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# International Criminal Tribunals: A Review of 2007

William A. Schabas\*

¶1 In its modern incarnation, international criminal justice might be said to be now about fourteen years old. Following the bold experiments at Nuremberg and Tokyo after the Second World War, it went into a prolonged slumber, awakened in the early 1990s by the new political climate that emerged as the Cold War came to an end. In 1993, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was established by the United Nations Security Council. A year later, the International Criminal Tribunal for Rwanda (“ICTR” or “Rwanda Tribunal”) was created. In 2002, the United Nations established its third *ad hoc* tribunal, the Special Court for Sierra Leone (“SCSL”).<sup>1</sup> The same year, the *Rome Statute of the International Criminal Court* entered into force.<sup>2</sup> The International Criminal Court (“ICC”) was fully operational within a year. A fourth United Nations criminal court, the Special Tribunal for Lebanon, was authorized by the Security Council in 2007,<sup>3</sup> but no trials took place during the year. In parallel to the activities of these new international institutions, national and so-called ‘hybrid’ courts<sup>4</sup> also made their own contributions to the growing corpus of international criminal case law.

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<sup>1</sup> On the *ad hoc* tribunals generally, see William A. Schabas, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE* (2006).

<sup>2</sup> Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. See William A. Schabas, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (3rd ed. 2007).

<sup>3</sup> See S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

<sup>4</sup> For the distinction between ‘international’ and ‘hybrid’ tribunals, see The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies – Report of the Secretary-General, delivered to the Security*

¶2 During 2007, the *ad hoc* tribunals for the former Yugoslavia and Rwanda were in the advanced stages of their ‘completion strategy.’ Major cases were underway, with an ambitious target: to conclude trials at first instance by the end of 2008. Each tribunal had a big question mark about future priorities. The ICTY has yet to apprehend two of its most important suspects, Radovan Karadžić and Ratko Mladić. They were the object of special confirmation hearings when the Tribunal was at its very beginnings, in 1996,<sup>5</sup> but have never been captured. The Rwanda Tribunal also awaited an important suspect, the alleged banker of the 1994 genocide, Félicien Kabuga, believed to be at large in Kenya. The Prosecutor provided no clarification about the possibility of prosecution of individuals associated with the Rwandese Patriotic Front, a matter that has been under consideration for many years. The Special Court for Sierra Leone completed its three multi-defendant trials, and prepared to begin what will be its final trial, of former Liberian president Charles Taylor. As for the International Criminal Court, it was readying for its very first trial, of Thomas Lubanga Dyilo (“Lubanga”), who has been charged with war crimes related to the recruitment of child soldiers in eastern Congo.

¶3 This article will provide an overview of some of the highlights of the case law of the tribunals during 2007. The volume of material is enormous, and any attempt to be comprehensive will stumble on superficiality. Necessarily, then, this review article focuses on only some of the major issues.

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*Council*, ¶¶ 40, 45, 46, U.N. Doc. S/2004/616 (Aug. 23, 2004). See also Laura A. Dickinson, *The Promise of Hybrid Courts* 97 AM. J. INT’L L. 295, 295 (2003) (“Such courts are ‘hybrid’ because both the institutional apparatus and the applicable law consist of a blend of the international and the domestic. Foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries. The judges apply domestic law that has been reformed to accord with international standards.”). On the hybrid courts, see also Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INT’L L. 934 (2001); NEW APPROACHES IN INTERNATIONAL CRIMINAL JUSTICE: KOSOVO, EAST TIMOR, SIERRA LEONE AND CAMBODIA (Kai Ambos & Mohamed Othman eds., 2003); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle* 31 N.Y.U. J. INT’L L. & POL’Y 709 (1999); David Turns, “Internationalized” or *Ad Hoc* Justice for International Criminal Law in a Time of Transition: The Cases of East Timor, Kosovo, Sierra Leone and Cambodia, 6 AUSTRIAN REV. INT’L & EUR. L. 123 (2001).

<sup>5</sup> Prosecutor v. Karadžić & Mladić, Case No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber I, July 11, 1996).

## I. GENOCIDE, SREBRENICA AND THE INTERNATIONAL COURT OF JUSTICE

¶4 Arguably the most important judicial decision during the year in the field of international criminal law was the work of the International Court of Justice, and not one of the international criminal tribunals. On February 26, 2007, the principal judicial organ of the United Nations, the International Court of Justice, issued a seminal ruling on the crime of genocide. Its judgment concluded litigation that had begun in 1993, when newly-independent Bosnia sued what was then called the Federal Republic of Yugoslavia and what had become, by the time of the 2007 decision, Serbia.<sup>6</sup> The Court addressed a number of important interpretative problems with respect to provisions of the 1948 *Convention for the Prevention and Punishment of the Crime of Genocide*.<sup>7</sup> It adopted a relatively conservative interpretation of the definition of the crime, and rejected the suggestion that ‘ethnic cleansing,’ ‘cultural genocide’ and forms of attack and persecution directed at ethnic groups falling short of physical destruction are comprised within the concept.<sup>8</sup>

¶5 The International Court of Justice placed great reliance on the factual and legal findings of the ICTY. In effect, it treated the *ad hoc* Tribunal as a specialised and authoritative jurisdiction whose conclusions, within its area of expertise, were to be accorded great deference. The Court reaffirmed its earlier jurispru-

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<sup>6</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro), Judgment, [2007] I.C.J. General List No. 91 (Feb. 26) [hereinafter *Bosnia v. Serbia*]. See also Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J. INT’L CRIM. JUST. 875 (2007); Orna Ben-Naftali & Miri Sharon, *What the ICJ did not say about the Duty to Punish Genocide: The Missing Pieces in a Puzzle*, 5 J. INT’L CRIM. JUST. 859 (2007); Paola Gaeta, *Génocide d’État et responsabilité pénale individuelle*, 111 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 272 (2007); Andrew B. Loewenstein & Stephen A. Kostas, *Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ’s Judgment in the Genocide Case*, 5 J. INT’L CRIM. JUST. 839 (2007); William A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 GENOCIDE STUD. & PREVENTION 101 (2007); William A. Schabas, *Whither Genocide? The International Court of Justice Finally Pronounces*, 9 J. GENOCIDE RES. 183 (2007); Christian Tomuschat, *Reparation in Cases of Genocide*, 5 J. INT’L CRIM. JUST. 905 (2007).

<sup>7</sup> Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 75 U.N.T.S. 135.

<sup>8</sup> *Bosnia v. Serbia*, *supra* note 6, ¶ 190.

dence with respect to the ‘direct control’ test over paramilitary units,<sup>9</sup> an issue that had been challenged in case law of the Appeals Chamber of the ICTY.<sup>10</sup> The judgment also endorsed an ambitious interpretative approach to the duty to prevent genocide.<sup>11</sup> Its insistence that the Convention imposes an obligation upon states to prevent genocide even when it occurs outside their own borders, to the extent that they are in a position of influence, and that they act within the confines of the Charter of the United Nations, dovetails very neatly with the emerging doctrine of the responsibility to protect.<sup>12</sup>

¶6 The influence of the International Court of Justice ruling in *Bosnia and Herzegovina v. Serbia* was felt almost immediately by the Appeals Chamber of the ICTY, which reversed its conviction of Vidoje Blagojević for complicity in genocide during the Srebrenica massacre of July 1995.<sup>13</sup> The principal Appeals Chamber decision concerning genocide, *Prosecutor v. Krstić*,<sup>14</sup> coupled with the dissenting opinion of Judge Shahabuddeen in that case, left trial chambers of the Tribunal in some disarray, and subsequent interpretations took the law in rather different directions.<sup>15</sup> In *Blagojević*, the Appeals Chamber cited the International Court’s recent ruling as support for the conclusion that “displacement is not equivalent to destruction,” and that acts of ethnic cleansing perpetrated at Srebrenica could not necessarily be taken as evidence of genocidal intent, contrary to what the Trial Chamber had decided.<sup>16</sup>

<sup>9</sup> See *id.* ¶¶ 403-406 (confirming Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) (Merits), [1986] I.C.J. 14, ¶ 115).

<sup>10</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Judgment, ¶ 137 (July 15, 1999) [hereinafter *Tadić* Appeals Judgment]; see also *Prosecutor v. Naletilić*, Case No. IT-98-34-T, Judgment, ¶ 184 (Trial Chamber I, Mar. 31, 2003).

<sup>11</sup> *Id.* ¶¶ 461-62.

<sup>12</sup> See *2005 World Summit Outcome*, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

<sup>13</sup> See *Prosecutor v. Blagojević*, Case No. IT-02-60-T, Judgment (Trial Chamber I, Jan. 17, 2005) [hereinafter *Blagojević* Trial Judgment].

