

ICTY Manual on Developed Practices

**Prepared in conjunction with UNICRI
as part of a project to preserve the legacy of the ICTY**

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Foreword

This Manual is the result of collaboration between the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Interregional Crime and Justice Research Institute (UNICRI). A defining feature of the Presidency of Judge Pocar has been an emphasis on the ICTY legacy as an important part of its Completion Strategy. In this respect, President Pocar envisaged the ICTY's completion as a continuation of its work by other domestic jurisdictions and a lasting partnership with local authorities. Accordingly, in collaboration with UNICRI, which undertook this activity within the framework of its programme Security Governance in Post-Conflict Areas, and under the Chairmanship of President Pocar, this Manual is aimed at preserving the legacy of the ICTY in the form of a blueprint of its practices for use by other international and domestic courts. This Manual was prepared with assistance and contributions from a number of ICTY staff members from each of the Tribunal's organs. The material was collated and prepared for UNICRI by an ICTY Review Committee, comprising John Hocking, Deputy Registrar, Catherine Marchi-Uhel, Head of Chambers, Gavin Ruxton, Chief of Prosecutions and Gabrielle McIntyre, Chef de Cabinet. The ICTY Review Committee worked closely with UNICRI, which was facilitating the compilation of the Manual on the basis of the information provided by the ICTY. UNICRI team was composed of members of its Counter Terrorism and Security Governance Laboratory: namely, Massimiliano Montanari, Programme Manager, who coordinated the initiative on UNICRI's behalf, Judge Roberto Bellelli and Prosecutor Jesus Santos, UNICRI Scientific Advisors, Alma Pintol, Francesco Miorin and Madhawa Tennakoon, UNICRI Consultants and Associates. The editing of the Manual was undertaken by Mr. Russel Weaver, Professor of Law, with the support of Mariamah Crona, Jessica Peake, and Alice Burani, UNICRI Consultants. Matteo Di Pane undertook the composition and art direction. In addition to the above, some distinguished members of the academia contributed to it by way of providing feedback about methodology adopted in presentation of the Manual.

Staff members who contributed to the contents of this Manual include Ken Roberts, Guido Acquaviva, Evelyn Anoya, Tilman Blumenstock, Valeria Bolici, Augustus De Witt, Joakim Dungel, Sabrina Fofana, Linda Murnane, Matthew Gillett, Martin Petrov, Wayde Pittman, Thilan Legierse, Nerma Jelačić, and Liam McDowall.

The legacy of the ICTY must be preserved by the continued prosecution of war crimes by domestic jurisdictions in the former Yugoslavia. In that respect, this Manual is particularly aimed at sharing with those jurisdictions the practices of the Tribunal with the hope that they may be helpful in their prosecutions. But this Manual also has a much broader purpose and that is to provide information from those intimately involved in the process to all national and international jurisdictions faced with the task of prosecuting for crimes committed during armed conflict in the hope that they may also be assisted in their task by the practices and lessons learnt by the ICTY. In that respect, this Manual underscores the key role of UNICRI as an interregional institute of the UN in promotion of the legacy of ICTY in the Balkan region and in other countries and regions all around the world affected by conflicts.

We hope that this Manual provides valuable guidance and insight to all those concerned in the prosecution of alleged war criminals.

The Hague, 16/11/2008

Fausto Pocar
President, ICTY

Sandro Calvani
Director, UNICRI

I. Introduction

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by UN Security Council resolution 827 on May 25, 1993 as an *ad hoc* measure to contribute to the restoration and maintenance of peace in the former Yugoslavia, after the Security Council determined that the situation in the former Yugoslavia constituted a threat to international peace and security. As a subsidiary organ of the UN, the ICTY was charged with the formidable task of prosecuting persons accused of serious violations of international humanitarian law (IHL) committed in the territory of the former Yugoslavia since 1991. Not since the International Military Tribunals of Nuremberg and Tokyo, established after World War II, had individuals been held to account by an international court for perpetrating mass atrocities. And, for the first time in history, the international community, and not just the war time victors, acted to establish a tribunal for prosecuting persons in order to deter the commission of further crimes, bring perpetrators to justice, and contribute to the restoration and maintenance of international peace and security. Soon thereafter, another *ad hoc* tribunal, the International Criminal Tribunal for Rwanda (ICTR), was established in 1994 to prosecute persons accused of committing genocide and other serious violations of IHL in Rwanda. The process by which both institutions were established, through a Security Council resolution, was completely novel and for some controversial; yet there is widespread recognition that the decision by the Security Council to establish the *ad hoc* Tribunals constitutes a landmark in the fight against impunity and a major advance in international law.

The establishment of the ICTY was a catalyst for a growing trend of holding individuals accountable for breaches of IHL, especially in the theatre of armed conflicts. One cannot underestimate the impact of the work of the ICTY on what was, at the time of its establishment, an as yet untested belief in the idea that international humanitarian law is not only enforceable, but capable of contributing to the restoration of international peace and security. In the wake of the establishment of the ICTY, there has been increased interest within the global community in the administration of international criminal justice to hold individuals accountable for war crimes, crimes against humanity and genocide, as evidenced in recent years by the proliferation of other international and mixed criminal courts and tribunals in various parts of the world. There is little doubt that the *ad hoc* tribunals of the Former Yugoslavia and Rwanda accelerated the elaboration of the statute of a universal criminal court, which culminated with the adoption of the Rome Statute in 1998. It is also undeniable that the proliferation of judicial bodies supported by the international community did not end with the creation of the International Criminal Court (ICC), as demonstrated by the establishment of mixed panels by the UN administration in Kosovo in 2000, the Special Court for Sierra Leone in 2002, the Special Panels for Serious Crimes in East Timor in 2002 and the Extraordinary Chambers in the Courts of Cambodia in 2003. The proliferation phenomenon may well continue even after the ICC expands its case-load, due in part to the need to bring perpetrators to justice for crimes committed before the Rome Statute entered into force.

In addition to holding individuals accountable, the establishment of the ICTY marked a bold step in the realization that States must prosecute individuals for violations of IHL under their domestic laws according to international standards. The ICTY was established because domestic institutions in the region were unable to prosecute such cases at the time. The Statute therefore provided ways for the ICTY to assert its primacy over national courts. However, the Tribunal could not have been entrusted with exclusive jurisdiction over all of the violations of IHL committed in the territory of the former Yugoslavia. It was thus never intended to act as a complete substitute for

I. Introduction

national courts in the region, which undoubtedly have an essential role to play in ensuring that justice is served, reconciliation is promoted and closure is brought to the families and victims of the war.

In 2003, recognizing that domestic capacity had increased, the UN Security Council passed resolution 1503 (2003), directing the ICTY to transfer all lower and mid-level accused back to the region for trial by domestic courts. At the same time, the Security Council called on the international community to assist national jurisdictions in improving their capacity to prosecute war crimes cases. Similarly, under the complementarity principle in the Rome Statute, the ICC has concurrent jurisdiction with States over individuals charged with perpetrating these crimes. The ICC will only exercise its jurisdiction in cases when a national court is unable or unwilling to prosecute crimes. This statutory provision of the ICC provides the clearest demonstration that the international community has a vested interest in ensuring that domestic courts of States are held accountable for conducting trials against perpetrators of the most serious international crimes in full compliance with due process standards.

In light of its complementary function, the ICTY has been actively working to strengthen the capacity of national judicial systems in the former Yugoslavia to prosecute IHL violations in accordance with the highest international standards. This is a task that has been described by the Security Council as crucially important to the implementation of the ICTY's completion strategy, which provides for a phased and coordinated completion of the Tribunal's historic mandate by the end of 2011 and the continuation of the Tribunal's work by domestic institutions.

In accordance with the ICTY policy of cooperating with domestic jurisdictions in the former Yugoslavia, the ICTY has referred a number of lower to mid-level accused to stand trial in the region. In addition, from 1996 to 2004, through the Rules of the Road process established under the Rome Agreement of February 1996, the ICTY has reviewed over a thousand local case files in Bosnia and Herzegovina, leading to the arrest of 848 persons to stand trial in local courts on charges of war crimes. In 2004, this process was transferred to the Prosecutor's Office of Bosnia and Herzegovina, which is presently ensuring that the most sensitive war crime cases are being heard at the State level.

As the ICTY proceedings draw to a close, it has become increasingly important to emphasize the shared responsibility of international and national jurisdictions in the prosecution and prevention of war crimes, and crimes against humanity and genocide. The close cooperation between international and domestic courts is essential to maintaining the radical departure from a culture of impunity and to fostering a culture of accountability. In this perspective, one should view the completion of the ICTY's mandate as a strategy devised to allow the continuation by domestic actors of the activities that were initiated by the ICTY. The ICTY's pioneering role and its unprecedented body of practice and case law will be its most significant achievement, and the continuation of its work through the local prosecution of war crimes by courts in the region its real legacy.

However, criminal proceedings for violations of IHL at the domestic level will only succeed if domestic institutions have sufficient resources and adequate capacity to handle complex criminal trials of this nature. The purpose of this Manual is to contribute to this process of capacity-building by sharing the ICTY experiences and established practices in the prosecution and adjudication of complex cases. Other international and mixed jurisdictions will also benefit from this work, so that the know-how developed by the ICTY may provide some guidance on the challenges of delivering justice.

II. Methodology

Compiling a Manual which provides an overview of the experience and practices established at the International Criminal Tribunal for the former Yugoslavia (ICTY) is an ambitious endeavour, which poses two substantial challenges. First, it is difficult to convey such a large amount of information while maintaining a high degree of "scientific preciseness." Second, it is equally difficult to organize the information and the content in a way that ensures its accessibility to a wide range of target groups.

The Manual has been prepared on the basis of official information exclusively provided by the ICTY and its compilation, organization and presentation have been facilitated by UNICRI. Although the Office of the President, Chambers, Prosecution and Registry have different functions within the ICTY, experienced personnel from each of those branches have contributed to the drafting of the Manual, promoting a common language that can be understood by a wide range of users. Moreover, various methodologies have been employed in order to make this publication a user-friendly reference tool.

While some of the chapters have been organized according to the chronology of ICTY proceedings, some chapters have been positioned independently to permit detailed elaboration of critical concepts that are common to some or all of the above chapters.

Even though the ICTY, since its inception, has developed a multitude of practices, the most effective ones have been selected on the basis of the following criteria:

- ◆ widespread applicability (regardless of the regional and institutional context);
- ◆ innovative approach;
- ◆ benefits (for a greater number of states/tribunals);
- ◆ jurisprudential support;
- ◆ ability to promote savings (both time-saving and resource-saving).

The Manual emphasizes practical considerations in two ways. First, the Manual uses case boxes which link the legalistic discussion directly to the Tribunal's jurisprudence. Second, the Manual includes practical exercises that help the reader conceptualize complex procedures and ideas.

This overview of the ICTY's practices is intended to serve as a reference tool for global and national level policy makers, international criminal law practitioners and other international, internationalized or hybrid tribunals. In addition, this Manual provides UNICRI, as a fully-fledged UN entity, with a method for promoting the legacy of the international criminal tribunals.

III. Special Features of Cases Involving War Crimes, Crimes Against Humanity and Genocide

1. While the ICTY's experience was unique, any system involving prosecution of violations of International Humanitarian Law (IHL) will grapple with many of the same challenges. These cases are profoundly different from ordinary domestic prosecutions involving criminal offences because they concern crimes committed within the theatre of armed conflict. However, while at the ICTY all crimes adjudicated occurred within the theatre of armed conflict, only war crimes require that nexus in international law. Crimes against humanity and genocide are crimes that can be committed in times of peace and in times of war.
2. Wars in which violations of IHL occur often involve immense geographical areas, span a number of years, and involve a variety of actors, including military and para-military forces as well as mercenaries. The crimes committed often involve hundreds if not thousands of victims, and the potential evidentiary base is massive. Consequently, as the ICTY experience demonstrates, preparation for a single trial can last years. In addition, due to the complexity and breadth of the cases and the huge volumes of evidence available, investigations will often continue well into the trial stage itself as the Prosecution discovers and attempts to respond to case evidentiary gaps.
3. Once trials commence, a host of additional problems can arise that make it difficult to manage the trial process, adequately protect witnesses and victims, and respond to attempted interferences. Indeed, the complexity of the cases requires Judges to take different approaches to the admission and evaluation of witness evidence than they might take in an ordinary domestic criminal proceeding. Crimes are committed during periods of chaos and immense stress, and generally many years prior to the hearing. As a result, from case-to-case, witnesses may be able to provide differing levels of detail regarding the identity of the perpetrator, and the time and place of incident. For this reason, Trial Chambers do not generally treat a lack of witness detail, or minor discrepancies in evidence of various witnesses, as discrediting that evidence, as long as a witness recounts the essence of the incident charged in sufficient detail.
4. In most cases, at least some victims and witnesses are unwilling to give evidence unless the ICTY provides them with personal protection guarantees. While witnesses' identities can be sufficiently protected from the general public by the use of pseudonyms and voice distortion, full protection can only be guaranteed if courts hear those witnesses in closed session. In some instances, the nature of a witness' testimony will disclose their identities or otherwise put their lives in danger.
5. Since an accused has a fundamental right to know the identity of his or her accuser(s), witness identity is always disclosed to the defence team. However, when a witness' identity is more sensitive, the witness' identity might be revealed closer to the time when the witness is scheduled to give evidence in court. In all instances, when the identity of such a witness is disclosed to the Defence, the Defence has a legal obligation not to disclose that identity any further than is strictly necessary for the preparation of their case. Violations of the requirement of limited disclosure has led the ICTY to instigate contempt proceedings. In some cases, witnesses have been subjected to protracted intimidation prior to the start of trials, resulting in witnesses being reluctant to appear before the ICTY. In such circumstances, Judges have issued subpoenas ordering the witnesses to appear, with varying levels of success, depending on the States' ability and willingness to cooperate in enforcing such binding orders.

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6. In some instances, the assessed danger to a witness for giving testimony requires his or her relocation to another country following the submission of his or her evidence. As a result, the ICTY must identify a country willing to take the witness and arrange for the witness' family to join him or her. When a witness has "blood on his hands", the ICTY may have difficulty finding a State willing to accept him, and the transition to a new home can be extremely difficult for all involved. In many cases, the transplanted witness will not speak the language of the country to which he is transferred and will be unable to find meaningful employment. These difficulties are often compounded as the witness will also suffer total separation from extended families and friends in a culturally alien society. Once relocated, any attempted contacts by the witness to extended family members and friends left behind may put his life in danger.
7. A myriad of problems can also arise with the ICTY's ability to obtain relevant evidence, establish the chain of custody relating to that evidence, and ensure that the evidence obtained is accessible to both the Prosecution and the Defence. For instance, an important aspect of the ICTY's proceedings was a Prosecution strategy to obtain all relevant evidence by use of broad-based search and seizure warrants that authorized the Prosecution to take possession of military records and government archives, many of which concerned events that occurred years prior to the onset of the conflict. For the Prosecution, this approach was necessitated by the need to preserve the integrity of evidence which might otherwise have been destroyed in an effort to avoid accountability. However, because of its methods, the Prosecution found itself in possession of some five million documents - all of which had to be archived in an accessible manner. Since an accused in an international criminal trial is afforded all of the guarantees provided to accused in domestic courts that adhere fully to the rule of law, the Prosecution is always under the obligation to assist the Defence by disclosing relevant evidence, including exculpatory evidence, in particular. The Prosecution has faced significant challenges in meeting its obligations to the court. While the Defence is dependant on the Prosecution's compliance with its obligations, the Defence is only under limited obligation to disclose its case. This relationship of obligation and dependency between the Prosecution and the Defence struggled to find synergy with the rights of the accused and in particular the right to silence.
8. The Prosecution's reliance upon State cooperation for the purposes of investigations and gathering evidence also presents challenges unseen in domestic prosecutions. As a result, ICTY Judges have been quick to appreciate the fact that State cooperation rather than coercion is key to the Tribunal's success and, as such, have required the parties to use all means possible to obtain relevant evidence through agreements before seeking judicial intervention to compel cooperation. Some States in the region have not always been forthcoming with evidence, or have been forthcoming only on terms dictated by the State. To avoid judicial intervention, States often publicly present a cooperative stance while in fact failing to fully meet their obligations. Rather than cooperate with the Tribunal, the States of the former Yugoslavia have persisted in obstructing the work of the Tribunal in important respects. However, other UN Member States are frequently in possession of large amounts of relevant material or can provide relevant testimony to the Tribunal. The Prosecutor and the Defence may experience difficulty accessing this evidence because the other State may fear that disclosure might reveal its intelligence practices or suggest its involvement in support of a particular side in the conflict. In an effort to encourage State cooperation, the Tribunal has developed a procedure providing for the submission of evidence on a confidential basis, and further providing that the evidence may not be disclosed without the consent of the provider. This, in turn, creates a host of problems in terms of fairness and openness of the proceedings, where a careful balance must be struck between competing interests.

9. Initially, the Prosecution was granted a large measure of flexibility in the pleading of indictments and was permitted to plead as broadly as possible. The procedure adopted at the Tribunal was for a single Reviewing Judge to consider the Prosecutor's indictment and make a determination that the Prosecution has a *prima facie* case in relation to each of the counts alleged. The standard applied was low, and in practical terms required some showing of some evidence, regardless of the quality of that evidence. If so satisfied, the indictment would be confirmed and the Prosecution authorised to proceed upon it. In granting the prosecution this flexibility in the pleading and reviewing of indictments, the Judges were showing understanding regarding the difficulties the Prosecution encountered in presenting cases of such complexity. However, the Judges began to show less flexibility as they became more sensitive to the difficulties faced by the accused in mounting a meaningful defence against such broad indictments. As time passed, Judges also began to appreciate the way in which broad indictments negatively impacted the quality of cases. In hindsight, perhaps the *prima facie* standard applied by the Judges in the confirmation of an indictment was too low. In addressing this situation, the ICTY has established a substantial body of jurisprudence on pleading practices that began a process of greater judicial control over the quality and scope of indictments at the Tribunal.
10. In addition to refining the contours of the Prosecution's pleadings, the Judges also developed methods aimed at reducing the amount of *viva voce* (oral) testimony by the use of written testimony in order to accommodate the huge volumes of evidence they encountered. Rules were crafted to allow for the admission of adjudicated facts from other cases and the use of written statements in lieu of examination in chief. Over time, additional methods were developed to help ensure that these complex proceedings were heard as expeditiously and efficiently as possible. The driving force behind all of these reforms was the goal of showing respect for the accused's right to a fair and expeditious trial.
11. The ICTY's trial process was further complicated by the right of the accused to self-representation. In many instances, it appears that accused have chosen self-representation not because they are convinced that they can provide the best counsel, but because of their desire to use the courtroom as a political stage. This situation has put pressure on Judges to restrict the amount and scope of evidence presented to that which is relevant in order to prevent the ICTY courtroom from being used as a political stage, and has created difficulties for the Prosecution in the disclosure of evidence, particularly with regard to the identity of protected witnesses. Issues have also arisen regarding the scope of resources that a self-represented accused is entitled to receive from the Office for Legal Aid and Detention Matters and the United Nations Detention Unit in presenting his defence. Further issues have arisen concerning the right to seek documents in languages other than English and French, the working languages of the ICTY. Given the volume of materials involved, these problems present substantial obstacles to the expeditious conduct of proceedings.
12. On appeal, problems have arisen with respect to the translation of the trial judgement into a language understood by the appellant. In some instances, the ICTY has been forced to completely stay the briefing schedule pending translation of the judgment, resulting in several months of delay. As at trial, the ICTY has encountered problems dealing with accused who represent themselves. In addition, the appeal process is complicated by the fact that new evidence may come available during the appeal (e.g., information from archives in the region may become available), and the parties may seek to introduce on appeal many thousands of pages of evidence that was unavailable at trial.
13. The length of the proceedings and the volumes of evidence involved also pose significant challenges for judges as they assess the evidence and draft final judgments. In most cases, judges are confronted by transcripts involving volumes of written evidence, hundreds of witnesses, and the passage of years since the opening of

III. Special Features of Cases Involving War Crimes, Crimes Against Humanity and Genocide

trial. Against such a backdrop, the organization of the trial record in preparation for judicial deliberations and the drafting of the final judgement is crucial.

