20 February 2001, para. 197.

<sup>63</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, para. 21.

<sup>64</sup> *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeal Judgement, paras 91, 92.

arguing that “*de jure* authority is only one factor that helps to establish effective control, and because the present question is resolvable on the basis of effective control alone”.<sup>65</sup>

### 2.5.3. *Effective Control or Cooperation? Military Benefits Achieved through Independent Units not a Factor to Consider*

Both in the *Hadžihasanović & Kubura* case and in the *Delić* case, it was in dispute whether the accused exercised effective control over Mujahedin detachments, which fought alongside with the units of the accused, and whether the accused were responsible for crimes committed by these detachments. The issue was whether the accused bear responsibility since they benefited militarily from the cooperation with those units.

The Appeals Chamber clarified that the alleged benefit from the cooperation with other units is not a relevant factor when assessing whether the superior had effective control.<sup>66</sup> It added that it may entail “some form of responsibility” if “the particulars of such responsibility are adequately pleaded in an Indictment”. However, ultimately the superior responsibility is only triggered upon a showing of effective control.<sup>67</sup>

In the *Hadžihasanović & Kubura* case, the Appeals Chamber found that the relationship between the accused and the Mujahedin detachment was one of cooperation and did not evolve into a superior-subordinate-relationship.<sup>68</sup> In the *Delić* case, the majority found that the Mujahedin detachment was not an independent unit merely cooperating with the Army of Bosnia and Herzegovina, although it enjoyed a certain degree of autonomy.<sup>69</sup> The majority found that *Delić* exercised effective control over the Mujahedin and was, therefore, criminally responsible for a number of crimes committed by the Mujahedin. In his dissenting opinion, Judge *Moloto* considered that the relationship between the Mujahedin detachment and the Army of Bosnia was throughout one of cooperation rather than one of effective control.<sup>70</sup>

### 2.5.4. “*Had Reason to Know*” Due to a Failure to Punish Past Crimes

If superiors do not punish past crimes, subordinates may understand that failure as acceptance or even encouragement and might continue committing crimes.

<sup>65</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, para. 189.

<sup>66</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, paras 213, 214, 217.

<sup>67</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, para. 213.

<sup>68</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, paras 200, 210, 214, 217, 221.

<sup>69</sup> *Prosecutor v. Delić*, Case No. IT-04-83-T, Trial Judgement, para. 466. Judge Moloto dissenting.

<sup>70</sup> *Prosecutor v. Delić*, Case No. IT-04-83-T, Dissenting opinion of Judge Moloto.

However, as the Appeals Chamber held in *Krnjelac*, the failure to punish a past crime cannot be taken as proof of knowledge that similar crimes would be committed in the future. It may be taken as “alarming information” to justify further inquiry.<sup>71</sup>

The Appeals Chamber in the *Hadžihasanović & Kubura* case further clarified that this does not mean that the superior’s failure to punish past crimes *automatically* constitutes sufficiently alarming information to meet the threshold of “had reason to know”. It held that the assessment has to take into account the circumstances of the case.<sup>72</sup>

#### 2.5.5. Superior Responsibility for Crimes Committed Before Superior Had Effective Control

Superiors may not be held responsible for crimes committed before they assumed command and exercised effective control. This was the debatable finding of the Appeals Chamber in a jurisdiction decision in the *Hadžihasanović & Kubura* case of July 2003 that was reached by majority.<sup>73</sup> In the *Orić* appeal, the issue came back to the Appeals Chamber. The Prosecution argued that the Trial Chamber erred in law when it found that *Orić* could not be held responsible for crimes, of which he had knowledge, because they were perpetrated before he assumed effective control over the Military Police.<sup>74</sup>

The majority of the Appeals Chamber in the *Orić* case declined to address the issue arguing that the *ratio decidendi* in the *Hadžihasanović* case could not have an impact on the outcome of the case.<sup>75</sup> Judge *Schomburg* and Judge *Liu* dissented holding that the Appeals Chamber should have discussed the validity of the *ratio decidendi* as a matter of general significance. Judge *Shahabuddeen* did not formally dissent, but attached a declaration.<sup>76</sup>

In substance, all three judges agreed that the finding of the Appeals Chamber in the *Hadžihasanović* case was wrong, thus forming a “silent” reversing majority. Judge *Liu* and Judge *Schomburg* demonstrated that the restriction in the

<sup>71</sup> *Prosecutor v. Krnjelac*, Case No. IT-07-25-A, Appeal Judgement, 17 September 2003, para. 169.