<sup>14</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004) [hereinafter *Krstić* Appeals Judgment].

<sup>15</sup> Compare *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment (Sept. 1, 2004), with *Blagojević* Trial Judgment, *supra* note 13.

<sup>16</sup> *Prosecutor v. Blagojević*, Case No. IT-02-60-A, Appeals Judgment, ¶ 123 n.337 (May 9, 2007).

¶7 The Appeals Chamber of the ICTY has confirmed, on two occasions, that genocide was committed during the Srebrenica massacre, but it has as yet not actually convicted anyone of the crime. General Krstić was found guilty of genocide by the Trial Chamber,<sup>17</sup> but the verdict was reversed and replaced with a conviction for aiding and abetting genocide.<sup>18</sup> *Blagojević* was even more successful, in that the stigma of ‘the crime of crimes’ was erased entirely in his case in the May 2007 ruling of the Appeals Chamber, which overturned the genocide conviction altogether. A trial involving several defendants concerning the Srebrenica massacre proceeded during 2007.<sup>19</sup> In an interlocutory ruling issued only days after the International Court of Justice decision, the Trial Chamber declined to take judicial notice of the fact that genocide had been committed in Bosnia in 1995. Its position places it in marked contrast with the Appeals Chamber of the ICTR, which has held that the Rwandan genocide of 1994 is beyond any dispute.<sup>20</sup>

¶8 There are also very divergent views on the subject within the Office of the Prosecutor of the ICTY, to the extent that a provocative *mémoire* by the press attaché of Carla del Ponte, published in September 2007, is to be believed. Florence Hartmann’s book *Paix et châtiment* provides gory details of the Prosecutor’s battle with lawyers on her staff who were resistant to proceeding with genocide charges in the *Milošević* case.<sup>21</sup> Ms. Hartmann obviously breached her duties of confidentiality and is arguably in contempt of the Tribunal. She describes, for example, judgments of the Appeals Chamber on access to Serb documents of which there is no trace in the publicly available materials of the Tribunal, and which were presumably ordered to be kept secret. We may wait a long time to hear the other side of the story, as others may be more reluctant to break their pledges of confidentiality. Prosecutor del Ponte, who completed her eight years at the Tribunal at the end of 2007, has promised to write her own account.

<sup>17</sup> See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber I, Aug. 2, 2001).

<sup>18</sup> See *Krstić Appeals Judgment*, *supra* note 14.

<sup>19</sup> See *Prosecutor v. Popović*, Case No. IT-05-88-PT, Second Consolidated Amended Indictment (June 14, 2006).

<sup>20</sup> See *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (Appeals Chamber, June 16, 2006).

<sup>21</sup> Florence Hartmann, *PAIX ET CHÂTIMENT* (2007).

## II. BALANCED PROSECUTION AND THE ‘FLIPSIDE’ CASES

¶9 A great dilemma in terms of the selection of cases for prosecution has been presented by the so-called ‘flipside’ cases. At the ICTY, this has involved prosecuting a representative sampling of Croats and Muslims, despite the widely-held view that Serb forces were primarily responsible for atrocities committed during the conflict. As a general rule, the sentences imposed upon the Muslims have been much lower than those for the Serbs, suggesting that the crimes were not of comparable gravity and, possibly, that they were not even within the threshold set by the Security Council of “trying the most senior offenders of crimes which most seriously violate international public order.”<sup>22</sup> The Security Council has told both Tribunals to concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal.<sup>23</sup> This section will examine the balanced approach to prosecutions in the Special Court for Sierra Leone, the ICTR and the ICC.

### A. *The Balanced Approach at the Special Court for Sierra Leone*

¶10 The Special Court for Sierra Leone may have gone furthest in attempting a balanced approach to prosecutions, organizing three multiple-defendant trials, each of them focused on one of the warring parties in the civil war that raged through the 1990s. Two of these, concerning the rebel Armed Forces Revolutionary Council and the pro-government Civil Defence Forces, concluded in 2007 with final judgments of the Trial Chambers. All of the defendants were convicted. However, it became clear in the sentencing phase that the two sides in the conflict were not to be treated equally, and that a ‘just war’ narrative may emerge from the work

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<sup>22</sup> *Tenth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, ¶ 4, U.N. Doc. A/58/297-S/2003/829 (Aug. 20, 2003). See also U.N. Doc. S/PRST/2002/21; S.C. Res. 1503, preamble, U.N. Doc. S/RES/1503 (Aug. 28, 2003); *Ninth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, ¶ 6, U.N. Doc. A/57/379-S/2002/985 (Sept. 4, 2002); ICTY, *Rules of Procedure and Evidence*, Rule 11bis, Rule 28(A), IT/32/Rev. 41 (Feb. 28, 2008), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev41eb.pdf>.

<sup>23</sup> See S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

of the Special Court. The two leaders of the Civil Defence Forces who were convicted (a third defendant, Hinga Norman, died in custody in early 2007 before the end of the trial) of war crimes and crimes against humanity received relatively insignificant terms of imprisonment of six and eight years.<sup>24</sup> By the time the judgment was rendered in August 2007 they were probably already eligible for parole, having served two-thirds of their sentences. The Trial Chamber considered the support of the Civil Defence Forces for the democratically elected regime to be an important mitigating factor in determining the appropriate sentence.<sup>25</sup> One of the three judges on the Trial Chamber voted to acquit the defendants altogether.<sup>26</sup> He took the view that their defense of a democratic regime essentially excused their crimes, a position that may be politically popular among some elements in Sierra Leone but that is utterly untenable from the standpoint of international criminal law. By contrast, the three leaders of the Armed Forces Revolutionary Council were convicted and sentenced to terms of forty-five and fifty years.<sup>27</sup> International humanitarian law is said to be concerned with the *jus in bello* rather than the *jus ad bellum*, but it seems that when punishment is being meted out for violations of the *jus in bello*, the *jus ad bellum* may have a powerful effect.

#### B. Case Selection at the ICTR and the RPF Investigations

¶11 When the Rwanda Tribunal was being established in late 1994, the Commission of Inquiry established by the Security Council proposed that the Tribunal be aimed primarily at prosecuting those responsible for genocide, but the draft resolution submitted by the United States referred to prosecution of “all persons” who have violated “international humanitarian law.” The broader language would also authorize prosecution of members of the Rwandan Patriotic Front for atrocities in which they might be in-

<sup>24</sup> See Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, (Trial Chamber I, Aug. 2, 2007) [hereinafter *Fofana* Trial Judgment].

<sup>25</sup> See Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa, ¶¶ 80, 86 (Trial Chamber I, Oct. 9, 2007).

<sup>26</sup> See Prosecutor v. Fofana, Case No. SCSL-04-14-T, Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute (Aug. 2, 2007).

<sup>27</sup> See Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment (Trial Chamber II, June 20, 2007) [hereinafter *Brima* Trial Judgment].

volved, including allegations of massacres committed after they took power in July 1994. Aware of this agenda, the Government of Rwanda opposed including language in the Tribunal's Statute that would allow such jurisdiction.<sup>28</sup> In the Security Council debate, New Zealand's representative, Colin Keating, noted that "the focus of the jurisdiction of the Tribunal is not on war crimes, but on genocide, as Rwanda had requested."<sup>29</sup> In 1999, when a judge refused to confirm charges of genocide with respect to an individual suspected of killing the Prime Minister and several Belgian soldiers, the Prosecutor asked to withdraw the indictment as it did not conform any longer to the priorities of the Tribunal, which were to deal with genocide.<sup>30</sup>

¶12 It has always been an open secret, however, that investigations into atrocities attributed to the Rwandese Patriotic Front and its military wing, the Rwandese Patriotic Army, were underway. In her recent book, Florence Hartmann describes the resulting tension between the Office of the Prosecutor and the government of Rwanda, and defends the view that Carla del Ponte was replaced as Prosecutor of the ICTR because of her determination to proceed against the Rwandese Patriotic Front.<sup>31</sup> But the book also shows, perhaps inadvertently, that permanent members of the Security Council wanted to remove Prosecutor del Ponte altogether, but compromised by allowing her to remain at the ICTY for an additional four-year term.<sup>32</sup> The explanation that her mandate for Rwanda was not renewed in 2003 because of her zealotry concerning the Rwandan leaders appears to be an oversimplification.

¶13 Be that as it may, in 2004, the President of the Security Council called upon all States, and "especially Rwanda . . . to intensify cooperation with and render all necessary assistance to the ICTR, including on investigation of the Rwandan Patriotic Army. . . ."<sup>33</sup> The Prosecutor told the Security Council that his office was evaluating evidence with a view to determining whether there was

<sup>28</sup> See Raymond Bonner, *U.N. Commission Recommends Rwanda 'Genocide' Tribunal*, N.Y. TIMES, Sept. 29, 1994, at A13.