14. Due to the fact that the ICTY is located a great distance from the affected communities, it faces significant challenges in ensuring that its proceedings and judgements are accessible to those communities. These challenges have been tackled, in part, by broadcasting the proceedings in the region. However, complete transparency of ICTY proceedings is complicated by the statutory obligation to protect victims and witnesses and the necessity of keeping certain sensitive information from some providers out of the public domain. Trials are long and often dominated by difficult legal and evidentiary issues and as a Court it is more often than not inappropriate for the ICTY to address misreporting by local media about on going judicial proceedings. While trials are meant to be one of the means for achieving peace and reconciliation, the ICTY's judicial task is actually rather narrow in scope. While the ICTY recognizes that its reputation has faltered in the affected communities, substantial efforts have been made to explain its work through outreach activities and events aimed at dispelling myths orchestrated by political authorities of the countries of the region.

IV. Investigation

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1. The public face of the ICTY is its judicial process. What the world sees is the courtroom activity, including the initial appearances of the accused, the trials and the appeals. However, the judicial process depends upon the crimes being first discovered and investigated. Necessarily, investigations are not conducted in the public domain: they take place with as much confidentiality as can be achieved. It is therefore easy to underestimate the extent of the ICTY's investigative activity, especially in cases involving large scale and notorious crimes that have been subject to widespread media coverage. In the early stages of a tribunal or war crimes proceeding, investigation will constitute the main portion, if not the entirety, of the operational work and may involve an enormous task.
2. Under the ICTY statute the task of investigating falls to the Prosecutor, who is given powers to act independently and without requiring further authorization. Article 18 provides:

The Prosecutor shall initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
3. The statute also gives the Prosecutor the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In the initial investigative phase of the ICTY's activity it was the Prosecutor's policy to explain in public how investigations were being carried out, but to keep the operational details of particular investigations strictly confidential. It was also the policy to have Tribunal investigators go to the original sources of information, and not merely to rely on information provided by others.
4. In the initial phases of an investigation, especially in the midst of an armed conflict, it may be difficult to send investigators into the field. When the ICTY was established, the conflict was still raging in the former

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Yugoslavia and it was too dangerous to conduct on-site investigations. However, some initial investigations and limited field missions were possible because many displaced persons and refugees from the affected areas were available as witnesses. In Bosnia and Herzegovina, and later in Kosovo, investigators were sent into the field at the earliest opportunity behind the international forces of IFOR¹ and KFOR.² In the following weeks and months many on-site investigations were carried out, including a substantial programme of exhumations. Other evidence gathering activity included examination of crime scenes, search and seizure operations for documents, and the interviewing of witnesses. Approximately 10,000 witnesses were interviewed by the Office of the Prosecutor since 1994, and the total evidence collection now contains some 8 million pages of documents. The ICTY is by far the single largest depository of information about the crimes committed in the former Yugoslavia during the conflict.

5. Although investigations precede and underpin judicial proceedings, it is important to realise that investigations do not stop when trials begin. On the contrary, they may even intensify. New evidence may come to light even at the appeal stage or well after conviction. All planning and budget projections should therefore be made with the understanding that there will be a need for an investigative component at all stages of a tribunal's existence.

A. Preliminary considerations

A.1 A multi-disciplinary approach

6. Investigating serious violations of international humanitarian law requires a multi-disciplinary approach, and requires operational teams of specialists who bring together a range of skills and capabilities. Experience has shown that in addition to investigators with a traditional police background, teams require the services of military, criminal and political analysts, historians, demographers, forensic specialists and linguists. All groups of investigators can learn from each other, and it is essential that all understand the legal structure of the cases and the legal requirements for gathering evidence
7. While there is a need to employ investigators with traditional police skills in handling witnesses and evidence, a police background in serious fraud, financial enquiries or organised crime investigations is often particularly useful for complex, document-intensive war crimes cases. Investigators should have inquisitive minds and willingness to do a great deal of reading to familiarise themselves with all the circumstances of their cases.
8. At different stages of an investigation, the emphasis may change as to the various sets of skills required in the investigative team. Some parts of an investigation, for example, may involve exhumation of mass graves, or may be more intensively focused on evidence gathering, whereas examinations of archive holdings may be a much more analytical exercise. Experience has also shown that it is essential for investigative teams to have strong legal direction from the outset.

A.2 Legal supervision of investigations

9. Investigative work must precede all other operational activity. Initially at the ICTY an Investigations Division was created under the managerial command of a former senior police officer. The nature of the early fact-finding work, and the skills then required, required that investigative teams be organised under the leadership

1 NATO 'Implementation Force' in Bosnia and Herzegovina

2 NATO 'Kosovo Force'

of experienced police officers. Teams were tasked to conduct discrete investigations into crimes known to have been committed in different areas by different perpetrator groups. Prosecutors were attached as advisors to the investigative teams. Later, as accused were taken into custody and trials began, Senior Trial Attorneys became increasingly involved in the direction of investigations, and investigation work became progressively concerned with supporting on-going trials. Eventually, as the last investigations of new targets were concluded and the final indictments issued by the Tribunal, the Investigations Division was merged with the Prosecution Division, reflecting the fact that the work of investigators and prosecutors had become inseparable by the time of the trial stage. In whatever way the work is divided between investigators and lawyers, it is good practice to have substantial legal input into the investigations at the earliest possible stage. Decisions taken at the outset, for example how witness statements are to be recorded, can have an important impact at a later stage in a case. Internal guidelines have been issued by the Office of the Prosecutor (OTP) of the ICTY setting out the roles and responsibilities of Trial Attorneys. The guidelines emphasised *inter alia*:

- ◆ the need to provide a legal framework for an investigation;
- ◆ the importance of keeping abreast of jurisprudential developments;
- ◆ the benefit of consulting specialists in the law of armed conflict;
- ◆ the need for an investigative plan with legal direction.

A.3 Financial investigations

10. The possibilities arising out of investigations into financial affairs should not be overlooked. Although armed forces need to maintain financial records, especially regarding sources of funds, (e.g., paramilitary or other irregular troop deployments may not always be reflected in official budget figures), there is always the possibility of links between belligerents and organised crime. A financial investigation conducted by specialists with training in accountancy and banking practices may therefore produce better results.

A.4 Command responsibility

11. Particular care should be given to any investigation which explores the command responsibility of a superior for the acts of his subordinates. It is a mistake, and a potential trap, to treat a command responsibility charge as an easy option, or as a fall-back position when direct evidence cannot be obtained of a commander's more direct involvement in the commission of a crime by his subordinates. As the ICTY's jurisprudence developed, it became increasingly clear that it can be difficult to prove superior responsibility (e.g., proving that the accused possessed *effective control* over his subordinates). Proving a negative conduct, such as a failure to prevent or punish crimes committed by subordinates, may also require considerable effort on the part of the prosecution. Ultimately, it will be necessary to examine the legal structures and mechanisms for reporting and punishing criminal conduct that were available at the relevant time. This may necessitate identification of witness familiar with military procedures or court records as a way of showing the superior's opportunity to take action, as well as his inaction or other failure. Expert military or other witnesses may be needed to explain the command system and provide an opinion on the responsibilities and failure of the commander under investigation. Care should also be taken to preserve a coherent theory of the prosecution case. For example, a commander who orders or who is otherwise actively involved in a crime is different from one who receives notice about the crime and fails to act. There is a danger that an investigation will confuse the two distinct scenarios, for example, when circumstantial evidence may support both inferences.

B. Opening an investigation

12. The decision to open an investigation must be properly documented, and the process must follow established criteria. Those criteria need not be made public, but should provide a framework for the activities of investigators, including setting forth a formal investigation plan, detailing the focus of the enquiry, and outlining the different phases of the operations. The plan should include an assessment of whether particular lines of enquiry are likely to produce sound evidentiary results, and should clearly establish the legal framework into which the evidence must fit. The plan should also include resource estimates, should outline the need for specialist services and taskings, and set forth a projected timetable for completion of the investigation. A detailed plan of this nature, approved at a senior level will provide the necessary clarity and understanding for all involved in the investigation (see Annex 1: *Investigations plan*).
13. Guidelines on Opening New Investigations issued by the Prosecutor's Office stress the need for a written proposal discussing the following issues:
 - ◆ the background of the crimes and the alleged perpetrator;
 - ◆ strategic considerations;
 - ◆ the charging theory and the characterization of the crimes;
 - ◆ the role, position, authority and knowledge of the alleged perpetrator;
 - ◆ the status of the information and evidence;
 - ◆ the required time and resources.

B.1 Investigation Log

14. Since large complex investigations often involve dozens of staff working simultaneously, it is important to maintain a chronological record of all the investigative activities conducted in the case. The log should contain the name of the investigator, as well as a description of the type of investigative activity, the date of the activity, and a link to the work product generated by the investigation. The log should not only record investigative activities that yield positive results, but also those that yield negative results. In some cases the fact that there was a negative result will be important for future investigations.

C. Selecting targets of investigations

15. Any armed conflict involving serious criminal activity is likely to involve a large number of victims, witnesses and perpetrators, and it will not be possible or practicable to investigate all crimes or every potential accused. Choices must be made about whom to prosecute, and these choices will most likely be driven by two factors: the mandate of the judicial authority and the availability of evidence. A clear mandate will allow the early development of an investigation strategy, and that in turn will allow evidence to be collected in an organised fashion for particular prosecution cases.
16. It should not, however, be expected that the most complex or high level cases can be prepared first. A newly established Tribunal or War Crimes Unit will have a poor understanding of the complexities of the events confronting it, and a more complete understanding will be developed only in light of specialist knowledge, investigation, and in-house expertise. While an overall impression of the most serious crimes may well emerge

in the early stages of an investigation, it is likely to require many months of painstaking enquiry for investigators to develop a comprehensive picture of command structures and the roles of individual leaders.

17. Since all prosecutions require proof of individual criminal responsibility, prosecutors and investigators must take care not to assume the collective guilt of entire groups. There may, however, be situations in which it is reasonable for an investigation to target a particular leader, and to concentrate resources on the command structures linking that individual to particular crimes. Nevertheless, the best result is likely to be obtained by a combination of a "top-down" and "bottom up" approach. Particularly in the early stages of an investigation, prosecutors and investigators should keep an open mind about the responsibility of individuals, and should be prepared to consider conflicting evidence, alter the direction of an investigation, and avoid focusing on simply trying to build a selective case against a particular individual because of early discovery of some evidence that appears to inculcate that individual.
18. In deciding what and who should be investigated, investigators must make choices. ICTY Prosecutor's Office investigative guidelines regarding the commencement of investigations and the selection of targets of investigations placed emphasis *inter alia* on the following factors:
 - ◆ the seriousness of the crimes, the numbers of victims, the duration of the offences and the scope of destruction;
 - ◆ the role of the person under investigation, especially his position in the political or military hierarchy, the extent of his authority, and his alleged participation in the crimes under investigation;
 - ◆ whether the persons and the crimes to be investigated were exceptionally notorious, even though the person did not hold a formal hierarchical position.
19. The guidelines also suggested that practical considerations should be taken into account in deciding whether to commence an investigation. These considerations included such factors as the potential for arrest, and the potential to develop the necessary evidence. Generally speaking, persons were not investigated if they did not hold high rank, and crimes which consisted of single incidents did not justify investigation in isolation and were left to be handled by the local courts.
20. Ultimately the Security Council affirmed the principle that the Tribunal should concentrate on prosecuting the most senior leaders who were suspected of being most responsible for crimes within the ICTY's jurisdiction. The Tribunal was expected to transfer other cases - those involving individuals with a lower level of responsibility - to competent national jurisdictions.
21. A tribunal's overall investigation (and prosecution) strategy should be kept under constant review, and there may be situations when the strategy should be radically overhauled. At ICTY this happened on two occasions: first to remove a number of lower-level cases from the list of indictments after the Office had successfully indicted more senior figures; and second when the demands of the Tribunal's completion strategy called for decisions regarding which targets to pursue in the time remaining. It should be stressed that even cases earmarked for transfer from the international forum to national jurisdictions must be properly investigated and prepared so that transfers cannot be regarded as resource-free solutions.

D. Information gathering

22. The investigation of crimes may need to commence during an armed conflict, even though it may yet be unsafe to conduct on-site investigations, and even though the identity of the perpetrators is known. Even if

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investigators have only limited access to crime scenes and witnesses, it is important to begin the process of collecting evidence as soon as possible. At this early stage, investigators will have unique opportunities to gather and preserve evidence at crime scenes, and these opportunities should be seized wherever possible.

23. Many humanitarian institutions, and other agencies, may also be operating on the ground during or immediately after an armed conflict, and their personnel may offer suggestions or advice about who are responsible for crimes and should be prosecuted. The parties to an armed conflict may also make claims about crimes committed by their enemies. Much of this information requires careful verification, and should not be unquestioningly relied on to select cases for prosecution. Instead, institutions and agencies should be encouraged to record the details of potential witnesses, including and especially their future contact information, but should be encouraged not to attempt to take comprehensive witness statements. Rather, they should simply record in a general way the statements of potential witnesses based on their own direct experiences, and they should understand that the taking of statements is a professional process that is best left to the criminal justice system and to trained investigators. It is good practice to issue guidelines to outside agencies regarding proper practices.

D.1 Modular investigations

24. In the work of an international prosecutor it is likely that several investigations will concern the same or similar events. For example, for crimes perpetrated in a particular town, one investigation may examine the responsibility of local political leaders while another investigation might examine the role of a senior military figure from a third country. Wherever possible these common areas of investigation and proof should be identified and investigated in a way that efficiently meets the requirements of all investigations to which they are relevant. However, investigators must be cognizant of the fact that investigation of a single event that is relevant to two distinct investigations may compromise both investigations by producing contradictory conclusions. A single investigation designed to form a reliable and accurate view of events should be undertaken in a way that collects and preserves all of the evidence necessary for subsequent related investigations. In order for this to happen, investigations should be modular, in that they are uniformly prepared and organized, and case filing and evidence collection methods should be standardized so that they can easily be incorporated and made part of other case files.

D.2 Investigative missions

25. Since the seat of the ICTY was in The Hague, and therefore outside the territory of the former Yugoslavia, the Prosecutors Office was forced to send staff to the region, and these staff teams in the field conducting investigations were said to be "on mission". Although Field Offices were established in each of the countries of the former Yugoslavia to facilitate investigative work, it was considered preferable to base investigators at the main office of the Prosecutor in The Hague, rather than have them permanently stationed away from the Tribunal. After spending time in the field, especially if operating in difficult conditions or climate, investigators need to return to the central office in order to analyze and process the information collected. In order to facilitate field work, the ICTY's Prosecutor's Office developed detailed guidelines on mission procedures, and in particular detailing the procedures for sending teams into the region to conduct investigations.

D.3 Exhumation and identification of human remains

26. The Office of the Prosecutor of the ICTY undertook a great deal of exhumation work in an effort to achieve several objectives: to obtain evidence regarding the identity of victims killed during the conflict; to establish the circumstances and causes of death; to link primary and secondary mass graves; and to reveal attempts to cover up the crimes. For example, in Kosovo approximately 2000 bodies were exhumed by teams working for Office of the Prosecutor (OTP) - representing some 50% of all 4000 bodies exhumed in Kosovo over a two year period. In some prosecutions forensic evidence played a crucial role at the trial, but other exhumations failed to disclose any evidence of relevant to ICTY cases. Although all forensic work had initially been conducted as part of a criminal investigation, many reported grave sites were found not to contain human remains, or to be irrelevant to on-going prosecutions. Even so, the exhumations served a valuable purpose because they helped to inform relatives that their loved ones were not in the place they were thought to be. While the results of criminal investigations should be shared with other agencies dealing with missing persons, exhumation or other scientific work should not be undertaken by a tribunal unless its purpose relates to a criminal investigation.
27. Exhumation of mass graves is a complex and expensive exercise involving different scientific disciplines and requiring specialist assistance from external sources. The most cost-effective exhumations are those conducted by external agencies with tribunal staff in attendance. The ICTY's OTP experimented with a number of arrangements involving NGOs and specialists provided by various States at no cost before settling on a system whereby it assumed primary control over all the operations. The simplest arrangements involved autopsies conducted at the exhumation site in a field mortuary. When that was not possible, for example because of an inadequate water supply, more elaborate and costly arrangements involving transport to an established mortuary were required. The ideal arrangement was for national authorities to allocate a full police forensic team to a tribunal exhumation project, rather than supply skilled individual investigators, especially when those countries also had troop contingents in theatre that could support the operation.
28. It is vital that the various stages of an investigation progress at the same rate and in a co-ordinated fashion. If bodies are exhumed faster than autopsies can be performed, problems will arise, especially if bodies are not yet skeletonised, and are stored in bio-degradable bags. Similar problems will be created if the agencies that are charged with arranging the return of bodies to families do not have sufficient resources to keep pace with mortuary work.
29. Command and control of external contributors is a very important issue. These teams must be subject to the Tribunal's orders and minimum standards. It is therefore good practice to have a clear command structure for an exhumations project with a single Tribunal's staff member charged with controlling the operation from exhumation through reburial. A chief forensic archaeologist or anthropologist should be in charge of the actual exhumations and a chief pathologist should be in charge of the mortuary and autopsies. One of these two should be designated as the lead scientist on the overall project. There should also be a field operations chief to handle logistical details. Ideally, the chief should be an experienced logistics person, with a military background. Experienced and mature security staff are needed at the exhumations sites themselves, to guard mortuaries and ensure safety and discipline.
30. After the bulk of the prosecution's exhumation work was concluded, the Prosecutor's Office could no longer justify maintaining its exhumation capability at its former level. When new mass graves were reported thereafter, local authorities and other agencies were asked to conduct the exhumations and examinations of

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bodies on the Tribunal's behalf using methods designed to meet its evidential requirements. In general, this practice was efficient and effective. (see Annex 2: *Guiding Principles for Exhumations*)

D.4 Collecting evidence (search and seizure)

31. It is important to have detailed evidence collection procedures. Those used by the ICTY's Prosecutor's office emphasised the following general collection procedures:
 - ◆ maintaining the chain of possession (chain of custody);
 - ◆ proper packaging of items;
 - ◆ accurate labelling and registering of items;
 - ◆ preservation of originals by proper handling and storage.
32. Occasionally, special missions must be arranged to premises to seize evidence. Relevant evidence is often to be found in official buildings in areas protected by uncooperative local authorities and can only be recovered by the execution of a search warrant. Such missions require careful operational planning, co-ordination and secrecy if their objectives are to be achieved. The ICTY's OTP issued lengthy internal guidelines to investigators on the search and seizure of evidence covering:
 - ◆ the legal procedures for search warrant applications;
 - ◆ the execution of search warrants, including guidelines on co-operation with international bodies, and the use of reasonable force;
 - ◆ the need for particular security (a need-to-know basis) and meticulous planning;
 - ◆ the types of records and documents to be sought.

D.5 Request for legal assistance

33. In order to efficiently implement its charge to investigate and prosecute persons accused of committing serious violations of international humanitarian law, the Prosecutor's Office was given the power to request (or in some cases order) co-operation and judicial assistance of States or International bodies.
34. Prosecutors sought State assistance for, among other things:
 - ◆ the identification and location of persons;
 - ◆ the taking of witness testimony;
 - ◆ the production of evidence;
 - ◆ the service of documents;
 - ◆ the arrest or detention of persons;
 - ◆ the arrest of a suspect or an accused;
 - ◆ the surrender or transfer of the accused;
 - ◆ the summoning and interviewing of witnesses and suspects;
 - ◆ the collection of evidence;
 - ◆ the collection of information;
 - ◆ the conduct of on-site investigations;
 - ◆ the seizure of physical evidence.
35. Investigators can seek official co-operation from State prosecutorial and judicial organs through Requests for Assistance (RFA). In addition to outgoing requests, a specialist tribunal or war crimes unit will receive incoming requests for mutual legal assistance from other States and international bodies in relation to investigations and prosecutions of war crimes in domestic cases. The Office of the Prosecutor needs to

allocate sufficient staff and time to be able to respond to incoming Requests for Assistance adequately and provide the requesting States with the information that they need.

36. In order for the Office of the Prosecutor to receive effective legal assistance and for States to render efficient legal assistance to the Office of the Prosecutor, strict internal procedures for the processing of Requests for Assistance should be put in place. If that happens, it will be much easier to verify the willingness of states to co-operate. Poor procedures will make it difficult for willing States to co-operate and will make it easy for unwilling States to delay and complain. Complaints to the ICTY highlighted requests that were too vague or drafted too broadly, or that contained impossible deadlines. The complaints revealed irritation and miscommunication between the Prosecutor's Office and individual States or International bodies. For this reason it was important for the Prosecutor's Office to develop and maintain good relationships with diplomats and civil servants of states and international bodies to improve communication on co-operation and requests for assistance.
37. Non-compliance with requests for assistance can ultimately lead to the filing of motions for binding court orders. To create a well-documented foundation for litigation, it is therefore imperative that all Requests for Assistance meet the necessary legal requirements and that the "history" of Requests for Assistance be properly documented.
38. Non-co-operation also have political implications. Non-compliance will be reported to the Secretary General and the Security Council, and can lead to political pressure and possibly to the imposition of sanctions.

