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Atrocity Crimes Litigation: 2008 Year-In-Review

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I. INTRODUCTION

¶1 As in years past,¹ important rulings in international criminal law (ICL) abound in quantities that render it difficult for even the most avid aficionado to stay current. This is due in part to the fact that the jurisprudential process remained decentralized in 2008, with three international/hybrid tribunals actively prosecuting cases and issuing appeals, two tribunals in pre-trial proceedings, and one tribunal still largely on the drawing board.² Pursuant to their Security Council-mandated Completion Strategies,³ the original ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY)⁴ and Rwanda (ICTR)⁵ are gradually winding down their

* Associate Professor of Law, Santa Clara University School of Law. Thanks are due to all the participants in the Atrocities Crimes Year-In-Review Conference at Northwestern School of Law for their insightful comments and to Prof. David Scheffer for including me in such an amazing gathering. In addition, I am indebted to Adam Birnbaum and Akilah Davis for their excellent research assistance and to Abby Bernardini for editorial and research assistance.

¹ See William A. Schabas, *International Criminal Tribunals: A Review of 2007*, 6 NW. U. J. INT'L HUM. RTS. 382 (2008), available at <http://www.law.northwestern.edu/journals/jihr/v6/n3/2/Schabas.pdf>.

² In addition, cases continue to proceed in domestic courts pursuant to extraterritorial forms of jurisdiction. In 2008, for example, the United States completed its prosecution against Chuckie Taylor, the son of Liberian ex-President Charles Taylor. Taylor *filis* was indicted for torture and conspiracy to commit torture under the U.S. Torture Statute, 18 U.S.C. § 2340 (2004). See *United States v. Charles Emmanuel*, No. 06-20758-CR, 2007 U.S. Dist. LEXIS 48510 (S.D. Fla. July 5, 2007) (upholding the constitutionality of the statute). A jury convicted Taylor in early 2009 and sentenced him to 97 years in prison.

³ See S.C. Res. 1053, U.N. Doc. S/RES/1053 (Apr. 23, 1996); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

⁴ Two individuals indicted by the ICTY continue to elude arrest: Ratko Mladić and Goran Hadžić. In 2008, the ICTY finally obtained custody of Radovan

dockets by issuing final trial and appeals judgments. Pursuant to Rule 11bis, the ICTY is transferring lower-level defendants to domestic courts for prosecution;⁶ the ICTR's efforts to transfer such cases have fared less well.⁷ The Special Court for Sierra Leone (SCSL) is also close to the end of its life, having issued judgments in all cases pending before it⁸ except the Charles Taylor

Karadžić, who was arrested in Belgrade on July 21, 2008. Karadžić's efforts to represent himself like his brethren Vojislav Šešelj and the late Slobodan Milošević prompted the ICTY to adopt Rule 45ter, which allows the Tribunal to assign counsel to an accused "in the interest of justice." See generally, Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. 3 (2005). On September 22, 2008, the Prosecutor submitted an amended indictment against Karadžić more clearly charging his participation in four separate joint criminal enterprises related to four distinct crime bases (crimes committed in Bosnian-Serb controlled territory, the 1992-95 attack on Sarajevo, the Srebrenica massacre, and the taking of hostages in 1995). The Prosecutor also dropped the grave breaches count and added two distinct counts of genocide, among other changes. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Motion to Amend the First Amended Indictment (Sept. 22, 2008). In February 2009, the Prosecutor filed a Third Amended Indictment. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment (Feb. 27, 2009).

⁵ Thirteen ICTR defendants remain at large. See Int'l Criminal Tribunal for Rwanda, Status of Cases, <http://69.94.11.53/default.htm> (last visited June 2, 2009).

⁶ The cases against Paško Ljubičić, Zeljko Mejakić, and Mitar Rašević provide examples.

⁷ See, e.g., Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis (Oct. 8, 2008). The Prosecutor sought the transfer of the case against Munyakazi—a businessman and leader of a Hutu militia indicted by the ICTR for genocide and crimes against humanity—to Rwanda pursuant to Rule 11bis. In 2008, the Appeals Chamber confirmed a Trial Chamber decision to deny the transfer on the grounds that the implementation of life imprisonment in Rwanda in certain cases amounted to a life sentence spent in total isolation, *id.* ¶ 20, and that Rwanda could not guarantee the safety of witnesses, *id.* ¶¶ 37-39. The Appeals Chamber did note, however, that Rwanda had reformed many of the other legal impediments to transfer by, for example, abolishing the death penalty and improving judicial independence. *Id.* ¶¶ 26-31. A similar impasse has arisen for individuals acquitted by the ICTR who fear a return to Rwanda. See, e.g., Prosecutor v. Ntagerura, Case No. ICTR-99-46-A28 (May 15, 2008) (deciding that a "request note" by the Tribunal to Canada was sufficient to obligate that country to grant Ntagerura asylum). See generally Kevin Jon Heller, *What Happens to the Acquitted?*, 21 LEIDEN J. INT'L L. 663 (2008).

⁸ See, e.g., Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment (February 22, 2008) (Armed Forces Revolutionary Council); Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment (May 28, 2008) (Civil Defense Forces (CDF)). The Trial Chamber judgment in the Revolutionary United Front (RUF) trial came down in early 2009. Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment (Feb. 25, 2009). An appeal is expected.

case, which proceeds in guest chambers within the International Criminal Court (ICC) in The Hague.⁹ By the end of 2008, the ICC itself had issued arrest warrants¹⁰ or confirmed the charges¹¹ in all of the situations under consideration. In 2008, the ICC also obtained custody of Mathieu Ngudjolo Chui¹² and Jean Pierre Bemba Gombo,¹³ although all the Ugandan (indicted in 2005)¹⁴ and Sudanese defendants (indicted in 2007 and 2009)¹⁵ remain at large.

⁹ The Prosecution rested its case in February 2009. The Defense's motion for acquittal was heard April 6, 2009.

¹⁰ See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-2, Warrant of Arrest (Aug. 22, 2006). The *Ntaganda* warrant for arrest was issued under seal in 2006, but was not publicly revealed until approximately April 28, 2008.

¹¹ See, e.g., *Prosecutor v. Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008).

¹² The Court unsealed Chui's arrest warrant on February 7, 2008, the same day he was arrested and transferred to The Hague. See *Prosecutor v. Chui*, Case No. ICC-01/04-01/07-260, Mandat D'Arrêt a l'Encontre de Mathieu Ngudjolo Chui [Warrant for Arrest for Mathieu Ngudjolo Chui] (July 6, 2007).

¹³ *Prosecutor v. Gombo*, Case No. ICC-01/05-01/08-15, Warrant of Arrest for Jean Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008 (June 10, 2008). Bemba was arrested by Belgian authorities on May 24, 2008 and transferred to The Hague on July 3, 2008.

¹⁴ Pre-Trial Chamber II on October 21 requested the Democratic Republic of Congo to provide the Chamber with information on measures taken for the execution of the warrants of arrest issued against the four defendants. See Coal. of the Int'l Criminal Court, *Bulletin No. 7*, Sept./Oct. 2008, www.iccnw.org/documents/Bulletin_no7.pdf (last visited June 2, 2009) [hereinafter ICC Bulletin No. 7]. The President of the U.N. Security Council also reminded the international community of the outstanding indictments, Statement by the President of the Security Council, U.N. Doc. No. S/PRST/2008/38 (Oct. 21, 2008), and the European Parliament called for arrests, see European Parliament Resolution of 21 October on the Indictment and Bringing to Trial of Joseph Kony at the International Criminal Court (Oct. 21, 2008), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B6-2008-0536+0+DOC+PDF+V0//EN>. In addition, the judges have been evaluating whether the Ugandan cases are still viable in light of the proposed establishment by Uganda of a special court to prosecute crimes committed in connection with the Lord's Resistance Army campaign. See ICC Bulletin No. 7, *supra*.

¹⁵ In 2008, the ICC Prosecutor applied for a warrant of arrest for President Omar Hassan Ahmad Al Bashir of Sudan, making him the fourth sitting head of state (along with Charles Taylor (SCSL), Slobodan Milošević (ICTY), and Jean Kambanda (ICTR)) to be indicted by a modern international tribunal. The Court issued the warrant, which contains war crimes and crimes against humanity charges, in March 2009. *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (March 4, 2009). In addition, on November 20, 2008, the Prosecutor presented evidence to the Pre-Trial Chamber against rebel commanders for crimes committed against African Union Peacekeepers. Press Release, Office of the Prosecutor of the ICC,

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were largely preoccupied by pre-trial rulings on provision detention¹⁶ and victims' participation in 2008¹⁷ and continue to face corruption allegations.¹⁸ They are also considering an unprecedented appeal by the Canadian Co-Prosecutor to expand the scope of his investigation contrary to the views of his Cambodian counterpart.¹⁹ In 2008, the Special Court for Lebanon

“Attacks on Peacekeepers Will Not Be Tolerated”. ICC Prosecutor Presents Evidence in Third Case in Darfur, ICC-OTP-20081120-PR373_ENG (Nov. 20, 2008), *available at* http://www.icc-cpi.int/menus/icc/situations_and_cases/situations/situation_icc_0205/press_releases/attacks_on_peacekeepers_will_not_be_tolerated—icc prosecutor presents evidence in third case in d. *See also* Coal. for the Int'l Criminal Court, *Darfur: ICC Prosecutor Asks Judges to Open Third Case in Darfur* (Nov. 20, 2008), <http://www.iccnw.org/?mod=newsdetail&news=3188> (last visited June 3, 2009).

¹⁶ *See, e.g.*, Nuon Chea, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Extension of Provisional Detention (Sept. 16, 2008) (extending the detention of Nuon Chea on the ground that there remain well-founded reasons to believe that the defendant committed the crimes as charged). Internal Rule 63 allows persons charged with crimes to be detained provisionally for an initial one-year period, which may be twice extended. ECCC Internal Rules, Rule 63(6)-(7) (March 6, 2009), *available at* <http://www.eccc.gov.kh/english/cabinet/fileUpload/121/IRv3-EN.pdf>. In mandating provisional detention, the Co-Investigating Judges must determine that the measure is necessary to prevent the defendant from pressuring witnesses, to preserve evidence, to ensure the presence of the accused, to protect the security of the individual, or to preserve public order. *Id.* at Rule 63(3)(b). The ECCC's practice of default pre-trial detention has been criticized. *See* Anne Heindel, *Detention and the Well-Reasoned Opinion*, Nov. 15, 2008, <http://intlwgrrls.blogspot.com/2008/11/detention-extension-well-reasoned.html> (last visited June 2, 2009).

¹⁷ *See, e.g.*, Nuon Chea, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on Civil Party Participation in Provisional Detention Appeals, ¶ 36 (Mar. 20, 2008) (allowing civil parties in the Nuon Chea case to participate in provisional detention appeals).

¹⁸ *See* Seth Mydans, *Corruption Allegations Affect Khmer Rouge Trials*, N.Y. TIMES, Apr. 10, 2009, *available at* http://www.nytimes.com/2009/04/10/world/asia/10cambo.html?_r=1&ref=global-home.

¹⁹ At the end of 2008, the ECCC had five individuals in custody: four regime leaders and one prison head. *See* Beth Van Schaack, *Who Next?*, Dec. 4, 2008, http://www.cambodiatribunal.org/index.php?option=com_myblog&show=Who-Next-.html&Itemid=55 (last visited June 3, 2009). The decision of whether to pursue additional defendants rests with the Tribunal's two Co-Prosecutors, who are in disagreement on this point. According to the ECCC's constitutive statute, if such disputes cannot be resolved internally, they are to be referred to a Pre-Trial Chamber (PTC) of judges for decision. The investigations will go forward unless the PTC rules by supermajority (in an opinion that at least one

(SCL) gradually began to take shape.²⁰ The year 2009 promises additional institutional flux, as the ad hocs continue to close down, the ECCC and SCL gear up, and the ICC begins its first trials. Also on the horizon is the first ICC review conference (to be held in Uganda in 2010), where delegates will focus on reaching a consensus definition for the crime of aggression.²¹

12 This survey of 2008's top developments in these international fora will focus on the law governing international crimes and applicable forms of responsibility. Several trends in the law are immediately apparent. The tribunals continue to delineate and clarify the interfaces between the various international crimes, particularly war crimes and crimes against humanity, which may be committed simultaneously or in parallel with each other. Several important cases went to judgment in 2008 that address war crimes drawn from the Hague tradition of international humanitarian law, and the international courts are demonstrating a greater facility for adjudicating highly technical aspects of this body of law. In addition, there were several cases with immediate relevance to the "war on terror" proceedings in the United States that have addressed such thorny issues as when acts of terrorism

international judge must join) that they should not. *See* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 20 new, NS/RKM/1004/006 (Oct. 27, 2004), *available at* [http://www.cambodia.gov.kh/krt/pdfs/KR Law as amended 27 Oct 2004 Eng.pdf](http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf). The Cambodian Co-Prosecutor, Chea Leang, is opposed to additional investigations on account of "(1) Cambodia's past instability and the continued need for national reconciliation, (2) the spirit of the agreement between the United Nations and the Government of Cambodia . . . and the spirit of the law that established this court ("ECCC Law"), and (3) the limited duration and budget of this court." Statement of Co-Prosecutors (Jan. 5, 2009), *available at* http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf.

²⁰ *See* S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007); Special Tribunal for Lebanon, <http://www.un.org/apps/news/infocus/lebanon/tribunal/index.shtml> (last visited June 24, 2009).

²¹ *See* Coal. for the Int'l Criminal Court, Review Conference of the Rome Statute, <http://www.iccnw.org/?mod=review> (last visited June 3, 2009). The Special Working Group on the Crime of Aggression concluded its work at the 7th Session of the Assembly of State Parties in early 2009. An informal intersessional session on the crime convened in June 2009. For a recent discussion paper on the crime of aggression, see Int'l Criminal Court, Assembly of State Parties, Discussion Paper on the Crime of Aggression Proposed by the Chairman, ICC-ASP/7/WGCA/INF.1 (Feb. 19, 2009), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-SWGCA-INF.1%20English.pdf.

contribute to triggering IHL, what conduct constitutes direct participation in hostilities, and when acts of terrorism may constitute war crimes within the jurisdiction of ICL tribunals. While the year produced some groundbreaking jurisprudence on gender-based and sexual violence—in particular, the confirmation of the international crime of forced marriage—the year continued to feature setbacks in ensuring that such crimes are consistently and rigorously prosecuted.²² The forms of responsibility in ICL continue to undergo significant development and refinement, and the ICC is beginning to explore the scope of Article 25 of its Statute, which sets out the Court's applicable forms of responsibility. While the Court will no doubt be influenced by the jurisprudence of its *ad hoc* predecessors, it is clear from early jurisprudence that its personnel are intent on charting their own course.

¶3

A general observation from the developments in 2008: the rate of innovation in substantive ICL is slowing considerably. Like many incipient areas of law, the progress of ICL development since its renaissance in the 1990s proceeded in great leaps, with early cases addressing vast open areas of legal doctrine. In this process, the judges on the international criminal tribunals engaged in a full-scale—if unacknowledged—refashioning of ICL through their jurisprudence by updating and expanding historical treaties, even at the expense of fealty to negotiated compromises; by more precisely identifying the elements of international crimes, forms of responsibility, defenses, and other penal doctrines; and by adding content to customary international law concepts and vaguely-worded treaty provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. Today's decisions, by contrast, are increasingly applying established law to novel facts. ICL has thus begun to exhibit features of a more mature body of law with modern innovations happening primarily at the outer edges of doctrine. The legal philosopher Ronald Dworkin has employed a tree metaphor to describe this process,²³ whereby jurisprudence of

²² For a discussion of the legacy of gender justice before the *ad hoc* international tribunals, see Beth Van Schaack, *Obstacles On The Road To Gender Justice: The International Criminal Tribunal for Rwanda As Object Lesson*, 17 AM. U. J. GENDER SOC. POL'Y & L. 355 (2009).

²³ RONALD DWORKIN, *LAW'S EMPIRE* 70 (1986).

the likes of *Tadić*²⁴ and *Akayesu*²⁵ provided the trunk for modern ICL, whereas decisions in the more recent cases, perched on ever narrower branches, are making increasingly nuanced refinements to established doctrine. As in the domestic historical narrative—by which account legislative primacy eventually supplanted the common law crime—international crimes are increasingly finding expression in more positivistic sources of law, thus obviating the need for, and diminishing the discretion of, international judges to make law in the face of gaps or deficiencies. As a result, there has been less and less space for judges to build upon the ICL edifice, and the defense of *nullum crimen sine lege* (“no crime without law”)—once ubiquitous in the early cases—has retreated in significance.²⁶

II. THE YEAR IN JUDGMENTS

A. *The Concept of Gravity in International Criminal Law*

¶4 Although there may be fewer blockbuster rulings in 2008 than in years past, the ICL jurisprudence of the past year has featured several important yet subtle developments. Of overarching importance, the Court made public in 2008 a 2006 opinion in which it began to operationalize the concept of gravity within the ICC Statute.²⁷ One of the primary justifications for the international or extraterritorial prosecution of international crimes is that grave crimes should not go unpunished.²⁸ The ICL tribunals are specifically charged in their founding documents with concentrating on the most serious crimes of international concern²⁹

²⁴ Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

²⁵ Prosecutor v. Akayesu, Case No. ICTR-94-4-T, Judgement (Dec. 6, 1999).

²⁶ For a fuller discussion of this process vis-à-vis the principle of *nullum crimen sine lege* see Beth Van Schaack, Crimen Sine Lege: *Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

²⁷ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, ¶ 44 (Feb. 10, 2006) [hereinafter *Lubanga Arrest Warrant Decision*], available at <http://145.7.218.139/iccdocs/doc/doc236260.PDF>.

²⁸ For a comprehensive discussion of the way in which the concept of gravity undergirds the legal, moral, and sociological legitimacy of the International Criminal Court, see Margaret M. DeGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400 (2009).

²⁹ The ICTR, for example, is dedicated to prosecuting “persons responsible for

or upon high-level defendants who are most responsible for the commission of international crimes.³⁰ The concept of gravity permeates the ICC Statute as an express limitation on the Court's jurisdiction and as a guide to the exercise of prosecutorial discretion. According to Article 5(1), for example, the "jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole."³¹ The prosecutor's decisions (1) to initiate an investigation into a situation and then

serious violations of international humanitarian law committed in the Territory of Rwanda." Statute of the International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, 33 I.L.M. 1602 (emphasis added) [hereinafter ICTR Statute], available at <http://www.un.org/ictt/statute.html>. Similar language appears in the Statute of the ICTY at Article 1. Statute of the International Tribunal for the Former Yugoslavia art. 1, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], available at http://www.icty.org/x/file/LegalLibrary/Statute/statute_sept08_en.pdf. In addition, the ICTR Statute empowers that tribunal to prosecute "persons committing or ordering to be committed *serious* violations of Article 3 common to the Geneva Conventions of 12 August 1949." ICTR Statute, *supra*, art. 4 (emphasis added). *Accord* Statute of the Special Court of Sierra Leone art. 3, Jan. 16, 2002, 2178 U.N.T.S. 138 [hereinafter SCSL Statute], available at <http://www.specialcourt.org/documents/SpecialCourtStatuteFinal.pdf>.

³⁰ The Extraordinary Chambers of the Courts of Cambodia are to "bring to trial senior leaders of Democratic Kampuchea [the Khmer Rouge] and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979." Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 1, Oct. 27, 2004, NS/RKM/1004/006 [hereinafter ECCC Statute], available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf. Likewise, the Special Court for Sierra Leone is to concentrate on "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996." Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone pmbl., U.N. Doc. S/2002/246/Annex (Jan. 16, 2002), available at <http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf>.

³¹ Rome Statute of the International Criminal Court art. 5(1), opened for signature July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. *See also id.* art. 1 (providing that the Court has "the power to exercise its jurisdiction over persons for the most serious crimes of international concern"). Some of the crimes themselves contain gravity thresholds. *See, e.g., id.* art. 6(b) (setting forth genocide *actus reus* of "causing serious bodily or mental harm" to members of a protected group); art. 7(1)(e) (including as a crime against humanity "severe deprivation[s] of physical liberty"); art. 7(g) (same with respect to "other form[s] of sexual violence of comparable gravity" to rape, sexual slavery, etc.).