<sup>72</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeal Judgement, 22 April 2008, paras. 30-31.

<sup>73</sup> *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR72, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, para. 51.

<sup>74</sup> *Prosecutor v. Orić*, Case No. IT-03-68-A, Prosecution appeal brief, para. 102.

<sup>75</sup> *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeal Judgement, 22 April 2008, para. 167.

<sup>76</sup> Judge *Shahabuddeen* was one of the Judges who had dissented in the *Hadžihasanović* jurisdiction decision. With Judge *Schomburg* and Judge *Liu* dissenting in the *Orić* appeal, his vote was decisive. In his declaration, Judge *Shahabuddeen* puts the question whether a judge who dissented in one decision can subsequently properly form part of a reversing majority and comes to the conclusion that, in the circumstances of the case, “a reversal should await such time when a more solid majority”. Declaration, paras. 13-15.

*Hadžihasanović* decision does not reflect customary international law and defeats the object and purpose behind the concept of superior responsibility which is to ensure compliance with the laws and customs of war and international humanitarian law in general.<sup>77</sup> The Appeals Chamber in the *Hadžihasanović* case was wrong to point to missing state practice and/or *opino iuris*. It is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle. In fact, the framework indicating the customary rule already existed.<sup>78</sup>

### 3. Rights of the Accused

#### 3.1. *Right of the Accused to Receive Material in a Language He or She Understands*

An accused has the right to use his mother tongue in written and oral communications with the organs of the Tribunal and to receive relevant material in a language the accused understands. This is laid down in the Statute of the Tribunals which reproduce Article 14(3)(a) of the International Covenant on Civil and Political Rights. However, the accused may not demand the production of documents in any language or script that he or she chooses. This was held by the Appeals Chamber in a decision in the *Tolimir* case.<sup>79</sup>

In the *Karadžić* case, the Trial Chamber was seised of a similar request by *Karadžić* to be provided with all materials, including transcripts of the sessions in his case, as well as other transcripts which might be necessary for him to prepare his defence, in the Serbian language and in the Cyrillic script. The Trial Chamber stated that an accused is not entitled to receive all documents in a language he understands, but only certain documents, such as the indictment and the material supporting the indictment, witness material and all orders and decisions rendered by the Trial Chamber.<sup>80</sup>

<sup>77</sup> Partially dissenting opinion and declaration of Judge Liu, paras 29-31; Separate and partially dissenting opinion of Judge *Schomburg*, para. 7.

<sup>78</sup> Separate and partially dissenting opinion of Judge *Schomburg*, para.14.; Partially dissenting opinion and declaration of judge Liu, para. 33; Judge *Shahabuddeen* highlighted that the Appeals Chamber in the *Hadžihasanović* decision reached that general finding unanimously. Declaration, para. 17.

<sup>79</sup> *Prosecutor v. Tolimir*, Case No. IT-05-88/2-PT, T. 114; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-AR73.1, Decision on Interlocutory appeal against oral decision of the Pre-trial judge of 11 December 2007, 28 March 2008, paras 14, 15.

<sup>80</sup> So-called Rule 66(A) material, *Prosecutor v. Karadžić*, Case No. IT-95-5-PT, Decision on the accused's request that all materials, including transcripts, be disclosed to him in Serbian and Cyrillic script, 25 September 2008, paras 2, 7.

### 3.2. *Right to Self-Representation – Assignment of Counsel in the Interests of Justice*

It is worth noting that the Rules of Procedure and Evidence of the ICTY have been amended and now include a new Rule 45 *ter* relating to the right to self-representation.<sup>81</sup> Rule 45 *ter* reads: “The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused”.