D.6 Sensitive sources

39. War and war crimes have the ability to affect people from many different backgrounds in many different ways: direct victims who have suffered the effects of violence or the destruction and loss of property; soldiers and paramilitaries from all levels of the chain of command; and international peace keeping forces. There will be a keen interest and involvement in the investigations from governments and governmental agencies, not only local but regional and the wider international arena, and non-governmental agencies (NGOs). Because of the presence of such a diverse array of both direct and indirect participants in an armed conflict, investigations and prosecutions will involve a diverse range of potential witnesses and sources of evidence. Many of these witnesses and sources will express concerns regarding their personal safety or the need to maintain the confidentiality of sensitive or national security information. Some of the material that may be central to a war crimes case, for example military intelligence and operational documents, will be the kind of material to which civilian courts traditionally have very limited access. Special procedures will be necessary at the national level for balancing the competing interests involved.
40. The ICTY dealt with these problems by establishing rules governing the handling of extremely sensitive information from the outset. The rules reflected the underlying philosophy that it was better for the Prosecutor to be able to access confidential intelligence information (even if it could not be used as evidence) than to be denied that possibility. Such information can help guide the prosecutor during the early stages of an investigation, but the prosecutor might not be able to gain access unless the providers can be assured that it will not be handed over to others and that its production will not be compelled by the judicial process.
41. It is important from the outset to identify and categorise sensitive sources, to evaluate the risks to those sources, and to protect the sources' personal safety and confidentiality.

D.7 Vulnerable victim/witness

42. The victims and eye-witnesses of war crimes are often called to testify against individuals who hold positions of power or great influence in their country. The accused may still enjoy wide support from certain sections of the public who in turn may pose a threat to anyone testifying against that accused. As such, the risk to the personal safety of the witness or members of his family may be great; even many years after the events in question took place. The ICTY is aware of numerous instances where witnesses have been threatened, assaulted or even killed. Any investigative tribunal must take seriously potential threats to witnesses and take steps to minimize those threats.

Insider

43. Inside witnesses (e.g., those inside the same organisation as the accused such as a fellow soldier within the same unit or a fellow politician or civil servant within the same party or government structure) are often particularly at risk of intimidation or reprisal and great care must be taken to ensure their safety.

Informants

44. The informant is an individual who will provide confidential information but who will not be expected to be called as a witness. It is sometimes the case that informants will provide confidential information in return for monetary payment or a non-cash benefit. As well as protecting the security of the source, great care must be taken to assess the veracity and accuracy of the information being provided in circumstances where the source may be motivated by personal gain. Special accounting records should be kept of all payments to informants to ensure protection for investigators and informants and to avoid allegations of impropriety or corruption.

International

45. The term "international witness" refers to those witnesses from the international community who are often of a high political profile and were involved in the conflict in a professional capacity such as a diplomat, negotiator or NGO representatives. It may be necessary for international witnesses to get written permission from their own country or organisation to allow them to provide information and testify. Such permission may come with conditions attached, requesting protective measures or restricting disclosure of certain information. United Nations staff generally require waivers of immunity before giving evidence.

Confidential "Rule 70" material

46. The ICTY has developed a particular practice provided for under Rule 70 of its Rules of Procedure and Evidence. It has allowed government agencies and certain NGOs and other organisations to provide sensitive and confidential information for use, in the first instance, for lead purposes only. Such information is provided with restrictions on any further use. Before the information can be disclosed to the defence, to a Judge or used in court as evidence, the consent of the provider must be obtained, usually on a witness-by-witness or document-by-document basis. It is often the case that the provider will impose further restrictions on the use of the information, normally in the form of redactions to documents. The information is often highly classified or sensitive and very often the name of the provider or the names of individual staff members of the provider are treated as highly confidential. A provider's consent to any disclosure of the evidence may be conditional on the granting of protective measures at trial.

47. The ICTY rules have been developed to provide strict protection for Rule 70 material. However, a conflict may arise if Rule 70 information is exculpatory and triggers the prosecution's disclosure obligations to the defence. The Tribunal's Rules have resolved that conflict by exempting Rule 70 information from disclosure. Nevertheless, in that situation it is good practice for the Prosecutor to try to resolve the dilemma by first exploring all avenues with the provider to find ways of making the exculpatory information available in some form together with suitable protective measures. Thereafter, if the provider's consent cannot be obtained, as a matter of fairness the prosecutor may have to make adjustments to the presentation of other evidence, and in extreme cases may have to make changes to the charges being pursued against an accused.

D.8 Witnesses

D.8.1 Early contacts by Prosecution investigators

48. The first contact with a potential witness is likely to be made by an investigator or other member of the Prosecutor's Office. In a conflict zone or in the aftermath of a conflict, the very act of contacting a potential witness may put the person at risk. Witness protection is a complex area which gives rise to many logistical and personal issues. Before significant resources are committed to protecting a witness, a decision needs to be made regarding whether the witness is essential for the conduct of the trial. If that decision is affirmative, the investigator should then address potential security concerns.
49. Witnesses are understandably nervous about being seen as cooperating with the authorities against powerful or violent individuals. Insider witnesses - witnesses who are working with the prosecution from inside an organization where individuals are targeted - may be at particular risk. In any event, all witnesses should be approached discretely in a manner designed to attract as little attention as possible. If the first contact is by telephone through an interpreter, it is important that the investigator take steps not to alarm the witness (e.g., the interpreter speaks with the wrong accent).
50. In the context of ICTY investigations, many witnesses immediately raise concerns about their security. Not all of their concerns are well-founded. Only by conducting an interview can the investigator determine if the witness' security concerns are real or simply perceived. Many witnesses honestly believe, because of the circumstances that confront them, that they have legitimate security concerns and need protection. However, in many cases, after a thoughtful and constructive interview, it becomes obvious that there is no forensic basis for concluding that protective measures are needed.
51. If the witness is vital to a prosecution, and the security concerns are legitimate, the investigator must then explain to the witness about available protective measures which can include simple forms of protection (e.g., testifying in closed session, voice and facial distortion, apportion of pseudonym) to more drastic measures (e.g., immediate extraction from the area, relocation to third countries, change of identity).
52. The investigator should not make any promises concerning witness protection and security before consulting with appropriate superiors concerning the value of the witness' evidence. The Tribunal's Victims and Witnesses Section (VWS), or the equivalent authority, should be consulted at the earliest possible opportunity to allow for constructive dialogue and action. Investigators should be aware that any promises of protection are likely to be viewed poorly by Judges who may view it as their task to decide on appropriate protective measures. Measures taken to assist witnesses, including protective measures, may also subsequently be portrayed by the defence as an inducement to the witness to give favourable evidence. Investigators should therefore keep detailed records of all dealings with witnesses.

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53. Different levels of protection will be appropriate depending on the level of risk. Measures should be proportionate: the more serious the threat, the more drastic the remedy. Ultimately, a decision to provide protective measures will be made by VWS extra judicially or by Judges, but the decision will depend heavily on the preparatory work done by the investigator, who should provide the credible evidence required to justify the appropriate remedy.
54. If a witness is threatened, action may have to be taken quickly. It is important that witnesses know how to contact the Tribunal, or the local authorities, in the event of an emergency. It is equally important that investigative staff put adequate procedures in place to allow a rapid response.

D.8.2 Protection of sensitive sources and vulnerable witnesses

55. Often, witnesses or sensitive sources will provide information and evidence to the Tribunal at great personal risk to themselves, their families or in some instances, their organisations. By accepting such assistance from individuals under such circumstances, authorities have a moral duty to protect those individuals from any harm that may result from providing such information.

D.8.3 Preparation for witness interview

56. Before entering the field to take interviews, investigators should have an agreed-upon strategy for identifying investigation targets. The strategy should be initiated by the prosecutor in charge of coordinating the investigators and analysts. It is also important for different investigative teams to co-ordinate with each other regarding who is pursuing which perpetrator. In practice, difficulties have been caused if one team interviews a witness whom another team interviewed as a suspect.
57. Multiple statements should be avoided. It is therefore good practice for one person with an overview of current investigations and prosecutions to co-ordinate the taking of witness statements. If that cannot be achieved because of the volume of investigative work, it becomes all the more important to have good witness management systems in place.
58. Preparation before the interview is essential. Therefore all staff should be thoroughly briefed before going into the field, and this briefing should include an analysis of in-house material and an overview of all the material and its relevance to the case. The briefing should also include a definition of the elements of the crimes committed, the facts needed from witnesses, and the pattern of the crimes. Good preparation requires that staff members be given sufficient time to read all available material. The reading should focus on more than just the specifics of the case, and should help familiarize the interviewer with the crime scene. Ideally, the interviewer should be sent to the scene to enable him to become familiar with the crimes committed, the country, the cultures etc.
59. The investigative system should include a mentoring program so that new staff should be assigned mentors to help teach them how to conduct witness interviews. New staff members should begin by observing their mentors conducting interviews before being allowed to conduct interviews under the supervision of the mentors. Staff members should not only be trained regarding how to deal with victims who have been sexually violated but also with witnesses who have suffered other forms of trauma. Staff members also need to be trained on how to write clear, logical and concise statements.
60. Staff members must also be taught how to use and work with interpreters. For instance the investigators / prosecutors / analyst should work with interpreters in advance to define interview parameters and objectives.

61. Before starting the interview, a witness should be asked for identification. By confirming the witness' identity, the investigator helps avoid confusion regarding witness identity.

D.8.4 Interviewing witnesses

62. The manner of conducting witness interviews and the content of resulting statements is of vital importance for the successful handling of cases. Each legal system will have its own requirements and rules of procedure and evidence governing the taking of statements, which can include special safeguards regarding the questioning of suspects and accused persons. Particular care must be taken while interviewing traumatised witnesses, many of whom will have lost not just friends and relatives, but whose whole lives may have been destroyed by the conflict. In addition, investigators must be aware of the fact that victims of sexual assault, both male and female, may be subject to social or cultural stigma.
63. At the ICTY, witness statements are usually taken by an investigator or prosecutor working through an interpreter. It is good practice for investigators rather than prosecutors to take witness statements so that will be in a position to testify regarding the circumstances under which the statement was taken. Effort should be made to avoid placing interpreters in position where they need to be called as witnesses.
64. It is not ordinarily necessary to have female witnesses interviewed by female staff and male witnesses interviewed by male staff. However within reason, a witness should be allowed to make a choice as to the sex of the interviewing investigator, and this preference should be given serious consideration.
65. It is important to obtain witness information in chronological order even if the interview is more thematic. However, if a witness does not remember dates, the investigator should not attempt to supply them. Furthermore, the interview should begin with a preliminary paragraph that outlines the witness' personal details, qualifications, experience and expertise. The remainder of the paragraphs should be numbered so that the statement can be easily referenced.
66. The statement should be in the witness' own words; the use of paraphrasing should be avoided whenever possible.
67. In addition, the statement should be recorded and signed in a language that the witness understands. If that is not possible, the statement should be read to the witness by the interpreter and the details of the review and signing process should be recorded in the statement itself.
68. It is very important for the investigator to avoid cross-examining the witness during the interview. This task should be performed only by a lawyer in court. However, investigators have a duty to test witness accounts that seem incredible or that are contradicted by known information from another source. However, before a version of events is put to a witness, it is important to allow the witness to first give his or her own account of what happened.
69. It is important to realise that if investigators notes are taken, they may have to be disclosed at a later stage, although this may not be a legal requirement in all national systems.
70. The process of interviewing witnesses is necessarily a team effort. Moreover, the team needs to be flexible enough to select the best person to lead the interview. When the team is put together, it is important to assess strengths and weaknesses of the team members as well as the status of the witness (e.g., is the witness a crime base witness or high profile politician or expert), and to recognize that the same interviewer need not deal with every interview topic. It is important to evaluate and assess the interview afterwards.

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71. There are advantages and disadvantages to tape recording ordinary witness interviews, and it is not possible to make a blanket recommendation regarding recording. Indeed, a decision on whether to record must depend on the individual situation. The advantages of recording are that the recording helps protect the integrity of the interview process, reduces the impact of future challenges, and can allow for speedy disclosure to the defence if the alternative is to wait for a written statement to be finalised and translated. The disadvantage is that many witnesses are reluctant to speak while being recorded, taped interviews of long interviews are cumbersome to play, and the work of transcription is a serious drawback that can create backlogs. Nevertheless, the Tribunal's Rules require that all questioning of suspects be audio or video recorded.
72. During a witness interview it may be necessary to establish the identity of an accused by using a photo-board procedure that presents the witness with an array of photographs of a number of different persons. Such a procedure is not normally required or appropriate if the accused is well-known to the witness. In any event, if the witness has difficulty making an identification, these difficulties should be recorded in the witness' statement. If possible, it is preferable to videotape the identification process to avoid any misunderstandings regarding what happened. The ICTY's Prosecutor's Office established detailed internal procedures governing field identifications. These procedures distinguished between ordinary identifications, and recognition of individuals already known to the witness. For ordinary identifications, investigators were expected to prepare multiple photo boards and show them to witnesses in a controlled and standardised manner designed to avoid allowing the investigator or the interpreter to influence the witness by words or gestures.
73. It will not always be possible to conduct face-to-face witness interviews. Occasionally telephone interviews will be necessary, and sometimes video conference facilities will be available.

D.8.5 Recording contacts with witnesses

74. In order to adhere to best practices for conducting witness interviews, it is very important to develop a good Witness Management System (WMS) that records witness information and the details of investigator contacts with them. Such a system should be established before witness interviews begin. It is essential to include data entry protocols, designed to ensure that data be entered in standard format, in the WMS. Regarding witnesses/potential witnesses, the WMS should include the following data:
 - ◆ biographical information;
 - ◆ contact details (phone/fax/email - address);
 - ◆ contact person (so that others who want to contact a witness will know how to do so);
 - ◆ a record of each contact with a witness as well as the subject of the contact;
 - ◆ the cases/investigations to which the witness' statement is related and whether the witness is willing to testify;
 - ◆ any special/security concerns related to the witness;
 - ◆ passport details for later use by the Victim and Witness Section;
 - ◆ classification of the witness *i.e.* general or sensitive (the latter being someone who would be in jeopardy if their association with Tribunal became known).
75. The WMS is designed to help ensure that, organizationally, all Tribunal witnesses are identified and searchable. Prior to contacting any witness, investigators can consult the WMS to to ascertain whether that person has been contacted previously and by whom.
76. In the ICTY's Prosecutor's Office, WMS information is linked electronically to information held by the Registry which includes, *inter alia*, witness testimony, exhibits tendered in court, and witness documents (statements). There are advantages to drawing together data maintained by the prosecution, the court and the Registry,

even though these various forms of evidence have been collected for different purposes. Compartmentalization of these records can create duplication, error and inefficiency. Sharing information (subject to certain necessary restrictions) has proved to be much better practice.

77. In addition it is good practice to maintain a database designed to display Prior Witness Testimony. The ICTY's Prosecutor's Office now has an index containing the names of all witnesses who have testified at the ICTY, the cases they testified, protective measures used, and the dates of the testimony. This index currently identifies 6,483 individual testimonies, and was compiled from various trial lists (Prosecution/Defence) and includes information regarding Chambers' witnesses. The benefit of this system is that a trial team can easily and quickly determine if a proposed witness has testified previously. Efficiency gains can be considerable. For instance, without an index, one large case might require manual searches for 300 prosecution witnesses which can require many hours of work. These same 300 searches can be conducted through a central index in a matter of minutes. In addition, the index allows for easier retrieval of transcripts/exhibits for disclosure purposes. At present the index is updated on a daily basis by monitoring the various trials under way, and by filling in the necessary information relating to testimony, dates and protective measures. Another benefit is that an index allows the prosecution to quickly sort and evaluate all witnesses in a given case.

D.9 Interviewing victims of sexual assault

78. Armed conflicts often involve crimes of sexual violence against women and men.
79. Gathering evidence of crimes of sexual violence under international criminal law is one of the greatest challenges investigators face. There are numerous obstacles – security, political, cultural, psychological, and professional – that impact on an investigator's access to evidence of crimes of sexual violence. A clear understanding of the challenges will empower the investigator to develop strategies that anticipate them, and to prepare an investigative plan adapted to the particular context (see Annex 3 - *Guiding principles for interviewing victims of sexual assault*).

D.10 Interviewing expert witnesses

80. Expert witnesses should be used to provide evidence, including opinion evidence, in areas requiring specialized skills or knowledge that the court does not possess. A prosecution team attached to a specialised tribunal or war crimes unit, that employs a multi-disciplinary approach to investigations, should develop a great deal of in-house expertise. Nevertheless, the prosecution must take care to ensure that in-house experts retain the necessary degree of detachment if they are to give evidence. In house analysts may also be used to compile documentation for external experts. In the ICTY context it has been common for in-house military analysts to assemble collections of military documents for external senior military experts who are called to give opinion evidence (e.g., regarding command and control issues). Internal OTP policy and procedures regarding the handling of experts emphasise that:
- ◆ Experts should be properly qualified to address the subject matter on which they will testify ;
 - ◆ Experts should give their views impartially and act in the cause of justice;
 - ◆ Both internal and external experts can be employed by a party to assist the Judges if they possess specialized knowledge, skill or training relevant to an issue in dispute;
 - ◆ Experts should provide their opinions transparently by explaining the facts they rely on and the methods they used to arrive at their conclusions;
 - ◆ Experts should be fully informed regarding the matters at issue.

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81. Where external experts work closely with internal analysts, it is good practice to prepare two reports, so that the work of the analyst (usually in collecting and preparing materials for the external expert) dovetails with the opinions of the external expert. However, it is important to ensure that the analyst does not seek to influence the material content of the external expert's report.

D.11 Interviewing suspects

82. The ICTY created special rules for interviewing suspects, *i.e.* persons concerning whom the Prosecutor possesses reliable information that tends to show that they may have committed a crime over which the Tribunal has jurisdiction.
83. The practices outlined above regarding interviewing witnesses, the preparation of interviews, working with interpreters, and addressing the content of a statement, are also applicable to interviews of suspects. However because of the special status of suspects, the ICTY's Prosecutor's Office has created special rules for interviewing suspects. The guidelines emphasise *inter alia* the following points:
- ◆ prior to the interview, the investigator must determine if the person to be interviewed should be viewed as a suspect as defined in the Rules;
 - ◆ a decision to interview a suspect needs prior authorisation from senior management;
 - ◆ at the start of a suspect interview, the investigator must ensure that the suspect is fully aware of and understands his/her rights under ICTY Rules. If during the interview of an ordinary witness, the person's status changes from witness to suspect, the person should be advised immediately of his rights under the Rules;
 - ◆ when a defence lawyer is involved in an interview, the lawyer should be given a pre-briefing regarding the conduct of the interview process;
 - ◆ the suspect interview should be recorded on an audio/video system;
 - ◆ the suspect should be given a copy of the tapes and a printed transcript in a timely manner.
84. On rare occasions, incriminating statements made by a suspect may be required in a case against another accused. In such a situation, transactional immunity from prosecution is typically extended to suspects as a method of gaining their co-operation. However, such immunity has been granted sparingly, and only with the prior authorisation of the Prosecutor.

E. Information management

85. Investigations will produce a great deal of information and evidence. Despite the fact that ICTY investigators did not initially expect to find a great deal of meticulous documentation involving the crimes they investigated, the Prosecutor's Office evidence collection grew over the years to almost eight million pages. Handling this volume of material was made all the more challenging because the ICTY was established at the dawn of the era of modern office automation and computerisation. Fears about the security of sensitive information also led to the development of islands of information among teams. It took many years to establish a culture of sharing information and to establish computer systems that enable investigators and prosecutors to record and retrieve information. To avoid creating a patchwork array of unconnected data storage, it is necessary for prosecution and investigation teams to provide proper management of any documents seized. For example, although it is very easy to collect duplicate copies of documents, the existence of duplicates can cause confusion, place unnecessary demands on translation, and are extremely

difficult to remove from the system. The importance of good document management cannot be overstated. Any new tribunal should look to the industry standard in office automation and information processing.