<sup>29</sup> U.N. SCOR, 49<sup>th</sup> Sess., 3453d mtg. at 5, U.N. Doc. S/PV.3453 (Nov. 8, 1994).

<sup>30</sup> See Prosecutor v. Ntuyahaga, Case No. ICTR-98-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment (Trial Chamber I, Mar. 18, 1999).

<sup>31</sup> See Hartmann, *supra* note 21.

<sup>32</sup> *Id.*

<sup>33</sup> *Statement by the President of the Security Council*, at 2, U.N. Doc. S/PRST/2004/28 (Aug. 4, 2004). See also U.N. SCOR, 59<sup>th</sup> Sess., 5016<sup>th</sup> mtg. at 4, U.N. Doc. S/PV.5016 (Aug. 4, 2004).

a sufficient basis for prosecution.<sup>34</sup> In November 2004, Prosecutor Jallow told the Security Council:

We are deeply aware of the fact that the investigation of those allegations falls within our mandate and our duty at the Tribunal. We are also conscious that the Security Council is currently concerned about this particular issue. Investigations have been conducted over a period of many years. At this stage, as I mentioned to counsellors at the last meeting, we are not conducting any more investigations, but we have started a process of assessing what material has been gathered over the years in order for me to be able to determine what cases exist - and against whom - with regard to those particular allegations of Rwandese Patriotic Front (RPF) involvement. I have indicated to the Rwanda authorities themselves that I am assessing the material at the moment and will get back to them to advise them of the outcome of my assessment in due course. This will hopefully take place early in the year. That is the situation as far as the RPF is concerned.<sup>35</sup>

More than three years later, there was still no clarity on the subject. In December 2007, Prosecutor Jallow stated: “Since my last report to the Security Council, my office has also made progress in the investigation of the allegations against members of the Rwandese Patriotic Front. We look forward to concluding this matter early next year.”<sup>36</sup>

### *C. The Need for Balance at the ICC*

¶14 Issues of a similar nature also face the International Criminal Court. Responding to the referral of the ‘situation in northern

<sup>34</sup> See U.N. SCOR, 59<sup>th</sup> Sess., 4999<sup>th</sup> mtg. at 17, U.N. Doc. S/PV.4999 (June 29, 2004).

<sup>35</sup> U.N. SCOR, 59<sup>th</sup> Sess., 5086<sup>th</sup> mtg. at 31, U.N. Doc. S/PV.5086 (Nov. 23, 2004).

<sup>36</sup> U.N. SCOR, Sess., 62d Sess., 5796<sup>th</sup> mtg. at 13, U.N. Doc. S/PV.5796 (Dec. 10, 2007).

Uganda,' in mid-2005 the Prosecutor requested arrest warrants for five leaders of the rebel Lord's Resistance Army.<sup>37</sup> When the arrest warrants were unsealed, in October 2005, both Amnesty International and Human Rights Watch questioned the one-sided approach, and called upon the Prosecutor to proceed against the government forces as well.<sup>38</sup> The Prosecutor responded to the criticism: "We therefore started with an investigation of the LRA. At the same time, we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met."<sup>39</sup> But in 2007, there was no evidence of any interest from the Office of the Prosecutor in pursuing Ugandan officials for crimes committed during the civil war or, for that matter, regarding its military activities in eastern Congo.

¶15 Thus, to one extent or the other, it seems that all of the international criminal tribunals have been wrestling with a cluster of issues relating to the motivations of those who perpetrate atrocities. International humanitarian law takes the position that this issue is irrelevant, but it nevertheless rears its head in the exercise of prosecutorial discretion about targeting of investigations as well as in judicial determinations of appropriate sentences.

### III. HATE PROPAGANDA AND INCITEMENT TO GENOCIDE

¶16 In November 2007, the Appeals Chamber of the International Criminal Tribunal for Rwanda issued its judgment in the so-

<sup>37</sup> See generally Situation in Uganda, Situation No. ICC-02/04-87, Decision on the Prosecutor's Application for Warrants of Arrest under Article 59, Unsealed as of Oct. 13, 2005 (Pre-Trial Chamber II, July 8, 2005).

<sup>38</sup> See Amnesty International, *Uganda: First Ever Arrest Warrants by International Criminal Court - a First Step Towards Addressing Impunity*, Oct. 14, 2005, <http://www.amnesty.org/en/library/asset/AFR59/008/2005/en/dom-AFR590082005en.html>; Human Rights Watch, *ICC Takes Decisive Step for Justice in Uganda*, Oct. 14, 2005, <http://www.hrw.org/english/docs/2005/10/14/uganda11880.htm>.

<sup>39</sup> International Criminal Court: Office of the Prosecutor, *Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Informal meeting of Legal Advisors of Ministries of Foreign Affairs*, Oct. 24, 2005, at 7, available at [www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051024\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051024_English.pdf). See also International Criminal Court: Office of the Prosecutor, *Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005*, Nov. 28, 2005, at 2, available at [www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051128\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051128_English.pdf).

called ‘media trial.’ The accused were three prominent journalists who had worked for the racist newspaper *Kangura* as well as the notorious radio station *Radio-télévision libre des mille collines*. Many findings of the Trial Chamber were overturned, and spectators attending the reading of the judgment by President Fausto Pocar say they feared the three might be acquitted entirely. But despite the many flaws that the Appeals Chamber found with the trial judgment, convictions were sustained on several counts and the ultimate sentences were barely touched.

¶17 The Appeals Chamber addressed important factual issues as it struggled to establish whether mere words could rise to the level of international crime. In contrast with the Trial Chamber, it found that broadcasts of *Radio-télévision libre des mille collines* prior to the outbreak of genocide in April 1994 were not punishable acts. However, some of the issues of *Kangura* published in the first months of 1994 were held to constitute incitement to commit genocide and crimes against humanity.

¶18 The Appeals Chamber upheld convictions for direct and public incitement to commit genocide. It also confirmed that this is an inchoate crime, whose commission does not require any acts as a consequence. This was all rather theoretical, given that in 1994 the Rwandan media incited crimes that actually took place, and that were therefore punishable as complicity or aiding and abetting in genocide. Thus, with respect to genocide, the legal findings are unremarkable.

¶19 More significant is the Appeals Chamber’s conclusion with respect to hate speech or hate propaganda. Already, in an early Trial Chamber ruling, the International Criminal Tribunal for Rwanda had endorsed an approach to crimes against humanity by which hate speech formed the basis of a conviction for the crime against humanity of persecution. However, the judgment was the result of a plea agreement, and it was never appealed.<sup>40</sup> In the ‘media trial,’ the Trial Chamber said:

The Chamber considers it evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article

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<sup>40</sup> See Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgment and Sentence, ¶¶ 18-24 (Trial Chamber I, June 1, 2000).

3(h) of its Statute. In Ruggiu, the Tribunal so held, finding that the radio broadcasts of [*Radio télévision libre des mille collines*], in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of ‘the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society.’ Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.<sup>41</sup>

¶20 In reaching its conclusion, the Trial Chamber of the Rwanda Tribunal reviewed authorities from international human rights law as well as national legislation prohibiting hate speech, concluding that “hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination.”<sup>42</sup> For the Trial Chamber, the crime of persecution by hate speech could be committed even where there is no call to violence, or where violence does not actually result.

¶21 This holding appears to derive largely from a misreading of the *Streicher* case before the International Military Tribunal at Nuremberg. Streicher was prosecuted for incitement to the crime against humanity of murder. Although Streicher’s hate-mongering in the pre-war period was referred to in the Nuremberg judgment’s narrative,<sup>43</sup> as a question of law none of the accused were actually convicted for acts committed prior to the outbreak of the war.<sup>44</sup> The Nuremberg judgment is thus not authority for the proposition that hate speech falling short of incitement to murder that actually occurs is punishable under international law.

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<sup>41</sup> Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment, ¶ 1072 (Trial Chamber I, Dec. 3, 2003).

<sup>42</sup> *Id.* ¶ 1076.

<sup>43</sup> U.S. v. Goering, 6 F.R.D. 69, 100-102 (Int’l Mil. Trib. 1946).

<sup>44</sup> *See Id.* at 84-127.