(2) to commence a prosecution against a specific individual are premised in part on a determination of a case's admissibility under Article 17.³² Article 17(1), in turn, invokes the concept of gravity and provides that a case³³ will be considered inadmissible if it "is not of sufficient gravity to justify further action by the Court." In addition, pursuant to Article 53, the prosecutor may decline to initiate either an investigation or prosecution where there are "substantial reasons to believe that an investigation would not serve the interests of justice," taking into account the gravity of the crime and the interests of the victims.³⁴ Decisions to decline to initiate either an investigation or a prosecution are subject to some

³² *Id.* art. 53(1)(b) (concerning the initiation of an investigation); art. 53(2)(b) (concerning the initiation of a prosecution).

³³ These Articles address gravity with respect to "cases" (which presumes the commission of a particular crime by a particular defendant) and not to the antecedent determination of which "situations" to investigate. In the *Lubanga* case, however, a Pre-Trial Chamber determined that the gravity threshold in Article 17 applies to both situations and cases. *Lubanga*, Arrest Warrant Decision, ¶ 44 ("The gravity threshold provided for in article 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold; and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision."). Indeed, the Office of the Prosecutor indicated that it would select situations to investigate in accordance with the Article 53 criteria. ICC Office of the Prosecutor, *Communication Concerning the Situation in Iraq*, at 8 (Feb. 9, 2006), available at http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. See Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270369, in *FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE* (Carsten Stahn and Larissa van den Herik, eds., TMC Asser/CUP, 2009) (presuming that the principles governing situational gravity are not substantially different from those governing case gravity). Parts of the *Lubanga* Arrest Warrant Decision were overturned upon appeal; this aspect of the Pre-Trial Chamber's opinion remained intact. It should be noted, however, that aspects of the Appeals Chambers' opinion (such as the elimination of an admissibility inquiry at the arrest warrant stage and the de-emphasis on the systematicity and large scale nature of the crimes) could be interpreted to diminish the relevance of situational gravity. See *infra* text accompanying notes 51-54.

³⁴ ICC Statute, *supra* note 31, arts. 53(1)(c) (concerning the initiation of an investigation), 53(2)(c) (concerning the initiation of a prosecution). See Office of the Prosecutor, ICC, *Policy Paper on the Interests of Justice*, ICC-OTP-2007 (2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (discussing the exceptional circumstances in which a situation or case, that would otherwise qualify for selection by the Prosecutor is not pursued on the ground that it would not serve the "interests of justice").

oversight by the Pre-Trial Chamber. In the case of a referral from the Security Council or a State Party, the Pre-Trial Chamber can “request the Prosecutor to reconsider [his or her] decision” not to proceed if so requested by the source of the referral.³⁵ A decision by the Prosecutor not to proceed with an investigation or prosecution on the basis of the “interests of justice” (which includes a consideration of the crime’s gravity and the interests of victims) is “effective only if confirmed by the Pre-Trial Chamber.”³⁶ On the basis of these provisions and prevailing interpretations thereof, gravity concerns appear relevant before the ICC at two key moments: when choosing which situations to investigate and when choosing particular cases (i.e., crimes or individuals) to investigate and prosecute.

¶5

Although crucial investigative decisions are premised upon an objective assessment of gravity, the Statute provides little in the way of concrete guidance for elucidating the quantitative or qualitative contours of this key concept. In a 2006 set of draft criteria for the selection of cases and situations that was circulated for discussion,³⁷ the ICC Prosecutor indicated that in assessing gravity, he would focus in part on the number of victims of particularly serious crimes, with reference to the scale of the crimes and the degree to which they were systematically committed.³⁸ At the same time, the criteria include more qualitative factors, such as whether the crimes are planned, are ongoing or may be repeated, exhibit particular cruelty or reflect other aggravating circumstances, target especially vulnerable victims, are discriminatory in their execution, or involve an abuse of power.³⁹ In addition, the prosecutor announced that he will

³⁵ *Id.* art. 53(3)(a). The Pre-Trial Chamber may request that the Prosecutor reconsider his or her decision when the referring state or the Security Council so demands.

³⁶ Article 53(3)(b). The effect of this provision appears to be that the Pre-Trial Chamber can order the Prosecutor to investigate a situation. *See Heller, supra* note 33, at 31.

³⁷ ICC Office of the Prosecutor, *Draft for Discussion: Criteria for Selection of Situations and Cases*, at 4-5 (June 2006) [hereinafter *Draft Criteria for Selection*].

³⁸ *See* ICC Office of the Prosecution, *Draft Discussion Paper, The Interests of Justice: Internal OTP Discussion Paper*, at 5 (June 13, 2006) (summarizing factors for determining whether the situation is of sufficient gravity).

³⁹ *Id.*; *Draft Criteria for Selection, supra* note 37. *See also* International Federation of Human Rights, *Comments on the Office of the Prosecutor’s Draft Policy Paper on “Criteria for Selection of Situations and Cases,”* at 1, Sept. 15,

consider “the broader impact of the crimes on the community and on regional peace and security, including longer term social, economic, and environmental damage.”⁴⁰ By way of example, he noted that the situations currently under consideration in Central and East Africa involved thousands of displacements, killings, abductions, attacks on peacekeepers and humanitarian workers, and large-scale sexual violence.⁴¹

¶6 The ICC adjudicated these gravity provisions for the first time in the cases arising out of the ongoing regional war being waged in the Democratic Republic of Congo (DRC). The rulings emerged in the context of the Prosecutor’s request to the ICC’s Pre-Trial Chamber for the issuance of arrest warrants against two defendants: Thomas Dyilo Lubanga (Lubanga) and Bosco Ntaganda pursuant to Article 58(1) of the ICC Statute.⁴² In this matter of first impression, the Pre-Trial Chamber determined that it had to confirm the admissibility of the case prior to issuing any arrest warrant. In so doing, the Pre-Trial Chamber looked to several factors. First, the Trial Chamber considered the existence of systematic or large-scale crimes.⁴³ Second, the Pre-Trial Chamber indicated that it would look to the “social alarm” caused within the international community by the relevant conduct.⁴⁴ Third, the Pre-Trial Chamber indicated that it would consider the position of the accused and whether he or she fell within the category of the most senior leaders involved in the situation under

2006, available at http://www.fidh.org/IMG/pdf/FIDH_comments_-_selection_criteria_-_final.pdf (approving of this approach and the consideration of “the impact of the crimes on the affected communities as well as on regional peace and security”).

⁴⁰ *Draft Criteria for Selection*, *supra* note 37.

⁴¹ *Id.*

⁴² An arrest warrant is appropriate according to that Article where (a) there “are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” and (b) the arrest of the person appears necessary to guarantee his or her appearance, to ensure that the individual does not endanger the investigation, or to prevent the commission of additional crimes. ICC Statute, *supra* note 31, art. 58(1)(a)-(b).

⁴³ “Systematicity” can be interpreted to mean crimes that follow a pattern, are organized, or are being committed pursuant to a policy or plan. It seems clear that “systematic” conduct need not be pursuant to a plan, policy, common design, or conspiracy if it is a regular or repeated feature of an armed conflict or state of repression that arises naturally without exogenous impetus. The notion of “large-scale” denotes a quantitative measure and suggests that the crimes are numerous or widespread.

⁴⁴ *Lubanga Arrest Warrant Decision*, Case No. ICC-01/04-01/06, ¶¶ 46-47.

investigation, taking into account the role of the suspect in the state or organization implicated in the abuses.⁴⁵ The Chamber reasoned that this latter factor would maximize the deterrent effect of the Court by focusing on those individuals most capable of preventing the commission of international crimes.⁴⁶ Although the Pre-Trial Chamber issued the arrest warrant for Lubanga,⁴⁷ it determined that Ntaganda was not a central figure in the decision-making process of the Union of Congolese Patriots and lacked any authority over the development or implementation of policies and practices (such as the negotiation of peace agreements).⁴⁸ This was notwithstanding the fact that Ntaganda was in a command position over sector commanders and field officers.⁴⁹ On the basis of these factors, the case against Ntaganda was deemed inadmissible, and the arrest warrant did not issue.

¶7 The Prosecutor appealed this decision, arguing that the Pre-Trial Chamber committed an error of law in defining gravity too narrowly for the purpose of determining the admissibility of the case against Ntaganda. The Appeals Chamber ruled⁵⁰ as a preliminary matter that an admissibility determination was not a

⁴⁵ *Id.* ¶¶ 52-53, 64. Had this criterion remained operative, it would have effectively precluded the pyramidal prosecutorial strategy employed by many domestic prosecutors and before the ICTY. See Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level*, 4 J. INT'L CRIM. JUST. 539, 543 (2006) (noting the practice of building "a case against the most senior persons responsible [with] a series of cases which 'work up the ladder,' prosecuting lower-level perpetrators in the collection of evidence against the higher-level perpetrators").

⁴⁶ *Lubanga Arrest Warrant Decision*, Case No. ICC-01/04-01/06, ¶¶ 49, 55.

⁴⁷ *Prosecutor v. Lubanga*, Case No. ICC-01/04-02/06, Warrant of Arrest (Feb. 10, 2006), available at <http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF>. At the time the warrant issued, Lubanga had been in the custody of Congolese authorities, who transferred him to the ICC on March 17, 2006, making him the first defendant in the custody of the ICC. His trial commenced in January 2009.

⁴⁸ *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ¶ 87 (Feb. 10, 2006), available at <http://www2.icc-cpi.int/iccdocs/doc/doc530350.PDF>.

⁴⁹ *Id.* ¶ 85.

⁵⁰ *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Judgement on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58" (July 13, 2006). (Although this decision is dated 2006, it was reclassified as public in April 2008 when the Court unsealed the arrest warrant against Ntaganda. See *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda (April 28, 2008), available at <http://www2.icc-cpi.int/iccdocs/doc/doc479828.PDF>).

pre-requisite to the issuance of an arrest warrant.⁵¹ Turning to the issue of gravity, the Appeals Chamber determined that the Pre-Trial Chamber had erred in its interpretation of gravity in several key respects. First, it noted that imposing requirements of systematicity or large-scale action contradicted the guiding threshold language of Article 8(1) governing war crimes, which provides for jurisdiction only “in particular” when war crimes are committed “as part of a plan or policy or as part of a large-scale commission of such crimes” and duplicated aspects of the definition of crimes against humanity that already require a showing that the charged acts were part of a widespread or systematic attack against a civilian population.⁵² Second, the Appeals Chamber also took issue with the concept of “social alarm,” which it noted depends on “subjective and contingent reactions” to crimes “rather than upon their objective gravity.”⁵³

¶8 Finally, the Appeals Chamber noted that the deterrent effect of the Court will be maximized where all categories of perpetrator may be brought before the Court.⁵⁴ It reasoned that “individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes.”⁵⁵ In so ruling, the Appeals Chamber appropriately refocused the gravity inquiry on qualitative rather than quantitative factors, ensuring flexibility in pursuing cases and enhancing the deterrent power of the Court. The Court thus reversed the Pre-Trial Chamber’s finding of inadmissibility and remanded the case to determine on the basis of Article 58(1) alone whether an arrest warrant against Ntaganda should be issued.⁵⁶ The Pre-Trial Chamber subsequently issued an arrest warrant against Ntaganda (unsealed April 28, 2008) charging him

⁵¹ *Id.* ¶ 41. In particular, the Court ruled that Article 58 contains an exhaustive list of factors to consider in issuing a warrant for arrest such that admissibility should not be treated as an additional substantive pre-requisite. *Id.* ¶ 42. In addition, the Court noted that admissibility determinations should involve the accused, which is impossible where they are undertaken in advance of the issuance of an arrest warrant. *Id.* ¶ 50.

⁵² *Id.* ¶ 70.

⁵³ *Id.* ¶ 72.

⁵⁴ *Id.* ¶¶ 73-75.

⁵⁵ *Id.* ¶ 77.

⁵⁶ *Id.* ¶ 91.

alongside Lubanga with enlisting, conscripting and using child soldiers in armed conflict.⁵⁷ Ntaganda remains at large.

B. War Crimes

¶9 One set of 2008 cases worth highlighting concerns those war crimes that trace their origins to the Hague tradition of international humanitarian law (IHL), concerning the means and methods of warfare, as opposed to the Geneva tradition, primarily concerning particular classes of protected person.⁵⁸ Early cases before the ICTY in particular tended to focus on Geneva crimes (such as the mistreatment or murder of civilians or prisoners of war in detention).⁵⁹ Later ICTY cases have addressed the at times more technical Hague crimes, premised on breaches of the fundamental and interlocking principles of military necessity, proportionality, and distinction.⁶⁰ Some of the first cases addressed to the means and methods of warfare were relatively thin in their reasoning.⁶¹ In

⁵⁷ Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006) (reclassified as public on April 28, 2008).

⁵⁸ Additional novel war crimes rulings are found in the Civil Defense Forces (CDF) case before the SCSL. There, defendants were convicted of engaging in collective punishments (imposing collective punishment upon persons for acts or omissions that they did not personally commit) against the civilian population in violation of common Article 3 of the Geneva Conventions and Additional Protocol II, punishable under Article 3(b) of the SCSL Statute. Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶¶ 176-181, 697, 728, 740, 759-762 (Aug. 2, 2007). On appeal, the Appeals Chamber noted that “punishment” must be considered distinct from other forms targeting of protected persons, which may not “necessarily be predicated upon a perceived transgression by such persons.” Prosecutor v. Fofana, Case No. SCSL-04-14-A, Judgment, ¶ 223 (May 28, 2008). Although the Appeals Chamber confirmed that cumulative convictions could be entered for acts of murder, pillage, and cruel treatment along with the imposition of collective punishments, *id.* ¶ 225, it nonetheless reversed the convictions on the ground that the required *mens rea* of the offense (the intent to collectively punish rather than target) was not met, *id.* ¶ 130. In the same opinion, the Appeals Chamber issued a useful ruling on the crime of pillage, which requires the unlawful appropriation of property, as distinct from the crime of causing destruction not justified by military necessity. *Id.* ¶ 409.

⁵⁹ See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment (Feb. 20, 2001) (adjudicating crimes committed against detained civilians).

⁶⁰ A use of military force may only target military objectives whose destruction offers a definite military advantage, and it may only involve a level of force that is proportional to the concrete military advantage to be gained. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48-52, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I].

⁶¹ See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 159-187

more recent cases, including some opinions released in 2008,⁶² the ICTY had demonstrated a much greater facility with these norms. Several of these cases—*e.g.*, *Boškoski* and *Strugar*—also address issues that are of direct and immediate relevance to ongoing proceedings involving individuals detained by the United States as part of the so-called “war on terror,” such as the scope of application of IHL, the definition of combatant, the challenges of conflict classification, and the notion of direct participation in hostilities.⁶³ These opinions provide a window into the ability of international judges to adjudicate war crimes—the crime within the jurisdiction of the ICC that raises the most concern to the United States and other strong military powers that have failed to join the Court to date.

1. Hague Crimes

¶10 One such example is the Appeals Chamber’s decision in *Martić*.⁶⁴ Milan Martić held various leadership positions in the Serbian Autonomous Region of Krajina, a Serbian-majority area within Bosnia-Herzegovina whose populace pursued irredentist aspirations during the war in the former Yugoslavia. In the period covered by the indictment (1991-1995), Martić was Minister of the Interior and of Defense, Deputy Commander of the Territorial Defense Forces, and eventually President of the so-called Republic of Serbian Krajina. The Tribunal originally indicted him in a four-count indictment for his role shelling the Croatian city of Zagreb on May 2 and 3, 1995.⁶⁵ In 2002 and 2005, the prosecutor amended this indictment to charge Martić with more extensive involvement in a joint criminal enterprise to establish an ethnically-Serb territory through the displacement of non-Serb inhabitants.⁶⁶

(Mar. 3, 2000); Prosecutor v. Kordić and Čerkić, Case No. IT-95-14/2, Judgement ¶¶ 358-62, 803-09 (Feb. 26, 2001).

⁶² See, *e.g.*, Prosecutor v. Martić, Case No. IT-95-11-A, Judgement (Oct. 8, 2008) [hereinafter *Martić* Appeal Judgement]; Prosecutor v. Strugar, Case No. IT-01-42-A, Judgement (July 17, 2008) [hereinafter *Strugar* Appeal Judgement].

⁶³ See, *e.g.*, Prosecutor v. Boškoski, Case No. IT-04-82-T (July 10, 2008); *Strugar* Appeal Judgement, Case No. IT-01-42-A.

⁶⁴ *Martić* Appeal Judgement, Case No. IT-95-11-A.

⁶⁵ Prosecutor v. Martić, Case No. IT-96-11, Indictment (July 25, 1995) (charging Martić with unlawful attacks against the civilian population).

⁶⁶ See Prosecutor v. Martić, Amended Indictment, Case No. IT-95-11-PT (Dec. 9, 2005) (charging various crimes against humanity and war crimes as part of a joint criminal enterprise and pursuant to the doctrine of superior responsibility).

¶11 In 2006, the Trial Chamber convicted the defendant of various crimes against humanity and war crimes, including the original charges of ordering the 1995 shelling of Zagreb, which was characterized as both a war crime (encompassing the crimes of murder, cruel treatment, and attacking civilians) and a crime against humanity (including murder and inhumane acts).⁶⁷ With respect to the Zagreb attack, the Trial Chamber found that the use of twelve M-87 Orkan rockets (Yugoslav-manufactured, non-guided, high-dispersion missiles containing cluster bomb warheads)⁶⁸ in Zagreb constituted a widespread attack against the civilian population.⁶⁹ In particular, it held that given the indiscriminate character of the weapon, especially at the range at which it was fired,⁷⁰ its use in a densely populated area constituted a *per se* indiscriminate attack, notwithstanding the presence of any lawful military targets.⁷¹ The Chamber also rejected Martić's argument that the attack could be justified as a reprisal.⁷² The

⁶⁷ Prosecutor v. Martić, Case No. IT-95-11-T, Judgement (June 12, 2007) [hereinafter *Martić* Trial Judgement].

⁶⁸ The Trial Chamber found that the cluster bombs fired on Zagreb each contained 288 bomblets containing 420 balls. At a height of 800-1,000m above the targeted area, the rocket ejects the bomblets, which explode upon impact, releasing the pellets. The maximum firing range of the M-87 Orkan is 50 kilometers, and the dispersion error (i.e., the distance from the point of impact to the mean point of impact) increases with the firing range. *Id.* ¶ 462.

⁶⁹ *Id.* ¶¶ 462-63, 469.

⁷⁰ *Id.* ¶ 463. Expert testimony adduced by the prosecutor indicated that when fired from a range of 50 km, the dispersion error of the Orkan is about 1000m in each direction. The prosecution submitted the testimony of two expert witnesses: Lieutenant Colonel Jožef Poje, a former officer in the Yugoslavia national army (JNA) and an artillery expert, and Reynaud Theunens, an investigator with the ICTY's Office of the Prosecutor, who authored an expert report on the evolution of the Yugoslavia national army. The defendant had earlier unsuccessfully excluded the testimony of Theunens on grounds of impartiality. See Prosecutor v. Martić, Case No. IT-95-11-T, Decision on Defence's Motion to Exclude the Evidence of Reynaud Theunens and to Call an Independent Military Expert with Confidential Annexes A, B, C, D and E (Nov. 28, 2006).

⁷¹ *Martić* Trial Judgement, Case No. IT-95-11-T, ¶ 461.

⁷² *Id.* ¶ 468. A reprisal is "an otherwise unlawful act rendered lawful by the fact that it is made in response to a violation of international humanitarian law by another belligerent." Martić Appeal Judgement, Case No. IT-95-11-A, ¶ 263. Reprisals are subject to strict conditions: they are only to be used as an exceptional measure of last resort when other options to provoke compliance have been exhausted, they must be proportional, and they must be preceded by a warning. See Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgement, ¶ 535 (Jan. 14, 2000).