E.1 Protection of sensitive information

86. Information and evidence from vulnerable witnesses and sensitive sources may take many forms: witness statements, documentary evidence, expert reports, intelligence reports, intercepts, photographs, etc.
87. Great care must be taken to hold such information in a secure environment. Material with the greatest sensitivity should be held in a locked safe with access restricted to a small number of essential and named staff members. Consideration should be given to retaining other sensitive materials in password protected computer files, again with limited access.
88. Where confidential information is provided by a government body or NGO under the terms of Rule 70 or its equivalent, it is helpful to appoint a liaison officer to deal with such provider individually on a one-to-one basis. It may also be advantageous to have a written agreement with the provider of sensitive information.
89. It is important to keep a clear record of all sensitive information stored. There should be separate records for each Rule 70 provider, detailing every document received, whether or not it has been cleared for use in court, whether or not it has been disclosed to the defence and when it has been used as evidence. Obviously, such records should be treated with the same care as the sensitive information itself.

E.2 Handling, processing and storage of evidence

90. A war crimes case stands or falls based on the evidence that is presented to the court. It is imperative that the Prosecutor's Office develop systematic and efficient procedures for collecting, processing, storing and retrieving materials identified as evidence.
91. The sources of evidence can be very broad and diverse. First, there is documentary evidence which shows a historical record of what was said, done, ordered and reported at the time. Sources of this evidence can be found in archives, diaries, journals and books, military reports, situation reports ("sitreps"), dispatches, minutes of government sessions, command and control documents, international reports, photographs and videos, intercepts and open sources. Other forms of evidence include computer equipment, clothing, ballistic and trace metals and firearms, found at crime scenes and at other locations.
92. The Prosecutor's Office Evidence Unit (EU) was established to ensure central control and proper handling of all evidence received by the OTP. The EU was responsible for the standardization of evidence collection procedures. Prior to the submission of evidence to the EU, an electronic MIF (Mini Index Information Form) is created and attached to the evidence. When the evidence is received, it is stamped, given an Evidence Reference Number (ERN) and placed in a database. What sounds like a deceptively simple process is in practice a complex undertaking with far-reaching effects on procedures and resources. Poor document management will result in inefficiencies and a loss of confidence in the system's ability to retrieve information. At worst, not knowing what evidence is held, or how documents have been used in the past, can affect the trial process.
93. Best practices and lessons learned for the processing and the storage of evidence as developed by the ICTY's OTP are as follows.

E.3 Chain of custody

94. Because challenges about how evidence was collected may arise during subsequent judicial proceedings, it is good practice to establish detailed procedures designed to preserve an unbroken record detailing the handling of a piece of evidence. Guidelines created in the Prosecutor's Office emphasise:
- ◆ chain of custody commences the moment evidence is collected, and continues up to and beyond its presentation in court;
 - ◆ the chain of custody should not be broken, and the evidence should remain secure at all times;
 - ◆ all movements of evidence must be recorded and the chain-of-custody documentation must be readily available for court purposes.

E.4 Analysis of evidence

95. There are three primary analytical functions that are essential in the investigation and prosecution of war crimes, all of which can be broadly classified under the term "Intelligence Analysis". These are:
- ◆ Military Analysis;
 - ◆ Political Analysis;
 - ◆ Criminal Analysis.
96. Military analysis provides investigation and can lead to prosecution of cases that involve a military dimension, and can include scrutiny of integrated events, personalities, organisations and crimes. The military analyst will examine *de jure* and *de facto* issues relating to crimes, prosecution targets and events, and will provide analysis from the most preliminary stages of an investigation or assessment through to the presentation to the court of analyses for the prosecution. The Military Analyst also provides assistance in monitoring, researching for, and advising the prosecutor in the defence phase of a trial.
97. Political analysis functions in the same way, but focuses on issues of a political/leadership nature.
98. Criminal analysis provides investigation and prosecution teams with a detailed overarching knowledge of the case, especially in relation to the conduct of the accused, the role and position of the accused in relation to the alleged crime base and the sequence of events. The criminal analyst provides analysis of crime patterns, linkage of the accused to the crime base and to other individuals, as well as contextual analysis of the events alleged in the indictments.
99. For each of these disciplines, the focus of the analysts' work is dependant on the phase of the case, *i.e.* investigation/pre-trial, trial prosecution, trial defence, and appeal.
100. During the investigation/pre-trial phase, the analytical focus is on the assessment of information, identification of evidentiary gaps, identification of sources, assessment of witnesses, assistance in interviews and in some instances preparation of "Expert" reports. Once information gaps and sources are identified, analysts are relied upon to provide support in the collection of new material, *e.g.* search and seizure missions. In this regard, a balance has to be found in the analyst's work between in-house and field work. A large part of the work involves the research of documentary evidence designed to strengthen the case(s) while being mindful of the obligation to disclose exculpatory evidence.
101. During the trial phase, the analyst's focus is on monitoring the trial, assisting in the proofing of witnesses, in some instances testifying, and then importantly, monitoring the defence phase of the trial so as to assist the Senior Trial Attorney in providing responses to issues that arise in the courtroom. Extensive knowledge of the case and the prosecution evidence is of utmost importance at this stage in the proceedings.

102. The role of the analyst during the appeals stage is more *ad hoc*, usually providing the appeals section with the benefit of overall case knowledge and identification of documents.
103. In summary, a generic overview of the analyst's function is to: simplify or reduce complex or voluminous documents, identify core details, identify inconsistencies and information gaps, and support the investigation and trial teams. If the analyst performs his/her function well, he/she can provide valuable assessments regarding the relevance of information (*i.e.* evidence) and can help present that analysis in a coherent manner.
104. The generic activities carried out by an analyst would include:
 - ◆ document Assessment;
 - ◆ document Management;
 - ◆ collection Planning & Management;
 - ◆ interviews (witness, suspect, expert);
 - ◆ providing miscellaneous technical support to cases (based on particular areas of expertise).

F. Importance of demographic evidence

105. In addition to the obligation to prove that many innocent civilians were killed in an armed conflict, the Prosecution may have to show that the deportation or forcible transfer of large numbers of civilians occurred. This task will be greatly facilitated by having a specialized demographic unit within the Prosecutor's Office. Tasks of Demographers at the ICTY's OTP include:
 - ◆ collecting, organising and maintaining demographic material for use at Office of the Prosecutor;
 - ◆ conducting statistical analyses of this material;
 - ◆ estimating demographic consequences of the 1990s conflicts;
 - ◆ preparing expert and research reports;
 - ◆ providing expert witness testimonies;
 - ◆ assessing demographic evidence presented by the defence;
 - ◆ interacting with other OTP units regarding population statistics;
 - ◆ other tasks.
106. In the course of its existence, the Demographic Unit (DU) developed several methods and procedures that proved valuable in the work of the Prosecutor's Office and thus can be recommended to others working on the prosecution of war crimes and other violations of international humanitarian law.

IV. Annex 1: Investigation plan

- *Prior to commencing any significant investigative activity, a detailed comprehensive investigation plan should be developed, discussed and approved by senior management. The purpose of the investigation plan is to clarify the investigative objectives and evidence collection methods. Once approved it should be a practical and useful guide to investigators, analysts and lawyers actively engaged in investigative activities.*
- *The investigative plan should have the following components:*
 - *Summary of the Proposed Investigation*
 - *Fundamental Questions*
 - *Legal Framework of the Investigation Plan*
 - *Theories of Responsibility*
 - *Possible crimes that were committed and their legal elements*
 - *Avenues of Investigation (i.e. use of paramilitaries by senior politicians)*
 - *Summary of Investigative Objective*
 - *Summary of what is presently known*
 - *People whose activities will be examined*
 - *Potential Witnesses*
 - *Physical Evidence*
 - *Potential Documentary Evidence*
 - *Summary of Investigative Tasks to be Undertaken*
 - *Resources to be deployed to conduct Investigation*
 - *Implementation of Plan*
 - *Comments of Reviewers*
 - *Approval of Senior Management*
 - *Periodic Reviews of Investigative Results*
- *Summary of the Proposed Investigation: Any investigation will be one of many that are undertaken by a Prosecutor, who has the responsibility to fairly and comprehensively conduct investigations in all allegations of misconduct arising within his or her mandate. The summary section identifies the parameters and subject matter of the particular investigation to assist senior managers in coordinating the several investigations being undertaken.*
- *Fundamental Questions: Every investigation poses several fundamental questions that the investigation will hopefully be able to answer through the collection of credible and reliable evidence. These essential questions should be clearly articulated and explained if necessary. Without a clear statement of the questions for which answers are sought there is a strong likelihood that efforts will lack the focus necessary to effectively and efficiently identify and collect the evidence necessary to answer them.*
- *Legal Framework of the Investigation Plan: Any investigation must identify the applicable legal prohibitions that may be the subject of any resulting prosecution. The definitions of international crimes are still evolving and each new judgment contributes significantly to an understanding of what is required to prove these crimes.*

Recognizing that these legal requirements are often the subject of dispute between judges themselves and the lawyers practising before them it is imperative that the investigation plan provide the investigative staff with workable definitions of the elements as well as enumerated lists of the types of evidence that is likely to be relevant to each of these elements. For example, in establishing the shared intent of a plurality of persons involved in a joint criminal enterprise the plan should set out the types of evidence that investigators will be looking for such as intercepted communications, correspondence, public and private statements showing shared intent, etc.

- Investigative Avenues: Most large investigations will include several primary investigative avenues. For example in evaluating the possible culpability of senior political figures in crimes it may be necessary to examine separately the crimes perpetrated by police, military and paramilitaries. Each primary avenue of investigation may be sufficiently discreet to merit a separate plan of investigation. Each of these discreet "sub-investigations" should be the subject of a separate section with clearly articulated goals and methods as defined below.
- Summary of Objectives: This section summarizes the objectives of a particular investigative avenue. It is closely related to the fundamental questions posed by the investigation and serves to define with greater specificity the goals of this particular aspect of the overall enterprise.
- Summary of What is Presently Known: If a prosecutor has been given a mandate to conduct investigations there is probably a great deal of information already available from various sources, such as: UN reports, the media reports and documents issued by non-governmental organizations. Reporters are increasingly placing themselves at risk in an attempt to bring reliable information about a conflict into the public consciousness. This essential section gathers what is presently known about the events in question. The investigation must be shaped by what is reliably known about the events. While in most cases this information ultimately proves to be nothing more than lead and background information. Gathering this information and evaluating it allows the investigation to be designed in an informed way. Over the tenure of a prosecutor several investigations will be conducted. Every time a new investigation is planned efforts should be made to identify and evaluate the relevant evidence collected in the course of other investigations.
- People whose activities will be investigated: The investigation plan should in a general way describe the people whose activities will be examined. A full and fair investigation should not have specific "targets" of the investigation. Calls for an international investigation are often accompanied by public statements of the people believed to be the most responsible. It is unacceptable for an impartial prosecutor to begin an investigation with these or other people specifically targeted regardless of the degree of public sentiment already condemning them. The investigation should identify the broad class of people whose conduct will be investigated and should only be narrowed to specific persons as dictated by the results of the investigative activities. For example, an investigation might identify the "direct physical perpetrators of the crimes committed on 1/1/08 in town X" or "senior military officers with authority over the 42nd Corps." Prematurely narrowing an inquiry to specific subjects risks impartiality challenges and creates a serious flaw in the integrity of the investigation.
- Potential Witnesses to be Interviewed: With the above sections in mind a list of potential witnesses should be generated. This list should not only identify the names of the people or class of people to be interviewed (i.e. "rape victims from town X", or "logistics officer from 42nd Corps.") but should explain what information they could possess. This information may be derived from the position the person held, by public statements the person made, or by references to this person by other witnesses.
- Physical Evidence: Physical evidence is very often the most reliable evidence that is available. If collected, processed and analyzed properly, in most cases it offers a firm foundation upon which to draw conclusions. This section must comprehensively identify all the potential sources of physical evidence. Because of its susceptibility to destruction, especially during times of conflict, the collection of physical evidence must always be a

IV. Investigation

paramount concern of the investigation. This section should also set out, at least in general terms, the methods that will be employed to collect this evidence.

- Documentary Evidence: The experience has clearly demonstrated that documents are an essential part of proof at these trials. Most of the crimes that are under investigation are complex and the result of large collective efforts. The organization and implementation of such crimes invariably requires the production of documentation. This section seeks to enumerate all of the potential sources of this documentation as well as to identify the obstacles to their collection. During a war-time situation it may be difficult to identify and search the repositories of these documents. Some will be subject to national security laws and require protracted litigation to obtain them.
- Resources to be Deployed: Once the task list has been generated the resources necessary to complete these tasks should be identified with as much specificity as possible. While predicting the actual resources required for an investigation is a difficult and uncertain endeavour, efforts should be made to identify at least in approximate terms the resources that are going to be drawn upon. A prosecutor forced to allocate limited resources among several investigations must have the necessary information to make informed decisions. An investigation may also require resources not available within the office of the Prosecutor. Resources such as outside experts and lab analysis should be identified and quantified if possible at the outset of the investigation.
- Implementation of the Plan: It is important to give thought to the implementation of the investigative plan. Generally, all tasks should be completed according to a schedule. Some investigative avenues may be predicated on the results of another avenue. This section should identify these temporal relationships and fix the time period during which a particular investigative activity must be completed.
- Reviewers Comments: Prior to the implementation of an investigative plan there should be a careful and comprehensive review of the plan. This should be done at both a peer level and a senior management level. At the peer level there should be a consensus that the investigative objectives and methods are valid and reasonably likely to prove successful. At a senior management level the review should not only consider the objectives and methods of the individual plan but also similarities and possible areas of conflict between the different investigations being undertaken. Wherever possible different investigations examining related concerns should be identified and combined to increase the efficiency of the overall enterprise. In the case of potential conflicts between investigations (one investigation identifies X as a witness while another identifies X as a possible target of an investigation) senior managers should resolve these issues if possible or set up mechanisms which will monitor the possible conflict as both investigations progress. This process of review should result in a more carefully crafted investigation plan that can then be approved.
- Approvals: The Investigation Plan should be formally approved at the peer, senior managerial and prosecutor level. Given the cost and importance of these investigations it is imperative that the investigations be commenced only upon the approval of the senior staff of the Office of the Prosecutor.
- Periodic Review: Once the investigation commences it should be reviewed on a quarterly basis to assess progress towards its objectives and to evaluate how the collective knowledge of a particular event has evolved. During these reviews this recently collected evidence should precipitate alterations to the investigation plan. For example the class of people to be investigated should over time narrow as recent evidence inculpates some and exculpates others. Theories of how crimes were committed will similarly evolve and entire investigative avenues can be safely terminated and newer more precise avenues commenced.
- Summary of the Investigative Tasks to be Undertaken: Building on the investigation plan so far a list of tasks should be generated and allocated to different members of the team. Each task must be specific in its requirements, its time frame for completion and its expected work product.

IV. Annex 2: Guiding principles for exhumations

- *Logistical supplies (e.g. mortuary tables, x-ray equipment, and body bags) should be co-ordinated so that they arrive in advance of or at the same time as the human resources;*
- *A basic kit (for example a transport container of the necessary supplies) should be maintained to allow field operations to be undertaken at short notice;*
- *Before starting work the team should plan the operation and determine the supplies needed;*
- *Standardised procedures should be established in the form of written protocols for exhumations and autopsies. These procedures should also cover custody, control and handling procedures for evidence gathering;*
- *Experts (e.g. radiologists) are likely to be available only for short periods. Finding them and rotating them will be an onerous and difficult task. Ideally a register of qualified and available experts should be established at the outset, together with a system of call up which will allow them to be brought into the theatre at short notice;*
- *Proper arrangements must be made to clear exhumation areas of mines and other booby-traps. Bodies themselves may be booby-trapped, and teams should be vigilant at all times;*
- *Ideally identification of remains should be by a combination of traditional methods and DNA samples;*
- *Existing graveyards should be considered as holding sites for unidentified mortal remains and also for the temporary and hygienic storage of bodies before examination;*
- *Equipment must be suited to the conditions and meet minimum requirements. Bags and coffins must be marked with permanent markers. Coffins made of chipboard may suffice in the mortuary, but will disintegrate if used to transport bodies in the rain;*
- *Bodies should ultimately be returned to the relatives and the local community to be buried in accordance with their wishes;*
- *Team members, some of whom may be young and inexperienced helpers, should have regular stress debriefings.*

IV. Annex 3: Guiding principles in interviewing victims of sexual assault

- **Know the Security Situation:** Gather as much information as possible in advance about the physical and psychological security of the survivor, including the parties to the conflict, the status of the conflict, the location of the perpetrator group in proximity to the witness, the relationship between the relevant actors including combatants, officials, community leaders, and family of the witness, the community structure and roles within the conflict.
- **Know the political context:** Learn in advance as much as possible about the political environment, the conflict and geography, the motivations of the parties involved, the affiliations, and the local and regional authority structure.
- **Know the cultural context:** Be prepared with knowledge of the social structure, the religious beliefs and practices, traditional greetings, appropriate demeanour, methods of culturally sensitive barrier-breaking. Learn about the temporal markers, and about the story telling tradition. Develop an in depth awareness of the survivor's community taboos surrounding sexual violence, and the social consequences of coming forward with such evidence.
- **Do No Harm:** Prioritise the witness over the evidence. Empower the witness through respect and affirmation, using her or his words rather than substituting your own words. Be patient. Assume nothing. And do not rush either the witness or yourself. Know when to stop.
- **Ensure you have obtained informed consent:** Empower the witness through giving him/her a choice of whether and how to speak to you. Disempowerment of a victim of sexual violence could cause re-traumatisation. Recognise that investigators inherently have power, which can be used for good or for harm. Endeavour not to make any promises of any kind, and be aware of and seek to avoid subtle coercion.
- **Know the Law:** This will prepare the investigator with a blueprint of the elements of the crimes which the evidence must prove. It will increase the integrity of the final product produced through the witness interview, and prevent needless follow up interviews with witnesses for whom the very process of telling their story means reliving the events. Ideally investigators should go to the field with a short "aide memoire" of the elements of crimes and the types of evidence which could serve to prove those crimes. Then during a break in an interview, an investigator can consult the "aide memoire" and be easily reminded of aspects for immediate clarification.

V. Indictment

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1. As is the practice of many national systems, the ICTY sets out the allegations against the accused in an indictment. It is the main instrument guaranteeing the accused's right "*to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him*"- Article 21(4)(a) of the ICTY Statute. The Prosecution is bound to prove the facts and allegations contained in the indictment.
2. The indictment serves three main purposes:
 - ◆ it provides the basis for the arrest of the accused, once it is confirmed;
 - ◆ it provides the accused with notice of the charges against him;
 - ◆ it provides the basis for the Prosecution's case against the accused and thus for the trial itself, once challenges to its form and/or requests for amendments have been adjudicated.
3. The indictment is the principal document upon which the Prosecution relies upon to give notice to the accused regarding the case against him. It is essential to avoid the possibility that the charges will shift and becoming "moving targets" so that the accused would find it difficult to challenge them.

A. The state of readiness of the case

4. Ideally a case should be ready for trial before an indictment is issued and it should be the object of the Prosecutor's investigation to gather all necessary evidence before any charges are brought. However, ICTY experience has shown that in large, complex war crime cases investigations will continue well beyond the stage at which sufficient material has been assembled to justify charging an accused. In practice it is not possible to have the final indictment ready at the very outset of the case. Moreover, waiting until the investigation is "complete" may mean losing a unique opportunity to arrest the accused. The timing of the decision to issue an indictment will therefore have to balance the need to arrest the accused with the desire for further investigation.
5. Although detailed examination can occur later if the Defence challenges the form of the indictment, it is preferable to have judicial confirmation at the earliest stage. An independent thorough review of the indictment ensures that the crimes are properly described and that each charge is supported by evidence.