¶22 The Appeals Chamber ruling of November 2007 was more nuanced. The Chamber agreed with the trial judges that hate speech violated human dignity and was a form of discrimination, but it said it was not convinced that taken on its own hate speech amounted to a violation of life, liberty and physical integrity. The Appeals Chamber held that it was “not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.”<sup>45</sup> Without overruling the pronouncement of the Trial Chamber explicitly, the Appeals Chamber found it unnecessary to determine whether hate speech alone amounted to the crime against humanity of persecution, given that in the case of Rwanda the various acts imputed to the media were part of a broad campaign of persecution that should be considered as a whole.<sup>46</sup> The Appeals Chamber held that broadcasts made after the beginning of the genocide on April 6, 1994 were part of this campaign and therefore constituted the crime against humanity of persecution.<sup>47</sup>

¶23 The Appeals Chamber was clearly divided, and this is reflected in the equivocal language of its judgment. In his individual opinion, President Pocar said that the judgment was not sufficiently clear in stating that hate speech on its own could constitute persecution, the Rwandan case providing a perfect example of this.<sup>48</sup> Judge Shahabuddeen appeared to share much the same perspective.<sup>49</sup> On the opposite end of the spectrum, Judge Meron wrote a strong dissent in which, with reference to the drafting history of the Genocide Convention, he argued that “Mere Hate Speech is Not Criminal.”<sup>50</sup>

¶24 An interesting feature of the ‘media case’ is the conviction of one of the three accused, Ferdinand Nahimana, on the basis of superior or command responsibility. As a general rule, superior or command responsibility has generated more heat than light. At the ICTR, where there have been a few convictions on this basis alone,

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<sup>45</sup> *Nahimana v. Prosecutor*, Case No. ICTR 99-52-A, Appeals Judgment, ¶ 986 (Nov. 28, 2007) [hereinafter *Nahimana Appeals Judgment*].

<sup>46</sup> *Id.* ¶ 988.

<sup>47</sup> *Id.* ¶¶ 988, 995.

<sup>48</sup> *Id.*, Partly Dissenting Opinion of Judge Fausto Pocar, ¶ 3.

<sup>49</sup> *Id.*, Partly Dissenting Opinion of Judge Shahabuddeen, ¶¶ 7-20, 74.

<sup>50</sup> *Id.*, Partly Dissenting Opinion of Judge Meron, ¶ 5-8.

its scope has been confined to war crimes, and the sentences that have resulted have been relatively light.<sup>51</sup> The obvious suggestion is that superior or command responsibility is not nearly as serious a form of liability as primary perpetration. The conviction of Nahimana for genocide solely as a result of superior responsibility, and the imposition of a thirty-year term of imprisonment, stands out as a dramatic exception in this context. The Appeals Chamber quashed Nahimana's convictions based upon Article 6(1) of the Statute, that is, as a principal perpetrator or accomplice, but upheld his convictions based upon Article 6(3). It reduced the sentence from one of life imprisonment as a result.<sup>52</sup> A professor of history at the National University of Rwanda in Butare, Nahimana was a prominent ideologue and political activist in pre-genocide Rwanda. In 1992, Nahimana participated in the establishment of *Radio télévision libre des mille collines*. According to the Appeals Chamber, Nahimana was the founder and guiding spirit of the radio station, with influence over its activities and the content of its broadcasts, but he failed to intervene to prevent the incitement. Judge Meron, in his partly dissenting opinion, considered the sentence "too harsh," given that "[d]espite the severity of this crime, Nahimana did not personally kill anyone and did not personally make statements that constituted incitement."<sup>53</sup>

¶25

*Nahimana* might be said to demonstrate the real utility of the superior responsibility concept. Nahimana was deeply involved in the operation of the racist radio station. It was part of his more general involvement in the anti-Tutsi movement in Rwanda that culminated in the terrible events of April to July 1994. But the Appeals Chamber said there was no evidence linking him directly to the broadcasts. This recalls the judgment of General Yamashita in the final months of 1945, who was convicted for failing to intervene when Japanese troops under his command pillaged the city of Manila.<sup>54</sup> Perhaps, however, the result in the Appeals Chamber judgment is the consequence of strategic decisions by the Prosecu-

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<sup>51</sup> Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 481 (Trial Chamber II, Jan. 31, 2005); Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶ 2084 (Trial Chamber II, Mar. 15, 2006); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 783 (Trial Chamber II, June 30, 2006).

<sup>52</sup> *Nahimana* Appeals Judgment, *supra* note 45, ¶ 1052.

<sup>53</sup> *Id.*, Partly Dissenting Opinion of Judge Meron, ¶ 22.

<sup>54</sup> U.S. v. Yamashita, 4 L.R.T.W.C. 1, 36-37 (1948). *See also* In re Yamashita, 327 US 1 (1945).

tor, who might well have approached the issue in another manner. Nahimana could have been charged as part of a joint criminal enterprise to incite genocide, one for which he would then readily have been convicted as the directing mind of a notorious radio station whose broadcasts dramatically contributed to the carnage. Such an approach might also more accurately describe his culpability. As a mastermind of the racist campaign against the Tutsi, his real crime must have been so much more than simply failing to supervise his subalterns. Indeed, how else can a thirty-year sentence be explained?

#### IV. TRANSFERRING CASES BACK TO NATIONAL COURTS

¶26 Rather like the hungry man or woman at an ‘all you can eat’ buffet, the *ad hoc* Tribunals for the former Yugoslavia and Rwanda filled their plates only to discover that they could not digest everything. By 2003, the Security Council was insisting that they wind up their activities. One way to do this was to transfer cases to national jurisdictions, a process that began in 2005. Transfers of individuals who have already been indicted, whether or not they are in custody, require the authorization of a Trial Chamber or a three-judge ‘Referral Bench.’ One of the interesting features of the applicable law, the result of Rule 11 *bis* of the Rules of Procedure and Evidence of the two tribunals, is the possibility of transferring cases to states with no traditional jurisdictional link to the crime or the offender, in accordance with the principle of universality. By the beginning of 2007, several transfers had been successfully accomplished, with accused persons being sent to Bosnia and Herzegovina for trial before special chambers of the national justice system.<sup>55</sup>

¶27 At the ICTR, the process began more slowly. By the beginning of 2007, only one application had been made for transfer, to Norway, and it had been denied by the judges because of inadequacies in Norwegian legislation.<sup>56</sup> In 2007, the Prosecutor applied for and obtained the transfer of the same case to the Neth-

<sup>55</sup> See Michael Bohlander, *Last Exit Bosnia – Transferring War Crimes Prosecution for the International Tribunal to Domestic Courts*, 14 CRIM. L.F. 59 (2003); Mark S. Ellis, *Coming to Terms with its Past - Serbia's New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT'L L. 165 (2004).

<sup>56</sup> See Prosecutor v. Bagaragaza, Case No. ICTR 05-86-AR11*bis*, Decision on Rule 11*bis* Appeal (Appeals Chamber, Aug. 30, 2006).

erlands.<sup>57</sup> The ruling of the Trial Chamber was not appealed, given that the accused himself much preferred trial in Europe to any of the alternatives, including the threat of transfer to Rwanda itself. But in August 2007, a ruling of the Dutch national courts in an unrelated case established a precedent that cast doubts on the prospect of effective prosecution of Bagaragaza in the Netherlands. The Prosecutor demanded that Bagaragaza be returned to the custody of the International Tribunal, and that the transfer order be rescinded. By the end of the year, Bagaragaza's fate was uncertain. He had been in custody in The Hague awaiting transfer to a national jurisdiction for two years.

¶28 The Prosecutor has regularly lamented the fact that few countries have shown any interest in prosecuting transfer cases from the Rwanda Tribunal. The big exception to this is Rwanda itself, which actually resents transfer to other jurisdictions and considers that its courts are the natural forum for genocide trials that the International Tribunal will not undertake. Prior to 2007, in the bi-annual reports to the Security Council on the completion strategy, the Prosecutor had expressed his concern that Rwanda's courts were not in a position to take cases. He spoke of problems of capacity within the national justice system as well as the possibility of capital punishment, which remained an option under Rwandan law.<sup>58</sup> In March 2007, the Rwandan parliament enacted legislation providing for a special legal regime for cases transferred by the Tribunal, and clarified the fact that there would be no capital punishment.<sup>59</sup>

¶29 The first application for transfer of a case to Rwanda was filed by the Prosecutor in June 2007.<sup>60</sup> Because the accused was not in custody, it was unlikely that there would be much opposition to the proceedings. Then, human rights NGOs intervened to op-

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<sup>57</sup> See Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-R11bis, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands (Trial Chamber III, Apr. 13 2007).

<sup>58</sup> See, e.g., U.N. SCOR, 61st Sess., 5594th mtg. at 13-4, UN Doc. S/PV.5594 (Dec. 15, 2006).

<sup>59</sup> Organic Law No. 11/2007 of 16/03/2007, Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette of the Republic of Rwanda, Year 46, Special issue of 19 March 2007, p. 22.