The adoption of Rule 45 *ter* eventually brings the rules of the ICTY in conformance with rules and practise of other international tribunals such as the ICTR, the ICC and the SCSL<sup>82</sup> and incorporates existing case-law of the ICTY into a common rule. The ICTY has acknowledged limitations of the right to self-representation in a number of cases.<sup>83</sup>

### 3.3. *Fitness to Stand Trial – Fitness to Represent Oneself*

The accused’s fitness to stand trial is of great importance. The Appeals Chamber in the *Strugar* case held that the fitness to stand trial may generally be regarded as an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.<sup>84</sup> The applicable standard for assessing the fitness of the accused is that of “meaningful participation” which allows the accused to “exercise his fair trial rights to such a degree that he is able to participate effectively in his trial, and has an understanding of the essentials of the proceedings”.<sup>85</sup> The Appeals Chamber emphasised that the fitness to stand trial must be distinguished from the fitness to represent oneself. Thus, the accused need not have the capacity to fully comprehend the course of the proceedings in the trial, so as to make a proper defence, and to comprehend details of the evidence.<sup>86</sup>

<sup>81</sup> Rule 45(A) of the ICTY Rules of Procedure and Evidence only allows for the assignment of counsel in the interests of justice when the accused is indigent.

<sup>82</sup> Rule 45 *quater* of the ICTR Rules of Procedure and Evidence; Art. 67(1)(d) of the Rome Statute; ICC Regulation 76(1); *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on the application of Samuel Hinga Norman for self-representation under Art. 17(4)(d) of the Statute of the Special Court, 8 June 2004, paras 26, 27.

<sup>83</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Assignment of Defence Counsel, 1 November 2004, para. 13; *Prosecutor v. Šešelj*, Case No. IT-03-67-AR 73.3, Decision on Appeal against the Trial Chamber’s Decision on Assignment of Counsel, 20 October 2006, para. 20; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Reasons for Oral Decision Denying Mr. Krajišnik’s Request to Proceed Unrepresented by Counsel, 18 August 2005, paras. 5 et seq.; see also *Prosecutor v. Stanisić*, Case No. IT-04-79, Status Conference of 6 May 2008, T. 122 123; *Prosecutor v. Prlić et al.*, Decision on Assignment of Defence Counsel, 15 February 2006; *Prosecutor v. Tolimir*, Status Conference of 14 September 2007, T. 54-55.

<sup>84</sup> *Prosecutor v. Strugar*, Case No. IT-01-47-A, Appeal Judgement, 17 July 2008, para. 34.

<sup>85</sup> *Prosecutor v. Strugar*, Case No. IT-01-47-A, Appeal Judgement, 17 July 2008, paras 55, 60.

<sup>86</sup> *Prosecutor v. Strugar*, Case No. IT-01-47-A, Appeal Judgement, 17 July 2008, para. 60.

The Appeals Chamber did not further dwell on the question what effect that distinction may have in relation to a self-represented accused who is fit enough to stand trial but not fit enough to represent himself. It can, however, be taken from the decision of the Appeals Chamber in the *Milošević* case that it would be appropriate to limit self-representation of an accused who is unfit to represent himself and impose counsel provided that the curtailment of the right to self-representation is limited to the minimum extent possible.<sup>87</sup>

#### 4. Primacy/Complementarity of International Tribunals and National Courts

##### 4.1. Referral Under Rule 11 bis

Under Rule 11 *bis* of the respective Rules of Procedure and Evidence, the ICTY and ICTR may refer cases to the authorities of a state for trial. A Referral Bench considers the gravity of the crimes and the level of responsibility of the accused. It needs to be satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

##### 4.1.1. No Referral to Rwanda

In three remarkable decisions, the ICTR Appeals Chamber upheld the decisions of the “Referral Bench” denying referral of two cases to the Republic of Rwanda arguing that the Rwandan penalty structure does not meet internationally recognised standards and that there are concerns whether the Accused would receive a fair trial.<sup>88</sup>

On 8 October 2008, the ICTR Appeals Chamber in the *Munyakazi* case upheld the decision to deny the referral of the case to Rwanda. It held that the trial judges erred in finding that Rwanda does not respect the independence of the judiciary and that the composition of the courts in Rwanda does not accord with the right to be tried by an independent tribunal and the right to a fair trial.<sup>89</sup> However, the Appeals Chamber endorsed the findings as far as the right of the accused to obtain the attendance of, and to examine, Defence witnesses under the

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<sup>87</sup> The Appeal Judgement in the *Strugar* case refers to a decisions in the *Milošević* case in that regard, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on interlocutory appeal of the Trial Chamber’s decision on the assignment of Defense Counsel, 1 November 2004, para. 14.