B. Overloading indictments

6. One of the most important lessons to be learned from the ICTY experience is that, given the complex nature of war crime trials, there is a tendency for indictments to become overloaded with charges, thus making it difficult for the criminal process to cope with the extent of issues to be proved. The problem becomes particularly acute in leadership cases or cases involving genocide and crimes against humanity, which inevitably involve massive prosecutorial undertakings. The criminal conduct of an accused in such a case is likely to extend over a lengthy period of time, and across broad geographical areas involving many individual victims and perpetrators. In leadership cases, it may be difficult to link commanders, especially political leaders, with individual incidents on the ground. In high-profile prosecutions, there may also be a desire to ensure that the charges properly reflect the full criminality of the accused in a way that will adequately be recorded in history. These factors sometimes encourage prosecutors to bring indictments that are unwieldy to the point of making trials unmanageable within a reasonable timeframe. It is, therefore, a good practice when drafting an indictment to estimate how long it is likely to take to try the case, bearing in mind the right of the accused to an expeditious trial.
7. Because of the range of possible crimes and the overlap among them, in most cases the same underlying facts may support various legal conclusions about the responsibility of an accused. The same facts, for example killings, may form the basis for a number of crimes such as genocide, extermination or murder. Unnecessary duplication of charges should be avoided. Depending on the strength of the evidence, charges may also have to be framed in the alternative, but care should be taken to avoid listing multiple theories of responsibility in a way that obscures the main theory of the Prosecution.
8. A considerable amount of jurisprudence has been developed in the ICTY as to the form of the indictment which has established a threshold of necessary specificity in indictments. Article 18 of the ICTY Statute requires a concise statement of the facts and the crime or crimes with which the accused is charged. There is no need for the Prosecution to include evidence in the indictment (*i.e.* how the facts are to be proved) (see Annex on CD Rom: *An example of an Indictment: Dragomir Milošević*).

C. The concept of "Adequate notice"

C.1 The material facts

9. The facts that must be pleaded in the indictment, the *material facts*, are the facts underpinning each of the charges.³ In other words, the indictment should include the facts underlying each of the elements of the crimes charged, as well as the forms of responsibility alleged, *i.e.*, the method by which the accused participated in the crime. The rationale behind this requirement is that, if the Defence is not properly notified of the material facts of the alleged crime until the Prosecution files its pre-trial brief, or until the trial itself, it will be difficult, if not impossible, for the accused to plan and work on his defence prior to commencement of the trial⁴. Moreover, an indictment that merely lists the charges against the accused without giving sufficient details of the material facts, does not constitute adequate notice, as it lacks "enough

³ *Kvočka et al.* Appeals Judgement, para.27.

⁴ *Kvočka et al.* Appeals Judgement, para.28.

detail to inform a defendant clearly of the charges against him so that he may prepare his defence"⁵. In other words, such an indictment is defective.⁶

10. The extent to which the details of material facts should be included in the indictment depends on the nature of the Prosecution's case. The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity demanded by the requirement of adequate notice. When an indictment alleges that an accused personally committed crimes, the material facts (e.g., the identity of the victim, the time and the place of the events and the means by which the alleged acts were committed) must be pleaded in detail.⁷ In other cases, however, such detailed information may not be in the Prosecution's possession, or the sheer scale of the alleged crimes may make it impractical to require specific details such as the identity of the victims and the exact dates of commission of the crimes.⁸ In any event, the indictment should contain enough information to allow an accused to understand the charges and defend himself effectively (see *Galić case - "Adequate notice"*).

Galić case - "Adequate notice"

The requirement that the Prosecution plead at a minimum the representative material facts in the indictment, is shown by the Galić case. Stanislav Galić was the commander of the Sarajevo Romanija Corps and de jure commander of Bosnian Serb military personnel present in Sarajevo. The indictment against Galić charged him with conducting: a campaign of shelling and sniping targeting civilian areas of Sarajevo between 10 September 1992 and 10 August 1994 that inflicted terror upon its civilian population, killing and wounding a large number of persons. The counts in the indictment were supported by a representative number of individual incidents listed in an annex to satisfy the Tribunal's requirement that an accused should have notice of the charges against him (specificity of pleading), as well as additional evidence of sniping, shelling incidents and other aspects of the situation in Sarajevo. The Trial Chamber concluded that the indictment as a whole gave adequate notice to Galić of the charges against him.*

* Galić Appeal Judgement, para.3.

C.2 The modes of responsibility

11. Article 7 of the ICTY Statute identifies the following forms of responsibility: planning, instigating, ordering, committing, aiding and abetting⁹ as well as superior responsibility¹⁰. An indictment should only plead the mode or modes of responsibility upon which the Prosecution intends to rely,¹¹ and, in order to avoid ambiguity, it should identify precisely the form or forms of liability alleged for the crimes charged in the indictment.¹² If an indictment merely quotes the provisions of Article 7(1) of the ICTY Statute without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous.¹³ As the ICTY's jurisprudence has developed, it has tended to require a greater degree of specificity in indictments, particularly in regard to specifying the charges and the accused's modes of participation in the crimes alleged.

5 *Simić Appeal Judgement*, para.20; *Kupreškić et al. Appeal Judgement*, para.88.

6 *Kupreškić et al. Appeal Judgement*, para.114.

7 *Naletilić and Martinović Appeal Judgement*, paras.24; *Kvočka Appeal Judgement*, para.28; *Krnojelac Appeal Judgement*, para.132.

8 *Naletilić and Martinović Appeal Judgement*, paras.25-27; *Kvočka Appeal Judgement*, paras.30-31; *Krnojelac Appeal Judgement*, paras.131-132.

9 Articles 7(1) and 6(1) of the ICTY and ICTR Statutes, respectively.

10 Articles 7(3) and 6(3) of the ICTY and ICTR Statutes, respectively.

11 *Simić Appeal Judgement*, para.21 (citing *Kvočka Appeal Judgement*, para.29).

12 *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, para.20; *Krnojelac Appeal Judgement*, paras.138-139; *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006 para.25.

13 See, e.g., *Aleksovski Appeal Judgement*, *supra* note 319; *Čelebići Appeal Judgement*, para.350; *Krnojelac Appeal Judgement*, paras.138-144.

12. The indictment must plead the material facts relevant to each of the forms of responsibility it alleges.¹⁴ For instance, when the Prosecution pleads "instigation" or "ordering" as modes of liability, it must describe precisely the instigating acts and the instigated persons or groups of persons,¹⁵ as well as material facts showing that the accused ordered the commission of a particular crime on a particular occasion.¹⁶ If the Prosecution relies on a theory of joint criminal enterprise (JCE), one of the forms of commission, then the Prosecutor must plead the purpose of the enterprise, its category,¹⁷ the identity of the participants and the nature of the accused's participation in the enterprise.¹⁸ Providing this information in the body of the indictment has by now become accepted not only as good practice, but as an essential element of fair notice to the accused of the allegations he will be expected to meet (see text box *Simić and Kupreškić cases - Requirement of adequate notice*).

Simić and Kupreškić cases - Requirement of adequate notice

*In Simić, the Trial Chamber had concluded that, although the final version of the indictment against Simić did not specifically allege his participation in a joint criminal enterprise (JCE), Simić had been given sufficient notice of the JCE charges by the inclusion of the words "acting in concert together" in the indictment. The Appeals Chamber, however, reversed the Trial Chamber's findings and held that none of the successive versions of the indictment gave the accused "adequate and timely notice that he was charged as a participant in a joint criminal enterprise". The Appeals Chamber found that the trial was unfair due to that defective notice, and it set aside Simić's conviction on the JCE charges**

*Similarly, in the Kupreškić case the Appeals Chamber found that the persecution charge against Zoran and Mirjan Kupreškić was not specific enough, because the Prosecution had not specified their role in the criminal conduct alleged. In the circumstances of the case, this lack of specific notice rendered the trial unfair, and, due to the Trial Chamber's erroneous reasoning in evaluating the evidence, resulted in acquittal of the two accused.***

* see Simić et al. Appeal Judgement, paras 73-74.

** see Kupreškić et al. Appeal Judgement, paras 245-246.

13. Indictments pleading modes of responsibility for which no corresponding material facts are pleaded are regarded as vague and therefore defective.¹⁹ It is impermissible for the Prosecution to allege forms of responsibility in an indictment that are not identified in the Statute or not encompassed by one of the forms of liability listed in the Statute.²⁰

D. Standardising indictment forms

14. The structure and wording of an indictment can be affected by the complexity of the case which can require inclusion of a large amount of information. The consequences of a defective indictment can be serious. Nevertheless, ICTY practice has resulted in a degree of organisation and standardisation in the form and content of indictments. These standardised indictments have survived challenges and, thus, serve the purpose

14 *Kvočka et al.* Appeal Judgement, para.29.

15 *Blaškić* Appeal Judgement, para.226.

16 *Kvočka et al.* Appeal Judgement, para.41.

17 The ICTY Appeals Chamber has identified three forms of JCE (basic, systemic and extended).

18 *Kvočka et al.* Appeals Judgement, para.29.

19 *Kvočka et al.* Appeals Judgement, para.41.

20 See, e.g., *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, paras.21-22; *Stakić* Appeal Judgement, para.62; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para.40; *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-PT; *Prosecutor v. Gotovina*, Case No. IT-01-45-PT, Joint Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006, paras.24-26.

of providing an example of permissible forms of indictments (see Annex on CD Rom - *An example of an ICTY indictment*).

15. The Office of the Prosecutor eventually adopted its own internal procedures for reviewing indictments before they are finalised and presented to a Judge for confirmation. Using a peer-review process, the prosecution team presented a draft indictment to colleagues from other teams, and defended their product against the colleague's questions. These internal indictment reviews helped produce a consistent approach, and often exposed problems with an indictment. The reviews also served to highlight the need for better evidence or further investigation, and produced suggestions for improvement.

E. Judicial approval of an indictment

16. The form of the indictment, its contents and the process of finalisation, will vary from one legal system to another. The ICTY's practice, enshrined in its Statute and Rules, is to have an independent Prosecutor prepare the indictment, and then to have the indictment confirmed by a Judge. The requirement for judicial examination of the indictment provides a safeguard against prosecutorial abuse. Given that war crime cases are often conducted against a background of political turmoil, it is good practice for the system to impose checks and balances on the Prosecutor's indictment power. However, it is equally important for the Prosecutor to function independently in a manner that avoids submission to political pressure to indict. Article 16 of the ICTY Statute therefore expressly provides: "the Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any government or from any other source."

E.1 The procedure of confirming an indictment

17. Under ICTY practice a proposed indictment and any supporting material must be submitted to a Judge designated to review indictments (Reviewing Judge). The Reviewing Judge must examine each count in the indictment and determine whether, on the face of the indictment, a *prima facie* case exists against the suspect on the basis of the supporting material. If the Reviewing Judge is satisfied that the indictment meets this standard,²¹ he confirms the indictment. In addition, the Reviewing Judge may, at the Prosecution's request, issue appropriate judicial orders for the arrest, detention or transfer of persons, or for any other purpose required by the trial process. If, however, the Reviewing Judge is not satisfied that the indictment establishes a *prima facie* case against the accused, he may ask the Prosecutor to present additional evidence supporting any or all of the counts, dismissing one or more of the counts, or adjourning his review to allow the Prosecutor the opportunity to modify the indictment.²²

E.2 The confirmation process as a control point

18. The ICTY's practice is for the confirmation process to be limited to an assessment of the *prima facie* sufficiency of evidence contained in supporting materials presented to the Reviewing Judge. A relatively low threshold test has generally been applied, and the ICTY does not require that a case be "trial-ready" at the indictment stage. In retrospect, the ICTY's approach may not have been preferable, and a more rigorous approach might have been beneficial. If the Tribunal had recognised the confirmation process as a vital

²¹ *Galić* Appeal Judgement, para.42; *Čelebići* Appeal Judgement, para.434.

²² Rule 47(F), ICTY RPE; Article 19(2), ICTY Statute.

control point in the process, or had developed a two-stage charging process involving the preparation of a detailed indictment at a later stage, the ICTY might have been better able to manage the pre-trial process. However, any Tribunal wishing to develop a greater judicial role in the confirmation process must carefully protect prosecutorial independence.

F. Challenging an indictment

19. An essential guarantee of a fair trial is the right of the accused to challenge by pre-trial motion aspects of the Prosecution's case against him. Before the ICTY, an accused has to make such challenges, but he/she must do so within 30 days after the Prosecution discloses the materials it relied upon in seeking confirmation of the indictment confirmed by the Reviewing Judge. An accused may bring a preliminary motion that challenges the Tribunal's jurisdiction or alleges defects in the form of an indictment.²³ If a Trial Chamber finds the accused's challenge to be well founded, it should order the Prosecution to amend the indictment (see Annex 4 - *Standards of review of the indictment before trial*).

G. Joinder of accused

20. When accused are alleged to have committed crimes together, it is good practice that they be tried jointly as co-accused on the same indictment. Under ICTY practice, when more than one accused are charged with the same or different crimes that are part of the same transaction (*i.e.*, a common scheme, strategy or plan that may include one or a number of events at the same or different locations and times),²⁴ they may be charged together in the same indictment and tried together in the same trial.²⁵ The Prosecution may opt to join accused from the very outset of the case or make a trial request for joinder. The number of the accused that may be tried in a single proceeding is subject to objective limits resulting from physical space limitations. Depending on the stage of proceedings, either the Pre-Trial Chamber or the Trial Chamber must decide whether to permit the joinder. In deciding the matter, the Pre-Trial or Trial Chamber must ensure that each accused in a joint trial is guaranteed the same rights he would have enjoyed had he been tried separately. Indeed, the Chamber may order separate trials to protect the rights of the accused, in order to avoid conflicts of interest that might prejudice an accused or to ensure the interests of justice.²⁶

²³ Rules 72(A)(i) and (ii), 66(A)(i), ICTY RPE; see also Rules 72(B) and 73, ICTY RPE.

²⁴ A "transaction" is defined as "a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan." (Rule 2(A)). See also *Prosecutor v. Zdravko Tolimir, Radivoje Miletic & Milan Gvero*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Miletic* Decision on Joinder"), para.7; *Prosecutor v. Vinko Pandurevic & Milorad Trbic*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurevic* Decision on Joinder") para.7; *Prosecutor v. Milosevic*, Case Nos.: IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milosevic* Appeals Decision on Joinder"), paras.13-17, 21.

²⁵ Rule 48, ICTY RPE; *Prosecutor v. Ante Gotovina and Prosecutor v. Ivan Čermak and Mladen Markač*, Case Nos. IT-01-45-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("*Gotovina* Interlocutory Decision of 25 October 2006"), para.16; *Miletic* Decision on Joinder, paras.7-8; *Pandurevic* Decision on Joinder, paras.7-8.

²⁶ Rule 82, ICTY RPE; *Gotovina* Interlocutory Decision of 25 October 2006, para.17; *Pandurevic* Decision on Joinder, para.8 and fn.20; see *Prosecutor v. Popovic et al.*, Case No. IT-88-AR73.1, Decision on Appeals Against Decision Admitting Material Related to Borovcanin's Questioning, 14 December 2007, para.43.

21. Within 30 days after the Prosecutor discloses to the accused the materials supporting the indictment, an accused may file a preliminary motion seeking separate trials for persons charged together in the indictment.²⁷ A Trial Chamber may, in its discretion, grant permission to file an interlocutory appeal challenging its decision on such a motion.²⁸
22. The decision to try a number of accused together should be based upon policy and practical considerations. While there may be a clear preference for trying all those allegedly involved in a crime at the same time, so that judges can evaluate a transaction as a whole and can utilize resources more efficiently, practical issues may prevent joint trials. At the ICTY, for example, the number of fugitives, and the fact that individual fugitives may be apprehended at different times, has sometimes made it difficult to jointly prosecute all individuals accused of one criminal transaction. However, the ICTY experience has shown that given the length and complexity of a trial, joinder of accused where possible is advisable. Separate trials can be difficult because they require additional resources, and create witness fatigue by requiring key witness to give what is essentially the same evidence on multiple occasions. This multiple testimony may create resentment on the part of the witness and may result in contradictions between depositions provided at different times.

H. Joinder of crimes

23. Two or more crimes committed by a single accused may be joined in one indictment if the series of acts, considered together, form a single transaction.²⁹ However, the Trial Chamber retains the discretion to deny such joinders.
24. In the exercise of the above discretion, the Trial Chamber may consider the following factors:
 - ◆ prejudice caused to an accused's right to a fair and speedy trial;
 - ◆ injustice caused by an unmanageably lengthy trial;
 - ◆ onerousness of the burden on an accused;
 - ◆ prejudice caused to an accused by the introduction of evidence relevant to only one locality into a trial which covers multiple localities.
25. Within 30 days of the Prosecution's disclosure to the accused of materials supporting the indictment, an accused may file a Preliminary Motion seeking the severance of counts joined together in a single indictment.³⁰ A Trial Chamber may, in its discretion, grant permission to file an interlocutory appeal to challenge its decision on a motion seeking the severance of joined counts.³¹

I. "Sealed" indictments

26. Initially, the ICTY practice was to publicly issue an arrest warrant upon confirmation of an indictment. However, the ICTY found that publishing indictments and generating media attention proved to be ineffective, as did the practice of announcing indictments in open proceedings designed to highlight failures to arrest

27 Rules 72(A)(iii), 66(A)(i), 82(B), ICTY RPE.

28 Rules 72(B)(ii) and 73(B), ICTY RPE.

29 For the definition of a "transaction", see *supra*, footnote 24.

30 Rules 72(A)(iii), 66(A)(i) and 49, ICTY RPE.

31 Rules 72(B)(ii), 73(B), ICTY RPE; see *supra*, sub-section F. *Challenging the Indictment*.

suspects. When accused learned of the existence of warrants for their arrest, it was not uncommon for them to go into hiding, sometimes in territories where they received protection. Eventually, the ICTY's Prosecutor's Office adopted the practice of requesting that indictments be "sealed" (not made public) after confirmation. When the opportunity to detain and arrest an accused exists, sealed indictments are undoubtedly more effective than are public documents. Sealed indictments allow the ICTY time to inform other authorities about the existence of arrest warrants and to plan arrests in the way traditional police forces do. As the ICTY was able to detain suspects in the post-conflict area, the Tribunal was able to begin prosecutions. On the other hand, when an accused is known to be at large on the territory of a sovereign state, publication of the indictment and resulting diplomatic pressure will be more likely to achieve results.

No State is entitled to shelter an accused from arrest, but failure to engage the State authorities in the arrest process may also cause difficulties (see text box *Nikolić case - Issues of Jurisdiction related to unclear circumstances of arrest*).

Nikolić case - Issues of Jurisdiction related to unclear circumstances of arrest

On 21 April 2000, Dragan Nikolić, charged with various crimes against humanity in the exercise of his functions as commander of the "Sušica" prison camp near the town of Vlasenica (Bosnia and Herzegovina).^{} He was arrested under unclear circumstances, and handed over to officials of the OTP by the Stabilisation Force in Bosnia and Herzegovina (SFOR). Nikolić alleged that unidentified individuals had abducted him on Serbian territory and had transferred him to Bosnia-Herzegovina against his will, where these same individuals handed him over to SFOR officials. The Appeals Chamber considered whether the appropriate remedy for the possible violations of Nikolić's rights could be to refuse to exert its jurisdiction; the Chamber, however, concluded that it is possible to exert jurisdiction over individuals illegally detained in the case of universally recognized crimes, such as genocide, crimes against humanity and war crimes.^{**}*

^{*} Prosecutor v. Dragan Nikolić, Case No. IT-94-2-PT, Third Amended Indictment, 31 October 2003.

^{**} Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 September 2003, para.24.

27. Issues may arise, as has happened before the ICTY, regarding the way an accused is brought before the court. Several domestic systems decline to exercise jurisdiction over accused who were illegally apprehended. Because of the extra-territorial nature of the crimes under the Tribunal's jurisdiction, the Tribunal must rely on other entities to detain or arrest indictees. In certain instances allegations of kidnapping have arisen and accused have argued that by exercising jurisdiction the Tribunal would be sanctioning the abuse of their rights that occurred by the kidnapping. In no case has the Tribunal found that an alleged kidnapping could be imputed to its prosecution and claims of kidnapping by persons unconnected to the Tribunal's proceedings are not considered a sufficient basis to warrant the Tribunal declining to exercise its jurisdiction.

J. Amendment of an indictment

28. In practice, it may be necessary to amend an indictment as new evidence becomes available. The Prosecution may amend an indictment at any time before the Reviewing Judge confirms it.³² However, once an indictment has been confirmed by a Reviewing Judge, and therefore assumed legal effect, it may only be amended with the permission of the confirming Judge or another Judge assigned by the President of the Tribunal.³³ Once the case has been assigned to a Trial Chamber, the indictment may only be amended with the permission of that Chamber (or a Judge thereof) and only after the parties have had an opportunity to be heard on the proposed

32 Rule 50(A)(i)(a), ICTY RPE.

33 Rule 50(A)(i)(b), ICTY RPE.

amendments.³⁴ In such cases, the accused must be brought before the Trial Chamber as soon as possible to enter his plea on the new charges,³⁵ and the accused may file a preliminary motion challenging the Tribunal's jurisdiction or alleging defects in the form of an amended indictment with respect to the new charges.³⁶ Thus, the system is designed to allow some flexibility to the Prosecution in making changes to the indictment in the interest of justice, but at the same time to prevent potentially prejudicial modifications from being made without a Judge's approval.