ICTY convicted Martić for killing seven individuals (including a Croatian police officer who died while deactivating a bomb) and wounding over 200.⁷³

¶12 On appeal, the defendant challenged all these findings, arguing that the shelling of Zagreb was a lawful military action involving military targets and undertaken in self-defense with precise—rather than indiscriminate—weapons. He further argued that the Chamber had erred in accepting the opinions of the Prosecution’s expert witnesses whose information, in his estimation, was outdated.⁷⁴ In the alternative, Martić claimed that he did not have the military knowledge to evaluate the impact of the particular rocket employed, and in any case was not in charge of weapons selection during the offensive. Finally, he pointed the finger at Croatia, arguing that its officials failed to take the necessary precautions to protect the civilian population from the attack as required by Article 58 of Additional Protocol I.⁷⁵ The Appeals Chamber largely affirmed the Trial Chamber’s findings,⁷⁶ determining that Martić knew about the effects of the M-87 Orkan when he ordered the shelling of Zagreb.⁷⁷ It also confirmed that the attack could not be characterized as a lawful reprisal or an exercise in self-defense.⁷⁸

2. Direct Participation in Hostilities

¶13 The *Strugar* case also involved allegations that the defendant adopted improper means and methods of warfare. The Prosecution charged General Pavle Strugar, the commander of a unit of the

⁷³ *Martić* Trial Judgement, Case No. IT-95-11-T, ¶ 470.

⁷⁴ *Martić* Appeal Judgement, Case No. IT-95-11-A, ¶ 239.

⁷⁵ *Id.* ¶¶ 240, 244. That Article provides that

The Parties to the conflict shall, to the maximum extent feasible:

- (a) Without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
- (b) Avoid locating military objectives within or near densely populated areas;
- (c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Geneva Convention Protocol I, *supra* note 60, art. 58.

⁷⁶ *Martić* Appeal Judgement, Case No. IT-95-11-A, ¶¶ 249-252, 259-261.

⁷⁷ *Id.* ¶ 256.

⁷⁸ *Id.* ¶¶ 264-268.

Yugoslav National Army (JNA), with superior responsibility for an unlawful attack on civilians and civilian objects in the Old Town of Dubrovnik. The attack involved the use of mortars (a muzzle-loading weapon that fires shells at relatively short ranges), recoilless guns (which facilitate the firing of a heavy projectile), and wire-guided rockets (a projectile guided by signals sent to it via thin wires connected to the missile and its guidance mechanism), which destroyed cultural property and caused civilian deaths and injuries. After it declared the defendant fit to stand trial⁷⁹ and conducted a site visit, the Trial Chamber convicted Strugar of unlawful attacks on civilians and cultural property⁸⁰ and sentenced him to eight years' imprisonment.⁸¹ Although the Trial Chamber was not satisfied either that Strugar ordered the attack or that he was aware of the substantial likelihood that such an attack would occur as a result of his order to attack Croatian forces located above the city,⁸² it nonetheless found him guilty pursuant to

⁷⁹ Prosecutor v. Strugar, Case No. IT-01-42-T, Decision Re the Defense Motion to Terminate Proceedings (May 26, 2004) [hereinafter *Strugar* Fitness Decision].

⁸⁰ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, ¶ 478 (Jan. 31, 2005) [hereinafter *Strugar* Trial Judgement]. The crimes were identified as unenumerated offenses under Article 3 of the ICTY Statute with reference to Article 51 and 52 of Additional Protocol I to the Geneva Conventions. *Id.* ¶¶ 273-83, 298-312. The notion of an unlawful attack encompasses direct, indiscriminate, and disproportionate attacks. Prosecutor v. Strugar, Case No. IT-01-42-AR72, Decision on Interlocutory Appeal, ¶¶ 9-11 (Nov. 22, 2002). Purporting to apply principles of cumulative convictions, the Trial Chamber did not enter convictions for the crimes of murder, cruel treatment, devastation not justified by military necessity, or unlawful attacks on civilian objects, on the ground that those crimes were encompassed in the counts on which convictions were entered. *Strugar* Trial Judgement, Case No. IT-01-42-T, ¶¶ 447-454. The prosecution appealed this aspect of the Judgement with respect to the property crimes, arguing that the Trial Chamber erroneously exercised its discretion to decline to enter convictions for crimes that contained materially distinct elements of the charges upheld. The Appeals Chamber agreed, quoting a prior ruling that "when the evidence supports convictions under multiple counts for the same underlying acts, the test . . . does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements." Prosecutor v. Strugar, Case No. IT-01-42-A, Judgement, ¶ 324 (July. 17, 2008) [hereinafter *Strugar* Appeal Judgement] (quoting Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶ 358 (Mar. 22, 2006)). Accordingly, new convictions were entered, although the sentence was not amended as the new convictions were based on the same criminal conduct. *Id.* ¶¶ 332, 388.

⁸¹ *Strugar* Trial Judgement, Case No. IT-01-42-T, ¶¶ 478, 481.

⁸² *Id.* ¶¶ 347, 358.

the principle of superior responsibility on the grounds that he exercised effective control over the responsible forces, knew that the attack was occurring or might occur, and failed to either stop it or conduct an investigation after the fact.⁸³

¶14 On appeal, the Appeals Chamber confirmed the Trial Chamber's approach to determining the defendant's fitness to stand trial with a review of national and international authorities.⁸⁴ Among his alleged errors of fact and law, Strugar argued that one of the individuals injured, a driver for the Dubrovnik Municipal Crisis Staff who was transporting members of the Crisis Staff to perform war tasks, was a lawful military target and thus could not be the victim of the crime of cruel treatment under Article 3 of the Statute by virtue of being injured during the shelling of the Old City.⁸⁵ As grounds, Strugar noted that the victim, a reservist who had not been called up during the conflict, had been deemed a "military war invalid" as a result of his injuries.⁸⁶ The ensuring opinion is important, because in prior cases, the Tribunal had not had occasion to fully flush out the concept of direct participation in hostilities, because the victims were in detention and could no longer directly participate in hostilities.⁸⁷ As such, any attack

⁸³ *Id.* ¶¶ 391, 414, 418, 446.

⁸⁴ *Strugar Appeals Judgement*, Case No. IT-01-42-A, ¶¶ 25-64. The Trial Chamber had determined that an accused is fit to stand trial when, viewed overall and in a reasonable and commonsense manner, he has the capacity to plead, to testify, to instruct counsel, and to understand the nature of the charges, the course of the proceedings, the details of the evidence, and the consequences of trial. *Strugar Fitness Decision*, Case No. IT-01-42-T, ¶¶ 36-37.

⁸⁵ *Strugar Appeals Judgement*, Case No. IT-01-42-A, ¶ 164.

⁸⁶ *Id.* ¶ 183.

⁸⁷ The concept of direct participation in hostilities has been raised in the ICTY proceedings as a defense to charges that the defendant intentionally attacked civilians whereby the defendant argues that the individual in question was directly participating in hostilities, thus abrogating his or her immunity from attack. In the Guantánamo litigation, by contrast, this concept has been employed to help identify "enemy combatants," whom the U.S. government argued may be indefinitely detained by the U.S. in connection with its military operations in Afghanistan and elsewhere. This line of argument thus controversially applies a targeting doctrine to the detention context. *See United States v. Hamdan, U.S. Military Comm'n, Ruling on Motion to Dismiss for Lack of Jurisdiction*, at 6 (Dec. 19, 2007), <http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction> After Reconsideration Ruling.pdf (last visited June 6, 2009) (finding that the accused directly participated in hostilities by driving weapons in temporal and spatial proximity to ongoing combat operations). So far, these international law opinions have not been cited in the domestic litigation, but cross-fertilization is

against or mistreatment of detained individuals is unlawful, regardless of the victim's classification as a civilian or combatant.⁸⁸

¶15

The determination of whether a particular victim was directly participating in hostilities is foundational to many war crimes charges, as civilians enjoy protection from military operations unless and for such time as they take a direct part in the hostilities.⁸⁹ In *Strugar*, the Appeals Chamber reiterated the standard of direct participation in hostilities that had been employed in previous cases:⁹⁰ the Prosecution must show beyond a reasonable doubt that at the time of the injury, the victim was not

inevitable. The International Committee of the Red Cross with the Dutch T.M.C. Asser Institute has prepared interpretive guidance on the concept of direct participation for governments. INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/\\$File/direct-participation-guidance-2009-ICRC.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609/$File/direct-participation-guidance-2009-ICRC.pdf).

⁸⁸ *Strugar* Appeals Judgement, Case No. IT-01-42-A, ¶ 179 n.458, 460.

⁸⁹ *Id.* ¶ 174 (citing Article 51(3), Additional Protocol I (“Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.”); Article 43(2), Additional Protocol I). Article 43(2) of Additional Protocol I provides that “[m]embers of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.” *Id.* Article 13(3) of Protocol II applies the same rule to non-international armed conflicts that meet that treaty's material field of application per Article 1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, U.N. Doc. A/32/144 Annex II [hereinafter Protocol II]. The provisions cited by the ICTY, it should be noted, technically apply only within the context of an international armed conflict, where the concepts of combatant and prisoner of war are well-established. *Strugar* Appeals Judgement, Case No. IT-01-42-A, ¶ 170 n.427. Notably, because the prosecution had not charged the commission of grave breaches of the Geneva Conventions, the Trial Chamber did not have occasion to classify the particular conflict at issue as international or non-international. *Id.* ¶ 179 n.458 (“In conflicts where Common Article 3 is the only applicable provision, the more elaborate rules regarding civilian and combatant status outlined in the Geneva Conventions and Additional Protocol I would not be applicable.”). Nonetheless, the Appeals Chamber assumed that the concepts of “active participation” in common Article 3 and “direct participation” in Additional Protocol I are synonymous. *Id.* ¶ 173. Common Article 3 specifically applies to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*,” and protects such individuals from “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”

⁹⁰ Prosecutor v. Kordić & Čerkić, Case No. IT-95-14/2-A, Judgement, ¶ 51 (Dec. 17, 2004).

committing “acts of war which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy’s armed forces.”⁹¹ It made clear that direct participation is not limited to combat activities as such and might include the commission of other “acts harmful to the adverse party.”⁹²

¶16 Canvassing military manuals, treaty drafting histories, prior jurisprudence, and other sources of state practice and *opinio juris*, the Appeals Chamber identified several types of direct participation in hostilities that fall short of obviously hostile acts, such as transmitting military information for immediate use by a belligerent, transporting weapons in proximity to combat operations, or serving as a guard or intelligence agent on behalf of a military force.⁹³ At the same time, it noted that the concept of direct participation does not embrace all acts in support of a war effort or all forms of work of a military character. To determine otherwise would render the principle of distinction virtually meaningless.⁹⁴ In this regard, the Appeals Chamber identified several forms of indirect participation that would not cause a civilian to forfeit his civilian immunity, including selling goods or supplying food to parties to the conflict, expressing sympathy for the cause, failing to act to prevent an incursion by a belligerent force, gathering and transporting military information, arms, munitions or other supplies to a party, and providing specialist advice.⁹⁵ Ambiguous cases may turn on the degree of nexus between the victim’s activities at the time of the alleged offense and contemporaneous acts of war that are intended to cause harm to the adverse party.⁹⁶

⁹¹ *Strugar* Appeals Judgement, Case No. IT-01-42-A, ¶ 173. *See also id.* ¶ 175 (noting that “the notion of active participation in hostilities encompasses armed participation in combat activities”).

⁹² *Id.* ¶ 176 (citing Article 67(1)(e), Additional Protocol I; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art 3(1), U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (referencing participation in “a concerted act of violence”).

⁹³ *Id.* ¶ 177.

⁹⁴ *Id.* ¶ 176.

⁹⁵ *Id.*

⁹⁶ *Id.* (“As the temporal scope of an individual’s participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim’s activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.”).

¶17 The Appeals Chamber emphasized that the determination of whether a particular victim was a lawful target requires a case-by-case analysis.⁹⁷ Turning to the facts at hand, the Appeals Chamber determined that the Trial Chamber did not err in finding no reasonable doubt as to the victim's non-participation in activities that "by their nature or purpose were intended to cause actual harm to the personnel or equipment of the JNA forces in the Dubrovnik region at the time he was injured"⁹⁸ and as to the lack of the requisite nexus between his particular conduct and any possible participation by members of the Crisis Staff in acts of war.⁹⁹ In addition, the Appeals Chamber ruled that it was incumbent upon the Trial Chamber to confirm that the acts were otherwise unlawful. This required a determination of whether the victim was combatant, who could be targeted at any time even when not directly participating in hostilities, or a civilian.¹⁰⁰ Although the Trial Chamber did not make an explicit ruling in this regard, its findings were deemed sufficient by the Appeals Chamber to conclude that the victim was indeed a civilian who remained protected from attack.¹⁰¹ Accordingly, the conviction was upheld.¹⁰²

3. The Scope of Application of International Humanitarian Law

¶18 The question of when international humanitarian law is triggered was the central issue in *Boškoski*.¹⁰³ The ICTY Prosecutor had indicted the defendants for war crimes—murder, cruel treatment, and wanton destruction of property—allegedly committed in the village of Ljuboten within the former Yugoslav

⁹⁷ *Id.* ¶ 178.

⁹⁸ *Id.* ¶ 183.

⁹⁹ *Id.* ¶ 184.

¹⁰⁰ *Id.* ¶ 187.

¹⁰¹ *Id.* ¶ 187.

¹⁰² Strugar received early release for good behavior and undisclosed medical problems after having served more than two-thirds of his sentence. *See* Case No. IT-01-42-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar (Jan. 16, 2009).

¹⁰³ This question also emerged in the Kosovo proceedings. *See, e.g.*, Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 36-100 (April 3, 2008) [hereinafter *Haradinaj* Judgment] (compiling jurisprudence and concluding that there existed a conflict between the government of the former Yugoslavia and the Kosovo Liberation Army (KLA) in the period relative to the indictment).

Republic of Macedonia (FYROM) during the conflict between the state security forces (generally the police with support from the Macedonian army) and the Albanian National Liberation Army (NLA) that was alleged to have been waged from January to September 2001.¹⁰⁴ The Prosecutor charged the Minister of the Interior at the time, Ljube Boškoski, under the doctrine of superior responsibility for failing to prevent the crimes. She charged Boškoski's co-defendant, Johan Tarčulovski, with participating in a joint criminal enterprise to unlawfully attack civilians.¹⁰⁵

¶19 In attempting to defeat the war crimes counts in the indictment, the defendants had earlier challenged the jurisdiction of the Tribunal on the ground that there was no armed conflict in FYROM in 2001 that would support charges of war crimes.¹⁰⁶ The Trial Chamber addressed this argument in its Judgment with reference to the test earlier developed in *Tadić*¹⁰⁷ to confirm the existence of a non-international armed conflict. This test is premised on two key factors: (1) the intensity of the conflict, which includes a consideration of its duration, and (2) the degree of organization of the parties to the conflict.¹⁰⁸ These two elements serve to distinguish armed conflicts from “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.”¹⁰⁹ The intensity

¹⁰⁴ The case came to the ICTY by virtue of a request for deferral from the ICTY to the authorities in the FYROM. It is the only case before the ICTY involving that conflict. Prosecutor v. Boškoski, Case No. IT-04-82-T, ¶ 6 (July 10, 2008) [hereinafter *Boškoski* Judgment].

¹⁰⁵ Prosecutor v. Boškoski, Case No. IT-04-82, Indictment (Mar. 9, 2005).

¹⁰⁶ Earlier, the Tribunal ruled that such a determination is a factual question to be addressed by the Trial Chamber at trial. See Prosecutor v. Boškoski, Case No. IT-04-82-AR72.1, Decision on Interlocutory Appeal on Jurisdiction (July 22, 2005).

¹⁰⁷ In determining the applicability of international humanitarian law, including the prohibitions against war crimes, the Appeals Chamber in *Tadić* determined an “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

¹⁰⁸ *Boškoski* Judgment, Case No. IT-04-82-T, ¶ 175.

¹⁰⁹ Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 562 (May 7, 1997). The *Tadić* Trial Chamber also referenced the commentary to common Article 3 of the Geneva Conventions, which set forth some criteria for determining the existence of a non-international armed conflict:

(1) That the rebel party has an organized military force, an authority

elements involve an inquiry into a number of factors, including the seriousness and destructiveness of the attacks, whether the attacks have increased in number, the spread of clashes over the territory and over time, any increase in the mobilization of troops and weapons, the number of civilians forced to flee from combat zones, the types and caliber of weapons used, the involvement of military forces, the number of casualties, the occupation of territory, the closure of roads and other disruptions to daily life, the existence of ceasefires and other agreements, international efforts to broker ceasefires, and attention by the Security Council.¹¹⁰ The requirement that hostilities be protracted “adds a temporal element to the definition of armed conflict.”¹¹¹

responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.

- (2) That the legal Government is obliged to use the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) the *de jure* Government has recognized the insurgents as belligerents; or
 - (b) that it has claimed for itself the rights of a belligerent; or
 - (c) that it has accorded the insurgents recognition as belligerents for the purpose only of the Convention; or
 - (d) that the dispute has been admitted to the agenda of the UN Security Council or the General Assembly as being a threat to the peace, breach of the peace or an act of aggression.
- (4) (a) That the insurgents have an organisation that purports to have the characteristics of a State.
 - (b) The insurgent civil authority exercises de facto authority over the persons within determinate territory.
 - (c) The armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
 - (d) The insurgent civil authority agrees to be bound by the provisions of the Convention.

Int'l Comm. of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949, 49-50 (1952). At the same time, the treaty commentary notes that the Article is meant to be applied as widely as possible and be applicable where “armed strife breaks out in a country, but does not fulfil any of the above conditions.” *Id.* at 50. See also Prosecutor v. Akayesu, Case No. ICTR-94-4-T, Judgement, ¶ 619 (Dec. 6, 1999) [hereinafter *Akayesu* Judgement] (applying these criteria to determine whether there existed an armed conflict within Rwanda in 1994); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶ 86 (Nov. 30, 2005) [hereinafter *Limaj* Judgement] (“no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions.”).

¹¹⁰ *Bošković* Judgement, Case No. IT-04-82-T, ¶ 177 (compiling jurisprudence). See also Arne Willy Dahl & Magnys Sandbu, *The Threshold of Armed Conflict*, 45 MIL. LAW & THE LAW OF WAR REV. 369 (2006); Marco Sassòli, *Terrorism and War*, 4 J. INT'L CRIM. JUST. 965 (2006).

¹¹¹ *Bošković* Judgement, Case No. IT-04-82-T, ¶ 186. *But see Haradinaj*

¶20 The defendants urged that in applying these factors (and in particular the intensity element), the Tribunal should not take into account terrorist activities by the NLA or others, since the whole point of the *Tadić* test is to distinguish situations of armed conflict from terrorist activities and other forms of sporadic violence. The Trial Chamber agreed in principle that isolated acts of violence, such as terrorist activities committed in peacetime, would not trigger common Article 3, because they would not constitute “protracted” violence between “governmental authorities and organized groups or between such groups.”¹¹² Relying on a number of case studies from Israel, Lebanon, Chechnya, Peru, Nigeria, and the United States, the Chamber concluded, however, that so-called terrorist acts committed within the context of other armed engagements may be constitutive of an armed conflict.¹¹³ What matters is “whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence perpetrated may or may not be characterized as terrorist in nature.”¹¹⁴ The Tribunal cited a number of instances in which acts that would be considered terrorist in nature (the deliberate targeting of civilians, for example) nonetheless contributed to the determination of the existence of an armed conflict.¹¹⁵ The Trial Chamber thus concluded that “while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where [the acts] require the engagement of the armed forces in hostilities, such acts are

Judgement, Case No. IT-04-84-T, ¶ 49 (noting that the criterion of protracted armed violence has been interpreted “as referring more to the intensity of the armed violence than to its duration.”).

¹¹² *Boškoski* Judgement, Case No. IT-04-82-T, ¶¶ 184-185.