<sup>88</sup> A third decision denying the referral to Rwanda was issued by the Referral Bench in the *Nizemimana* case. *Prosecutor v. Nizemimana*, Case No. ICTR-00-55B-R11bis, Decision on Prosecutor’s request for the referral of the case of Ildephonse Hategekimana to Rwanda, 19 June 2008.

<sup>89</sup> *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11bis, Decision on the Prosecution’s appeal against decision on referral under Rule 11 *bis*, 8 October 2008, paras 26-28.

same conditions as witnesses called by the Prosecution, is concerned. It was not satisfied that the rights can be guaranteed at this time in Rwanda. It also was not satisfied whether the penalty structure in Rwanda is adequate for the purposes of transfer under Rule 11 *bis* of the Rules.<sup>90</sup>

The ICTR Appeals Chamber also upheld the decision in the *Kanyarukiga* case denying referral to Rwanda. It stated that “there is genuine ambiguity about which punishment provision would apply to transfer cases, and therefore the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases”.<sup>91</sup> The Appeals Chamber also found that “Kanyarukiga might face difficulties in obtaining witnesses residing within Rwanda because they would be afraid to testify, and that he would not be able to call witnesses residing outside Rwanda, to the extent and in a manner that would ensure a fair trial”.<sup>92</sup> On 5 December 2008, the Appeals Chamber upheld the decision in the *Hategekimana* case to deny referral to Rwanda.<sup>93</sup>

The decisions of the Appeal Chamber caused repercussions. Arrested earlier this year in Germany at the request of the Rwandan authorities, *Onesphore Rwabukombe* and *Callixte Mbarushimana* were set free by the German authorities because the Rule 11 *bis* decisions of the Appeals Chamber made it impossible to extradite the two persons or to hold them any longer in custody.

## 5. Procedure and Evidence

### 5.1. Retrial of a Case Ordered for the First Time

For the first time in the history of international criminal tribunals, retrial of a case was ordered. The Appeals Chamber in the *Muvunyi* case quashed *Muvunyi's* conviction for direct and public incitement to commit genocide based on a speech he gave at the Gikore Trade Center in Rwanda and ordered a retrial limited to the allegations considered in relation to this incident. The Appeals Chamber criticized the Trial Chamber for not having given a reasoned opinion for its findings, thus making it impossible for the Appeals Chamber to determine

<sup>90</sup> *Prosecutor v. Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's appeal against decision on referral under Rule 11 *bis*, 8 October 2008, paras 20, 45, 50.

<sup>91</sup> *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution's appeal against decision on referral under Rule 11 *bis*, 30 October 2008, para. 16.

<sup>92</sup> *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on the Prosecution's appeal against decision on referral under Rule 11 *bis*, 30 October 2008, para. 26.

<sup>93</sup> *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's appeal against decision on referral under Rule 11 *bis*, 4 December 2008. The Appeals Chamber, however, held that command responsibility is recognized under Rwandan law and that the Trial Chamber therefore erred in that aspect, *see* para. 12.

whether the Trial Chamber assessed the entire evidence on this point exhaustively and properly.<sup>94</sup>

Notably, the Appeals Chamber also ordered, in the event that a new Trial Chamber was to enter a conviction for the respective charge, that any sentence should not exceed the sentence imposed by the first Trial Chamber (*reformatio in peius* consideration).<sup>95</sup>