<sup>60</sup> Prosecutor v. Kayishema, Case No. ICTR 01-67-I, Request for the Referral of the Case of Fulgence Kayishema to Rwanda pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence (June 11, 2007).

pose the transfers, arguing that the Rwandan courts could not deliver trials that would be acceptable under international standards.<sup>61</sup> When the Prosecutor informed the Security Council of the first application for referral to Rwanda, in June 2007, he said that if it were successful, others would follow.<sup>62</sup> By the end of the year, the first case had not yet been heard. However, the Prosecutor chose to proceed with additional applications in other cases.

¶30 The Prosecutor also applied for transfer of two cases to France. These involved accused persons who were already in France. The transfers were not contested, and no NGOs complained about the French justice system.<sup>63</sup> Only Rwanda was unhappy, and it said as much to the Security Council when it learned of the transfers. The Rwandan representative said: “My Government has serious concerns about this – principally because well-known fugitives at large continue to live in that country with impunity. We intend to raise this issue with the appropriate authorities at the highest level.”<sup>64</sup>

¶31 At the ICTY, where transfer has become almost routine, the Appeals Chamber intervened to deny the Prosecutor’s request to transfer the case of Milan Lukić after it had been authorized by a Referral Bench. Lukić had been a leader of the White Eagles, a paramilitary organization. He was arrested in Argentina in 2005, and subsequently transferred to the Tribunal in The Hague. In April 2007, the Prosecutor obtained authorization to transfer the accused to the national courts of Bosnia and Herzegovina, on the

<sup>61</sup> See Prosecutor v. Kayishema, Case No. ICTR 2001-67-I, Brief of Human Rights Watch as *Amicus Curiae* in Opposition to Rule 11 *bis* Transfer (Jan. 3, 2008); Prosecutor v. Kayishema, Case No. ICTR 2001-67-I, Brief of *Amicus Curiae*, International Criminal Defence Attorneys Association (ICDAA), Concerning the Request for Referral [sic] of the Accused to Rwanda Pursuant to Rule 11 *Bis* of the *Rules of Procedure and Evidence* (Rule 74 of the *Rules of Procedure and Evidence*) (Jan. 3, 2008).

<sup>62</sup> U.N. SCOR, 62nd Sess., 5697th mtg. at 15, UN Doc. S/PV.5697 (June 18, 2007).

<sup>63</sup> Prosecutor v. Bucyibaruta, Case No. ICTR 2005-86-I, *Décision relative à la requête du Procureur aux fins de renvoi de l’acte d’accusation contre Laurent Bucyibaruta aux autorités françaises* [Decision relating to the request of the Prosecutor for purposes of referral of the bill of indictment against Laurent Bucyibaruta to the French authorities] (Trial Chamber III, Nov. 20, 2007); Prosecutor v. Munyeshyaka, Case No. ICTR 2005-87-I, Decision on the Prosecutor’s Request for the Referral of Wenceslas Munyeshyaka’s Indictment to France (Trial Chamber III, Nov. 20, 2007).

<sup>64</sup> U.N. SCOR, 62nd Sess., 5697th mtg. at 32, UN Doc. S/PV.5697 (June 18, 2007).

ground that Lukić was not one of the “most senior leaders” and that as a result trial before the International Tribunal was not appropriate.<sup>65</sup> One of the bizarre features of such litigation is that sometimes, as in this case, it is the accused who appeals the transfer, arguing that he is in effect worse than the Prosecutor has portrayed him. The Appeals Chamber confirmed that paramilitary leaders could be tried at either level, national or international, but it felt the Trial Chamber had underestimated the significance of the accused. The Trial Chamber had focused on the local dimension of his influence, but for the Appeals Chamber, “within his own sphere, he was a dominant presence.”<sup>66</sup> Given the importance of prosecuting paramilitary leaders, the Appeals Chamber ordered that trial take place before the International Tribunal and not the national courts of Bosnia and Herzegovina.<sup>67</sup>

#### V. JOINT CRIMINAL ENTERPRISE ON A BROAD SCALE

¶32 The doctrine of ‘joint criminal enterprise’ has been at the core of the complicity paradigm of the Tribunals since it was first enunciated in the ICTY Appeals Chamber decision in *Tadić*.<sup>68</sup> Not set out explicitly in the statutes of the *ad hoc* tribunals, the concept was developed with reference to theories of organized crime in national legal systems as well as precedents established in the post-World War II decisions. In the leading case, *Tadić*, the accused was convicted for murders committed by his associates as part of a raid on a Muslim community. The doctrine was conceived of as applicable to criminal activity on a relatively small and localized scale, as it had been in *Tadić*. Its relevance to much broader forms of criminal activity remained a matter in dispute until the Appeals Chamber, in April 2007, confirmed that big fish as well as small fry could be part of a joint criminal enterprise.

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<sup>65</sup> Prosecutor v. Lukić, Case No. IT-98-32/1-PT, Decision on Referral of Case Pursuant to Rule 11 *bis* with Confidential Annex A and Annex B, ¶ 29-30 (Referral Bench, Apr. 5 2007).

<sup>66</sup> Prosecutor v. Lukić, Case No. IT-98-32/1-AR11*bis*.1, Decision on Milan Lukić’s Appeal Regarding Referral, ¶ 21 (Appeals Chamber, July 11, 2007).

<sup>67</sup> *Id.* ¶ 28.

<sup>68</sup> *Tadić* Appeals Judgment, *supra* note 10, ¶ 220.

### A. *The Brđanin Case*

¶33 In September 2004, charges based upon joint criminal enterprise had been dismissed by an ICTY Trial Chamber in the trial of Radoslav Brđanin.<sup>69</sup> The accused had served as president of the ‘Crisis Group’ of the Autonomous Region of Krajina. Relying upon earlier formulations by the Appeals Chamber, the Trial Chamber concluded that the joint criminal enterprise theory was inapplicable. It held that the primary perpetrator of the criminal act must be a member of the joint criminal enterprise.<sup>70</sup> The consequence was to confine the doctrine to small groups, and to exclude its relevance to large scale criminal plans in which the primary perpetrator may even be ignorant of the overall intentions of the leaders and organizers.

¶34 The ICTY Appeals Chamber reversed the legal findings of the Trial Chamber, thereby holding that joint criminal enterprise was applicable not only to ‘small cases’ but to large-scale criminal enterprises involving primary perpetrators or offenders who are personally outside of the common plan. Referring to two post-World War II cases, the Appeals Chamber said it found strong support for the imposition of criminal liability upon an accused for participation in a common criminal purpose, “where the conduct that comprises the criminal *actus reus* is perpetrated by persons who do not share the common purpose.” There is no requirement of proof “that there was an understanding or an agreement to commit that particular crime between the accused and the principal perpetrator of the crime.”<sup>71</sup>

¶35 One of the authorities relied upon by the *Brđanin* Appeals Chamber, known as the *Justice Case*, involved prosecution of leading judges, magistrates and prosecutors for their role in implementing the racist and genocidal Nazi policy.<sup>72</sup> The Appeals Chamber cited one of the conclusions in the *Justice Case*: “The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the

<sup>69</sup> Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶¶ 355-356 (Trial Chamber II, Sept. 1, 2004).

<sup>70</sup> *See id.*

<sup>71</sup> Prosecutor v. Brđanin, Case No. IT-99-36-A, Appeals Judgment, ¶ 394 (Apr. 3, 2007) [hereinafter *Brđanin* Appeals Judgment].

<sup>72</sup> U.S. v. Alstötter (“Justice Trial”), 3 T.W.C. 1, 6 L.R.T.W.C. 1, 14 Ann. Dig. 278 (U.S. Mil. Trib. 1948).

plan. This is but an application of general concepts of criminal law.”<sup>73</sup> Interestingly, in a 2002 ruling where it decided that crimes against humanity need not be committed pursuant to a state policy, the same Appeals Chamber described the *Justice Case* as “not to constitute an authoritative statement of customary international law.”<sup>74</sup>

¶36 The Appeals Chamber relied heavily on the analysis of Judge Iain Bonomy in his separate opinion in a preliminary ruling in *Milutinović* the previous year. Judge Bonomy also analyzed the *Justice Case*. He wrote:

The Military Tribunal appears to have imposed criminal responsibility on both accused for their participation in the common criminal plan although they did not perpetrate the *actus reus* of the crimes of which they were convicted; the *actus reus* was instead perpetrated by executioners simply carrying out the orders of the court. Nowhere did the Tribunal discuss the mental state of the executioners who carried out the death sentences imposed as a result of the actions of Lautz, Rothaug, and their fellow participants in the common plan, or whether such persons even had knowledge that the death sentences formed part of a plan to pervert the law for the purpose of exterminating Jews and other ‘undesirables.’<sup>75</sup>

¶37 The other post-World War II case referred to by the *Brđanin* Appeals Chamber, and discussed by Judge Bonomy in his separate opinion, involved the SS Race and Resettlement Main Office, and is known as the *RuSHA case*. The RuSHA leaders were charged with participating in a “systematic program of genocide.”<sup>76</sup> As Judge Bonomy explained, the United States Military Tribunal con-

<sup>73</sup> *Brđanin* Appeals Judgment, *supra* note 71, ¶ 397 (citing Justice Trial, 3 T.W.C. 1, p. 1063).