29. A Trial Chamber will authorise an amendment if it does not cause prejudice to the accused.³⁷ Thus, fairness is the main criterion in deciding whether to authorise amendments.³⁸ Fairness essentially requires the availability of adequate opportunity to the accused to prepare an effective defence in view of the amendments.³⁹ (For a discussion of a Trial Chamber's power to invite the Prosecution to reduce the number of counts charged in an indictment, or to direct the Prosecution to elect the counts on which to proceed, see Chapter VII - Pre-Trial - section on reducing the scope of the indictment).

34 Rule 50(A)(i)(c), ICTY RPE; see *Gotovina* Decision of 25 October 2006, para.7.

35 Rule 50(B), ICTY RPE.

36 Rules 72(A)(i) and (ii), 66(A)(i), ICTY RPE.

37 *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution's Motion for Leave to File an Amended Indictment, 14 September 2007, para.14 (citing *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin and Talić* Decision"), para.50; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-PT, Decision on Vinko Martinović's Objection to the Amended Indictment and Mladen Naletilić's Preliminary Motion to the Amended Indictment, 14 February 2001, p. 7); *Prosecutor v. Gotovina*, Case No. IT-01-45-PT, Joint Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder, 14 July 2006 ("*Gotovina* Indictment Decision"), para.10 (citing *Brđanin and Talić* Decision, para.50; *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, ("*Halilović* Decision"), para.22; *Prosecutor v. Beara*, Case No. IT-02-58-PT, Decision on Prosecution Motion to Amend the Indictment, 24 March 2005, p. 2 ("*Beara* Decision")).

38 *Gotovina* Interlocutory Decision of 25 October 2006, para.8; *Gotovina* Indictment Decision, para.10 (citing *Brđanin and Talić* Decision, para.50; *Prosecutor v. Ivan Čermak and Mladen Markač*, Case No., IT-03-73, Decision on Prosecution Motion Seeking Leave to Amend the Indictment, 19 October 2005 ("*Čermak and Markač* Second Indictment Decision"), para.35).

39 *Čermak and Markač* Second Indictment Decision, para.35.

V. Annex 4: Standards of review of the indictment before trial

- *Almost identical indictments were brought against various accused inter alia alleged to have participated in a same joint criminal enterprise which involved the commission of various crimes in Kosovo. Challenges were brought to similar aspects of the indictments in the case against Milutinović, Ojdanić and Šainović where the latter unsuccessfully challenged the form of the indictment,*and a little more than two years later in the case against Payković, Đorđević, Lukić and Lazarević, where the latter raised arguments similar in part to the ones raised by Šainović. The Trial Chamber disposed of the challenge to the form of the indictment raised by Lazarević in response to a motion to join the two cases.*
- *Reviewing the challenge raised by Lazarević, the Trial Chamber concluded that it must be addressed on its own merits in the light of legal developments. In particular, the Trial Chamber took note of the standards established by the Appeals Chamber for determining whether the Prosecution had stated the material facts of its cases in sufficient detail in the indictments in the Blaškić, Kordić & Čerkez, Kvočka et al. and Ntakirutimana cases, so that the accused were informed clearly of the nature of the charges against them and were able to prepare their defence effectively and efficiently.***
- *Applying these standards, the Trial Chamber found the indictment to be defective in several respects and ordered the Prosecution to amend the indictment as follows:*
 - *Identify either a) the specific conduct that supports the averment that the accused acted in each or any of the ways whereby individual criminal responsibility may be attributable to him under Article 7 (1) of the Statute; or, b) state that it does not intend to rely upon specific conduct but proposes to invite the Trial Chamber to infer that the accused acted in one or more of the ways set out in Article 7(1) from the conduct of the forces over whom he exercised authority, his position in the military hierarchy and his relationship to others, in the military, police or political hierarchy;*
 - *Specify the state of mind required for each of the various forms of responsibility alleged pursuant to Article 7 (1) of the Statute, including participation in the various forms of JCE alleged, and how these material facts are to be established;*
 - *Clarify to whom the expression "others known and unknown" refers and further state the identity of those participants in the JCE whose identities are known. If the identity of participants is not known, then specify the category to which they belong;*
 - *Specify the category of persons alleged to have committed the crimes charged by indicating which of the forces and units allegedly subordinated to the accused were involved in the events in each municipality and specify whether it is the Prosecution's case that only those forces and units were involved in the commission of the crimes charged;*
 - *Specify, if the Prosecution is in a position to do so, 1) the units attached to the VJ Priština Corps of the VJ 3rd Army, in the Corps' area of responsibility, the Prosecution alleges were commanded by the accused and 2) the republic police units subordinated to, or operating in co-operation or co-ordination with, the Priština Corps of the VJ 3rd Army or military-territorial units, civil defence units and other armed groups over which it alleges that the accused exercised command authority or control;*
 - *Identify specific aspects of the conduct of the accused, from which the knowledge and failure to act - required to establish his superior responsibility with regard to the crimes charged - may be inferred;*
 - *Specify the forces of the FRY and Serbia that were allegedly involved in each of the enumerated incidents of*

murder;

- *Specify the state of mind required for the crime of persecution.*

- *Faced by additional challenges raised by Lukić and Pavković, the Trial Chamber also required further amendments to the indictment to specify the category of persons involved in the "forces of the FRY and Serbia" alleged to have committed the crimes charged*** and the basis for the allegation that subordinates to the accused "included, but were not limited to, members of the MUP, military-territorial units, civil defence units and other armed groups."*****
- *Thus, despite the very similar wording in these indictments, the development in the law by the two ad hoc Tribunals made it possible for later accused to successfully challenge portions of their own indictment, which were deemed too vague to provide appropriate notice, while the same wording had been considered sufficient only a couple of years before.*

* *Milutinović et al. case, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003.*

** *Pavković et al. case, Case No. IT-03-70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para.12, referring to Blaškic Appeal Judgement, para.226; Kordić and Čerkez Appeal Judgement, paras. 144 and 147; Kvočka et al. Appeals Judgement, paras. 29, 41 and 42; Ntakirutimana Appeal Judgement, para.86 and 555.*

*** *Pavković et al. case, Case No. IT-03-70-PT, Decision on Nebojša Pavković Preliminary Motion on Form of Indictment, 15 July 2005.*

**** *Pavković et al. case, Case No. IT-03-70-PT, Decision on Sreten Lukić Motion on Form of Indictment, 15 July 2008.*

VI. Arrest Warrants

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A. Publication of the indictment and arrest warrants

A.1 Review and filing of the indictment

1. The Registry's practice is to open a new case-file when it receives an indictment with supporting materials, and a request for review/confirmation of the indictment signed by the Prosecutor or one of his/her representatives. An indictment can contain charges against multiple accused. In order to avoid the possibility of an accused fleeing, the Prosecution will often file the request for review/confirmation of the indictment confidentially and ask the Confirming Judge to issue the arrest warrant confidentially. The Registry will transmit the case-file to a Judge of a Trial Chamber, designated by the President. The Judge will then review the indictment. If the indictment is confirmed, the judge will issue an arrest warrant for the accused specified in the indictment. Once the arrest of one or more of the accused is executed, the President assigns a Trial Chamber to the case.
2. The Registry facilitates the scheduling of an indictment review hearing at which the Judge hears the Prosecutor in chambers. During the hearing, the Registrar carries out various necessary functions. The indictment review hearing may be recorded and a record of the entire procedure may be prepared. In all cases, minutes are kept by the Registry representative or any person authorised to do so. The "Minutes of the review of the indictment hearings" are then filed in the case file after the approval by the Reviewing Judge.
3. The practice of having a Registry representative present at the indictment review hearing was modified over the years. Eventually, the Reviewing Judge was given the discretion to decide whether to have a representative present. Many Judges did not consider it necessary to have a representative of the administration at the review procedure and as a result not all confirmed indictments include minutes of the review procedure in the record. In any event, the Registry was instructed to take certain actions following the confirmation process without consideration by the Reviewing Judge of the operational or logistical difficulties faced by the Registry in implementation of those instructions. The Registry can play a useful role in facilitating the efficient processing and filing of the indictment at the stage of submission and review. Practical and operational issues can be addressed and resolved at an earlier stage through adequate communication between the Reviewing Judge and the Registry official.

A.2 Transmission of arrest warrants

4. Service of the indictment and service of the arrest warrant, in most cases, are integral. With the confirmation of an indictment, an arrest warrant may be requested and issued by the confirming Judge. Since the Registry is required to work with national authorities in order to serve foreign court documents in the State concerned,

VI. Arrest Warrants

proper and expeditious execution of the arrest warrant requires that the Judge provide clear instructions to the Registry regarding the competent national authority to which the arrest warrant should be directed. Clear instructions help conserve both time and resources, and help proper service of process. In many cases, however, a Judge's ability to identify the State to which an arrest warrant should be directed is dependent on the availability of information as to the whereabouts of the accused. In many cases, the precise location of an accused will be unknown.

5. When arrest warrants are issued confidentially, clear decisions need to be made regarding when and how to lift the confidentiality. In cases where confidentiality can be lifted immediately after the transfer of the accused to the United Nations Detention Unit (UNDU) or upon arrest, instructions to this effect can be incorporated into the warrant of arrest, thereby avoiding the need for issuance of a subsequent order. Further, it allows a definite time frame for media and publication purposes. Prior to arrest, flexibility of disclosure can be useful for operational reasons. For example, if a tribunal wishes to ensure that the entity executing the warrant need not seek further order or clarification regarding its ability to disclose the arrest warrant to third parties, it can use the following language:

'ORDER that, with the exception of the persons or entities designated by X or X's authorised representative(s) to whom or which this Arrest Warrant is transmitted, there shall be no public disclosure of this Arrest Warrant and the accompanying materials until further order'.

B. Arrest warrants and failure to execute

6. It is of crucial importance that a tribunal establishes a reliable network to ensure that all relevant authorities or entities receive the Indictment and Arrest Warrant. Establishing firm contact with focal points or liaison officers for Embassies, other national governmental authorities – international peacekeeping or administrative authorities – and maintaining regular contact with them is pivotal for the success of the process. The need for such a network is most evident during the arrest and transfer of an accused to the Seat of the Tribunal. The Registry can also rely on this network to obtain further information in cases where there has been a failure to execute a warrant of arrest.⁴⁰
7. For the efficient functioning of the network – and to avoid unnecessary delays in the transmission and execution of arrest warrant – it is advisable to maintain and update contact information for all relevant focal points and liaison persons. In addition, the network should include a duty roster designed to ensure that a Registry official, Judge, and Chamber Legal Officer is on-call to cover all issues that may arise outside of the official working hours or during the court recess.
8. The diplomatic channels, which the Registry is required to use in implementing arrest warrants, may not be the most efficient mode for transmitting arrest warrants. Future tribunals should consider the possibility of creating a mechanism that allows the prosecution to use its own criminal justice/police networks to handle the execution of warrants. The INTERPOL red notice procedure, for example, is an effective one. Often, the OTP's active tracking team has the latest information on the whereabouts of an accused. Since many arrest opportunities are extremely time-sensitive – as accused can move across borders -hours or even minutes may count. If warrants can be addressed to the Prosecutor, in addition to being addressed to specific States, it may

⁴⁰ Pursuant to Rule 59(A), ICTY RPE, "where a State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar and the reasons therefore".

be possible to more rapidly transmit an arrest warrant to police authorities in the territory concerned without having to obtain a fresh warrant from a duty Judge. Investigators from the OTP may need to be on standby to rapidly respond following the detention of an accused in order to complete the arrest formalities and verify the identity of the person in custody.

9. ICTY rules also allow the Prosecutor to ask States to arrest a suspect or accused provisionally or to take necessary measures to prevent his escape. These rules have been usefully employed in circumstances when an indictment was imminent, but had not yet been issued, and swift action was necessary to seize a unique arrest opportunity. The Tribunal's Rules also contained a special procedure to be used in cases involving failure to execute a warrant. Rule 61 provided for a public hearing before a Trial Chamber in circumstances where the Registrar and Prosecutor could demonstrate that reasonable steps had been taken to secure the accused's arrest and that a reasonable period of time had elapsed without the execution of the warrant of arrest by the State to which it had been transmitted. This procedure was invoked in 1996 in the case against Radovan Karadžić and Ratko Mladić. In a public hearing before three Judges of the Trial Chamber, the Prosecutor presented the indictment and the supporting materials in open court, outlined the failure by the State to arrest the accused, and also called certain witnesses to testify publicly about the events. The accused, who were at large, were not allowed to be represented, although an *amicus curiae* was invited to appear at the hearing. The procedure did not constitute a trial in absentia and was not designed to result in a conviction. Instead, the Chamber issued an international arrest warrant addressed to all UN Member States. The public Rule 61 procedure therefore served a limited purpose, but was discontinued when the Prosecutor adopted the practice of seeking to have indictments sealed and kept out of the public domain.

C. Co-operation of States and voluntary surrender

10. The Tribunal relies on the co-operation of States to execute arrests due to its lack of police power outside the premises of the Tribunal and due to its lack of authority to serve court documents on the territory of States. The Registry's role in arrests and transfers involves coordination between the relevant authorities of the arresting State and the Host State.

C.1 Cooperation of States

11. State cooperation is premised on Security Council Resolution 827 (1993)⁴¹ which provides that:

all States shall cooperate with the International Tribunal [...] and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.

12. While the provisions of the Statute are self-executing (in that they oblige a State to take all necessary measures under its domestic law to implement the Statute's provisions), the ICTY's Rules further provide that the obligation laid down in Article 29 of the Statute prevails over any legal impediment to the surrender or transfer of the accused to the Tribunal, which may exist under the national law or extradition treaties of the State concerned. This Rule corresponds to the primacy of the Tribunal over national courts established by Article 9 of the Statute. The Rules provide that the transfer of an accused to the seat of the Tribunal shall be

41 S/RES/827 (1993), 25 May 1993.

arranged between the State authorities concerned, the authorities of the Netherlands and the Registrar. The latter is responsible for coordinating operational procedures for the transport of the accused from the transferring State to the United Nations Detention Unit (UNDU), located in The Hague, Netherlands. The procedures should include consideration for related matters such as the mode of transport, security and medical needs (if any) during the transport. With the cooperation of States and other international bodies, the Registry has coordinated transfers involving military and commercial vehicles/aircraft.

13. In cases of arrests or voluntary surrenders taking place in the States of the former Yugoslavia, the transfers of accused have generally taken place without issue or query made regarding the statutory and regulatory basis for the transfers. The Registry's coordination role is greatly facilitated by the presence of a Registry liaison Officer in the region. This presence enabled and fostered the establishment of a communication network between the Tribunal and the relevant national authorities and international entities *i.e.* SFOR, KFOR, UNMIK, EULEX (present within the former Yugoslavia) which in turn helped with the organisation and logistics involved in the transfer of accused to the Seat of the Tribunal.
14. States outside the former Yugoslavia⁴² have sometimes sought clarification from the Registry regarding the statutory and regulatory basis for transfers following arrests. Typically, clarification was sought regarding the relevance of national extradition practice, whether conditions can be placed on the transfers or whether there was a further need to enter into *ad hoc* agreements between the transferring State and the Tribunal. Concerning the latter two questions, the Registry has consistently maintained the position that all States are obliged to carry out the transfer under the Article 29 of the Statute. Furthermore, Rule 56 RPE states that, "the State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute".⁴³ Thus when a State complies with its Article 29 duty to surrender an accused to the Tribunal, conditions should not be placed on the transfer. There is also no necessity for an agreement between the ICTY and a State as a predicate for the transfer of an accused to the Seat of the International Tribunal. On the basis of Security Council Resolution 827 (1993), as well as the provisions of the Statute and the Rules, there is sufficient legal basis for carrying out the transfer. For example, Rule 58 states that "the obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused [...] to the Tribunal which may exist under the national law or extradition treaties of the state concerned. The statutory and regulatory confirmation of the primacy of the Tribunal over national courts is the corner stone upon which the operational aspects of transfers and indeed, their unimpeded and expeditious coordination by the Registry have been made possible."⁴⁴

C.2 Host State cooperation

15. Apart from Security Council Resolution 827 (1993), and Article 29 of the Statute, cooperation with The Netherlands is based principally on the "Host State Agreement".⁴⁵ With regards to arrests and transfers

⁴² For example, individuals indicted by the Tribunal have been arrested and transferred from Germany, Austria, Argentina and Russia.

⁴³ In this connection, it is relevant to note that in, Case No. IT-94-1, *Prosecutor v. Duško Tadić a/k/a "Dule"*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, paras.77-93, the Appeals Chamber of the Tribunal stated that, "the principle of primacy of the Tribunal over national courts is not inconsistent with the principle of the sovereignty of States under international law. The crimes within the jurisdiction of the Tribunal are universal in nature, transcending the interest of any one State. The sovereign right of States cannot take precedence over the right of the international community to act appropriately".

⁴⁴ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-PT, "Decision on Referral of Case Pursuant to Rule 11bis with Confidential Annex A and Annex B", 5 April 2007, paras.108-122.

⁴⁵ "Agreement between The United Nations and The Kingdom of The Netherlands Concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991", 29 July 1994 ("Host State Agreement").

undertaken on behalf of and in cooperation with the Tribunal, The Netherlands can "not exercise its criminal jurisdiction over persons in its territory, who are to be or have been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country".⁴⁶ The Netherlands further assists the Tribunal with the transport and escort of the accused from the point of entry into Dutch territory (e.g., an airport) until the UNDU. In order for this operation to run smoothly, the Tribunal must maintain a system for communicating with and notifying the various Dutch authorities involved in the operation. This system of notification allows the Host State to ensure that the necessary threat assessments, as well as security and operational resources, are put in place to ensure that the transfer of the accused is expedited efficiently and safely. The success of the Registry's role in coordinating the operation between the authorities of the Host State and the transferring authority/State depends on the effectiveness of this system of communication and notification.

16. Furthermore, in view of Article XX of the Host State Agreement, the Host State's cooperation in ensuring the smooth transfer of accused to the UNDU is primarily based on the Tribunal's warrant of arrest, which is considered by the Host State as the legal basis for depriving the suspect or accused of his personal liberty, including measures of constraint during transport on Dutch soil. In cases where there is no arrest warrant, such as in cases of indictment for contempt of the Tribunal, the Host State may be concerned regarding the movement of a contempt accused within Dutch territory. This concern is further magnified in the case where the contempt accused is a national of a non-European Union State and thereby requires a visa to enter the Netherlands. The visa requirement is subject to abuse so that, upon entry into the Netherlands (and hence, the European Union), the individual may abscond and fail to appear to answer the contempt charges. It has been suggested by the Host State that a trigger to allow the Host State to exercise its authority to assist the Tribunal with ensuring the appearance of the contempt accused before the Tribunal is lacking. The Host State proposed a solution in the form of a suspended warrant of arrest (as exists under the Host State national legislation) that provides for conditions under which the suspension will be lifted and thereby providing the Host authorities with the necessary legal basis to act. The solution could, however, for various legal and practical reasons not be implemented by the ICTY.
17. An effective system of communication and notification with the various Host State authorities involved in cooperation with the Tribunal during arrests and transfers is critical. In the case of contempt of the Tribunal, that do not involve circumstances that merit the issuance of an arrest warrant, consideration of the practical benefits derived from a suspended warrant of arrest could assist the Host State in its efforts to cooperate with the Tribunal to ensure that an accused enters Dutch territory strictly for the purpose of the contempt proceedings.