## 5.2. *Stay of Proceedings Ordered in the Lubanga Case*

On 13 June 2008 the ICC Trial Chamber in the *Lubanga Dyilo* case decided to stay the proceedings, and on 2 July 2008 ordered the unconditional release of *Lubanga Dyilo*.<sup>96</sup> The Trial Chamber found that the Prosecution breached its disclosure obligation towards the Defence and the Chamber with regard to over 200 documents of potentially exculpatory material and that it entered into inappropriate agreements with information-providers, including the UN. As the disclosure of exculpatory evidence in the possession of the Prosecution is a fundamental aspect of the accused's right to a fair trial, the Trial Chamber found a stay of the proceedings was inevitable.<sup>97</sup>

In its decision 21 October 2008 the ICC Appeals Chamber confirmed the decision of the Trial Chamber on the stay of proceedings. It found that a conditional stay of the proceedings may be the appropriate remedy “where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused is of such nature that a fair trial might become possible at a later stage”.<sup>98</sup>

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<sup>94</sup> *Prosecutor v. Muvunyi*, Case No. ICTR- 2000-55A-A, Appeal Judgement, 29 August 2008, para. 148. The Trial Chamber had based its findings on the evidence of just two witnesses who were inconsistent in their testimony about *Muvunyi's* speech. Without having properly discussed the inconsistencies in their testimony, the Trial Chamber found that the testimony of the two witnesses was “strikingly similar”. Moreover, the Trial Chamber had rejected the evidence of one exculpatory witness without having discussed the credibility and reliability of that witness.

<sup>95</sup> *Prosecutor v. Muvunyi*, Case No. ICTR- 2000-55A-A, Appeal Judgement, 29 August 2008, para. 170.

<sup>96</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status conference on 10 June 2008, 13 June 2008 (“ICC Trial Chamber decision on stay of proceedings”); *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/06-04/06, Decision on the release of Thomas Lubanga Dyilo, 2 July 2008, para. 34.

<sup>97</sup> ICC Trial Chamber decision on stay of proceedings, paras 72, 75, 76, 91, 92. See also below 6.3. *Disclosure of potentially exculpatory material obtained by the Prosecution through confidentiality agreements.*

<sup>98</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference

Regarding the second issue, the Appeals Chamber, by majority, reversed the 2 July 2008 decision on the release of *Lubanga Dyilo* and decided to send the matter back to the Trial Chamber for a new decision on the question of his release. It held that in case of a conditional stay of the proceedings, the release of the accused is not the only “inevitable” consequence and the only “correct course” to take. The decision whether to release the accused must be taken in accordance with the articles and rules governing the detention of the accused prior to conviction.<sup>99</sup>

On 18 November 2008 Trial Chamber I decided not to grant the release or provisional release of Lubanga Dyilo. The accused will remain under the custody of the Court until the beginning of the trial which has been provisionally scheduled to start 26 January 2009. Trial Chamber I also decided to lift the stay of proceedings; it held that the reasons for imposing a halt “have fallen away”.<sup>100</sup>

### *5.3. Disclosure of Potentially Exculpatory Material Obtained by the Prosecution Through Confidentiality Agreements*

In the *Lubanga Dyilo* case, the Prosecution made extensive use of a provision allowing the Prosecution not to disclose material obtained through confidentiality agreements with information-providers.<sup>101</sup> The Trial Chamber held that instead of resorting to that provision exceptionally and for the sole purpose of generating new evidence, the Prosecution had used the provision “routinely, in inappropriate circumstances”.<sup>102</sup>

The ICC Appeals Chamber in the *Lubanga Dyilo* case acknowledged a potential tension between the confidentiality to which the Prosecutor agreed in confidentiality agreements with information-providers and the requirements of a fair trial.<sup>103</sup> In the Appeals Chamber’s view, in order to resolve the tension, the Trial Chamber has to be provided with the material in question in order to assess whether the material must be disclosed to the accused, had it not be obtained on the condition of confidentiality. However, the Trial Chamber shall respect the confidentiality agreement and shall not order the disclosure of the material

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on 10 June 2008”, 21 October 2008 (“ICC Appeals Chamber decision on stay of proceedings”), paras. 4, 76.

<sup>99)</sup> Articles 60, and 58(1) of the ICC Statute, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo, 21 October 2008, paras 1, 31-42. Judge Pikis dissenting.

<sup>100)</sup> A written decision will follow in due course.