¹¹³ *Id.* ¶ 187. In this regard, the Chamber noted that IHL directly addresses itself to acts of terrorism committed within armed conflict in the form of prohibitions against committing “acts of terrorism” (Article 33(1), Geneva Convention IV, and Article 4(2)(d), Additional Protocol II) and “acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (Article 51(2), Additional Protocol I, and Article 13(2), Additional Protocol II).

¹¹⁴ *Boškoski* Judgement, Case No. IT-04-82-T, ¶ 185. *See also* Prosecutor v. Kordić & Čerkić, Case No. IT-95-14/2-A, Judgement ¶ 341 (Dec. 17, 2004) (“[t]he requirement of *protracted* fighting is significant in excluding mere cases of civil unrest or single acts of terrorism.”) (emphasis in original).

¹¹⁵ *Boškoski* Judgement, Case No. IT-04-82-T, ¶¶ 188-190.

relevant to assessing the level of intensity with regard to the existence of an armed conflict.”¹¹⁶

¶21

Turning to the question of the organizational capacity of the NLA, the Trial Chamber indicated that it would look to a number of factors,¹¹⁷ including whether the group operated pursuant to a hierarchical chain of command, rules of engagement and discipline and a system of ranks, training, and recruitment; whether the group was capable of implementing common Article 3;¹¹⁸ whether the group manifested outward symbols of authority and possessed a leadership corps with the capacity to exert authority over its members (e.g., a general staff or high command);¹¹⁹ whether the

¹¹⁶ *Id.* ¶ 190. The Trial Chamber also noted that while the Security Council has condemned terrorist attacks by rebel groups in the context of internal armed conflicts, such pronouncements are made on a political, rather than legal, basis. *Id.* ¶ 192 (citing *inter alia* S.C. Res. 1465, U.N. Doc. S/RES/1465 (2003) (condemning attack in Colombia)).

¹¹⁷ *Id.* ¶¶ 199-203. The Trial Chamber gleaned most of these factors from the *Limaj* case. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, ¶¶ 93-134 (Nov. 30, 2005). The Tribunal acquitted Limaj, former commander of the KLA and currently Kosovo’s Minister of Transport, in 2005. A Serbian prosecutor subsequently indicated he was opening an investigation into crimes that were not included within the ICTY’s indictment and for which double jeopardy had not yet attached.

¹¹⁸ The Trial Chamber specifically noted that the standard for the application of common Article 3 is lower than that required for Additional Protocol II, which requires a showing that armed groups are under responsible command and exercise such control over territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. *Boškoski* Judgement, Case No. IT-04-82-T, ¶ 197 (citing Article 1(1), Additional Protocol II (“This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”)). This higher control standard is logical given the more detailed rules contained in the Protocol: “there must be some degree of stability in the control of even a modest area of land for [the armed groups] to be capable of effectively applying the rules of the Protocol,” such as caring for the wounded and sick. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶1943 (Yves Sandoz et al. eds., 1987).

¹¹⁹ *Boškoski* Judgement, Case No. IT-04-82-T, ¶ 195-196 (citing Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 120 (July 15, 1999) [hereinafter *Tadić*]).

group communicated with the international community; and whether the group was capable of confronting the enemy with military means.¹²⁰ The Trial Chamber confirmed that “a high number of international humanitarian law violations by the members of an armed group may be indicative of poor discipline and a lack of hierarchical command in the group.”¹²¹ At the same time, it noted that terrorist acts are often deliberately employed as a tactic of war and require “a high level of planning and a coordinated command structure for their implementation.”¹²² In other words,

so long as the armed group possesses the organizational ability to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict. ... [T]he Chamber needs to examine how the attacks were planned and carried out—that is, for example, whether they were primarily the result of a military strategy ordered by those leading the group or whether they were perpetrated by members deciding to commit attacks of their own accord.¹²³

This explanation resolves the apparent conundrum between the test for applying IHL, which requires a showing that a group has the ability to implement and ensure compliance with IHL, and the fact that organized armed groups regularly and deliberately commit IHL violations. It makes clear that such groups may still qualify as

Appeal Judgement)). In addition, in *Limaj*, the Trial Chamber concluded that the KLA constituted an “organized armed group” given that it manifested “some degree of organization” even if not the same level of organization seen in formal armed forces. *Limaj* Judgement, Case No. IT-03-66-T ¶ 89. See also Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 23-24 (June 16, 2004) (also confirming that the KLA constituted a sufficiently organized armed group to justify the application of IHL).

¹²⁰ *Boškoski* Judgement, Case No. IT-04-82-T, ¶ 198 (citing *Haradinaj* Judgement, Case No. IT-04-84-T, ¶ 60).

¹²¹ *Id.* ¶ 204.

¹²² *Id.*

¹²³ *Id.* ¶ 205.

combatants under IHL even when they deliberately breach those rules.

¶22 Applying this approach to the facts, the Trial Chamber canvassed a series of incidents and events involving the NLA and Macedonian authorities during the operative period (including attacks on police stations and border controls, kidnappings, ambushes, significant property damage, the occupation of various villages, and armed clashes).¹²⁴ Many of the incidents on which the tribunal relied involved significant military assets (including large caliber weaponry, tanks, and helicopter gunships) and coordinated action by camouflaged NLA members. The events, which occurred throughout an expanding geographical area, provoked an escalating military response by the FYROM as well as the attention of the Security Council and the International Committee of the Red Cross (ICRC). A number of proposed ceasefires failed, and the central authorities implemented an amnesty law absolving all those who participated in the conflict from prosecution except individuals who committed crimes within the jurisdiction of the ICTY. The Chamber also determined that the NLA controlled certain villages to such an extent that the state police were unable to function there.¹²⁵

¶23 The dead totaled somewhere in the range of 120-150 individuals, with many more injured or displaced.¹²⁶ The Trial Chamber opined that the lack of significant harm and property damage was perhaps due to the exercise of restraint by the parties, the more localized nature of the clashes, parallel law enforcement measures, and the NLA's use of guerilla "strike and withdraw" tactics, which eluded a large-scale response.¹²⁷ Although the FYROM at times employed both a law enforcement and military

¹²⁴ *Id.* ¶¶ 212-238, 243. A number of additional alleged incidents could not be attributed to the NLA because the evidence identified those responsible only as "terrorists" or "armed Albanian groups." *Id.* ¶ 211. Indeed, the Trial Chamber noted that the evidence suggested that other "local 'terrorist'-type groups existed and functioned, probably independently of the NLA" during the period in question. *Id.* ¶ 287.

¹²⁵ *Id.* ¶ 242. In this regard, the Trial Chamber cited the *Akayesu* case, in which the Rwanda Tribunal determined that territory in an armed group's control is usually that which has eluded the control of government forces. *Akayesu* Judgement, Case No. ICTR-94-4-T, ¶ 626.

¹²⁶ *Bošković* Judgement, Case No. IT-04-82-T, ¶ 239.

¹²⁷ *Id.* ¶ 244.

legal framework, much of its response was consistent with the existence of an armed conflict.

¶24 Looking to the degree of organization manifested by the NLA, the Trial Chamber concluded that although some of the self-serving and contradictory testimony of NLA witnesses was not entitled to great weight,¹²⁸ the evidence on balance revealed that the NLA gradually evolved from a collection of “individually formed and organized smaller local groups”¹²⁹ into a fighting force with an extensive command structure capable of carrying out more efficient and organized operations.¹³⁰ In particular, the group “managed to compel the government to commit the full weight of its substantial army including reserves, and the large police force including reserves, to fight” against it in a conflict that brought the country to the verge of a civil war.¹³¹ All told, the Trial Chamber concluded that an armed conflict existed at all times material to the Indictment, thus laying the necessary predicate for the war crimes charges.¹³²

¶25 Turning to the attack on Ljuboten in particular, the Defense argued that the operation was justified by military necessity. The defendants tried to establish that there was an NLA presence within Ljuboten and that the group was using the village as a logistics base.¹³³ The Defense also argued that Macedonian forces received fire from houses within the village.¹³⁴ Based on the evidence presented, the Trial Chamber concluded that although the village was not a logistics base *per se*, there were in fact legitimate reasons for the police to enter the village because of a suspected terrorist or NLA presence.¹³⁵ In addition, it concluded that the police and army received outgoing fire from some homes,¹³⁶ but not from all of the homes that the government forces ultimately

¹²⁸ *Id.* ¶¶ 254-265.

¹²⁹ *Id.* ¶ 286.

¹³⁰ *Id.* ¶¶ 286-291.

¹³¹ *Id.* ¶ 289.

¹³² *Id.* ¶ 249.

¹³³ *Id.* ¶ 30-31.

¹³⁴ *Id.* ¶ 145.

¹³⁵ *Id.* ¶ 140.

¹³⁶ *Id.* ¶ 378 (noting that while its inhabitants returned police fire, the house was a military objective whose attack would have offered a definite military advantage; however, by the time the house was burned by the police, it was unoccupied and so no longer a lawful military objective). Accordingly, the prosecution also established the crime of wanton destruction. *Id.* ¶ 380.

destroyed.¹³⁷ It further determined that Defense evidence that the military had only responded to fire from the village directed at army positions was contrived,¹³⁸ and that any NLA members present during the events in question likely offered little resistance to the well-armed police unit present in the area.¹³⁹

¶26

With respect to particular IHL violations alleged (mainly the murder and cruel treatment of Albanian residents), the defendants' primary defense was that the victims in question had forfeited their civilian immunity by virtue of directly participating in hostilities.¹⁴⁰ No conviction was entered with respect to three victims, because the evidence was insufficient that the victims were killed by the police, who were under the defendant's command, rather than the army. In any case, there was evidence that the victims had ammunition in their pockets and that they may have been carrying firearms.¹⁴¹ Under the circumstances, the Trial Chamber concluded that the Prosecution did not prove, beyond a reasonable doubt, that the victims were not taking an active part in hostilities at the time they were killed.¹⁴² With respect to other victims, by contrast, there was sufficient evidence that the crime of murder was committed, because even if they were members of the NLA, the victims were unarmed civilians not playing any part in hostilities at the time they were killed.¹⁴³ With respect to the cruel treatment counts, the victims were in detention, and thus *hors de combat*, so it was of no moment that they may, at one time, have directly participated in

¹³⁷ *Id.* ¶¶ 145-157, 161. *See also id.* ¶ 369 (concluding that there was no evidence that the houses burned by the police were being used for military purposes or that their destruction offered any military advantage).

¹³⁸ *Id.* ¶ 170.

¹³⁹ *Id.* ¶ 172.

¹⁴⁰ *Id.* ¶¶ 383-391. The doctrine of direct participation applies *mutatis mutandis* in non-international armed conflicts. *See* Article 13, Additional Protocol II:

- (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
- (3) Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

Additional Protocol II, *supra* note 89, art. 13(2)-(3).

¹⁴¹ *Boškoski* Judgement, Case No. IT-04-82-T, ¶¶ 334-345.

¹⁴² *Id.* ¶ 348. *See also Strugar* Appeal Judgement, Case No. IT-01-42-A, ¶ 178 n.457 (noting that “for the purpose of establishing an accused’s criminal responsibility, the burden of proof of whether a victim was not taking active part in the hostilities rests with the Prosecution”). *Cf.* Prosecutor v. Blaškić, Case No. IT-95-14-A, [Appeal] Judgement, ¶ 111 (July 29, 2004).

¹⁴³ *Boškoski* Judgement, Case No. IT-04-82-T, ¶¶ 306-328.

hostilities.¹⁴⁴ Turning to the responsibility of the accused, the Trial Chamber acquitted Boškoski on the ground that he took adequate means within his material ability to ensure that criminal conduct was investigated, but was in essence a political figurehead with no real power. Tarčulovski, on the other hand, was convicted of the crimes proven on the ground that he ordered, planned, and instigated the offenses as head of the police operation in Ljuboten.

4. Particular War Crimes Developments

¶27 With respect to particular war crimes, the Special Court for Sierra Leone issued an interesting decision with respect to the war crime of terrorism, also of immediate relevance to “war on terror” proceedings in the United States.¹⁴⁵ In the CDF case, the Trial Chamber of the SCSL had acquitted the defendants of acts of terrorism on the ground that it had not been proven beyond a reasonable doubt that the defendants possessed the necessary *mens rea*—the specific intent to cause terror.¹⁴⁶ The Appeals Chamber affirmed the Trial Chamber’s determination that the evidence did not establish that the defendants, charged with superior responsibility and with aiding and abetting acts of terrorism, knew that the direct perpetrators were acting with the necessary intent to spread terror among the civilian population.¹⁴⁷ Accordingly, the findings of not guilty went undisturbed.¹⁴⁸

¹⁴⁴ *Id.* ¶ 388.

¹⁴⁵ SCSL Statute, *supra* note 29, art. 3(d) (granting jurisdiction to prosecute acts of terrorism in violation of common Article 3 of the Geneva Conventions and Articles 4(d)(2) and 13(2) of Additional Protocol II). In this regard, the SCSL noted that Article 13(2)’s prohibition is narrower than that contained in Article 4(d)(2) as it requires a showing that the individual had the specific intent to spread terror among the civilian population. *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgment, ¶¶ 345-348 (May 28, 2008) [hereinafter CDF Appeal Judgment]. It determined that the latter crime was the charged crime and requires proof beyond a reasonable doubt of the following elements:

- The commission of acts or threats of violence;
- That the offender willfully made the civilian population (or individual civilians not taking direct part in hostilities) the object of those acts or threats of violence; and
- That the acts or threats of violence were carried out with the specific intent to spread terror (i.e., extreme fear) among the civilian population.

Id. ¶¶ 350, 352.

¹⁴⁶ *Id.* ¶¶ 729-731, 743, 779-780, 879.

¹⁴⁷ *Id.* ¶¶ 368-370, 373, 376.

¹⁴⁸ *Id.* ¶ 379.

¶28 After a rocky start,¹⁴⁹ the crime of recruiting child soldiers is now firmly entrenched in the war crimes canon.¹⁵⁰ In the Civil Defense Forces (CDF) case, a Trial Chamber of the SCSL found Allieu Kondewa guilty of “enlisting children under the age of 15 into an armed force or group and/or using them to participate actively in hostilities” as set forth in Article 4(c) of the SCSL Statute by virtue of his role initiating child soldiers for battle.¹⁵¹ On appeal, Kondewa argued that initiation should not have been considered the equivalent of enlistment.¹⁵² The Appeals Chamber noted that enlistment means “accepting and enrolling individuals when they volunteer to join an armed force or group,” that there must be a nexus between the act of the accused and a child joining an armed force or group,¹⁵³ and that “enlistment” should not be narrowly defined as a formal process.¹⁵⁴ Reviewing the facts in the record, the Appeals Chamber concluded that the child soldier in question had been forcibly enlisted when he was captured by CDF forces and put to work prior to his initiation.¹⁵⁵ Accordingly, the Appeal Chamber reversed the conviction on the count of enlisting child soldiers.¹⁵⁶ The acquittal of Kondewa’s co-accused, Moinina

¹⁴⁹ Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (May 31, 2004) (confirming the availability of the charge in the face of a vigorous *nullum crimen sine lege* defense).

¹⁵⁰ Several ICC indictments feature the crime of using child soldiers. *See, e.g.*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Indictment (Aug. 29, 2006); Prosecutor v. Katanga & Chui, Case No. ICC-01/-4-01/07, Indictment (2008).

¹⁵¹ Prosecutor v. Fofana, Case No. SCSL-04-14-T, Judgment, ¶¶ 968-970 (Aug. 2, 2007) [hereinafter CDF Trial Judgment]. Specifically, the Trial Chamber found him guilty of initiating only one child soldier, Witness TF2-004, because the ages of other initiates had not been conclusively established. The Trial Chamber did not consider Kondewa’s liability for using child soldiers, as it considered that an alternative charge to enlistment. *Id.* ¶ 971. This ruling was upheld on appeal. CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶ 132.

¹⁵² CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶ 136.

¹⁵³ *Id.* ¶ 139 (citing Prosecutor v. Brima, Case No. SCSL-04-16-T, ¶ 735 (June 20 2007); Prosecutor v. Lubanga, Case No. ICC-01/-4-01/06, Decision on the Confirmation of Charges, ¶ 247 (Jan. 29, 2007)).

¹⁵⁴ *Id.* ¶ 144.

¹⁵⁵ *Id.* ¶ 142.

¹⁵⁶ *Id.* ¶ 145. Judge Renate Winter (the President of the SCSL) entered a dissent, arguing that “enlistment may in some circumstances be a process involving several acts which may substantially further the enrolment and acceptance of a child under the age of fifteen into an armed force or group. Religious initiation, military training and the signing of a certificate declaring a child fit for combat may all be acts that substantially further a child’s enlistment.” Prosecutor v.

Fofana,¹⁵⁷ was upheld on appeal on the ground that his mere presence at meetings in which child soldiers were referenced or present was insufficient to render Fofana personally involved in such crimes.¹⁵⁸

5. War Crimes Before the International Criminal Court

¶29 These decisions draw attention to the enhanced ability of ICL judges to decide complex questions of IHL in a wartime context. The ICTY judges in particular have proven themselves to be increasingly adept at evaluating and assimilating expert testimony involving questions of military organization and strategy while adjudicating questions of conflict classification, military necessity, and proportionality. The judges revealed a high degree of technical acuity with respect to the special features of particular weapons systems, including the weapons' effective zone ("an area around [a] landed munition within which it may cause death or injury"), the error ellipse ("the percentage of munitions fired from a particular weapon system ... [that] can be expected to land within a given area of the aiming point"), and expenditure norms (which "indicate how many munitions of a certain type must be fired at a particular objective to militarily achieve an assurance of destroying or neutralizing the objective").¹⁵⁹ In their judgments, the judges readily assessed expert and percipient evidence about weapon trajectories, traces, and strike markings alongside documentary evidence—often of uncertain provenance—and the results of forensic anthropological investigations.

Fofana, Case No. SCSL-04-14-A, Partially Dissenting Opinion of Honourable Justice Renate Winter, ¶ 12 (May 28, 2008) [hereinafter Winter CDF Dissent]. In addition, she reasoned that "[i]n the situation where there are no formal or informal processes for reenlisting individuals, especially children, the 'use' of a child to participate actively in hostilities may amount to enlistment." *Id.* ¶ 13. She also argued that it had been established that Kondewa was guilty of committing the crime of enlisting more than one child and of using children in armed conflict. *Id.* ¶¶ 21, 30.

¹⁵⁷ CDF Trial Judgment, Case No. SCSL-04-14-T, ¶¶ 960-962.

¹⁵⁸ CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶¶ 152-153. Judge Winter dissented here as well, arguing that Fofana's presence at meetings "constituted tacit approval, encouragement and moral support to the commanders and Kamajors to continue to enlist and use children under the age of 15 to participate actively in hostilities." Winter CDF Dissent, Case No. SCSL-04-14-A, ¶ 37.

¹⁵⁹ William J. Fenrick, *The Prosecution of Unlawful Attack Cases Before the ICTY*, 7 Y.B. OF INT'L HUMANITARIAN LAW 153, 162 (2004).

¶30 A primary objection of the United States to the ICC is that the Court's judges, who may lack any formal military experience, cannot be trusted to apply and interpret the fundamental but somewhat elastic principles of IHL in the same way that those who plan and implement U.S. military strategy will. The assumption is that U.S. officials and service members are vulnerable to politicized prosecutions before the ICC for purported war crimes committed in the many theaters of war in which they operate as combatants, occupiers, peacekeepers or in other capacities. Although this argument tends to be articulated less often than other more specious arguments against the ICC,¹⁶⁰ it is probably the primary reason the United States has opposed the Court to date. This collection of war crimes decisions reveal that the ICL judges are able to conduct methodical, well-reasoned, and sophisticated IHL analysis and that IHL concepts are not so malleable as to support overly expansive judicial interpretations. To be sure, we have little indication as to how the ICC judges will approach these crimes and it may take some time before they develop the institutional competency exhibited by the ICTY. Several of the ICC's judges, however, did serve on the *ad hoc* tribunals as sitting (e.g., Judge Elizabeth Odio Benito) or *ad litem* (e.g., Judge Fatoumata Dembele Diarra) judges.