46 Article XX (1), Host State Agreement.

VII. Pre-Trial

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1. Because of the scale and inherent complexity of war crimes trials, active pre-trial management is needed. The pre-trial stage provides an important opportunity to ensure that the trial is conducted in the most fair and expeditious manner while bringing the Prosecution and Defence together to resolve issues that can be disposed of before the trial begins. Without robust pre-trial management, trials will be unduly lengthy, witnesses will be called needlessly, valuable court time will be taken up with procedural issues instead of hearing evidence. Adjournments, expensive delays and interruptions will occur, and it will be difficult to prevent collateral matters from diverting the court's attention away from substantive issues. As a result, the participants will be unable to plan their activities, or properly manage their time, and the right of the accused to an expeditious trial may be violated.
2. The objective of the pre-trial stage should be twofold: to dispose of as many issues as possible in order to conserve valuable court time; and to provide a solid platform for the parties and the court to determine how much time is required to present evidence on the matters in dispute. The Pre-trial Judge, who is assigned by the Presiding Judge of the Trial Chamber shortly after the accused arrives at the Tribunal, is ultimately responsible for implementing planning and organizational objectives. The Pre-trial Judge is assisted by a Senior Legal Officer (SLO) who manages the case from shortly after the initial appearance of the accused until the case is about to proceed to trial. The Pre-trial Judge performs many functions, including coordinating communication between the parties, ensuring that the proceedings are not unduly delayed and taking all judicial measures necessary to prepare the case for trial. In complex cases which regularly involve a great number of witnesses and exhibits, this task is critical to ensure the smooth running of the case at trial.
3. The role of the Pre-trial Judge has increasingly gained significance as the Tribunal has tried to implement recommendations of the Working Group on Speeding Up Trials.⁴⁷ These recommendations related to greater pre-trial efficiency and a more proactive role of the Pre-trial Judge in making full use of the managerial tools at his or her disposal.

⁴⁷ The Working Group on Speeding Up Trials was established by the President of the Tribunal in February 2005 and made written recommendations in a February 2006 report. The Working Group was reconstituted in April 2008 to undertake an assessment of the implementation of those recommendations. Many of the pre-trial practice improvements are a direct result of the initiative to create the Working Group.

A. Pre-trial proceedings

4. Due to the number of procedural steps required to prepare a complex war crime case for trial, a minimum period of eight months to a year is needed, after an accused arrives at the seat of the Tribunal, until the trial begins. This time period can vary, depending on the degree of priority and number of unforeseen problems that might arise.
5. Pre-trial proceedings should begin the moment the accused arrives at the seat of the Tribunal. From that moment, until the Defence files a motion on the form of the indictment, the Rules prescribe the course of events that need to take place and impose a number of deadlines. If there are no requests for extension of time, or other time-consuming requests (e.g., related to protective measures), this stage can be completed in just over two months.
6. The immediate period of time following the arrival of an accused to the Tribunal is a very busy one. Once an accused arrives, the President assigns the case forthwith to a Chamber. The Presiding Judge of that Chamber then typically issues four orders: 1) an order designating a judge before whom the initial appearance will take place; 2) a scheduling order for the initial appearance of the accused; 3) an order for the release of the audio-visual record and permitting photography; and 4) an order for the detention of the accused on remand to the United Nations Detention Unit. Although the Rules allow for the initial appearance to take place before a bench of three judges, normally these tasks are carried out by a single judge⁴⁸. The accused may not be released except upon an order of a Chamber⁴⁹. Furthermore, although the initial appearance shall take place "without delay"⁵⁰, it normally takes place one or two days after the accused's arrival, depending upon whether the accused arrived over a weekend. This allows sufficient time to prepare an agenda, as well as the various orders, and to consult with counsel regarding whether the accused will waive his right⁵¹ to have the indictment read in full at the appearance. As to the latter, most accused waive this right and the Judge simply provides a summary of the case against the accused.
7. The main purpose of an initial appearance is to inform the accused that he or she will be called upon to enter a plea of guilty or not guilty on each count in the indictment within 30 days.⁵² In the majority of cases, the pleas are entered at the initial appearance, but if the accused elects to defer entry of pleas, then a further appearance must be scheduled. If an accused ultimately refuses to plead, the judge will enter a plea of not guilty on the accused's behalf.⁵³ There may be occasions where entry of pleas may not be warranted such as when the accused has not yet been assigned counsel or has been unable to sufficiently discuss the indictment and supporting material with counsel. Before the initial appearance, the Office for Legal Aid and Detention Matters (OLAD) should assign a duty counsel to the accused,⁵⁴ unless counsel is refused and the accused chooses to appear without the assistance of Defence counsel. A plea of guilty, should one be entered, can only be accepted by a full bench⁵⁵ after it satisfies itself that the accused understands the charges to which he/she has decided to plead guilty and it concludes that there are sufficient factual allegations underpinning those charges. The initial appearance, which is not necessarily the point at which a plea is entered, triggers a

48 Rule 62(A), ICTY RPE.

49 Rule 65(A), ICTY RPE.

50 Rule 62(A), ICTY RPE.

51 Rule 62(A)(ii), ICTY RPE.

52 Rule 62(A)(iii), ICTY RPE.

53 Rule 65(A)(iv), ICTY RPE.

54 Rule 62(B) and Rule 45(C), ICTY RPE.

55 Rule 62(A)(vi), ICTY RPE.

number of important time limits for the pre-trial proceedings, relating to disclosure obligations and the filing of preliminary motions. The date of the initial appearance also serves as the starting date for determining the date of the next hearing (generally referred to as a status conference). Even if a status conference is needed, the scheduling of a further appearance does not postpone the deadlines for the filing of preliminary motions, which depend on disclosure of material supporting confirmation of the indictment.

8. Within one week of the accused's initial appearance, the Presiding Judge should appoint the Pre-trial Judge of the Trial Chamber. Within two to three weeks of the accused's arrival, permanent counsel should be chosen by the accused from a list of qualified counsel maintained by the Registrar, and the choice should be reflected in an appointment by the Deputy Registrar in coordination with OLAD. Normally, delay in the assignment of permanent counsel is attributable to the time needed to find someone who is both available and satisfactory to the accused. Often the accused will select a counsel who is not already on the list of counsel, and the Registrar will have to ensure that the chosen counsel has the necessary qualifications and language skills to be placed on the list of counsel eligible to represent accused before the Tribunal.
9. Within 30 days of the initial appearance, the Prosecution must disclose to the accused copies of the supporting material which accompanied the indictment during the confirmation process, as well as all prior statements obtained by the Prosecution from the accused.⁵⁶ Normally, this material is already organised for immediate disclosure to an accused, but the duty defence counsel typically prefers that it be directly disclosed to the permanently assigned counsel. Thirty days after receipt of this material, the Defence must file its preliminary motion on form of the indictment, if any. Shortly before this happens, the first *inter partes* meeting with the SLO ("Rule 65ter meeting") and Status conference will take place and the pre-trial work plan will be discussed. The work plan, which will be discussed further below, is essentially a calendar of events which must take place in order to prepare the case for trial. In all, about 70 days are needed to bring a case to the point of the preliminary motion on form of indictment. As will be explained below, practice has shown that the attendance of the pre-trial Judge at the Rule 65ter meeting can foster more efficient exchanges among the parties and more expeditious pre-trial preparation.
10. There are a series of important decisions that will need to be taken during pre-trial proceedings in response to motions filed by the parties. Such motions include preliminary motions challenging the form of indictment and/or jurisdiction, as well as other motions related to provisional release of the accused from detention, motions for joinder or severance of cases, motions for protective measures, motions for access to confidential material in other cases, motions related to facts agreed upon by the Prosecution and the Defence, motions for admission of facts of common knowledge and/or adjudicated facts. Meanwhile, the Prosecution will have an obligation to make further disclosures to the Defence of copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial (and these statements must be in the language of the accused), and copies of all transcripts and written statements taken in accordance with the Rules.⁵⁷ The amount of time needed for this process is dependent upon several factors, including the complexity of the case, the level of priority given to bringing the case to trial, whether the Defence opts for an active pre-trial approach, and the extent to which the Prosecution and the Defence are indeed ready for trial. With the necessary priority given, this process can be finalized in about six months for a mid-level case. However, the exact amount of time required depends upon the Prosecution's anticipated number of witnesses and exhibits, and whether translations are needed for witness statements and exhibits at trial. For cases of higher complexity, the time

56 Rule 66(A)(i), ICTY RPE.

57 Rule 66(A)(ii), ICTY RPE.

needed may be much longer. Periodic *inter partes* Rule 65*ter* meetings and status conferences (the latter which must be held every 120 days), continue during that process.

11. The last steps of the pre-trial proceedings are designed to ensure that the case is 'trial ready', and involves setting deadlines for the filing of pre-trial briefs and establishing a hearing for the Pre-Trial Conference, the latter of which is usually scheduled for the eve of trial. The pre-trial proceedings require a period of about three months at a minimum. Scheduling the pre-trial briefs can only occur once all preliminary motions have been resolved,⁵⁸ and ideally after all other important motions and the method of leading evidence have been decided, *i.e.* which witnesses must be called to give evidence in chief and which can be admitted by witness statements. There are two different approaches to scheduling. One approach is to have the parties file their pre-trial briefs without regard to whether the trial is scheduled to commence imminently, in which case the parties are typically permitted to later amend their briefs just prior to the start of the trial. The other approach is to wait for scheduling of the pre-trial briefs until appointment of a trial bench. Typically, the former approach is preferred because it allows for multiple cases to be ready for trial upon the shortest notice possible. Having multiple cases ready is desirable if a prior trial is unexpectedly halted, or if a prior case is delayed in terms of going to trial, and it helps keep the ICTY's scarce courtrooms operating at peak capacity. If the prosecution is allowed a reasonable amount of time to prepare its brief (generally considered to be about two months), the scheduling order for filing of the pre-trial briefs should be issued about three months prior to the start of trial. Annex 5 - *Timelines for the Pre-Trial stage* summarises the timelines discussed thus far. Those timelines which have the greatest impact on the length of the pre-trial proceedings are set forth in bold print.

B. Case Management Tools

12. The primary case management tools for the ICTY's pre-trial practice are periodic conferences between the Pre-trial Judge, the Senior Legal Officer and the parties, the work plan established by the Pre-trial Judge, the pre-trial briefs filed by the Prosecution and the Defence, as well as the Pre-Trial Conference. The process is also subject to the calendar of events necessitated by the Rules of Procedure and Evidence. Pre-trial activities are governed by Rules which require that certain steps occur at specified times. Adherence to these timelines is critical to successful case management at the pre-trial stage, as well as to ensuring expediency in the conduct of the proceedings and the most efficient use of court time.

B.1 Status conferences and Rule 65*ter* meetings

13. A status conference must be held within 120 days of either the initial appearance of the —accused or of the previous status conference.⁵⁹ This status conference is conducted by the Pre-trial Judge in the presence of the accused. The twin purposes of the status conference are to organize exchanges between the parties regarding their trial preparations, and to hear from the accused, if in pre-trial detention, about his or her mental and physical well-being. An accused who is on pre-trial provisional release need not attend the status conference. The standard for granting pre-trial provisional release (discussed in a separate section below) is governed by the Tribunal's jurisprudence, but in no circumstance is it permitted to cause delay to pre-trial preparation. In addition to the status conferences, exchanges between the parties (Rule 65*ter* meetings) are traditionally

⁵⁸ Rule 65*ter*(E), ICTY RPE.

⁵⁹ Rule 65*bis*, ICTY RPE.

organized by the Trial Chamber's Senior Legal Officer⁶⁰ under the supervision of the Pre-trial Judge. Practice has shown that the attendance of the Pre-trial Judge at the Rule 65ter meeting can help spur the parties toward more efficient exchanges and expeditious preparation.

14. There is no requirement that Rule 65ter meetings be held at regular intervals - although experience has shown that they are most beneficial when held one or two days prior to (and in preparation for) a status conference. If the accused has Counsel, Counsel will represent the accused at these meetings which serve as an avenue for more informal exchanges between the parties even though non-public transcripts are prepared. If the accused is representing himself, his presence at the meeting is required, but most cases involving self-representation include greater emphasis on dealing with issues in the more formal setting of the status conference.
15. Unlike the trial itself, pre-trial proceedings are conducted primarily on the basis of documents, and Rule 65ter meetings and status conferences frequently provide the only means for face-to-face interaction between the parties and Judges. Depending upon the priority accorded to a case, the Tribunal may decide not to hold a status conference more frequently than every 120 days as required by the Rule, and not to convene a Rule 65ter meeting ahead of the status conference. This is typical, for example, if there are few new developments to discuss. On the other hand, as a case enters the final stage prior to trial, status conferences and Rule 65ter meetings may take place as often as needed to address final trial preparation matters.

B.2 Work plan

16. The Pre-trial Judge shall establish a work plan that sets forth the obligations of the parties and the deadlines for completion of those obligations.⁶¹ This plan shall indicate, in general terms, the obligations that the parties are required to meet pursuant to Rule 65ter (D)(ii) and the dates by which these obligations must be fulfilled. More specifically, the work plan should consider the various pending motions, and the priorities set by the President regarding the proposed trial date. Although insufficient use was made of such work plans in the past, they now form the central basis upon which the parties proceed. Work plans are discussed with the parties at the 65ter meetings in order to gain their full commitment to the plan. Any outstanding issues can be discussed at the status conference and can be decided by the Pre-trial Judge. Work plans can be adjusted later based on the President's decisions regarding the case's priority for trial. These decisions are usually made on the basis of the length of time an accused has been held in pre-trial detention, along with an assessment of the Pre-trial Judge as to the trial readiness of a case.

B.3 Prosecution's pre-trial brief and witness list and the Defence's pre-trial brief

17. The timing of the filing of pre-trial briefs can lead to greater expediency, and this is a matter that the Pre-trial Judge can influence and indeed order. Once any existing preliminary motions are resolved, the Pre-trial Judge should order the Prosecution to file the final version of its pre-trial brief.⁶² The pre-trial brief must include, for each count, a summary of the applicable law and evidence that the Prosecution intends to present regarding commission of the alleged crime, as well as the form of responsibility allegedly incurred by the accused. The brief should also include any admissions by the parties, a statement of matters that are not in dispute, as well as a statement of contested matters of fact and law. Typically, the areas of dispute have been narrowed through the process of reaching agreement between the Prosecution and Defence counsel regarding facts that will be admissible at trial, a topic covered below.

60 Rule 65ter(D), ICTY RPE.

61 Rule 65ter (D)(ii), ICTY RPE.

62 Rule 65ter(E), ICTY RPE.

18. The Pre-trial Judge also orders the Prosecution to file a list of witnesses it intends to call at trial, with the name or pseudonym of each witness, a summary of the facts on which each witness will testify, the points in the indictment as to which each witness will testify, the total number of witnesses (and the number of witnesses who will testify against each accused and on each count). The Prosecution is also required to provide an indication of whether the witness will testify in person, and if so, for how long, or whether it seeks to introduce witness evidence by way of written statement or transcript from a prior proceeding. Although not explicitly mentioned in the Rules, the Pre-trial Judge may require the Prosecution to submit a 'proofing chart', aimed at presenting all the material required under the Rule in a systematic and schematic way. Such a chart essentially catalogues the evidence to be presented according to which portion of an indictment it purportedly supports. Proofing charts provide an effective way to assist the Trial Chamber in exercising its powers during the Pre-Trial Conference. It also enables the Defence to get a better understanding of the case against it. The pre-trial brief may be ordered regardless of whether the trial will begin in the near future. However, the pre-trial brief must be available at least six weeks prior to the Pre-Trial Conference. In practice, the deadline for the submission of the pre-trial brief is discussed with the parties during the Rule 65*ter* meetings and the status conferences.
19. The Pre-trial Judge shall further order the Defence to file a pre-trial brief once the Prosecution's pre-trial brief and witness list have been filed.⁶³ The Defence's pre-trial brief address the factual and legal issues raised by the case. In particular, the brief should include a written statement setting forth in general terms the nature of the accused's defence, the matters with which the accused takes issue in the Prosecution's pre-trial brief, and the rationale for taking issue with each such matter. Because it is under no obligation to disclose its case, the Defence need not file a list of witnesses it intends to call at trial until after the close of the Prosecution's case. The Pre-trial Judge has a degree of flexibility in determining when this brief needs to be filed, and normally a deadline is agreed upon between the parties during a Rule 65*ter* meeting or a status conference. The Defence pre-trial brief must, however, be submitted at least three weeks before the Pre-Trial Conference. Ideally, the Pre-trial Judge will require the parties to file their pre-trial briefs much earlier than the last possible date allowed under the Rules. The earlier the briefs are filed, the earlier in the pre-trial proceedings that the parties can be encouraged to engage in exchanges that will lead to a narrowing of disputes at trial. It should be noted that, since the burden is on the Prosecution to prove its case, the accused is under no obligation to agree to a narrowing of the issues in dispute, and may simply refuse to agree any facts.

B.4 Trial management meeting

20. Prior to trial, the Registry also holds a Trial Management Meeting (TMM) in order to manage cases, ensure that they are ready for trial, and that the parties are aware of the procedures to be followed. The Registry Court Officer is responsible for organizing the meeting prior to holding the Pre-Trial Conference hearing, as well as for inviting the following Registry sections to make presentations at the TMM: the Conference and Language Services Section (including a representative of the Court Reporters, Victim Witness Section), the Office for Legal Aid and Detention Matters, the Audio/Visual Unit, Press and Information, Security, and the Court Management and Services Section. The TMM is held in closed session and attended by members of the Prosecution, Defence and Chambers. Judges are also involved in the meeting and can use it to ensure that the parties understand the manner in which the Chamber will conduct proceedings. The transcript of the meeting is distributed to participants and the video recording is filed with the archiving unit for future use by newly assigned staff or counsel. Following the implementation of e-court, TMM have become even more important as

⁶³ Rule 65*ter*(F), ICTY RPE.

an effective way to ensure that all parties are aware of how the courtroom functions, of the services offered by the Registry, and of their obligations to the Court.

21. In order to carefully plan the presentation of evidence by the parties, and ensure a smooth flow of witnesses as much as possible, while ensuring that trials are conducted in an expeditious manner, the Victims and Witnesses Section (VWS) developed a policy on pre-trial planning. At the commencement of each trial, or when a trial moves from Prosecution to Defence, each trial team is required to decide which witnesses will be needed, the sequence in which they will be used, and outline any of their special travel needs or support/protection to the Victims and Witnesses Section. This pre-trial planning is critical to the VWS' capacity to plan witnesses' travel to The Hague and cater for their support and accommodation.
22. There is a range of objectives for pre-trial planning processes. These objectives primarily concern the exchange of information between the VWS and the trial teams with the ultimate goal of ensuring that witnesses receive the best possible service while they are in The Hague to testify. In addition, each of the planning processes assists the key personnel to meet each other and become familiar with the roles of each of the units within the VWS, and in turn for the VWS to develop a working relationship with the teams.
23. Each pre-trial meeting should be attended by:
 - ◆ Liaison Officer;
 - ◆ Support Officer;
 - ◆ Protection Officer;
 - ◆ Trial Assistant (assigned to the case);
 - ◆ the Chief of the VWS (if needed).
24. The specific objective of the planning process is to promote a clear understanding of the role and scope of VWS Services. The parties will therefore be briefed on VWS operational services and requirements and provided with information related to the following:
 - ◆ what is required in order to ensure effective planning for logistical movements, travel and accommodation e.g. passports, travel documents. Witness Information sheets, Production Schedule and other documents;
 - ◆ the Witness Assistant program and the services provided to witnesses while they are in Court;
 - ◆ the expectations of witnesses when travelling to The Hague;
 - ◆ the services that can be provided by the Support Unit including an explanation of child care, the support person policy etc.;
 - ◆ protection measures in court;
 - ◆ the relocation program.
25. In addition to providing information regarding the VWS, effective trial planning must include the collection of information from the Prosecution and Defence teams about the trial, its the duration, and the number of witnesses to be presented. The planning should also include identification of:
 - ◆ any special protection, support, relocation needs;
 - ◆ ethnic or regional origins of witnesses; any health conditions of witnesses;
 - ◆ time frames, including any particular logistical needs of the trial teams.
26. At this meeting the trial team will be provided with a file which contains the following:
 - ◆ a summary presentation on the VWS (operations, support, protection);
 - ◆ a collection of policies and guidelines (e.g. Principles of Effective Service, Child-care, Accompanying Support Person, Service Standards and Complaint policy, guidelines regarding limited number of days and limited numbers of schedule changes, guidelines for investigators, etc);

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- ◆ booklets;
 - ◆ protection video and information;
 - ◆ witness information sheets.
27. If needed, a meeting with the trial team can be organised during the course of the trial as well. This meeting can include discussion of any problems or impediments that witnesses are experiencing, or any logistical, support or protection needs that have emerged during the trial. These meetings could be on-going if required.
28. When a trial involves multiple accused, the VWS' experience suggests that it is preferable to hold a pre-trial meeting with each Defence Team just before they present their cases.