<sup>101)</sup> Pursuant to Rule 54(3)(e) of the ICC Statute the Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.

<sup>102)</sup> ICC Trial Chamber decision on stay of proceedings, para. 72.

<sup>103)</sup> ICC Appeals Chamber decision on stay of proceedings, para. 43.

without prior consent of the information-provider. If the information-provider does not consent to the disclosure, the Trial Chamber will then have to determine which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair.<sup>104</sup>

#### 5.4. *Contact Between Counsel and Accused Appearing as a Witness in Their Own Defence*

In the *Prlić et al.* case, the ICTY Appeals Chamber held that an accused who appears in his own defence must not be deprived of the assistance of his counsel during his testimony. It is a fundamental right of an accused to have access to counsel “at any stage of the proceedings”.<sup>105</sup>

This ruling overturns case-law of the Tribunal limiting the contact between the counsel and the accused while the latter is taking the stand in his own defence. This case-law was not only based on the general prohibition of contact between witnesses and the parties during the course of their testimony, but also on the concern that coaching of the accused by his counsel may render the accused’s testimony unreliable.<sup>106</sup>

According to the Appeals Chamber, the general prohibition of contact between a witness and the parties during the testimony does not *per se* bar communication between an accused testifying in his own defence and his counsel. Further, it held that the reliability of the accused’s testimony may be tested during cross-examination when the Prosecution can seek to establish that the accused was improperly coached by his counsel on how to respond to questions.<sup>107</sup> The Appeals Chamber also pointed to the general presumption that conversations between the accused and his counsel are “appropriate”.<sup>108</sup>

Presumably, it is not easy to establish that communications between an accused and his counsel were not “appropriate”. The ambiguity of the term “appropriate” led Judge *Shahabuddeen* and Judge *Vaz* to attach a joint declaration indicating

<sup>104</sup> ICC Appeals Chamber decision on stay of proceedings, paras 3, 43–48.

<sup>105</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.10, Decision on Prosecution’s appeal against Trial Chamber’s order on contact between the accused and counsel during an accused’s testimony pursuant to Rule 85(C), 5 September 2008, paras 14, 19.

<sup>106</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Oral decision, 16 October 2000, T. 5956; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Finalized procedure on Chamber witnesses; Decisions and Orders on several evidentiary and procedural matters, 24 April 2006, para. 31. The Appeals Chamber found that there was no precedent binding the Trial Chamber in the *Prlić et al.* case.

<sup>107</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.10, Decision on Prosecution’s appeal against Trial Chamber’s order on contact between the accused and counsel during an accused’s testimony pursuant to Rule 85(C), 5 September 2008, paras 17, 18.

<sup>108</sup> *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.10, Decision on Prosecution’s appeal against Trial Chamber’s order on contact between the accused and counsel during an accused’s testimony pursuant to Rule 85(C), 5 September 2008, para. 18.

that the term “appropriate” must not be understood to mean that counsel could advise the accused on how to respond to questions.

### 5.5. *Impeachment of One’s Own Witness – Discretion of the Trial Chamber*

Is a party to proceedings before international criminal tribunals allowed to “impeach” its own witness? Must it seek permission to do so? The ICTY Appeals Chamber in the *Popović et al.* held that, while impeachment of one’s own witness is permitted in general, it is for the Trial Chamber to determine whether to allow the calling party to cross-examine its own witness and to limit, where appropriate, the scope of the questioning.<sup>109</sup> It thereby reversed the decision of the Trial Chamber that it is for each party, albeit at their own peril, to determine to what extent the credibility of a witness is to be challenged.<sup>110</sup> In the Appeals Chamber’s view, leaving the impeachment in the hands of the calling party would preclude the other party to object to the impeachment or to the scope of the cross-examination.<sup>111</sup> Whether the witness must be declared “hostile” prior to cross-examination is, in the Appeals Chamber’s view, also a matter to be determined by the Trial Chamber.<sup>112</sup> The Appeals Chamber in the *Popović et al.* case further held that evidence adduced through the cross-examination of a party’s own witness may not only be received as evidence for assessing the credibility of the witness, but may also be considered in relation to substantive issues.<sup>113</sup> It is within the Trial Chamber’s discretion to decide for what purposes the evidence is admitted.<sup>114</sup>

### 5.6. *Witnesses Called During Appellate Proceedings – Karadžić Testifies in the Krajišnik Case*

The ICTY Appeals Chamber in the *Krajišnik* case allowed Krajišnik to call Karadžić as a witness during the appellate proceedings. The Trial Chamber had

<sup>109</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on appeals against decision on impeachment of a party’s own witness, 1 February 2008, paras 26, 28.