C. Crimes Against Humanity

¶31 The Special Court for Sierra Leone (SCSL) issued what is likely the most significant decision on crimes against humanity in 2008.¹⁶¹ In the Armed Forces Revolutionary Council (AFRC) case, the Trial Chamber originally dropped charges of forced marriage against defendants Alex Timba Brima, Brima Bazzy Kamara, and

¹⁶⁰ See, e.g., Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840 (2002).

¹⁶¹ Another ruling of note emerged from the ICTY in *Haradinaj*. There, a Trial Chamber concluded that there was no attack against a civilian population that could be attributed to the KLA in the region in question. *Haradinaj* Judgement, Case No. IT-04-84-T, ¶ 118-122. In particular, the Tribunal concluded that many Serbs left their homes out of fear of being caught up in the escalating armed conflict between the KLA and Serbian forces, not necessarily because they were the targets of attack. *Id.* ¶ 119. In addition, many individuals who were ill-treated were singled out for reasons that were personal to them rather than on account of their membership in a civilian population. *Id.* ¶ 122.

Santigie Borbor Kanu.¹⁶² The Prosecution had charged the crimes of forced marriage as crimes against humanity under the residual clause Article 2(i) penalizing “other inhumane acts.” The definition of crimes against humanity in the SCSL Statute also contains an open-ended list of sexual crimes at Article 2(g), which includes “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.”¹⁶³ In dismissing the forced marriage charges for redundancy, a majority of the Trial Chamber ruled that the convictions for sexual slavery encompassed all the alleged conduct of the accused. As a matter of statutory construction, the Trial Chamber determined that all acts of a sexual nature were encompassed in Article 2(g). It saw no lacuna in the law that would merit the recognition of the novel “inhumane act” of “forced marriage” separate and apart from the existing crime of sexual slavery.¹⁶⁴ The Trial Chamber also indicated that any such crime would not be of comparable gravity to other, enumerated crimes against humanity and so could not be charged as an “other inhumane act.” Exemplifying the normative redundancy of ICL, the crime of forced marriage had also been charged as the war crime of committing “outrages upon personal dignity” (as prohibited by common Article 3 of the Geneva Conventions), but the Trial Chamber again determined that the facts adduced by the Prosecution did not indicate the commission of a non-sexual crime of forced marriage that did not wholly overlap with the crime of “sexual slavery.”¹⁶⁵

¶32 The Prosecutor appealed. In a landmark opinion, the Appeals Chamber reversed in February 2008.¹⁶⁶ The Chamber noted that the crime of forced marriage is not exclusively, or even predominantly, sexual and as such is not encompassed in the crime of sexual slavery.¹⁶⁷ Rather, it noted, forced marriage involves the imposition of the status of marriage and a conjugal association by force, or threat of force. The gravamen of the offense is the assertion of a claim of right and ownership by the “husband” over the “wife,” which involves the right to demand a whole range of

¹⁶² *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Judgment, ¶ 115 (Feb. 22, 2008) [hereinafter AFRC Appeal Judgment].

¹⁶³ SCSL Statute, *supra* note 29.

¹⁶⁴ AFRC Appeal Judgment, SCSL-2004-16-A, ¶ 187.

¹⁶⁵ *Id.* ¶¶ 701-704.

¹⁶⁶ *Id.* ¶¶ 175-203.

¹⁶⁷ *Id.* ¶¶ 190.

“conjugal duties” (including, but not at all limited to, non-consensual sex) in exchange for support and protection.¹⁶⁸ In reversing the Trial Chamber, the Appeals Chamber largely vindicated the dissent written by Justice Theresa Doherty of the Trial Chamber.¹⁶⁹

¶33 The Appeals Chamber’s view of the crime was consistent with the testimony that emerged at trial. Women testified that they were often placed in extreme danger as they were forced to “care for” their putative husbands in active war zones and risked severe punishment if they did not comply with their husbands’ orders. As they described it, the crime encompassed a constellation of violations, including abduction, forced labor, deprivations of liberty, corporeal punishment and assault, as well as sexual violence. Indeed, a man’s motive in taking a so-called “bush wife” clearly went beyond the desire for sex, as the statistics on rape in Sierra Leone reveal that non-consensual sex was readily available to the warring parties. (Some studies suggest that upwards of 60,000 women were made victim to sexual violence in war-torn Sierra Leone).¹⁷⁰ By being forced into this union with men involved in the commission of war crimes and crimes against humanity, women experienced severe physical and mental trauma. This harm was heightened by the fact that many women have been ostracized by their communities since the end of the war for being affiliated in such an intimate way with a member of one of the warring parties.¹⁷¹

¶34 Although it recognized the crime against humanity of forced marriage in theory, the Appeals Chamber declined to enter a fresh conviction. Rather, the Chamber emphasized the expressive function of its judgment:

The Appeals Chamber is convinced that society’s disapproval 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

¹⁶⁸ *Id.* ¶¶ 189-190.

¹⁶⁹ *Id.* ¶¶ 192-196.

¹⁷⁰ UNIFEM, *Facts & Figures on Violence Against Women*, http://www.unifem.org/campaigns/vaw/facts_figures.php?page=7 (last visited June 7, 2009).

¹⁷¹ AFRC Appeal Judgment, SCSL-2004-16-A, ¶¶ 192-196.

recognizing that such conduct is criminal and that it constitutes an “Other Inhumane Act” capable of incurring individual criminal responsibility in international law.¹⁷²

In the subsequent RUF Judgment issued in 2009, the SCSL finally entered convictions for the crime of forced marriage.¹⁷³

¶35 The reasoning in these judgments have paved the way for prosecutions for forced marriage before the ICC, which is considering crimes arising out of conflicts in Uganda and the Democratic Republic of Congo that involve the extensive practice of forced marriage. Article 7(g) of the ICC Statute contains an expansive list of crime of sexual violence that includes “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”¹⁷⁴ The ICC’s “Other Inhumane Acts” clause at Article 7(k) is formulated as “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹⁷⁵ These formulations lend themselves to the same reasoning employed by the SCSL if the ICC is so inclined. In addition, counsel for civil parties before the ECCC requested in February 2009 that the investigation be expanded to cover forced marriage under the Khmer Rouge.¹⁷⁶

¹⁷² *Id.* ¶ 202.

¹⁷³ Prosecutor v. Sesay & Kallon, Case No. SCSL-04-15-T, Judgment (Feb. 25, 2009). By contrast, in the CDF case, the Appeals Chamber of the SCSL denied the Prosecutor’s efforts to appeal a prior decision in which the Trial Chamber refused to allow the Prosecutor to amend the indictment to add sexual violence counts to the indictment on the ground that ruling on the appeal would amount to an academic exercise given that the Prosecutor did not seek any remedy other than a determination that the prior decision constituted an error of law. CDF Appeal Judgment, SCSL-04-14-A, ¶ 426. Nonetheless, the Appeals Chamber ruled that the decision of the Trial Chamber to exclude evidence of sexual violence at trial on grounds of prejudice to the accused was erroneous. *Id.* ¶ 446. Although the Indictment was defective in that it did not charge acts of sexual violence *per se*, it did include the charge of “other inhumane acts” (which can include acts of sexual violence), and the Prosecutor subsequently and adequately put the defendant on notice through its filings and oral submissions that evidence of sexual violence would be submitted to establish that charge. *Id.* ¶¶ 443-446.

¹⁷⁴ ICC Statute, *supra* note 31, art. 7(1)(g).

¹⁷⁵ *Id.* art. 7(1)(k).

¹⁷⁶ Kaing Guek Eav (“Duch”), Case No. 001-18-07-2007-ECCC/TC, Civil Parties’ Co-Lawyers’ Request for Supplementary Preliminary Investigations

¶36

Crimes of sexual violence feature prominently in many of the cases pending before the ICC,¹⁷⁷ whose constitutive statute contains groundbreaking structural, procedural, and substantive provisions to ensure gender justice.¹⁷⁸ Within the Democratic Republic of Congo (DRC) situation, both Germain Katanga and Mathieu Ngudjolo Chui have been indicted¹⁷⁹ for crimes against

(Feb. 9, 2009) (noting that mass weddings were ordered under the Khmer Rouge).

¹⁷⁷ Given the widespread sexual violence committed in the Democratic Republic of the Congo, the absence of gender violence crimes in the *Lubanga* indictment prompted criticism from advocates for gender justice, including Radhika Coomaraswamy, the U.N. Special Representative on Children and Armed Conflict. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-1229-AnxA, *Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in Application of Rule 103 of the Rules of Procedure and Evidence* (Mar. 17, 2008), available at http://www.un.org/children/conflict/_documents/AmicuscuriaeICCLubanga.pdf.

¹⁷⁸ See Women's Initiatives for Gender Justice, *Making a Statement: A Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court* (June 2008), available at http://www.iccwomen.org/publications/articles/docs/MakingAStatement-Web_Final.pdf (discussing existing and potential gender violence charges). See Valerie Oosterveld, *Gender-Sensitive Justice & the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 *NEW ENGL. J. INT'L & COMP. L.* 119, 128 (2005) (noting stronger gender violence policies within the ICC prosecutorial office than before the ICTR).

¹⁷⁹ Judge Anita Ušacka partially dissented from the confirmation decision on the sexual violence crimes, arguing that the Prosecutor's evidence was not sufficiently strong to establish "substantial grounds to believe" that the suspects are criminally responsible for the crimes of sexual violence (the standard necessary to confirm the indictment pursuant to Article 61 of the ICC Statute). In her estimation, the evidence did not suggest either that the suspects intended for rape and sexual slavery to be committed during the attack in question or that the suspects would know that these acts would be committed "in the ordinary course of events." *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07-717, *Decision on the Confirmation of Charges, Partly Dissenting Opinion of Judge Anita Ušacka*, ¶¶ 14, 19-22 (Sept. 30, 2008). Falling sway to the misperception that acts of sexual violence committed during armed conflicts or repression are simply opportunistic or private crimes reflecting personal motives, Judge Ušacka reasoned that general evidence that crimes of rape and sexual slavery were committed throughout Ituri is insufficient to infer the suspects' intent and knowledge that the particular crimes charged would occur or had occurred. See *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07-717, *Decision on the Confirmation of Charges*, ¶¶ 568-69 (Sept. 30, 2008) (noting that the rape and sexual slavery of women and girls was a common practice and was widely known among combatants). The issuance of Security Council Resolution 1820 definitively confirms that crimes of sexual violence are integral to any armed conflict, genocide, or campaign of ethnic cleansing rather than an isolated or peripheral phenomena. See S.C. Res. 1820, U.N. Doc. No. S/RES/1820 (June 19, 2008). Indeed, the Resolution notes that gender violence

humanity and war crimes for the commission of sexual slavery, rape, and outrages upon personal dignity.¹⁸⁰ Jean-Pierre Bemba Gombo, a citizen of the DRC who is implicated for his involvement in crimes within the Central African Republic (CAR), will likely be prosecuted for rape as a crime against humanity and a war crime in a situation in which mass sexual violence featured more prominently than mass murder.¹⁸¹ Several Ugandan defendants are to be prosecuted for crimes of sexual violence (sexual enslavement as a crime against humanity and rape as a war crime or a crime against humanity).¹⁸² All outstanding Darfur arrest warrants include gender violence counts (*viz.* rape, outrages upon personal dignity, and persecutory gender violence).¹⁸³ Chief

is regularly employed to exacerbate other forms of violence and repression.

¹⁸⁰ These counts barely made it into the indictment. In connection with the confirmation process, the Prosecutor requested protective measures from the Registry for two witnesses whose testimony was relevant to the sexual violence counts. The request was, however, rejected by the Registrar. Nonetheless, the Prosecutor arranged himself for the preventative relocation of the witnesses without authorization, citing his obligations to ensure the security of witnesses under Article 68(1) of the Statute. *See* Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules (Apr. 25, 2008) (detailing lack of authority for prosecutorial action). At the confirmation hearing, the Court ruled that even redacted or summary versions of the witnesses' testimony could not be admitted into evidence, because the witnesses were in effect "unprotected" and thus at risk. Eventually, the witnesses were relocated by the Registrar, which opened the way for their evidence to be considered and for the reintroduction of the sexual violence charges. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008). The defendants' request to appeal these decisions was rejected. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges (Oct. 24, 2008).

¹⁸¹ *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest Against Jean-Pierre Bemba Gombo (June 10, 2008).

¹⁸² *See, e.g.,* Situation in Uganda, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005). Two Ugandan defendants, Vincent Otti and Raska Lukwiya, have since died. The other arrest warrants (Okot Odhiambo and Dominic Ongwen) do not include sexual violence charges. *See, e.g.,* Situation in Uganda, Case No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo (July 8, 2005).

¹⁸³ Situation in Darfur, Sudan, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007) (charging acts of rape as crimes against humanity and war crimes); Warrant of Arrest for Ahmad Harun (April 27, 2007) (same).

Prosecutor Moreno-Ocampo also appointed feminist law professor Catherine MacKinnon as a dedicated Gender Advisor in 2008,¹⁸⁴ although the Court has yet to appoint a Gender Legal Advisor for the entire institution.

¶37 By contrast, the movement to ensure gender justice received setbacks before the ICTY and ICTR in 2008. In July, the ICTY refused to allow the prosecution to amend the indictment in the *Lukić* case to include sexual violence charges. The Lukić cousins, Milan and Sredoje, stand accused of war crimes and crimes against humanity in the region of Višegrad, where their paramilitary group, the “White Eagles,” was active. The men were initially indicted for a number of crimes, but no crimes of gender violence. Under the leadership of Swiss jurist Carla Del Ponte, the prosecutor’s office had indicated an interest in amending the indictment to include charges concerning the crimes of rape, enslavement, and torture committed against women, and was given until November 2007 to do so. No amendment was forthcoming, ostensibly because Del Ponte felt that to lengthen the prosecutor’s case would be contrary to the U.N. Security Council-mandated Completion Strategy.

¶38 After Del Ponte stepped down in January 2008, her replacement—Belgian jurist Serge Brammertz—attempted to amend the indictment in June 2008, well after the deadline for doing so. In addition to clarifying the charged forms of responsibility, Brammertz sought to add new counts concerning the crimes of rape, torture, and enslavement allegedly committed within a rape camp established by the defendants. Many of the victims and witnesses to these crimes had already been disclosed to the defendants. Indeed, 18 of the 26 female witnesses on the prosecutor’s witness list apparently could testify about the defendants’ involvement in sexual violence. In support of his untimely motion, Brammertz argued that the crimes should be charged because they were grave and systematic in nature; they were integral to other persecutory policies employed in Višegrad; the Prosecutor did not need to call new witnesses; the defense

See also Situation in Darfur, Sudan, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute (Apr. 27, 2007).

¹⁸⁴ *See* Press Release, Office of the Prosecutor of the ICC, ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes, ICC-OTP-20081126-PR377 (Nov. 26, 2008), *available at* <http://www.icc-cpi.int/Menus/Go?id=30484f06-076a-4e20-935a-8e603475cc37&lan=en-GB>.

would have adequate time to meet the new charges; the testimony would assist the prosecutor in meeting the defendants' apparent alibi defenses; and—most importantly—to include the testimony and counts was necessary “in the interest of justice” in order to allow the witnesses to testify fully about the harm they suffered at the hands of the defendants and to establish the full truth of the defendants' crimes.¹⁸⁵ In a July 8, 2008 ruling, the ICTY denied the motion to amend the indictment on the ground that allowing the amendment after the Prosecutor's unnecessary delay would unduly prejudice the accused.¹⁸⁶

¶39 A similar setback took place before the ICTR. A few weeks prior the start of the trial of Tharcisse Muvunyi before the ICTR, the Prosecution sought to withdraw rape charges altogether on the grounds that witnesses could not be traced and others refused to testify.¹⁸⁷ The Trial Chamber denied the Prosecutor's request to withdraw the rape charge reasoning that the Prosecution had not provided sufficient cause for reconsidering the confirmation of the original indictment and the Defense had already expended time and resources preparing to defend the charges.¹⁸⁸ The Trial Chamber also rejected other proposed amendments amounting to new charges as prejudicial where the Prosecution could not justify the delay in seeking the changes. The Trial Chamber instructed the Prosecution that it need not amend the indictment to remove the sexual violence counts; rather, it could simply present no evidence at trial and take an acquittal. At trial, however, the Prosecution

¹⁸⁵ See *Prosecutor v. Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecutor Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008, ¶¶ 12-13 (July 8, 2008).

¹⁸⁶ *Id.* ¶¶ 57-64.

¹⁸⁷ See Letter from Dr. Alex Obote-Odora, Office of the Prosecutor of the ICC, to Ms. Brunet, on behalf of the Coalition for Women's Human Rights in Conflict Situations and others (Feb. 11, 2005), available at <http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimsDeniedJustice/responseICTRmuvunyi.pdf> (explaining decision to withdraw sexual violence counts).

¹⁸⁸ See *Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, ¶¶ 28-34 (Feb. 23, 2005). The Trial Chamber also rejected other proposed amendments amounting to new charges as prejudicial where the Prosecution could not justify the delay in seeking the changes. *Id.* ¶¶ 40-50.

managed to locate and present the testimony of three rape victims, whose harrowing testimony was deemed reliable by the Trial Chamber. None of the witnesses, however, was raped by the specific group of subordinates alleged in the indictment. Accordingly, the defendant was acquitted on these counts.¹⁸⁹

¶40 Both sides appealed, with the Prosecution alleging error in the rape acquittals. In August 2008, the Appeals Chamber quashed the original convictions and ruled that the defendant should be partially retried on the incitement to genocide count alone, because the indictment was defective in that it failed to give adequate notice to the accused of the charges and of the theories of liability, and because the Trial Chamber did not adequately state the reasons for Muvunyi's conviction. With respect to the rape charges, the Appeals Chamber agreed with the Trial Chamber that the charges proven did not correspond to the allegations in the indictment, and that variances between the evidence adduced at trial and the allegations within the indictment remained un-remedied during the pre-trial period.¹⁹⁰

¶41 Unrelated to sexual violence, two rather technical rulings on the *chapeau* elements of crimes against humanity in the *Martić* Appeals Judgment and the Civilian Defense Force Appeals Judgment are also of note. In *Martić*, the ICTY Prosecutor appealed certain crimes against humanity acquittals based on the Trial Chamber's determination that *hors-de-combat* combatants could not be the victims of crimes against humanity.¹⁹¹ The Trial Chamber had reasoned that charging abuses against combatants who were *hors de combat* as crimes against humanity would impermissibly blur the principle of distinction between civilians and combatants. In so ruling, the Trial Chamber had relied upon the negative definition of civilian contained within Article 50 of Additional Protocol I:¹⁹² "A civilian is any person who does not

¹⁸⁹ Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgement, ¶¶ 400-09 (Sept. 12, 2006).

¹⁹⁰ Prosecutor v. Muvunyi, Case No. ICTR-00-55A-A, Judgement, ¶¶ 160-69 (Aug. 29, 2008).

¹⁹¹ Prosecutor v. Martić, Case No. IT-95-11-A, Judgement, ¶ 56 (Oct. 8, 2008) [hereinafter *Martić* Appeal Judgement]. See generally Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgement, ¶¶ 90-91 (June 12, 2002).