<sup>74</sup> Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Judgment, ¶ 98 n.114 (June 12, 2002).

<sup>75</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Ojđanic’s Motion Challenging Jurisdiction: Indirect Co-Perpetrations, Separate Opinion of Judge Iain Bonomy, ¶ 20 (Mar. 22, 2006).

<sup>76</sup> U.S. v. Greifelt (“RuSHA Case”), 4 T.W.C. 1, p. 609, 13 L.R.T.W.C. 1 (U.S. Mil. Trib. 1948).

cluded that Hitler, SS leader Himmler and other Nazi officials shared a “two-fold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of conquered nations.”<sup>77</sup> The leadership of RuSHA adhered to and enthusiastically participated in the execution of this ‘Germanization plan.’<sup>78</sup>

¶38 The Appeals Chamber agreed that the RuSHA Judgment supported the position that high officials involved in devising the Germanization plan were criminally responsible for the conduct of the agents who carried out the crimes, “without any discussion of whether the principal perpetrators had knowledge that their actions formed part of the Germanization plan, or of whether an agreement existed between the accused and these agents.”<sup>79</sup> The *Brđanin* Appeals Chamber also noted that much of the early case law of the ICTY dealt with small-scale joint criminal enterprises, and was not therefore good authority when broader schemes were concerned.<sup>80</sup> It referred to two exceptions, both of them involving senior leaders.<sup>81</sup>

### B. *The AFRC Judgment at the SCSL*

¶39 Another significant development in 2007 concerning joint criminal enterprise was the dismissal, by a Trial Chamber of the Special Court for Sierra Leone, of charges because of the manner in which the concept was pleaded. The indictment had charged three leaders of the Armed Forces Revolutionary Council as follows:

33. The AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLON and

<sup>77</sup> Prosecutor v. Milutinović, Case No. IT-05-87-PT, Decision on Ojdanic’s Motion Challenging Jurisdiction: Indirect Co-Perpetrations, Separate Opinion of Judge Iain Bonomy, ¶ 22 (Mar. 22, 2006) (citing RuSHA Case, 4 T.W.C. 1, p. 90).

<sup>78</sup> *Id.*

<sup>79</sup> *Brđanin* Appeals Judgment, *supra* note 71, ¶ 403.

<sup>80</sup> *Id.* ¶ 407.

<sup>81</sup> *Id.* ¶¶ 408-9 (citing Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment (Mar. 22, 2006); Prosecutor v. Krstić, Case No. IT-98-33-A, Appeals Judgment (Apr. 19, 2004)).

AUGUSTINE GBAO, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

34. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.<sup>82</sup>

The Trial Chamber took the view that paragraphs 33 and 34 of the indictment did not disclose a crime within the jurisdiction of the Court as a common purpose of the joint enterprise. It departed from a preliminary ruling that had upheld the validity of the indictment. According to the Trial Chamber, the charge that the accused took “actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas” is not a criminal purpose recognized by the Tribunal’s Statute nor is it an international crime.<sup>83</sup> “Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide,” it explained. “There is no rule against rebellion in international law.”<sup>84</sup>

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<sup>82</sup> Prosecutor v. Brima, Case No. SCSL-04-16-PT, Further Amended Consolidated Indictment, ¶¶ 33-34 (May 13, 2004).

<sup>83</sup> *Brima* Trial Judgment, *supra* note 27, ¶ 67.

<sup>84</sup> *Id.*

¶40 The same issue also arose in the second judgment of the Special Court, which was issued in August 2007. There, the Prosecutor had charged a different type of joint criminal enterprise, namely using “any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone.”<sup>85</sup> The indictment did not use the term ‘joint criminal enterprise,’ but the Trial Chamber seemed to consider that the words “plan, purpose or design” which did appear in paragraph 19 of the indictment were sufficient.<sup>86</sup> Perhaps the Prosecutor did not describe the enterprise as ‘criminal’ because this case involved the Civil Defence Forces, who were defending the regime. The Trial Chamber concluded that although “Norman, Fofana, Kondewa and their subordinates may have acted in concert with each other, we find that there is no evidence upon which to conclude beyond reasonable doubt that they did so in order to further a common purpose, plan or design to commit criminal acts.”<sup>87</sup> The discussion was perfunctory, and there is little guidance either about the nature of the ‘joint criminal enterprise’ allegedly charged by the Prosecutor or the Trial Chamber’s reasons for dismissing it. Hopefully the Appeals Chamber will sort things out, as the matter may be of decisive importance in the Charles Taylor trial, now ongoing in 2008.

## VI. SOME PROCEDURAL DEVELOPMENTS

¶41 The tribunals have been at work now for more than a decade. Very sophisticated rules and principles concerning procedure and evidence have been developed over this time. Often they represent compromises based upon practice in different legal traditions. Novel problems do, however, continue to present themselves. Three developments in this area will be discussed: (1) the issue of ‘witness proofing,’ (2) a possible exception to the right of the accused to be present at trial, and (3) the ‘confirmation hearing’ at the International Criminal Court.

<sup>85</sup> Prosecutor v. Norman, Case No. SCSL-03-14-I, Indictment, ¶ 19 (Feb. 5, 2004).

<sup>86</sup> *Fofana* Trial Judgment, *supra* note 24, ¶ 217.

<sup>87</sup> *Id.* ¶¶ 732, 744, 771, 804, 815, 907, 908, 914, 915, 939, 940, 949, 950.

*A. Witness Proofing*

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Witness proofing is a practice by which counsel prepare a witness for testimony. Some systems prohibit it altogether, others tolerate it to a certain extent, and in some systems, especially in the United States, the practice is both widespread and subject to relatively few constraints. It has become a feature of the work of the Office of the Prosecutor at the ICTY, ICTR and SCSL.<sup>88</sup> The debate about witness proofing was revived in 2006, when a Pre-Trial Chamber of the ICC essentially condemned the practice at the *ad hoc* tribunals and forbade lawyers from coaching their witnesses beyond telling them where to find the courthouse door, the toilets and the coffee machine.<sup>89</sup> The decision nourished attempts by defense lawyers to overturn precedent and have the *ad hoc* tribunals follow the line set by the ICC, but to no avail.<sup>90</sup> In May 2007, the Appeals Chamber of the ICTR confirmed that there would be no change in the law before that body.<sup>91</sup> The authoritative Appeals Chamber decision was then invoked by the Prosecutor before a Trial Chamber of the ICC in the hopes that it would reverse the earlier decision of the Pre-Trial Chamber. But the Trial Chamber refused to budge.<sup>92</sup> Referring to the rulings of the *ad hoc* tribunals on the same subject, it said:

44. However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of

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<sup>88</sup> See Prosecutor v. Jelisić, Case No. IT-95-10, Decision on Communication between Parties and Witnesses (Trial Chamber, Dec. 11, 1998); Prosecutor v. Limaj, Case No. IT-03-66-T, Decision on the Defence Motion on Prosecution Practice of Proofing Witnesses (Trial Chamber II, Dec. 10, 2004); Prosecutor v. Sesay, Case No. SCSL-2004-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117 (Trial Chamber I, Feb. 27, 2006).

<sup>89</sup> See generally Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, Public (Pre-Trial Chamber I, Nov. 8, 2006).

<sup>90</sup> See generally Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing (Trial Chamber III, Dec. 15, 2006); Prosecutor v. Milutinović, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing (Trial Chamber, Dec. 12, 2006).

<sup>91</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing (Appeals Chamber, May 11, 2007).

<sup>92</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Public, ¶¶ 56-57 (Trial Chamber I, Nov. 30, 2007).

the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, where appropriate, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, ipso facto, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.

45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence, for which the Statute and Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.<sup>93</sup>

¶43 Thus, there is a significant rift in the procedural law applied by the ICC and the *ad hoc* tribunals. The issue is a relatively minor one, but the willingness of judges at the ICC to depart from earlier precedent may portend future innovations and develop-

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<sup>93</sup> *Id.* ¶ 44-45 (emphasis omitted).

ments. Reliance upon legal points decided by the *ad hoc* tribunals may not help to clinch any arguments before the ICC which, clearly, has a mind of its own. Some will see this as a troublesome source of legal uncertainty. On the other hand, it enriches the law and gives it dynamism. International criminal law may be the better for it.