<sup>110</sup> *Prosecutor v. Popović et al.*, Decision on certification and clarification of the Trial Chamber’s oral decision on impeachment of a party’s own witness, 21 November 2007, paras 14-16; Transcript of Hearing, 17 September 2007, T. 15457-15458: The majority of Trial Judges held that “the old-fashioned or maybe archaic rules prohibiting or restricting the impeachment of one’s own witness, applicable in some common law jurisdictions,” have no application in the Tribunal, where professional Judges decide on matters of fact and law”.

<sup>111</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on appeals against decision on impeachment of a party’s own witness, 1 February 2008, paras 26, 28.

<sup>112</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on appeals against decision on impeachment of a party’s own witness, 1 February 2008, para. 28.

<sup>113</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on appeals against decision on impeachment of a party’s own witness, 1 February 2008, para. 29.

<sup>114</sup> *Prosecutor v. Popović et al.*, Case No. IT-05-88-AR73.3, Decision on appeals against decision on impeachment of a party’s own witness, 1 February 2008, para. 32.

convicted *Krajišnik* of crimes against humanity, including the murder, persecution and extermination carried out by the Bosnian Serb regime against Bosniaks and Bosnian Croats during 1992, but acquitted him of genocide charges.

The Appeals Chamber considered that the requirements for hearing additional evidence tendered on appeal were satisfied, namely that Karadžić's evidence had been "unavailable" at trial. Further, his evidence was *prima facie* credible, relevant and probative and that it also could have a potential impact on the verdict.<sup>115</sup>

Karadžić's evidence in the *Krajišnik* case was closely related to the facts that he himself is charged with. Thus, his testimony had a tendency to be incriminating. The Appeals Chamber therefore directed the Registry to inquire whether *Karadžić* wished to exercise his right to be assisted by counsel and to assign counsel in that case.<sup>116</sup> During his testimony Karadžić was represented by counsel who objected to several questions put to Karadžić on the grounds that the accused could incriminate himself by answering.

### 5.7. Victim Participation

On 11 July 2008 the ICC Appeals Chamber rendered a significant decision in relation to victim participation. It held that the harm suffered by victims does not necessarily have to be direct and may also be indirect, provided that it is personal. Material, physical and psychological harm are all forms of harm that fall within the rule, if they are suffered personally by the victim.<sup>117</sup> Thus, for example, the recruitment of a child soldier may result in personal suffering of both the child and the parents of the child.<sup>118</sup>

The Appeals Chamber further held that only victims who are victims of the crimes charged may participate in the trial proceedings and reversed the decision of the Trial Chamber in that regard. Unlike Rule 85(A) of the ICC Rules of Procedure and Evidence, the provision defining who is a victim,<sup>119</sup> Article 68(3) of the ICC Statute restricts participation of victims in that it requires that personal interests of the victims are affected. Thus, on the basis of the "Rome Statute

<sup>115</sup> *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on appellant Momčilo Krajišnik's motion to call Radovan Karadžić pursuant to Rule 115, 16 October 2008, paras 14, 16–20. *See also Prosecutor v. Krajišnik*, Order on "motion to interview Radovan Karadžić with a view to then calling him as a witness pursuant to Rule 115", 20 August 2008.

<sup>116</sup> *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Scheduling order, 21 October 2008.

<sup>117</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on victims' participation of 18 January 2008, 11 July 2008, paras 1, 30–32, 38.

<sup>118</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on victims' participation of 18 January 2008, 11 July 2008, para. 32.