¹⁹² *Martić* Appeal Judgement, Case No. IT-95-11-A, ¶¶ 51-55. In *Blaškić*, the Appeals Chamber invoked this definition as indicative of customary international law to confirm that members of the armed forces could not claim civilian status. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶¶ 110-

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.”¹⁹³ This, the Prosecution had argued, improperly excluded persons who were not lawful targets under IHL from the protections of the prohibition of crimes against humanity.¹⁹⁴ Based upon this interpretation of the term “civilian,” the Trial Chamber acquitted the defendant of certain charged crimes against humanity involving *hors de combat* victims.¹⁹⁵

¶42 On appeal, the Prosecution argued that the Trial Chamber erred in applying the definition of “civilian” from IHL to interpret the *chapeau* elements of crimes against humanity. In addition, it argued that the term “civilian” in the definition of crimes against humanity modifies the *chapeau* requirement of the existence of a widespread or systematic attack and does not imply that only civilians can be the victims of crimes against humanity.¹⁹⁶ The point of this modifier in that context, the Prosecution argued, is to exclude legitimate combat action from the scope of the prohibitive against crimes against humanity.¹⁹⁷

¶43 Further integrating the concepts of war crimes and crimes against humanity, the Appeals Chamber ruled that the Prosecution’s proposed expansion of the term “civilian” in Article 5 to include those *hors de combat* is contrary to the natural and ordinary meaning of the concept.¹⁹⁸ It concluded that “the

16 (July 29, 2004).

¹⁹³ The Geneva Convention provisions referenced define prisoners of war (and by implication privileged combatants). Article 43 of Additional Protocol I more directly define the meaning of “armed forces”:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Protocol I, *supra* note 60, art. 43.

¹⁹⁴ *Martić* Appeals Judgement, Case No. IT-95-11-A, ¶ 278.

¹⁹⁵ *Id.* ¶¶ 251-59, 277, 390-91, 407-22.

¹⁹⁶ *Id.* ¶ 275.

¹⁹⁷ *Id.* ¶ 281.

¹⁹⁸ *Id.* ¶ 297.

fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings under Article 3 and Article 5 of the Statute.”¹⁹⁹ Nonetheless, the Appeals Chamber ruled that combatants who were *hors de combat* could be the victims of crimes against humanity. The ICTY appropriately confirmed that the *chapeau* element of crimes against humanity requires that the widespread or systematic attack be against a civilian population, but not necessarily that every victim be a civilian. This outcome is consistent with the *Barbie* case in France (which determined that members of the French resistance could be the victims of crimes against humanity)²⁰⁰ in which combatants formed part of the civilian population that was the subject of the widespread or systematic attack.

¶44 Similarly, in the CDF case, the SCSL Trial Chamber ruled that although there was a widespread attack in the region in question, it had not been proven beyond a reasonable doubt that “the civilian population was the primary object of the attack” as the evidence suggested that the “attacks were directed against the rebels or juntas that controlled” the area.²⁰¹ Thus, it ruled, that “the targeting of a select group of civilians—for example, the targeted killing of a number of political opponents—cannot [constitute crimes against humanity as] the attack [must be] directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.”²⁰² The Appeals Chamber sided with the Prosecution in confirming that an attack against a civilian population can still provide the predicate for crimes against humanity charges even where “the ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors.”²⁰³ It thus determined that the Trial Chamber had

¹⁹⁹ *Id.* ¶ 299.

²⁰⁰ *Fédération Nationale des Déportés et Internes Résistants et Patriotes v. Barbie*, 78 I.L.R. 125, 140 (Fr. Cour de Cassation 1985). *See also* *Fédération Nationale des Déportés et Internes Résistants et Patriotes v. Touvier*, 100 I.L.R. 338, 352 (Fr. Cour de Cassation 1992).

²⁰¹ *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment, ¶ 693 (Aug. 2, 2007).

²⁰² *Id.* ¶ 119. There were also allegations that police officers were targeted in one of the attacks in question. CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶¶ 260-61.

²⁰³ CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶ 247. In this case, the Appeals Chamber also rejected the Trial Chamber’s reasoning that the

confused the purpose of the attack with the object or target of the attack.²⁰⁴ Likewise, it confirmed that the attack on the civilian population need not be based upon a specific discriminatory ground.²⁰⁵ The Appeals Chamber also agreed that, in principle, there may be parallel or co-existing attacks: one directed against a civilian population alongside one targeting opposing forces.²⁰⁶

¶45 Turning to the facts, the parties disputed whether the evidence suggested that attacks were specifically directed against a civilian population as a whole or whether particular “collaborators” were specifically targeted for their affiliation with opposing forces and some additional civilian deaths amounted to “collateral victims.”²⁰⁷ The Appeals Chamber confirmed that perceived collaborators and police officers are part of the civilian population, so long as they do not fight alongside or under the direction of the military.²⁰⁸ In addition, the evidence revealed that there were locations that became the object of Kamajor attacks after the rebels had withdrawn, attesting that civilian victims were not mere incidental or collateral targets of a legitimate military attack.²⁰⁹ Thus, the Appeals Chamber concluded that the Trial Chamber had erred in acquitting the defendants of crimes against humanity in these instances and substituted guilty verdicts.²¹⁰

defendants’ sentences should be mitigated, because the Kamajors were engaged in a “just cause” or exercising a “civic duty” to restore democracy to Sierra Leone. *Id.* ¶¶ 554-59. The Appeals Chamber reasoned that as an international court, its duty was to promote international interests in protecting humanity and not national interests or local sentiments. *Id.* ¶¶ 560-65. Accordingly, it increased the defendants’ sentences. *Id.* ¶ 567. *See also* Winter CDF Dissent, Case No. SCSL-04-14-A, ¶ 4 (noting that as a hybrid international court, the SCSL “must never look into the ‘righteousness’ of any particular political cause”).

²⁰⁴ CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶¶ 299-300.

²⁰⁵ *Id.* ¶¶ 262-63.

²⁰⁶ *Id.* ¶ 251.

²⁰⁷ *Id.* ¶¶ 254-56.

²⁰⁸ *See id.* ¶¶ 261, 264.

²⁰⁹ *Id.* ¶¶ 303-06.

²¹⁰ *Id.* ¶ 322. The sentences were correspondingly amended. *See id.* ¶ 567. *But see* Prosecutor v. Fofana, Case No. SCSL-04-14-A, Partially Dissenting Opinion of Honourable Justice George Gelaga King, ¶¶ 32-58 (May 28, 2008) (reasoning that the Trial Chamber had been correct to reject the crimes against humanity charge under the circumstances).

D. Genocide

¶46 The ICTR continues to be the only international tribunal routinely adjudicating the crime of genocide.²¹¹ As a follow up to the high profile Media Case from 2007,²¹² in 2008 the ICTR released its judgment against Simon Bikindi, a well-known Rwandan singer, songwriter, and dancer who was accused of committing genocide, conspiracy to commit genocide, incitement to commit genocide, and various crimes against humanity, including persecution, against members of the Tutsi group.²¹³ The Trial Chamber rejected most of the Prosecution's allegations that Bikindi collaborated with members of the government to militarize, indoctrinate, recruit, or train Hutu Power groups or the *Interahamwe*²¹⁴ or to otherwise implement a common plan²¹⁵ or conspiracy²¹⁶ to eliminate the Tutsi group; that he in any way controlled the programming of Radio Télévision Libre des Mille Collines (RTLM), the infamous radio station blamed for inciting the genocide in Rwanda;²¹⁷ that he participated in rallies that led to attacks on Tutsi individuals,²¹⁸ or that he committed any acts of genocidal violence himself.²¹⁹ It did find, however, that Bikindi at one point traveled with an *Interahamwe* convoy outfitted with public address system and "made exhortations to kill Tutsi."²²⁰

²¹¹ Genocide charges are pending before the ICTY in a handful of cases. In addition to the case against Radovan Karadžić, *see supra* note 4, several of the defendants in the Vujadin Popović et al. case (all members of the Bosnian Serb Army) have been charged with genocide, conspiracy to commit genocide, and extermination in connection with the Srebrenica massacre. Prosecutor v. Popović, Case No. IT-05-88-T, Indictment (Aug. 4, 2006). Their trial is ongoing.

²¹² Prosecutor v. Nahimana, Case No. ICTR-96-11-A, Judgement (Nov. 28, 2007) [hereinafter *Nahimana* Appeal Judgement]. *See* George William Mugwanya, *Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda*, 6 NW. U. J. INT'L HUM. RTS. 415, 436-40 (2008).

²¹³ Prosecutor v. Bikindi, Case No. ICTR-01-72-T, Judgement (Dec. 2, 2008) [hereinafter *Bikindi* Judgement].

²¹⁴ *Id.* ¶¶ 88, 103, 111

²¹⁵ *Id.* ¶ 402.

²¹⁶ *Id.* ¶¶ 406-07.

²¹⁷ *Id.* ¶ 122.

²¹⁸ *Id.* ¶¶ 183-85.

²¹⁹ *Id.* ¶¶ 288-366, 410.

²²⁰ *Id.* ¶ 285.

¶47 The most interesting aspect of the opinion is the Trial Chamber’s analysis of Bikindi’s lyrics with the assistance of linguistics experts presented by both sides.²²¹ The Trial Chamber confirmed that that definitions of speech and expression under international law “are broad enough to include artistic expression such as songs.”²²² At the same time, it noted that courts must tread lightly where international speech rights are concerned and be careful to distinguish between speech that may violate international human rights norms and speech that constitutes an international crime, such as incitement to genocide²²³ or persecution as a crime against humanity.²²⁴ The Trial Chamber concluded that Bikindi’s songs advocated Hutu unity against a common Tutsi foe, incited ethnic hatred, raised the morale of *Interahamwe* members while they were killing Tutsi, and inspired action among his listeners.²²⁵ At the same time, it declined to rule that Bikindi composed the songs “with the specific intention to incite ... attacks and killings, even if they were used to that effect” during the genocide.²²⁶ While noting that Bikindi’s songs were used by RTLM in a propaganda campaign to promote hatred for, and to incite violence against, the Tutsi populace,²²⁷ the Trial Chamber concluded that Bikindi played no role in the dissemination or deployment of his songs during the period of the genocide.²²⁸ Thus, Bikindi was convicted solely for his role in inciting genocide while part of the *Interahamwe*

²²¹ See *id.* ¶¶ 186-264.

²²² *Id.* ¶ 384.

²²³ The Trial Chamber noted that to determine whether speech rises to the level of incitement to commit genocide, the Tribunal must look to “the cultural and linguistic content; the political and community affiliation of the author; its audience; and how the message was understood by its intended audience, *i.e.*, whether the members of the audience to whom the message was directed understood its implication.” *Id.* ¶ 387.

²²⁴ *Id.* ¶ 391 (noting that hate speech that does not directly call for genocide may constitute persecution: “an act or omission that discriminates in fact and that denies or infringes upon a fundamental right laid down in international customary or treaty law [such as the right to dignity], and was carried out deliberately with the intention to discriminate on one of the listed grounds”). See also *Nahimana* Appeal Judgement, Case No. ICTR-96-11-A, ¶ 985. The Trial Chamber confirmed that the underlying constitutive act did not have to be criminal to constitute persecution so long as the other elements of that offense are present. *Bikindi* Judgement, Case No. ICTR-01-72-T, ¶ 392.

²²⁵ *Id.* ¶¶ 247-55.

²²⁶ *Id.* ¶ 255.

²²⁷ *Id.* ¶ 264.

²²⁸ *Id.* ¶ 421.

convoy.²²⁹ The Trial Chamber sentenced him to fifteen years' imprisonment.²³⁰

¶48

The ICC was poised to consider its first genocide case with the Prosecutor's application for an arrest warrant for President Omar Hassan Ahmad al-Bashir of Sudan. On July 14, 2008, the ICC Prosecutor sought to charge al-Bashir with three counts of genocide, five counts of crimes against humanity, and two counts of war crimes.²³¹ By proposing genocide charges based on al-Bashir's alleged responsibility for attacks against protected groups (members of the Fur, Masalit, and Zaghawa tribes), the Prosecutor implicitly rejected the conclusion reached by a United Nations Commission of Inquiry²³² that there was insufficient evidence to conclude the existence of a state policy to commit genocide.²³³ To prove that there were reasonable grounds to conclude the defendant acted with genocide intent, the Prosecutor submitted data attesting to the scale of the violence against protected groups; statements of the accused and members of his inner circle; evidence that attacks continued in camps, implying that the intent was not merely to displace groups but to eliminate them; staggering proof of sexual violence; and evidence that Sudanese and *janjaweed* forces sought to destroy the very means of survival of the groups.²³⁴ Early in 2009, however, a Pre-Trial Chamber of

²²⁹ *Id.* ¶ 422. Relatedly, in *Zigiranyirazo*, the Prosecutor failed to present evidence that established, beyond a reasonable doubt, the substance of speeches allegedly given by the accused in advance of any genocidal massacre. Accordingly, the accused was acquitted of ordering and instigating genocide. *See Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement, ¶¶ 404-05 (Dec. 18, 2008) [hereinafter *Zigiranyirazo* Judgement]. Instigation was also central to the prosecution of Moinina Fofana before the Special Court for Sierra Leone. There, the Special Court found that Fofana's speeches were too removed, temporally and geographically, from the crimes in question to satisfy the causality requirement of the crime of instigation, but that they did constitute aiding and abetting the crimes in question, which does not require a causal nexus. CDF Appeal Judgment, Case No. SCSL-04-14-A, ¶¶ 52-55.

²³⁰ *Id.* ¶ 460.

²³¹ Situation in Darfur, The Sudan, Case No. ICC-02/05, Summary of Prosecutor's Application Under Article 58 (July 14, 2008) [hereinafter Prosecutor's Darfur Submission].

²³² Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General* (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

²³³ *Id.* ¶¶ 513-17. *See generally* Beth Van Schaack, *Darfur and the Rhetoric of Genocide*, 26 WHITTIER L. REV. 1101 (2005) (critiquing methodology and conclusions of Commission of Inquiry).

²³⁴ *See* Prosecutor's Darfur Submission, Case No. ICC-02/05 ¶¶ 21-36, 45-60.

the ICC declined to issue an arrest warrant for genocide, concluding that the Prosecutor had not established reasonable grounds to believe that al-Bashir committed genocide as required by Article 58 of the ICC Statute.²³⁵

E. Forms of Liability

¶49 Although the law governing the substance of atrocity crimes seems to be stabilizing, there is still considerable development with respect to forms of responsibility available within ICL in light of the collective nature of crimes within the jurisdiction of the international and hybrid tribunals.²³⁶ In particular, the tribunals are still experimenting with the full reach of the doctrines of joint criminal enterprise (JCE), superior responsibility, and co-perpetration.

1. Joint Criminal Enterprise

¶50 JCE in particular has proven to be an incredibly potent doctrine. It enables particular individuals to be held liable not only for crimes committed by others as part of common plan, but also for the criminal acts of others that are the natural and foreseeable result of the implementation of the common plan.²³⁷ The ICTY

²³⁵ Prosecutor v. al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009). Similarly, the closing order against Kaing Guek Eav (“Duch”) does not include genocide counts, although the Co-Prosecutors originally indicated their intention to pursue such charges. See Kaing Guek Eav (“Duch”), Case No. 002/14-08-2006, Closing Order Indicting Kaing Guek Eav Alia Duch (Aug. 8, 2008).

²³⁶ *Martić* Appeal Judgement, Case No. IT-95-11-A, ¶ 82 (noting that the “crimes contemplated in the Statute mostly constitute the manifestations of collective criminality and are often carried out by groups of individuals acting in pursuance of a common criminal design or purpose”).

²³⁷ JCE is traditionally conceived of as encompassing three overlapping forms. The first (“basic”) mode provides for liability where an individual intentionally acts collectively with others to commit international crimes pursuant to a common plan. The second (“systemic”) form provides for liability for individuals who contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp. The third and most controversial form provides for extended liability, not only for crimes intentionally committed pursuant to the common design, but also for crimes that were the natural and foreseeable consequence of implementing the common design. The theory with this latter form is that participants in the JCE willingly took the risk of the commission of additional non-intentional but foreseeable crimes. See generally *Haradinaj* Judgement, Case No. IT-04-84-T,

Appeals Chamber has also held that members of a JCE can be held liable for crimes committed by principal perpetrators who were not members of the JCE but who were used by members of the JCE to commit the crimes in question so long as the crime formed part of the common purpose²³⁸ and a member of the JCE used the non-members in accordance with the common plan.²³⁹ Even where the crimes committed by the non-JCE member are not part of the common plan, such crimes still may be attributable to JCE members where they are the natural and foreseeable consequence of implementing the common plan and where the defendants willingly took the risk that such crimes were a possible consequence of the JCE.²⁴⁰ In order to convict a member of a JCE for crimes committed by non-members of the JCE, a Trial Chamber must be satisfied beyond a reasonable doubt that the commission of the crimes by non-members of the JCE formed part of a common criminal purpose (first category of JCE), or of an organized criminal system (second category of JCE), or were a natural and foreseeable consequence of a common criminal purpose (third category of JCE).²⁴¹ Because of these expansive interpretations of the JCE doctrine, it has emerged in recent years as the darling in the ICTY Prosecutor's nursery,²⁴² largely replacing superior responsibility as the primary theory of responsibility for regime leaders and their followers.

¶51

A case from 2008 demonstrated, however, that the JCE charge is not a silver bullet. The ICTY acquitted two of three defendants in *Haradinaj*, which concerned crimes allegedly committed by the Kosovo Liberation Army (KLA).²⁴³ Although the Trial Chamber concluded that KLA soldiers committed some (but not all) of the acts of cruel treatment, torture, rape, and murder

¶¶ 135-39 (discussing elements of the JCE doctrine).

²³⁸ Prosecutor v. Brđanin, Case No. IT-99-36-A, Judgement, ¶¶ 410, 418 (Apr. 3, 2007).

²³⁹ *Id.* ¶¶ 413, 430.

²⁴⁰ *Id.* ¶¶ 413, 411.

²⁴¹ *Tadić* Appeal Judgement, Case No. IT-94-1-A, ¶ 220.

²⁴² Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (coining the phrase with respect to conspiracy).

²⁴³ *Haradinaj* Judgement, Case No. IT-04-84-T, ¶¶ 502-04. This was the first case before the ICTY in which the accused did not make any submissions or call witnesses. *Id.* ¶ 6. Ramush Haradinaj resigned from his position as Prime Minister of Kosovo to defend against the ICTY charges.

alleged,²⁴⁴ the evidence was insufficient to infer the existence of a common criminal objective among the accused and the other participants in the alleged JCE.²⁴⁵ In particular, the Trial Chamber determined that the Prosecution had presented little direct and insufficient circumstantial evidence of the existence of a common criminal objective connecting the defendants to the crimes proven.²⁴⁶ The trial proceedings were marred by allegations of witness tampering and intimidation. Many prosecution witnesses refused to appear or to testify at trial, necessitating the extensive use of witness protection measures, the issuance of subpoenas, and the initiation of contempt proceedings.²⁴⁷ Some witnesses who were expected to give probative testimony were never heard by the Tribunal.²⁴⁸ The Prosecutor has appealed this verdict primarily on the ground that given the prevailing circumstances of witness intimidation and fear in Kosovo, the Prosecution was deprived of its right to a fair trial when the Trial Chamber disallowed additional time to secure the testimony of witnesses.²⁴⁹ The Prosecutor has requested a retrial to present the testimony of the absent witnesses.²⁵⁰

¶52

The availability and utility of the JCE doctrine before the other tribunals remains in flux.²⁵¹ In the ICTR context, because most defendants have been charged with genocide, the Prosecutor there has primarily relied upon charges of conspiracy to commit genocide (defined as “an agreement between two or more persons to commit genocide”²⁵²) rather than a JCE theory.²⁵³ One exception is

²⁴⁴ *Id.* ¶ 470.

²⁴⁵ *Id.* ¶ 475.

²⁴⁶ *Id.* ¶¶ 471, 475-78. The Trial Chamber held that to prove the existence of a JCE on the basis of circumstantial evidence such as evidence of crimes committed by KLA soldiers, the JCE must be “the only reasonable conclusion on the evidence.” *Id.* ¶ 475.

²⁴⁷ *Id.* ¶¶ 6, 22-29.

²⁴⁸ *Id.* ¶ 28.

²⁴⁹ *Prosecutor v. Haradinaj*, Case No. IT-04-84-A, Prosecutor’s Notice of Appeal, ¶¶ 3-5 (May 1, 2008).

²⁵⁰ *Id.* ¶ 7.

²⁵¹ *See Nahimana*, Appeal Judgement, Case No. ICTR-96-11-A, ¶ 478 (noting in principle that the notion of commission covers not only the physical perpetration of a crime, but also participation in a joint criminal enterprise).