*B. The Right of the Defendant to be Present at Trial*

¶44 The right of the defendant to be present at trial is set out in the statutes of all of the international tribunals, in language borrowed from article 14(3) of the *International Covenant on Civil and Political Rights*.<sup>94</sup> According to the Appeals Chamber of the ICTR, “the physical presence of an accused before the court, as a general rule, is one of the most basic and common precepts of a fair criminal trial.” The Appeals Chamber has pointed to the clarity of the language and practical import of Article 20(4)(d) of the Statute (equivalent provisions appear in the statutes of the other two *ad hoc* tribunals): “First, as a matter of ordinary English, the term ‘presence’ implies physical proximity. A review of the French version of the Statute leads to the same conclusion, in particular in the context of the phrase ‘être présente au process,’ conveying unambiguously that Article 20(4)(d) refers to physical presence at the trial.”<sup>95</sup> Moreover, a form of ‘constructive presence,’ such as attendance by video-link, is no substitute for physical presence, and cannot be imposed upon a defendant.<sup>96</sup>

¶45 Nevertheless, in 2007, confronted with a short-term illness of an accused, a Trial Chamber of the ICTR decided to proceed in his absence. The Trial Chamber had justified its exception to the principle of presence at trial by balancing this with the need to ensure an expeditious trial. It was overturned by the Appeals Chamber, but not because as a matter of principle it would be forbidden to proceed where an accused was absent through no choice or fault of his or her own. Rather, the Appeals Chamber accepted the Trial Chamber’s balancing test, but held that the minimal, three-day de-

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<sup>94</sup> International Covenant on Civil and Political Rights, *opened for signature* 19 December 1966, *entered into force* 23 March 1976, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., U.N. Doc. A/6316, at art. 14(1) (1966).

<sup>95</sup> *Zigiranyirazo v. Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, ¶ 11 (Appeals Chamber, Oct. 30, 2006) (citations omitted).

<sup>96</sup> *Id.* ¶ 12.

lay to the trial resulting from the accused's illness did not outweigh the accused's right to be present at his own trial when his absence was due to no fault of his own.<sup>97</sup>

¶46 Although *in absentia* trials as such have been rejected as an option—in the case of the ICC quite explicitly<sup>98</sup>—there is no shortage of authority for the proposition that a defendant may waive the right to be present at trial under specific circumstances. For example, a defendant before the ICTY attended portions of his trial by video-link due to illness, but his right to physical presence was explicitly waived.<sup>99</sup> Waiver may also take place where a defendant wilfully and substantially obstructs the proceedings.<sup>100</sup> Some defendants have chosen to boycott proceedings, as a form of protest against rulings by the bench. Jean-Bosco Barayagwiza refused to attend his trial before the ICTR. He issued a statement “refusing to associate himself with a show trial” and insisting that “the ICTR was manipulated by the current Rwandan government and the judges and the prosecutors were the hostage[s] of Kigali.”<sup>101</sup>

¶47 Barayagwiza unsuccessfully raised the matter on appeal, where he argued that nothing in the Statute or the Rules authorized proceedings in his absence. During the appeals hearing, his counsel suggested that the Tribunal might have brought him to court physically in order to ensure his presence at trial.<sup>102</sup> In its November 2007 ruling, the Appeals Chamber observed that the Secretary-General's report of May 3, 1993 did not oppose the idea that a trial might proceed in the absence of a defendant who refused to appear. The famous reference in the report to *in absentia* trials was addressed to individuals who had not yet been apprehended by the Tribunal.<sup>103</sup> According to the Appeals Chamber, an accused person can renounce his or her presence at trial providing this is “libre,

<sup>97</sup> Prosecutor v. Nzirorera, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, ¶ 15 (Appeals Chamber, Oct. 5, 2007).

<sup>98</sup> Rome Statute, *supra* note 2, art. 64.

<sup>99</sup> Prosecutor v. Simić, Case No. IT 95-9/2-S, Sentencing Judgment, ¶ 8 (Trial Chamber II, Oct. 17, 2002).

<sup>100</sup> Prosecutor v. Milošević, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 13 (Appeals Chamber, Nov. 1, 2004).

<sup>101</sup> Mercedeh Momeni, *Why Barayagwiza is Boycotting his Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COMP. L. 315, 315-16 (2001).

<sup>102</sup> *Nahimana* Appeals Judgment, *supra* note 45, ¶ 89 n.186.

<sup>103</sup> *Nahimana* Appeals Judgment, *supra* note 45, ¶ 98.

non équivoque (même si elle peut être expresse ou tacite) et faite en connaissance de cause.”<sup>104</sup> It noted that these were the same criteria applicable to renunciation by a suspect of the right to be assisted by counsel during questioning, pursuant to Rule 42(B),<sup>105</sup> and to the validity of a renunciation by an accused person of the protection against self-incrimination.<sup>106</sup> The Appeals Chamber said an accused must have received notice of the date and place of the trial, and of the charges against him or her, and the right to be present at trial. Moreover, where an accused who is in custody refuses to attend, the interests of justice require that counsel be designated.<sup>107</sup> Barayagwiza’s appeal on grounds that he had not been present at trial was therefore dismissed, given that he had voluntarily waived his right.

### C. Confirmation Hearings at the ICC

¶48 In January 2007, a Pre-Trial Chamber of the International Criminal Court issued its first decision following a ‘confirmation hearing.’ In November and December, it had heard evidence concerning charges against Thomas Lubanga. The proceeding itself, which is authorized by Article 61 of the Rome Statute, is novel, and there is no real equivalent in the procedure of the earlier international criminal tribunals.<sup>108</sup> Ostensibly the purpose is to protect the defendant against abusive and unfounded accusations.<sup>109</sup> At the confirmation hearing, the Prosecutor is required to support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prose-

<sup>104</sup> *Id.* ¶ 109. The sentence might be translated as follows: ‘free and unequivocal (although it may be implied or express), and informed.’

<sup>105</sup> *Id.* n.220 (citing Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), ¶¶ 18-19 (Trial Chamber I, Oct. 14, 2004).

<sup>106</sup> *Id.* n.220 (citing Prosecutor v. Blagojević, Case No. IT-02-60-T, Decision on Vidoje Blagojević’s Oral Request, ¶ 8 (Trial Chamber I, July 30, 2004); Prosecutor v. Halilović, Case No. IT-01-48-T, Decision on Motion for Exclusion of Statement of Accused, ¶¶ 22-23 (Trial Chamber I, July 8, 2005)).

<sup>107</sup> *Id.*

<sup>108</sup> Rome Statute, *supra* note 2, art. 61(1).

<sup>109</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges, Public Redacted Version with Annex I, ¶ 37 (Pre-Trial Chamber I, Jan. 29, 2007) [hereinafter *Lubanga* Decision on the Confirmation of Charges].

cutor is entitled to rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.<sup>110</sup>

¶49 Although it confirmed the charges against Lubanga, Pre-Trial Chamber I criticized the Prosecutor's first "document containing the charges"<sup>111</sup> for not providing a more detailed description of the context in which the alleged crimes had taken place.<sup>112</sup>

¶50 The confirmation hearing seems to resemble preliminary hearings held under common law procedure in many jurisdictions. It allows the Court to ensure that a prosecution is not frivolous and that there is sufficient evidence for a finding of guilt, thereby protecting the accused from prosecutorial abuse. From the standpoint of the defendant, it also provides a useful opportunity to be informed of important evidence in the possession of the prosecution and even to test the value of such evidence, at least in a superficial way, during a judicial proceeding. Where the Statute is not clear in the usefulness of submitting defense evidence during the confirmation hearing. While the Statute invites the defense to present evidence at this stage, it is not obvious that contradictory evidence adduced by the defense can have any effect upon the determination of the existence of 'sufficient evidence.' The Pre-Trial Chamber may well decide that whether or not defense evidence raises doubts about the validity of Prosecution evidence is a matter for the trial court and not a pre-trial issue.

¶51 The most dramatic conclusion of the confirmation hearing was the decision by the Pre-Trial Chamber to add to the charges against Lubanga. Lubanga was charged with child soldier offenses, which are set out in two provisions of the *Rome Statute*, one of which is applicable to international armed conflict and the other to non-international armed conflict. There are slight differences between the two, but they are broadly similar. Although the Prosecutor had initially requested issuance of an arrest warrant with respect to both provisions,<sup>113</sup> when he issued formal charges against Lubanga in August 2006, the provision concerning interna-

<sup>110</sup> Rome Statute, *supra* note 2, art. 61(5).