<sup>119</sup> Rule 85(A) reads: For the purposes of the Statute and the Rules of Procedure and Evidence: (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."

framework”, the harm alleged by a victim and the concept of personal interests in Article 68(3) of the ICC Statute must be linked with the charged confirmed against the accused.<sup>120</sup>

Thirdly, the Appeals Chamber held that victims may lead evidence pertaining to the guilt or innocence of the accused when requested and that they may also challenge the admissibility or relevance of evidence in the trial proceedings, but only upon a showing that personal interests would be negatively affected.<sup>121</sup> Although it is primarily the parties who lead evidence pertaining to the guilt or innocence of the accused, the Appeals Chamber found that this does not preclude the possibility for victims to lead evidence. Victims have to make a discrete application, give notice to the parties, comply with disclosure obligations and protection orders, show appropriateness and consistency with the rights of the accused, and, last not least, demonstrate their personal interests.<sup>122</sup> In the Appeals Chamber’s view, in order to “give effect to the spirit and intention of Article 68(3)” it must be interpreted as to make participation “meaningful”.<sup>123</sup>

In his partly dissenting opinion, Judge Pikiş disagreed with the majority that the harm suffered could also be indirect and stated that he would require a “direct nexus” between the crime and the harm.<sup>124</sup> Judge Pikiş also disagreed that victims may lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence. In his view, victims are not made parties to the proceedings and their participation is confined to expressing their views and concerns.<sup>125</sup>

## 6. Sentencing

### 6.1. *No reduction of Sentence Due to “Good Political Motivations”*

In the case against *Fofana & Kondewa*, the SCSL Appeals Chamber increased *Fofana’s* sentence from six to 15 years and *Kondewa’s* sentence from eight to 20

<sup>120</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victims’ participation of 18 January 2008, 11 July 2008, paras 2, 58–65.

<sup>121</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victims’ participation of 18 January 2008, 11 July 2008, paras 3, .

<sup>122</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victims’ participation of 18 January 2008, 11 July 2008, paras. 3, 86–104.

<sup>123</sup> *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision on victims’ participation of 18 January 2008, 11 July 2008, para. 97.

<sup>124</sup> Partly dissenting opinion of Judge Pikiş, para. 3.

<sup>125</sup> Partly dissenting opinion of Judge Pikiş, paras 4–13, 15, 19.

years. In October 2008, the Trial Chamber of the SCSL had sentenced *Fofana* to a total of six years and *Kondewa* to a total of eight years. As former leaders of the government-supported Civil Defence Forces during Sierra Leone's armed conflict both men in August 2007 were convicted of war crimes. When imposing the sentences, the Trial Chamber considered that the accused should receive a reduced sentence because they fought for a "legitimate cause", namely to "restore the democratically elected Government".

The Appeals Chamber overturned the Trial Chamber's ruling, considering that the political motivations of the Accused in committing international law violations cannot be considered as a mitigating factor.<sup>126</sup> While the motive of the accused, as a general principle, may be considered as a mitigating factor, the particular motive of "just cause" may not.<sup>127</sup>

The decision constitutes an important correction of a patently wrong consideration by the Trial Chamber. As the Appeals Chamber held, international humanitarian law specifically removes a party's political motive and the "justness" of a party's cause from consideration; in fact, accepting "just causes" would "undermine the bedrock principle of that law".<sup>128</sup>

### 6.2. *Aggravating Circumstance – Accused Was in a Prominent Public Position of Trust*

Nchamihigo was deputy prosecutor of Cyangugu prefecture in Rwanda. The Trial Chamber found Nchamihigo criminally responsible for genocide, extermination, murder and other inhumane acts as a crime against humanity and sentenced him to life imprisonment. The Trial Chamber noted, in particular, that the accused was in a prominent public position of trust, and was expected to uphold the rule of law, yet he exhibited zeal in the perpetration of these grave crimes. Thus, he promoted an "environment of impunity".<sup>129</sup>

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<sup>126</sup> *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeal Judgement, 28 March 2008, para. 513 et seq.

<sup>127</sup> *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeal Judgement, 28 March 2008, paras 528, 529.

<sup>128</sup> *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A, Appeal Judgement, 28 March 2008, para. 531.

<sup>129</sup> *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-T, 24 September 2008, para. 391.



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