²⁵² *Zigiranyirazo* Judgement, Case No. ICTR-01-73-T, ¶ 389. Conspiracy to commit genocide is an inchoate crime; it is completed once the agreement is reached, regardless of whether the common objective is realized. *Id.* ¶ 389.

²⁵³ Genocide is the only crime for which the conspiracy theory of liability is

the *Zigiranyirazo* case before the ICTR in which the Prosecutor indicted the defendant, a businessman, for committing genocide through a JCE (category one) and for conspiracy to commit genocide.²⁵⁴ The Trial Chamber acquitted the defendant of the conspiracy to commit genocide charge for lack of evidence that the accused entered into an agreement with others to commit genocide. Although the Trial Chamber acknowledged that the Prosecutor can prove the existence of a conspiracy on indirect evidence, it also ruled that the law requires that “the existence of the conspiracy ... be the only reasonable inference from the evidence.”²⁵⁵ The Trial Chamber so ruled, even though it had established beyond a reasonable doubt that there existed an *Akazu*, or Hutu power group, that included the accused.²⁵⁶

¶53 By contrast, the Trial Chamber did convict the defendant for participating in a JCE to commit genocide. It noted that the massacre in question could only have been implemented with prior planning and coordination, which gave rise to the inference that a common criminal purpose existed.²⁵⁷ Given the circumstances—the accused’s stature, his well-received speech, and his presence while the massacre was underway—the Trial Chamber considered it appropriate to infer that the accused shared the common purpose to commit genocide.²⁵⁸ Accordingly, the Trial Chamber declined to consider whether the accused could also be convicted of aiding and abetting genocide.²⁵⁹ Finding no mitigating circumstances, the accused was sentenced to twenty years’ imprisonment.²⁶⁰

¶54 Given the potency of the JCE theory of liability, it should come as no surprise that its cognizability before the Extraordinary

available before the *ad hoc* tribunals in keeping with Article III of the Genocide Convention. See ICTR Statute, *supra* note 29, art. 2(3)(b).

²⁵⁴ *Zigiranyirazo* Judgement, Case No. ICTR-01-73-T, ¶ 6.

²⁵⁵ *Id.* ¶ 394.

²⁵⁶ *Id.* ¶ 103.

²⁵⁷ *Id.* ¶ 407.

²⁵⁸ *Id.* ¶ 408. By contrast, with respect to another set of killings at a roadblock, the Trial Chamber concluded that although the operation was organized, there was insufficient evidence to conclude that the defendant was part of a JCE to kill Tutsi individuals. *Id.* ¶ 418. On relatively weak reasoning, the Trial Chamber convicted *Zigiranyirazo* of aiding and abetting the crimes committed at the roadblock by virtue of the defendant’s instructions to check identity papers and to feed the guards well, which the Trial Chamber considered to be sufficient encouragement to constitute aiding or abetting genocide. *Id.* ¶¶ 420-24.

²⁵⁹ *Id.* ¶ 411.

²⁶⁰ *Id.* ¶ 468.

Chambers in the Courts of Cambodia (ECCC) has emerged as a contentious issue. Kaing Guek Eav, alias “Duch,” is the first individual to go to trial before the ECCC. Duch had been chief of the infamous torture center Tuol Sleng (a.k.a. S-21). The Co-Prosecutors’ July 18, 2007 Initial Submission had requested that Duch be indicted for war crimes and crimes against humanity as well as certain domestic crimes under the 1956 Penal Code—which was never abrogated by the Khmer Rouge and which forms part of the ECCC’s subject matter jurisdiction—pursuant to principles of direct, accomplice, and superior liability, including by participation in a JCE.²⁶¹ The ECCC’s Co-Investigating Judges indicted Duch in an August 8, 2008 Closing Order (which concludes their investigation) for war crimes (grave breaches of the 1949 Geneva Conventions including the unlawful confinement of civilians and the mistreatment of prisoners of war) and crimes against humanity (murder, torture, rape, extermination, persecution, imprisonment, enslavement, and other inhumane acts).²⁶² The Co-Investigating Judges justified indicting Duch solely for international crimes on the ground that his conduct “must be accorded the highest available legal classification.”²⁶³ In terms of the applicable forms of responsibility, Duch is alleged to have committed, ordered, planned, instigated, aided, and abetted the crimes in question.²⁶⁴ In addition, the Co-Investigating Judges indicted him under the doctrine of superior responsibility by virtue of the fact that he exercised effective command and control over the staff of S-21.²⁶⁵ The Closing Order limits his “commission” of crimes, however, to those incidents in which Duch “personally tortured or mistreated detainees,”²⁶⁶ implicitly rejecting a theory of JCE.

¶55 On August 21, 2008, the Co-Prosecutors appealed the Closing Order to the Pre-Trial Chamber (PTC), arguing that Duch should also have been charged with the domestic crimes of murder

²⁶¹ Kaing Guek Eav (“Duch”), Case No. 002/14-08-2006/ECCC/OCP, Public Information by the Co-Prosecutors Pursuant to Rule 54 Concerning Their Rule 66 Final Submission Regarding Kaing Guek Eav alias “Duch” (July 18, 2008).

²⁶² Kaing Guek Eav (“Duch”), Case No. 002/14-08-2006, Closing Order Indicting Kaing Guek Eav alia Duch (Aug. 8, 2008).

²⁶³ *Id.* ¶ 152.

²⁶⁴ *Id.* ¶¶ 153-56, 159-61.

²⁶⁵ *Id.* ¶¶ 157-58.

²⁶⁶ *Id.* ¶ 153.

and torture and with the commission of all the charged crimes pursuant to JCE.²⁶⁷ In support of their appeal, the Co-Prosecutors argued that the Co-Investigating Judges have discretion with respect to findings of fact, but only limited discretion to determine the legal consequences of those facts.²⁶⁸ With respect to the absence of charges for national crimes, the Co-Prosecutors argued that the decision of the Co-Investigating Judges divests the Prosecution of the ability to utilize cumulative charging—which is generally allowed where crimes contain different material elements—in situations in which it is unclear which crimes the evidence will ultimately prove and in which it would be desirable to fully account for the totality of an accused’s wrongdoing.²⁶⁹ With respect to the absence of reference to JCE, the Co-Prosecutors also argued that an accused has the right to know in advance any theories of liability that will be pursued²⁷⁰ and that JCE liability will “more completely capture the reality of the commission of complex crimes involving numerous actors.”²⁷¹

¶56

In light of the appeal, the ECCC requested former ICTY Judge Antonio Cassese to submit an *amicus curiae* brief on the evolution of the concept of the JCE as a mode of liability, with particular reference to the period 1975-1979.²⁷² Ieng Sary, a higher-ranked defendant, also sought leave on September 15, 2008 to make submissions on the application of the JCE theory of liability in the *Duch* case. In his request, Sary argued that “[t]he application of JCE liability at the ECCC fundamentally affects Mr. Ieng Sary because he is alleged to be part of the same ‘common criminal plan’ as Duch. In these circumstances, Mr. Ieng Sary has a clear interest in the outcome of the appeal and must be permitted to make submissions on this appeal.”²⁷³ The PTC denied the right

²⁶⁷ Kaing Guek Eav (“Duch”), Case No. 001/18-07-2007-ECCC/OCIJ, Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch” Dated August 8, 2008 (Sept. 5, 2008).

²⁶⁸ *Id.* ¶¶ 14-15.

²⁶⁹ *Id.* ¶¶ 21-23.

²⁷⁰ *Id.* ¶¶ 24-28.

²⁷¹ *Id.* ¶ 48.

²⁷² Kaing Guek Eav (“Duch”), Case No. 001/18-07-2007-ECCC/OCIJ, Invitation to *Amicus Curiae*, ¶ 4 (Sept. 23, 2008).

²⁷³ Kaing Guek Eav (“Duch”), Case No. 001/18-07-2007-ECCC-OIJ, Ieng Sary’s Expedited Request to Make Submissions on the Application of Joint Criminal Liability in the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”, ¶ 1 (Sept. 15, 2008). Sary also moved to disqualify the

of intervention pursuant to the Court's Internal Rules, which state that only the Co-Prosecutors, the accused, and civil parties have a right to be heard under these circumstances.²⁷⁴

¶57 The PTC ruled for the Co-Prosecutors on the question of the national crimes,²⁷⁵ reasoning that domestic crimes are not fully subsumed by the international crimes.²⁷⁶ Looking to the practice of the other international criminal tribunals, the PTC determined that cumulative charging is permissible under ICL.²⁷⁷ With respect to the lack of reference to JCE liability in the Closing Order, however, the PTC ruled that the proposed "S-21 JCE did not form part of the factual basis" of the original investigation.²⁷⁸ The PTC

Cassese brief on the ground that it would be "result determinative" given that Professor Cassese served on the appellate panel of the ICTY that rendered the *Tadić* opinion. See Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC-OCIJ, Ieng Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the *Journal of International Criminal Justice* from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order Against Kaing Guek Eav "Duch" (Oct. 3, 2008). The Pre-Trial Chamber rejected the disqualification challenge for lack of standing. Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/OCIJ, Decision on Ieng Sary's Motion to Disqualify *Amicus Curiae*, ¶ 6 (Oct. 14, 2008). As Sary prophesied, the Cassese brief, which was filed on October 27, 2008, largely tracks the ICTY's reasoning in the *Tadić* case. In particular, it identifies a collection of cases from the post-World War II prosecutions that were based on theories of common purpose or design and argues that these doctrines had crystallized into customary international criminal law prior to 1975. In addition, the brief argues that JCE liability would have been sufficiently established and assessable in domestic legislation and case law (including from France and Cambodia) to provide adequate notice to the accused in keeping with the principle of *nullum crimen sine lege*. See Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/OCIJ, *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine (Oct. 27, 2008).

²⁷⁴ Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/OCIJ, Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order against Kaing Guek Eav "Duch", ¶ 10 (Oct. 6, 2008).

²⁷⁵ Kaing Guek Eav ("Duch"), Case No. 001/18-07-2007-ECCC/OCIJ, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", ¶ 107 (Dec. 5, 2008). In so ruling, the PTC also decided a question of first impression regarding its standard of review of a Closing Order. It determined that "it is empowered to decide independently on the legal characterization [of any offenses] when deciding whether to include in the Closing Order the offences and mode of liability requested by the Co-Prosecutors." *Id.* ¶ 44.

²⁷⁶ *Id.* ¶¶ 72, 82-84.

²⁷⁷ *Id.* ¶ 87.

²⁷⁸ *Id.* ¶¶ 137-41.

also described the Co-Prosecutors' formulation of the S-21 JCE as "vague" on the ground that they seemed to plead three different forms of JCE.²⁷⁹ Given these framing deficiencies, the PTC thus dodged the larger questions of whether the form of responsibility was part of customary international law during the Khmer Rouge era and thus whether it will be available as a theory of responsibility before the ECCC if properly pled.²⁸⁰

2. Superior Responsibility

¶58

Given the difficulties of establishing some of the elements of superior responsibility,²⁸¹ and the utility of the doctrine of JCE, prosecutors before the ICTY regularly charge JCE rather than superior responsibility. Nonetheless, superior responsibility remains a tool in the prosecutors' toolbox. The most compelling

²⁷⁹ *Id.* ¶ 135.

²⁸⁰ *Id.* ¶ 142. The ECCC Law does not specifically mention the availability of JCE as a form of commission, but the ICTY in the landmark *Tadić* decision treated JCE as a prosecutable form of "commission," even though its Statute is also silent as to this form of responsibility and excludes conspiracy except with respect to the crime of genocide. *Tadić* Appeal Judgement, Case No. IT-94-1-A, ¶¶ 187-220. Although the *Tadić* indictment did not specifically allege joint criminal enterprise liability, the theory was allowed on appeal. Nowadays, when the Prosecutor intends to rely on joint criminal enterprise, it must specifically plead this mode of liability in the indictment. *Bikindi* Judgement, Case No. ICTR-01-72-T, ¶ 398 (citing Prosecutor v. Simić, Case No. IT-95-9-A, Judgement, ¶ 22 (Nov. 26, 2006) ("[W]hen the Prosecution charges the 'commission' of one of the crimes . . . , it must specify whether the said term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. It is not enough for the generic language of an indictment to 'encompass' the possibility that joint criminal enterprise is being charged. The Appeals Chamber reiterates that joint criminal enterprise must be specifically pleaded in an indictment. . . . [I]t is insufficient for an indictment to merely make broad reference to Article 7(1) . . . ; such reference does not provide sufficient notice to the Defence or to the Trial Chamber that the Prosecution is intending to rely on joint criminal enterprise responsibility.")).

²⁸¹ Compare CDF Appeal Judgment, Case No. SCSL-04-14-A ¶¶ 174-89 (confirming conviction of Kondewa on grounds that he exercised *de facto* effective control over Kamajor commanders, even though he was a civilian) with ¶¶ 212-16 (finding there was insufficient evidence of a relationship of subordination with respect to other commanders). In so ruling, the Appeals Chamber confirmed that the test for establishing the existence of a superior-subordinate relationship is largely the same for both military and civilian superiors. *Id.* ¶ 175. See generally Beth Van Schaack, *Command Responsibility: An Anatomy of Proof in Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003) (discussing challenges of proving superior responsibility).

jurisprudence of 2008 with regard to the doctrine of superior responsibility appears in separate opinions in *Orić*.²⁸² In that case, the Trial Chamber indicated that, although it would have ruled differently had the issue been one of first impression, it felt bound by prior precedent in *Hadžihasanović*²⁸³ to disallow arguments by the prosecution that the defendant—Naser Orić, Bosniak commander of the Joint Armed Forces around Srebrenica—could be prosecuted and convicted for failing to punish police subordinates whose crimes were committed prior to the creation of a superior-subordinate relationship involving the accused.²⁸⁴ The Tribunal in *Hadžihasanović* had also somewhat reluctantly held²⁸⁵ that a superior could only be held liable for crimes committed while the superior-subordinate relationship was in place.²⁸⁶ In particular, the Appeals Chamber determined that there was no customary international law basis to hold a superior liable for the crimes of his or her subordinates when such crimes are committed prior to the superior assuming his or her position of command.²⁸⁷ Judge Mohamed Shahabuddeen issued a strong dissent in

²⁸² Prosecutor v. Orić, Case No. IT-03-68-A, Judgement (July 3, 2008) [hereinafter *Orić* Appeal Judgement]. The Trial Chamber originally convicted Orić for failing to prevent subordinates under his command from mistreating Bosnian Serb prisoners and sentenced him to two years' imprisonment. Prosecutor v. Orić, Case No. IT-03-68-T, Judgement, ¶¶ 490, 565-72, 578 (June 30, 2006) [hereinafter *Orić* Trial Judgement]. This resulted in his immediate release for time served. On the Prosecutor's appeal, the Appeals Chamber actually reversed the conviction. *Orić* Appeal Judgement, Case No. IT-03-68-A, ¶ 180.

²⁸³ Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003) [hereinafter *Hadžihasanović* Interlocutory Appeal]. See also Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgement (Mar. 15, 2006) [hereinafter *Hadžihasanović* Trial Judgement]. The Trial Chamber convicted Enver Hadžihasanović and his co-accused Amir Kubera, two Bosniak commanders, for crimes committed by subordinates (murder, cruel treatment, and plunder). On cross-appeals, the Appeals Chamber vacated some convictions and reduced the defendants' sentences. Prosecutor v. Hadžihasanović, Case No. IT-01-47-A, Judgement, ¶ 356-58 (Apr. 22, 2008).

²⁸⁴ *Orić* Trial Judgement, Case No. IT-03-68-T, ¶ 335 (noting that “for a superior's duty to punish, it should be immaterial whether he or she had assumed control over the relevant subordinates prior to their committing the crime.”). See also *id.* ¶¶ 574-75.

²⁸⁵ *Hadžihasanović* Trial Judgement, Case No. IT-01-47-T, ¶ 199.

²⁸⁶ *Hadžihasanović* Interlocutory Appeal, Case No. IT-01-47-AR72, ¶ 51.

²⁸⁷ *Id.* ¶ 45.

Hadžihasanović.²⁸⁸ In *Orić*, he restyled his dissent as a declaration²⁸⁹ and was joined by Judges Liu Daqun²⁹⁰ and Wolfgang Schomburg in dissent²⁹¹ in strongly urging the Tribunal to overrule its prior decision in *Hadžihasanović*. Nonetheless, without a majority of judges willing to formally dissent, the Appeals Chamber in *Orić* declined to even reconsider the *ratio decidendi* of *Hadžihasanović*, despite briefing by the parties.²⁹²

¶59 The *Orić* detractors took issue with the Appeals Chamber's inaction, noting the duty of the Appeals Chamber to correct the law and to address matters of general importance to the Tribunals' jurisprudence and to international criminal law,²⁹³ even if such matters would not be outcome determinative²⁹⁴ and especially where the issue is one that has proved to be contentious in subsequent cases.²⁹⁵ They also criticized the reasoning used and sources relied upon by the Tribunal²⁹⁶ in *Hadžihasanović* to

²⁸⁸ Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR72, Dissent by Judge Shahabuddeen (July 16, 2003).

²⁸⁹ Prosecutor v. Orić, Case No. IT-03-68-A, Declaration of Judge Shahabuddeen (July 3, 2008) [hereinafter Shahabuddeen *Orić* Declaration]. Judge Shahabuddeen explained his issuance of a declaration rather than a dissent on the ground that he did not feel that a judge in the dissenting minority in *Hadžihasanović* should form part of a reversing majority in *Orić*. *Id.* ¶ 15.

²⁹⁰ Prosecutor v. Orić, Case No. IT-03-68-A, Partially Dissenting Opinion and Declaration of Judge Liu (July 3, 2008) [hereinafter Liu *Orić* Dissent].

²⁹¹ Prosecutor v. Orić, Case No. IT-03-68-A, Separate and Partially Dissenting Opinion of Judge Schomburg (July 3, 2008) [hereinafter Schomburg *Orić* Dissent].

²⁹² *Orić* Appeal Judgement, Case No. IT-03-68-A, ¶ 167.

²⁹³ Schomburg *Orić* Dissent, Case No. IT-03-68-A, ¶ 32 (noting the importance of correcting the law). *See also* Prosecutor v. Brđanin, Case No. IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal (May 5, 2005) (noting that such determinations "do not constitute impermissible 'advisory opinions,' but are instead necessary means of moving forward this *ad hoc* international tribunal's jurisprudence within the limited time in which it operates and contributing meaningfully to the overall development of international criminal law").

²⁹⁴ Liu *Orić* Dissent, Case No. IT-03-68-A, ¶¶ 3-4; Schomburg *Orić* Dissent, Case No. IT-03-68-A, ¶ 27 (noting that a decision on the issue would not affect the liability of the particular accused, such that overturning a prior precedent would work no unfairness).

²⁹⁵ Liu *Orić* Dissent, Case No. IT-03-68-A, ¶ 8; Schomburg *Orić* Dissent, Case No. IT-03-68-A, ¶ 4 (noting that a number of judges have expressed disagreement with *Hadžihasanović*).

²⁹⁶ Liu *Orić* Dissent, Case No. IT-03-68-A, ¶¶ 14-21 (critiquing the prior interpretation Protocol I's formulation of command responsibility as inconsistent with the plain text of the relevant provisions).

conclude that there was no customary law basis to hold a successor liable for failing to punish the crimes committed by his subordinates when they were under the command of his predecessor. Finally, they noted that the object and purpose of IHL are undermined by the hole in the doctrine created by the prior opinion.²⁹⁷

¶60 Article 7(3) of the ICTY Statute, and indeed all formulations of the superior responsibility doctrine, make clear that the duty to prevent and the duty to punish are two separate but inter-related duties and that liability may attach with respect to either.²⁹⁸ The two are not unrelated, however, because rigorously punishing past bad acts by subordinates will contribute to the prevention of future crimes. Enabling a newcomer to be prosecuted for failing to punish known bad acts committed prior to his assumption of the position as a superior will ensure that the superior responsibility doctrine accomplishes what it is meant to accomplish—the creation of strong legal incentives to rigorously investigate and—where appropriate—prosecute crimes committed by subordinates.²⁹⁹ Ensuring the predictability of investigation and punishment will prevent a culture of impunity from taking root within an armed force. This, in turn, will go far toward preventing the commission of abuses in the first place.