<sup>111</sup> See *id.* art. 61(3)(a); Regulations of the Court, *adopted* on 26 May 2004 by the Judges of the Court, Fifth Plenary Session, ICC-BD/01-01-04, Chapter 5, The Hague, 17-28 May 2004, at Reg. 52. In deference to judicial pluralism, the *Rome Statute* does not use the term 'indictment.'

<sup>112</sup> *Lubanga* Decision on the Confirmation of Charges, *supra* note 109, ¶153.

<sup>113</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for warrant of arrest, Art. 58, Confidential (Pre-Trial Chamber I, Feb. 10 2006).

tional armed conflict was not invoked.<sup>114</sup> The Pre-Trial Chamber did not see the reason for this, and decided to ‘confirm’ charges against Lubanga with respect to both international and non-international armed conflict.

¶52 The Prosecutor objected strenuously, arguing in effect that the Pre-Trial Chamber had acted *ultra vires*. Its role under the *Statute*, he contended, was to ‘confirm’ charges and not to introduce new ones. By adding new charges to the case, the judges were unacceptably interfering in matters of prosecutorial discretion.<sup>115</sup> The Pre-Trial Chamber denied the Prosecutor’s application for leave to appeal its decision.<sup>116</sup>

¶53 The entire proceeding of the confirmation hearing consumed many months, and undoubtedly delayed the start of the trial, scheduled for March 31, 2008. When Lubanga’s trial begins, it will be able to take credit for the longest pre-trial period of any of the international criminal tribunals dealing with its first case.<sup>117</sup> The ICTY started its first trial, of Dusko Tadić, on May 7, 1996, slightly over a year after the date when he was taken into custody. The Rwanda Tribunal began its first trial, of Jean-Paul Akeyesu, on January 9, 1997, less than eight months after the accused had been brought to Arusha.<sup>118</sup> The Special Court for Sierra Leone began its first trial, of the three Civil Defence Forces defendants, on June 3, 2004, fifteen months after their arrest. The average is somewhat less than a year. Thus, the ICC, with twenty-five months from arrest to the beginning of trial, is by far the slowest of them all, and the confirmation hearing is part of the explanation for this regrettable situation. Legitimate questions arise about the real

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<sup>114</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-356, Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3), Public Document with *Ex Parte*, Confidential and Public Annexes, (Pre-Trial Chamber I, Aug. 28, 2006).

<sup>115</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-806, Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 « Décision sur la confirmation des charges », Public, ¶¶ 2-3 (Feb. 5, 2007).

<sup>116</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-915, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, Public, at 21 (Pre-Trial Chamber I, May 24, 2007).

<sup>117</sup> See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 10, 27 (Trial Chamber II, May 7, 1997).

<sup>118</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 11, 17 (Trial Chamber I, Sept. 2, 1998).

utility of this additional pre-trial step, given its cost in terms of lengthening the overall proceedings. It appears to have added little or nothing to the knowledge of the evidence by the defense, which is in any case addressed by the disclosure obligations upon the Prosecutor. If the Review Conference on the *Rome Statute* takes a pragmatic approach, it might decide to eliminate the confirmation hearing. Alternatively, it might attempt to circumscribe the scope of the hearing so that it does not take many months of preparation, weeks of hearing time, and two months for the drafting of a lengthy decision.

## VII. CONCLUDING REMARKS

¶54 A decade ago, an essay on significant developments over the previous twelve months in international criminal prosecutions would have been a modest affair. The International Criminal Tribunal for the former Yugoslavia had entered its first conviction following a contested trial.<sup>119</sup> Its Appeals Chamber had issued two interlocutory decisions, although the results were not very well received by the international community, and they were effectively overturned by provisions of the *Rome Statute of the International Criminal Court*, adopted the following July.<sup>120</sup> The Rwanda Tribunal had yet to render any judgment on the merits, and its only significant case law for 1997 consisted of an interlocutory ruling on jurisdiction that largely echoed the famous *Tadić* decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia.<sup>121</sup> Neither the International Criminal Court nor the Special Court for Sierra Leone existed at the time.

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<sup>119</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber, May 7, 1997).

<sup>120</sup> See generally Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Oct. 7, 1997) (whose conclusion that the defense of duress was unavailable in the case of crimes against humanity was rejected by the Rome Conference, see Rome Statute, *supra* note 2, art. 31(1)(d)); see also Prosecutor v. Blaškić, Case No. IT-95-14-AR108bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Appeals Chamber, Oct. 29, 1997) (whose conclusion that the international tribunal would be the ultimate arbiter in cases where states invoked national security concerns as a reason for not cooperating was rejected by the Rome Conference, see Rome Statute, *supra* note 2, art. 72).

<sup>121</sup> Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, ¶ 27 (Trial Chamber II, June 18, 1997)

¶55 Ten years later, the volume of case law is enormous. The Sierra Leone Special Court alone in 2007 accounted for two massive judgments, totaling more than 1,000 pages. This article has thus necessarily addressed only a selection of the important findings of the Tribunals in the course of 2007. Other points of considerable interest include: the rejection of the concept of ‘forced marriage’ as an autonomous category of crimes against humanity;<sup>122</sup> rulings clarifying the extent of victim participation in proceedings before the International Criminal Court;<sup>123</sup> an order by a Trial Chamber that a sum of money be paid to a defendant in compensation for procedural abuses;<sup>124</sup> payment of defense costs for a self-represented accused;<sup>125</sup> whether the Appeals Chamber has the authority to reopen proceedings after a final judgment has been issued;<sup>126</sup> conviction and sentencing to a term of imprisonment of a witness for contempt of court;<sup>127</sup> a narrow construction of crimes against humanity by which combatants including those *hors de combat* are not encompassed within the expression ‘civilian population’;<sup>128</sup> a finding that a non-guided high dispersion missile, the M-87 Orkan, that was incapable of hitting specific targets by virtue of its characteristics and the firing range in the specific instance,

<sup>122</sup> See *Brima* Trial Judgment, *supra* note 27, ¶¶ 702-707; see also *id.*, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (‘Forced Marriages’).

<sup>123</sup> See Situation in Uganda, Situation No. ICC-02/04-101, Decision on Victims’ Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06, Public Redacted Version (Pre-Trial Chamber II, Aug. 10, 2007); Situation in Darfur, Sudan, Situation No. ICC-02/05-110, Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Public (Pre-Trial Chamber I, Dec. 3, 2007).

<sup>124</sup> Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, at 23 (Trial Chamber III, Jan. 31, 2007), *aff’d*, Prosecutor v. Rwamakuba Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, ¶ 31 (Appeals Chamber, Sept. 13, 2007).

<sup>125</sup> See generally Prosecutor v. Šešelj, Case No. IT-03-67, Decision on Implementing the Financing of the Accused (Trial Chamber III, Oct. 30, 2007).

<sup>126</sup> See generally Prosecutor v. Strugar, Case No. IT-01-42-Misc.1, Decision on Strugar’s Request to Reopen Appeal Proceedings (Appeals Chamber, June 7, 2007).

<sup>127</sup> Prosecutor v. GAA, Case No. ICTR-07-90-R77-I, Judgment and Sentence, at 6 (Trial Chamber III, Dec. 4 2007).

<sup>128</sup> See Prosecutor v. Mrkšić, Case No. IT-95-13/1-T, Judgment, ¶ 461 (Trial Chamber II, Sept. 27, 2007); see also Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶¶ 693-694 (Trial Chamber I, Aug. 2, 2007).

was an indiscriminate weapon;<sup>129</sup> and the suggestion that shelling a city might constitute a lawful reprisal (although rejected in the specific circumstances of the case).<sup>130</sup>

¶56 This body of law is now probably the most dynamic area in public international law. In addition to the work of the *ad hoc* tribunals, important rulings and legal developments with respect to both substantive and procedural law have taken place before specialized ‘hybrid’ institutions, like the Extraordinary Chambers of the Courts of Cambodia, and exclusively national courts. The richness of accumulated experience and the increasing advocacy skills of practitioners manifest themselves in submissions of both prosecution and defense, not to mention the abundant case law.

¶57 International criminal justice is a costly business. All of this activity would not take place without the commitments of governments to the funding of the institutions, as well as to investments within their own domestic justice systems. To this extent, the continued existence and growth of international criminal justice crimes is dependent upon political decisions, which are in turn dependent upon the support of the populace. At present, this shows no signs of flagging. In order to maintain this support, international justice will have to continue to demonstrate serious and credible results that contribute both to accountability for atrocities and also to the promotion of peace and social stability.

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<sup>129</sup> Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶ 463 (Trial Chamber I, June 12, 2007).

<sup>130</sup> *Id.* ¶ 468.