¶61 There is no strong tradition of *stare decisis* in international law,³⁰⁰ but the international criminal tribunals have acknowledged the importance of stability and predictability in the law. Before the ICTY, the Appeals Chamber has indicated that it can depart from a prior decision for only “cogent reasons.”³⁰¹ This is one instance in which the ICTY should invoke that power. The *Hadžihasanović*

²⁹⁷ Schomburg *Orić* Dissent, Case No. IT-03-68-A, ¶¶ 16-17.

²⁹⁸ *Orić* Trial Judgement, Case No. IT-03-68-T, ¶ 335 (noting the “cohesive interlinking of preventing and punishing” in the doctrine); Liu Dissent, Case No. IT-03-68-A, ¶ 29.

²⁹⁹ Liu *Orić* Dissent, Case No. IT-03-68-A, ¶ 30 (noting that the purpose of the command responsibility doctrine is to ensure compliance with IHL and that the majority’s view “to a certain extent defeats this objective”). See also *id.* ¶ 31 (“When a commander assumes his duties, he does not only take over the rights and privileges of his predecessor, but also his duties and obligations.”).

³⁰⁰ Indeed, the ICJ specifically disclaims any precedential value of its prior decisions. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1031, pt. 2, 1055, 1060.

³⁰¹ Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, ¶¶ 107, 110, 111, 125 (Mar. 24, 2000).

decision is wrong as a matter of law, flawed as a matter of logic, and counter-productive as a matter of policy. It has been criticized by subsequent panels³⁰² and in the literature,³⁰³ is demonstrably erroneous, and produces arbitrary results. In short, it manifests all of the grounds recognized by courts all over the world for overturning prior precedent, notwithstanding the imperatives of predictability and stability guaranteed by *stare decisis*.

3. Co-Perpetration

¶62

Although JCE has to a certain extent been applied in the other *ad hoc* tribunals, it remains unclear to what extent the ICTY's JCE jurisprudence will influence the ICC. The JCE doctrine *per se* is not specifically enumerated within the Statute of the ICC, largely because the law in this area was still under development by the ICTY at the time the ICC Statute was finalized. The ICC Statute does contain reference to the common purpose doctrine,³⁰⁴ with language drawn from Article 2(3)(c) of the Convention for the Suppression of Terrorist Bombings,³⁰⁵ one of the sources relied on the *Tadić* appeal to support the existence of the JCE doctrine. Nonetheless, the ICC Prosecutor has to date primarily charged defendants pursuant to the doctrine of co-perpetration as set forth in Article 25(3)(a),³⁰⁶ rather than pursuant to the common purpose doctrine.³⁰⁷

³⁰² Schomburg *Orić* Dissent, Case No. IT-03-68-A, ¶ 27 (noting that *Hadžihasanović* was decided by a slim majority, was criticized in subsequent cases, and remains disputed—all grounds suggesting that “the threshold for overcoming the principle of *stare decisis* . . . is not as high as it would be vis-à-vis a unanimously adopted interpretation of the law.”).

³⁰³ See Carol T. Fox, *Closing a Loophole in Accountability for War Crimes: Successor Commanders' Duty to Punish Known Past Offenses*, 55 CASE W. RES. L. REV. 443 (2004).

³⁰⁴ In particular, the provision states that someone can be criminally liable if she:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

Be made in the knowledge of the intention of the group to commit the crime.

ICC Statute, *supra* note 31, art. 25(3)(d).

³⁰⁵ U.N. Doc. A/Res/52/164 (Jan. 9, 1998).

³⁰⁶ This Article provides:

In accordance with this Statute, a person shall be criminally responsible and liable

¶63 For example, the *Katanga & Chui* case involving crimes committed by allied members of the *Force de Résistance Patriotiques en Ituri* (FRPI—Katanga’s organization) and the *Front des Nationalistes et Intégrationnistes* (FNI—Chui’s organization) in the DRC village of Bogoro. The Prosecutor charged the defendants with “criminal responsibility as a co-perpetrator of a common plan”³⁰⁸ and, in the alternative, with ordering the offences charged pursuant to Article 25(3)(b).³⁰⁹ According to the co-perpetrator doctrine, the principals involved in a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who control or mastermind its commission because they decide whether and how the offense will be committed, even if they are removed from the scene of the crime.³¹⁰ This approach encompasses three categories of principal:

for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

ICC Statute, *supra* note 31, art. 25(3)(a).

³⁰⁷ This concept has been invoked before the ICTY, although the Appeals Chamber ultimately decided that the doctrine did not constitute part of customary international law. *See* Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, ¶ 741 (July 31, 2003) (identifying the accused as a co-perpetrator where he was the perpetrator behind the direct perpetrator); Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶ 62 (Mar. 22, 2006) (reversing the Trial Chamber by noting that co-perpetratorship “does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers” in contradistinction to the joint criminal enterprise doctrine, which is well established). The ICC rejected this approach in *Katanga & Chui*, on the ground that Article 21 of the ICC Statute directs the Court to consider its own Statute, first and foremost, as a source of law, so that whether or not the contested mode of liability forms part of customary international law is of no moment. Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 508 (Sept. 30, 2008) [hereinafter *Katanga & Chui* Decision on Confirmation of Charges]. The PTC noted, “[t]his is a good example of the need not to transfer the *ad hoc* tribunals’ case law mechanically to the system of the Court.” *Id.*

³⁰⁸ *Id.* ¶ 469.

³⁰⁹ *Id.* ¶ 470. Article 25(3)(b) allows for jurisdiction over anyone who “[o]rders, solicits or induces the commission of such a crime which in fact occurs or is attempted.”

³¹⁰ *Id.* ¶ 485. *See generally* Kai Ambos, *Article 25: Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 743-770 (Otto Triffterer ed., 2008).

- a. The individual who physically carries out all elements of the offense (commission of the crime as an individual);
- b. The individual who has, together with others, control over the offence by reason of the essential tasks assigned to him (commission of the crime jointly with others);
- c. The individual who has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).³¹¹

In the confirmation decision, an ICC Pre-Trial Chamber (“PTC”) treated this form of liability as an alternative to the doctrine of superior responsibility: “through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.”³¹² It also analogized the idea of committing a crime through another with the domestic law concept of “perpetrator-by-means” whereby the defendant uses the direct perpetrator as a tool or instrument for the commission of the crime.³¹³ Under this doctrine, although both individuals may ultimately be jointly liable for the crimes, one is deemed the “perpetrator behind the perpetrator.”³¹⁴ This doctrine is also useful in situations in which the defendant controls an organization or “organized apparatus of power”³¹⁵ that has been used to commit crimes. Under these circumstances, the PTC noted that the organization in question

³¹¹ *Katanga & Chui* Decision on Confirmation of Charges, Case No. ICC-01/04-01/07-717, ¶ 488.

³¹² *Id.* ¶ 492.

³¹³ *Id.* ¶ 495. Typically under domestic law, the direct perpetrator is not fully criminally responsible for his actions, either because he acted under duress, suffered from a mistake of fact, or is not capable of blameworthiness because of youth or incapacitation. *Id.* ¶ 495.

³¹⁴ *Id.* ¶ 496.

³¹⁵ *Id.* ¶ 511.

must be based on hierarchical relations between superiors and subordinates. The organisation must also be composed of sufficient subordinates to guarantee that superiors' orders will be carried out, if not by one subordinate, then by another. These criteria ensure that orders given by the recognised leadership will generally be complied with by their subordinates.³¹⁶

Indeed, “[t]he main attribute of this kind of organisation is a mechanism that enables its highest authorities to ensure automatic compliance with their orders.”³¹⁷ The PTC noted that such organizations are often formed by virtue of subjecting their members to intensive and violent training regimens.³¹⁸

¶64 In all these cases, the defendant is treated as a principal rather than as an accessory,³¹⁹ precisely because the leader can secure automatic compliance with his orders. This is compared with charges brought under Article 25(3)(b) (for ordering crimes *simpliciter*), whereby the defendant is considered a mere accessory to the crime committed by the subordinate.³²⁰ Thus, criminal actions of subordinates can be attributed to their leaders.³²¹ As will be relevant in the *Katanga & Chui* case, criminal liability can be ascribed across organizations and leaders on the basis of “mutual attribution.”³²²

¶65 In addition to this element of control, the doctrine of co-perpetration also requires proof that there is a common plan or agreement to carry out the elements of the crime through other

³¹⁶ *Id.* ¶ 512.

³¹⁷ *Id.* ¶ 517.

³¹⁸ *Id.* ¶ 518.

³¹⁹ *Id.* ¶ 504. The distinction between perpetrators and accomplices may have little practical effect in common law jurisdictions at sentencing. By contrast, in some civil law jurisdictions, accomplices may by law receive shorter sentences. For example, under Dutch law, principals include “[t]hose who commit a criminal offense, either personally or jointly with another or others, or who cause an innocent person to commit a criminal offense.” Pen. Code. § 47(1.1) (Neth). Accessories are those “who intentionally assist during the commission of the serious offense.” *Id.* § 48. Punishment for accessories is one-third that of principals, *id.* §49.1, and in no case shall exceed 15 years, *id.* §49.2.

³²⁰ *Katanga & Chui* Decision on Confirmation of Charges, Case No. ICC-01/04-01/07-717, ¶ 517.

³²¹ *Id.* ¶ 519.

³²² *Id.* ¶ 520.

individuals³²³ and that the defendant exercised joint control over the crime as a result of her dual ability to make an “essential contribution to it” and to frustrate the commission of the crime by not performing her tasks.³²⁴ In terms of the required mental element, the doctrine of co-perpetration requires a showing that

Both suspects: (a) are mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime; (b) undertake such activities with the specific intent to bring about the objective elements of the crime, or are aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events.³²⁵

In addition, with respect to perpetration through another, it must be shown that the defendant was aware of the factual circumstances enabling him to exercise control of the crime through the other person, i.e., that he played an essential role in the implementation of the plan and that he could frustrate the plan by withholding his contribution.³²⁶

¶66 Turning to the evidence in the record to date, the ICC PTC confirmed that there was sufficient evidence to establish substantial grounds to believe that the defendants exercised control over groups whose members, including child soldiers, would automatically comply with their orders,³²⁷ that they agreed upon a common plan to wipe out the village,³²⁸ and that they each played essential roles in implementing the plan.³²⁹ In addition, it was sufficiently established that the defendants intended the village to be wiped out and knew that their orders would be automatically complied with.³³⁰

³²³ *Id.* ¶ 522.

³²⁴ *Id.* ¶ 525.

³²⁵ *Id.* ¶ 533.

³²⁶ *Id.* ¶¶ 534, 538-39.

³²⁷ *Id.* ¶¶ 546-47.

³²⁸ *Id.* ¶ 548.

³²⁹ *Id.* ¶ 555.

³³⁰ *Id.* ¶¶ 562-63.

4. Conspiracy

¶67 In the long-anticipated Military I judgment, the ICTR illustrated the stringent standard of proof required to convict defendants of conspiracy on the basis of circumstantial evidence.³³¹ Théoneste Bagasora held the position of *directeur du cabinet* in Rwanda's Ministry of Defense and was widely believed to have been a major architect of the genocide in Rwanda. He and three other military commanders were prosecuted together for genocide, conspiracy and complicity to commit genocide, crimes against humanity, and war crimes including the killing of the Rwandan Prime Minister, Agathe Uwilingiyimana, and ten Belgian peacekeepers.³³² The trial consumed 408 days over six years and involved the testimony of 242 witnesses.

¶68 Conspiracy to commit genocide requires “an agreement between two or more persons to commit the crime of genocide.”³³³ The crime of conspiracy to commit genocide consists of the *actus reus*—an agreement between the two or more people—and the *mens rea* for genocide—“the intent to destroy in whole or in part a national, ethnical, racial or religious group as such.”³³⁴ Circumstantial evidence (such as evidence of concerted and coordinated action among individuals) can prove the existence of a conspiracy,³³⁵ but a finding of conspiracy on the basis of circumstantial proof must be the “only reasonable inference based on the totality of the evidence.”³³⁶ The Trial Chamber noted that

³³¹ Prosecutor v. Bagasora, Case No. ICTR-98-41-T, Judgement (Dec. 18, 2008) [hereinafter *Bagosora* Judgement].

³³² *Id.* ¶ 2002. The Prosecutor also charged Nsengiyumva, one of Bagasora's co-defendants, with incitement to commit genocide. Witnesses for the defendant argued that he preached peace at a series of meetings. The Prosecutor argued that this was a tactic to create a false sense of security among the Tutsi population and appease the international community. The prosecution, however, was unable to prove this theory sufficiently. *Id.* ¶¶ 1258-85.

³³³ *Id.* ¶ 2087. The Trial Chamber noted that in the eight cases concerning allegations of a conspiracy to commit genocide, only three cases resulted in a conviction for the crime: one pursuant to a guilty plea (Kambanda), one concerning a specific attack (Niyitegeka) and one concerning the RTLM that was overturned on appeal. *See id.* ¶ 2089.

³³⁴ *Id.* ¶ 2087.

³³⁵ “The qualifiers ‘concerted or coordinated’ are important: it is not sufficient to simply show similarity of conduct.” *Id.* ¶ 2088 (citing *Nahimana* Appeal Judgement, Case No. ICTR-96-11-A, ¶¶ 896-97).

³³⁶ *Id.* ¶ 2088 (citing Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgement, ¶ 221 (Mar. 12, 2008); *Nahimana* Appeal Judgement, Case No.

there was no requirement that all of the accused conspired together; rather, it is sufficient that each accused conspired with at least one other.³³⁷

¶169 The question of the Tribunal's temporal jurisdiction also became central to the case, because the Prosecution argued that the conspiracy to commit genocide was already in existence prior to April 7, 1994, the day after the assassination of Juvénal Habyarimana and the official start of the genocide.³³⁸ The Prosecutor put on evidence of events taking place between 1990 through 1994 that in his estimation evidenced a "growing and developing preparedness" forming links "in a chain of conspiracy."³³⁹ The Trial Chamber observed, however, that expert witnesses had varying views on the start date of the planning of the conspiracy, with some testifying that the conspiracy began in 1990 and others testifying that the genocide was first "spark[ed]" by the downing of Habyarimana's plane on April 6.³⁴⁰

¶170 The Prosecution adduced seven categories of circumstantial evidence to prove the existence of an extant conspiracy to commit genocide: (1) the convening of an "enemy commission" that identified Tutsi individuals as the enemy; (2) statements by Bagasora concerning the impending "apocalypse;" (3) meetings before April 6, 1994 between local military commanders; (4) the preparation and use of lists of Tutsi names; (5) the creation, arming, and training of civilian militias; (6) information from an informant ("Jean-Pierre") about a "Machiavellian Plan;" and (7) the defendants' involvement in clandestine Hutu Power organizations.³⁴¹ The Trial Chamber found, however, that the evidence was insufficient with respect to each of these elements to conclude that the only reasonable conclusion was that the defendants were involved in a conspiracy to commit genocide. Indeed, the Trial Chamber concluded that much of this evidence is also consistent with preparations for a political or military power struggle.³⁴² Three of the defendants were convicted of direct and

ICTR-96-11-A, ¶ 896).

³³⁷ *Id.* ¶ 2096.

³³⁸ *See id.* ¶¶ 2091, 2093, 2094.

³³⁹ *Id.* ¶ 2094.

³⁴⁰ *Bagasora* Judgement, Case No. ICTR-98-41-T, ¶ 2095.

³⁴¹ *Id.* ¶¶ 2098-2104.

³⁴² *Id.* ¶ 2110.

superior responsibility for international crimes,³⁴³ Kabiligi was acquitted, largely on the strength of his alibi defense.³⁴⁴

5. Chains of Liability

¶71

The jurisprudence of the international tribunals confirms that multiple modes of participation may be relevant to a particular crime base. The ICTY in particular has shown a willingness to parse the facts between the three forms of JCE liability.³⁴⁵ In addition, ICL cases are increasingly premised on layered theories of responsibility, where particular defendants are prosecuted for events that have been committed by individuals several steps removed from the defendants' immediate fields of operation. So, we can now contemplate situations in which there is a joint criminal enterprise involving the defendant that develops a common purpose to commit certain crimes. Other members of the JCE use individuals outside the JCE to provide knowing and substantial support to still other individuals who commit crimes that were not within the original common purpose of the JCE, but were the natural and foreseeable consequence of implementing the JCE—including, potentially, genocide.³⁴⁶ Or, it should be possible to pursue a case involving a defendant who is charged pursuant to superior responsibility for acts of complicity committed by subordinates under her effective command.³⁴⁷ This chain of liability is possible at a theoretical doctrinal level, but providing adequate proof of each relationship of derivative or secondary liability along this daisy chain can be exceedingly difficult. Where the prosecutor has not sufficiently established each and every link

³⁴³ *Id.* ¶ 2258.

³⁴⁴ *Id.* ¶¶ 1969-86.

³⁴⁵ *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement ¶¶ 435-55 (June 12, 2007) (convicting defendant of some crimes pursuant to a basic JCE and other crimes as foreseeable under the extended form of JCE).

³⁴⁶ *See Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, ¶ 31 (Oct. 22, 2004) (recognizing applicability of joint criminal enterprise liability to the crime of genocide).

³⁴⁷ *See Prosecutor v. Boškoski*, Case No. IT-04-82-T, ¶ 404 (July 10, 2008) (noting that superior responsibility “encompasses all forms of criminal conduct by subordinates, not only the ‘committing’ of crimes in the restricted sense of the term, but also all other modes of participation in crimes envisaged under Article 7(1) of the Statute”).

in the chain of liability, the notion of personal liability becomes too attenuated.

III. CONCLUSION

¶72 Unless the international community creates more *ad hoc* or hybrid courts, international prosecutions will increasingly proceed exclusively before the ICC.³⁴⁸ Although the ICC Statute and its assistive Elements of Crimes³⁴⁹ more closely mirror the precision expected of domestic penal codes, there are legality deficits within the Court's statutory framework that may invite or necessitate judicial innovation, notwithstanding more robust *nullum crimen sine lege* ("no crime without law") provisions that not only prohibit the retroactive application of law but also mandate strict construction in favor of the defendant.³⁵⁰ The ICC has yet to issue many substantive opinions, although its decisions confirming the charges against the accused do provide some insights into how the ICC will approach its subject matter. Nonetheless, these debut rulings already reveal that while the personnel of the ICC are

³⁴⁸ In addition, the ECCC will have to determine the state of ICL in the 1975-79 period, when the Khmer Rouge were in power and when many of the most relevant developments in the law of war crimes, crimes against humanity, and genocide were in flux. See ECCC Statute, *supra* note 30, art. 2 (limiting the ECCC's temporal jurisdiction to crimes committed during the period of April 17, 1975 to January 6, 1979).

³⁴⁹ Preparatory Comm'n for the Int'l Criminal Court, *Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (Nov. 2, 2000), available at <http://untreaty.un.org/cod/icc/prepcomm/jun2000/5thdocs.htm> (follow "Addendum: Finalized draft text of the Elements of Crimes" hyperlinks). See David Hunt, *The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56, 60 (2004) (opining that the Elements of Crime—"an overwhelming exercise of legal positivism"—will have the effect of "stultifying further growth in the law").

³⁵⁰ Article 22(1) of the ICC Statute dictates that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Article 24(2) provides that "[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply." Likewise, the principle of strict construction and the rule of lenity are specifically mandated at Article 22(2), which states: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." ICC Statute, *supra* note 31.

clearly influenced by their brethren at the *ad hoc* tribunals, they are by no means engaging in a mechanical borrowing of established doctrines. Instead, the world's first permanent international court is beginning to chart its own course. As the ICC increasingly issues substantive rulings, these developments will no doubt feature prominently in future atrocity crimes litigation reviews.