B.5 Pre-Trial Conference

29. The Pre-Trial Conference is normally within a week before (and sometimes even the very day of) the official start of the trial in order to allow the Trial Chamber to address any last-minute issues on the eve of trial. Often, the resolution of these issues will impact how the trial is to be conducted. A late scheduling of the Pre-Trial Conference gives newly arrived *ad litem* judges the opportunity to participate in the conference.
30. Ideally, the Pre-trial Judge will be the same Judge that presides over the case at trial, or who is at least a member of the trial bench, thus permitting the Judge to have more 'ownership' during the pre-trial proceedings, and thus to make decisions that will impact how the trial will be conducted. Otherwise, many decisions such as those concerning the admission of adjudicated facts will be deferred for decision for the bench that will hear the case to decide. The judge that conducts the Pre-Trial Conference has discretion to ask the Prosecution to shorten the length of examination for some witnesses, to determine the number of witnesses the Prosecution may call, and to regulate the time available to the Prosecution for presentation of its evidence. The process of limiting the Prosecution's number of witnesses and length of its case involves a detailed examination of the proposed witness summaries in light of the indictment, and also involves the exclusion of unnecessarily cumulative evidence. Again, in practice, if the Pre-trial Judge will eventually act as Presiding Judge at trial, the pre-trial bench may make these decisions earlier than at the Pre-Trial Conference, or can at least lay the groundwork for such decisions. For example, the bench may invite the Prosecution, well ahead of the Pre-Trial Conference, to reduce the proposed number of witnesses on its witness list, and can reduce the total estimated hours for examination to a figure that more accurately corresponds to the anticipated length of the overall trial. The bench may even rule on motions for adjudicated facts or on the introduction of written evidence pursuant to Rules 92*bis*, 92*ter* and 92*quater*, thus shortening the scope of the case ahead of time.

C. Role of the judge(s)

31. As indicated above, the Pre-trial Judge is designated by the Presiding Judge of the Trial Chamber within seven days of the initial appearance of an accused.⁶⁴ The Pre-trial Judge, under the authority and supervision of the Trial Chamber seized of the case, coordinates communication between the parties and takes any measure necessary to prepare the case for a fair and expeditious trial. According to Rule 65*ter*(D)(ii), the Pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to

64 Rule 65*ter*(A), ICTY RPE.

meet and the dates by which these obligations must be fulfilled. The Pre-trial Judge may be assisted in his or her duties by one of the senior legal officers of the Trial Chamber.

32. The Pre-trial Judge normally presides over status conferences and takes decisions regarding deadlines or requests for extension of time. In general the Pre-trial Judge may take decisions on procedural matters while motions dealing with substantial issues must be decided by the bench. To that end, the Pre-trial Judge should strive to anticipate the issues that are likely to be in dispute at trial, and assert his or her authority to control the issues. However, for reasons of work distribution among the Tribunal's Judges, it is not always possible for the Pre-trial Judge to also serve as a Judge in the Chamber that hears the case. If not, Judges forming the pre-trial Chamber may be reluctant to bind their colleagues who will hear the case by making pre-trial decisions on critical matters affecting the management of the trial itself. The ICTY dealt with this problem by trying to ensure participation of the Pre-trial Judge as a presiding judge or as a member of the trial bench (see Annex 6 - *Practice example: Projecting the estimated length of a trial at the pre-trial stage*).

D. Disclosure

33. In the predominantly adversarial legal system that exists at the Tribunal, a party's obligation to disclose relevant material to the opposing party is a fundamental component of trial preparation. Given the complex nature of war crimes cases, disclosure is a major undertaking that is extremely resource-intensive. Because the ICTY's OTP seized many original documents from government archives in the former Yugoslavia, the Defence is especially reliant on the disclosure process.
34. Disclosure in these massive cases is quite unlike disclosure in a domestic criminal trial where all the relevant evidence can be readily assembled and inspected. As a result, if the OTP encounters problems fulfilling its disclosure obligations, the problems may have an adverse impact on completion of the pre-trial proceedings. The Rules describe a number of disclosure obligations that fall primarily on the Prosecution. The most important obligations, apart from materials that help confirm the indictment,⁶⁵ involve disclosure of the statements of witnesses that the Prosecution intends to call at trial,⁶⁶ exculpatory material⁶⁷ and electronic disclosure.⁶⁸ Additional disclosure issues may arise if the Defence seeks to inspect other material in the Prosecution's custody or control.⁶⁹
35. The Defence must also, if requested, permit the Prosecution to inspect and copy material that it intends to use at trial.⁷⁰ Mirroring the Prosecution's obligation, the Defence must also disclose to the Prosecution copies of statements of witnesses that it intends to call at trial.⁷¹ Disclosure by the Defence also encompasses notice to the Prosecution with respect to its intention to raise the defence of alibi or other special defences.⁷²
36. During pre-trial proceedings, and at Rule 65^{ter} meetings and status conferences, normally most attention is given to whether the Prosecution is adequately fulfilling its disclosure obligations. In general, the major difficulty for the Prosecution is that a pre-trial case may not be given the same priority as a case that is being

65 Rule 66(A)(i), ICTY RPE.

66 Rule 66(A)(ii), ICTY RPE.

67 Rule 68(i), ICTY RPE.

68 Rule 68(ii), ICTY RPE.

69 Rule 66(B), ICTY RPE.

70 Rule 67(A)(i), ICTY RPE.

71 Rule 67(A)(ii), ICTY RPE.

72 Rule 67(B), ICTY RPE.

tried due to limited resources. As a consequence, delays in searching the Prosecution's own databases may delay disclosure. Further, translation issues are a major concern, as all material supporting confirmation of the indictment must be provided to the accused in a language he understands. Similarly, the level of priority given by the Prosecution to the pre-trial case will determine the amount of translation resources that will be made available.⁷³ Actual, physical disclosure of material takes place only between parties since the Chamber is not provided with such material. During Rule 65*ter* meetings and status conferences, the role of the Senior Legal Officer and the Pre-trial Judge is primarily reactive in relation to disclosure, but should also be proactive in certain instances (e.g., when issues are brought by the parties, normally the Defence). Orders issued by the Pre-trial Judge can help the Prosecution team gain a higher priority within the OTP in the competition for internal search and translation resources.

37. As already indicated, the Prosecution needs to disclose all material that supports the indictment - including all prior statements obtained by the prosecutor from the accused - to the Defence within 30 days of the initial appearance.⁷⁴ In practice, problems sometimes arise in that the Prosecution is not able to ensure the timely translation of the supporting material. The Pre-trial Judge or bench usually requires the Prosecution to notify the Chamber when it has fulfilled its obligation. Additionally, as mentioned earlier, the Prosecution does not ordinarily provide the supporting material to the duty counsel, but waits for the assignment of permanent counsel. During the 30-day period, the Prosecution routinely seeks protective measures for portions of the supporting material. The date on which the supporting material has been disclosed is relevant to establishing the 30-day deadline during which the Defence may file preliminary motions (e.g., alleging defects in the form of the indictment).⁷⁵ The Pre-trial Judge must prescribe a time-limit within which the Prosecution must make available copies of the statements of all witnesses who will be called by the Prosecution.⁷⁶ This time-limit is usually set well in advance of the trial's start date, but the Tribunal can grant extensions for disclosure of individual witnesses and discovery of additional material when the rights of an accused are not impinged.
38. Exculpatory material must be disclosed to the Defence as soon as practicable.⁷⁷ Exculpatory materials includes those things, known to the Prosecutor, that may (i) mitigate the guilt, or (ii) suggest the innocence of the accused, or (iii) affect the credibility of Prosecution evidence.⁷⁸ This very broad obligation continues until the end of a trial, and even extends to the appellate process, and has been the subject of considerable litigation. ICTY jurisprudence has held, for instance, that the Prosecution should specifically identify material that it considers potentially exculpatory when it discloses a batch of documents to the Defence. In practice, since the Prosecution may be unaware of the nature of the Defence's case until a later stage in the trial, difficulties may arise as to whether certain documents are exculpatory.
39. As the Prosecution evidence collection has grown over time to include millions of pages of material, the ICTY Prosecutor has developed an Electronic Disclosure System (EDS) specifically designed to facilitate the retrieval of relevant information by the Defence, and to improve upon the earlier practice of delivering large numbers of documents in hard copy to Defence counsel. While the Prosecutor remains subject to the underlying obligation to disclose exculpatory information within the Prosecutor's actual knowledge, the new EDS represents a move towards "open book" disclosure. The system now allows Defence teams secure access to the

73 ICTY translation resources are particularly in demand. While the Tribunal's language services, CLSS, fall within the Registry, in practice the OTP has had to engage its own language assistants in an attempt to deal with the overall translation demands. Even so, translation work has to be done on the basis of strict priorities determined by the stage of the cases and the demands of the trial process.

74 Rule 66(A)(i), ICTY RPE.

75 Rule 72, ICTY RPE.

76 Rule 66(A)(ii), ICTY RPE.

77 Rule 68, ICTY RPE.

78 Rule 68, ICTY RPE.

evidence collections on-line through the internet, and includes witness statements with the exception of the most sensitive material. In addition, the EDS has **also** become the primary method for delivering disclosure material to individual Defence teams. However, as earlier mentioned with respect to the disclosure of exculpatory material, the Prosecution does not fully meet its disclosure obligations under this Rule simply by making the material available on the EDS since it contains millions of documents.

40. Disclosing details of evidence to the other party often creates tension with the competing interests of protecting witnesses and preserving the confidentiality of sensitive sources. ICTY practice recognises this dilemma and addresses it in a number of ways, for example by allowing the delayed disclosure of the names of protected witnesses, by allowing sensitive information to be redacted from documents, and by excluding certain categories of internal and sensitive information from disclosure.

E. Communication among parties

41. The success of pre-trial management is dependent on the extent and quality of communication between all parties involved: the Prosecution, the Defence and the pre-trial Chamber. A good working relationship and effective communication at this stage can set the tone for the entire trial process and can lead to time saving efficiencies. If the accused is self-represented, communication can be more complicated. In such circumstances, the Registry's assistance is required to facilitate communication with the self-represented accused.
42. Time-consuming litigation may be avoided by informal discussions between the parties in an effort to resolve any perceived or actual difficulties. For example, regarding disclosure issues, it may be quicker and more efficient for the Defence to simply ask the Prosecution for information that it believes is lacking, rather than seeking a disclosure order from the pre-trial chamber.
43. There are many topics that may be discussed between parties at this stage, which may include the following:
 - ◆ pre-trial issues that may affect the start date of the trial, such as the accused's health, witness availability, counsel availability and trial preparedness;
 - ◆ whether or not the opposing side will agree to or oppose a forthcoming motion (*e.g.*, for provisional release or protective measures for witnesses);
 - ◆ the extent of relevant issues for trial, to avoid the Prosecution searching through and disclosing irrelevant material; and the agreement for evidence not in dispute.
44. It is important to keep clear and accurate records of all important communication between parties to avoid possible disputes or misunderstandings at a later stage in the trial process. This may be done by using a correspondence folder, either electronic or hard copy, containing copies of all letters, e-mails and contemporaneous notes of telephone conversations.
45. While the parties should be encouraged to communicate, there is no obligation upon the accused to co-operate with the Prosecution and in some cases an accused may make a strategic decision not to communicate with the Prosecution at all.

F. Pre-trial motions

F.1 Preliminary motions

46. Preliminary motions are those that challenge the Tribunal's jurisdiction (*i.e.*, a claim that the indictment does not relate to any of the persons, territories, time period or violations governed by the relevant articles of the Statute of the Tribunal), allege defects in the form of the indictment, or seek the severance of counts joined in one indictment. Most preliminary motions challenge jurisdiction or allege defects in the form of the indictment. According to the Rules, preliminary motions shall be filed within 30 days after the Prosecutor discloses all material supporting confirmation of the indictment. Preliminary motions must be disposed of before the filing of pre-trial briefs can be ordered.
47. In some Chambers, decisions have been rendered elaborating pleading principles, and covering topics such as specificity and pleading requirements for indictments, the definition of and distinction between international and non-international armed conflicts, and the applicability of the command responsibility. These principles are based on previous case-law under this Rule, as well as on trial and appellate judgements that discussed the issue of lack of clarity in the indictment. The Rules prescribe that preliminary motions shall be disposed of within 60 days. If a motion challenges the Tribunal's jurisdiction, there is a right to file an interlocutory appeal. Motions challenging the form of the indictment are not subject to interlocutory appeal unless the bench grants certification. If an indictment is amended after a motion challenging the form of the indictment has been filed, the Defence is entitled to file a new motion challenging those parts of the indictment that have been changed. In practice, due to further amendments, the Defence may end up filing three or four motions challenging the form of the indictment.

F.1.1 Other motions

48. In addition to the preliminary motions described above, there are a number of other common pre-trial motions. These include motions related to provisional release from detention, protective measures for witnesses or materials, motions for joinder or severance of cases, Prosecution's motions to amend the indictment and motions for access to confidential material in other cases.

F.1.2 Motion for provisional release

49. An accused may request provisional release pending preparation of the case for trial. Provisional release has been granted mainly during the pre-trial phase, but also at trial or pending the issuing of a judgement. Provisional release may only be ordered if the Trial Chamber is satisfied that the accused will appear for trial and that he or she will not pose a danger to any victim, witness or other person.
50. The Trial Chamber must give both the host country and the state to which the accused seeks to be released an opportunity to be heard. This can be done either on the basis of written submissions or at a hearing in the presence of state representatives. The host country does not take part because the Netherlands has a policy of not commenting on requests as such, but at the same time of not allowing released accused to remain in the Netherlands. In support of an application for provisional release the State to which the accused seeks release will often submit written guarantees concerning the surveillance and safety of the accused, as well as periodic reports during the provisional release.
51. Any decision granting provisional release is accompanied by a series of preconditions to be fulfilled by the accused and the State to which the accused will be released. If the Prosecution wishes to ensure that a

decision ordering provisional release will be stayed pending its appeal, it must make that application in its response to the request for provisional release indicating its intention to appeal if the decision is granted. Where the Trial Chamber grants the requested stay, the Prosecution must file its appeal not later than one day of the rendering of the decision. In the Tribunal's early days, provisional release was granted only exceptionally because the rule required that exceptional circumstances for release be identified. The rule was later amended to remove the requirement that exceptional circumstances be established. The accused still has the burden of demonstrating that the criteria for provisional release are satisfied, and the jurisprudence has identified a number of relevant factors that are relevant to determining whether that burden has been satisfied such as an accused's voluntary surrender, as well as the anticipated length of pre-trial detention. Provisional release can be sought not only in the pre-trial stage, but also after the commencement of trial for periods of time when the Chamber is not sitting, such as during a judicial recess or in the interim following the close of evidence and delivery of the trial judgement.

52. Without its own police force, the Tribunal cannot utilize systems of escorted release whereby an accused can be taken to an external event, such as a funeral of a close relative, while remaining in custody under escort. Nevertheless, the Chambers have permitted some accused subject to pre-trial, trial or post conviction detention to be released for short periods of time during trial, or pending appeal, for compelling humanitarian reasons. However, a condition of such release has been that the national authorities of the State to which the accused is to be released provide round the clock surveillance and supervision of the accused.

F.1.3 Protective measures

53. There are a number of Rules relating to the use of protective measures. These rules focus primarily on protection of witnesses, such as non-disclosure of a witness' name to the public, delayed disclosure of the name to the Defence, use of pseudonyms or other protective measures during pre-trial or trial proceedings; protection of material obtained from certain sources such as humanitarian organizations; and non-disclosure of information to avoid prejudice to further or ongoing investigations. In practice, such issues regularly arise in all pre-trial (and trial) cases. It is common for the Prosecution to file a number of protective measures motions during pre-trial proceedings. The pre-trial Chamber often defers decision to the bench on issues such as the need for in-court protective measures, including voice and face distortion and the closing of sessions. The Tribunal's jurisprudence provides that protective measures must be based on something more than merely a subjective expression of concern by the witness. Indeed, protective measures can only be granted upon a showing that the security of the witness or his or her next of kin would be jeopardised absent the proposed security measures.

F.1.4 Motion for joinder or severance of cases

54. Persons accused of the same or different crimes may be jointly charged and tried provided that they are charged with offences allegedly committed "in the same transaction". If joinder is requested for various accused whose cases have been assigned to different pre-trial chambers, problems may arise. At the Tribunal, the President has on a number of occasions appointed a special Chamber ("Joinder Bench") composed of judges from different Trial Chambers to decide whether joinder should be allowed.

F.1.5 Prosecution motion for amendment of the indictment

55. If a case has already been assigned to a Chamber, amendment of an indictment may occur only if the Trial Chamber or a Pre-trial Judge has given leave to amend after having heard the parties. In order to justify the amendment, the Prosecution must provide supporting material. If the amended indictment includes any new

charge or charges, a further appearance of the accused will be required in order to enter a plea regarding the new charge or charges. The Defence is entitled to a further thirty days to file preliminary motions with respect to any new charge or charges. In practice, the Defence has simultaneously used the Rule governing preliminary motions and the Rule governing amendment of the indictment, and some Pre-trial Judges have ordered the Defence to file submissions under both rules simultaneously, thereby furthering expediency while avoiding duplication.

Brđanin case - Redacting the confidential material

In the Brđanin case, the Trial Chamber considered the Registry and Prosecution proposal and rendered a further decision amending its original disposition to read "redaction by the parties" rather than "redaction by the Registry." The Prosecution supported the submission by the Registry and proposed that each party be responsible for redacting the confidential testimony and exhibits.***

* Further Decision on Motion by the defence of Milan Martić for Access to Confidential Transcripts and Documents, filed in Case No. IT-99-36-T on 26 May 2004.

** Prosecution's Response to 'Registrar's Submission on Redaction Pursuant to Rule 33(B),' filed in Case No. IT-99-36-T on 20 May 2004.

F.1.6 Motions for access to confidential material in other cases

56. It regularly occurs in pre-trial (and trial) proceedings that a party in one case may seek access to material in another case even though the other case is subject to protective measures. If a Chamber remains seized of that other case, such motions are filed with that chamber. If no Chamber is seized of the case subject to protective measures, the requesting party may file its motion before the Chamber seized of its case.
57. The requesting party must not engage in a "fishing expedition," but must sufficiently identify the material sought and demonstrate the existence of a legitimate forensic purpose for access. In assessing whether a legitimate purpose exists, the Chamber will give consideration to the nature of the material being sought, as well as any geographical or temporal overlap between the applicant's case and the case from which documents are sought.
58. The process involved in granting access to confidential material from other cases can pose logistical difficulties for the Registry.⁷⁹ The primary issue is the difficulty of identifying material that was obtained confidentially and therefore cannot be disclosed without the provider's consent. In such case, the Registry, as a neutral organ of the Tribunal, is not privy to any conditions that may have been imposed on the provision of information and thus needs outside assistance to identify information that needs to be redacted prior to its disclosure to a third party⁸⁰ (see text box *Brđanin case - Redacting the confidential material*).

G. Reducing the scope of indictment

59. In light of the length of proceedings at the Tribunal, a decision was made to amend the rules to allow the Chamber to invite the Prosecutor to reduce the number of counts and fix the number of crime sites or

⁷⁹ This was discussed in the Registrar's Submission on Redaction Pursuant to Rule 33(B), *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, dated 26 April 2004; see also Submission of the Registry Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Defence Motions Seeking Access to Confidential Material in Several Cases, cross filed in Case No: IT-95-14/2-A, IT-95-14-A, IT-01-47-T, IT-02-54-T, IT-02-60-A, IT-03-68-T, IT-04-74-PT, IT-04-83-PT, and IT-05-88-PT on 28 October 2005. The Trial Chamber decided that, "[s]ince the Prosecution is familiar with the material it shall redact it as requested; and it shall provide it to the Registry for disclosure to the Applicant".

⁸⁰ If the case is closed, the defence team will no longer be active, but the counsel of record retains responsibility for the case for up to five years after the completion. See Directive on Assignment of Defence Counsel (as amended on 11 July 2006), IT/073 Rev. 11, Article 16(I). Accordingly, should the request be submitted within those five years, it should still be possible to order the counsel of record to approach Rule 70 providers, redact materials, or perform other functions.

incidents in an indictment. If the Prosecutor refuses the invitation, the Chamber may direct the Prosecutor to select the counts on which to proceed.

60. After the Rule was amended, the Chamber has invited the Prosecution to shorten a trial in this way on numerous occasions. For instance, the Prosecution has been asked to lower the number of counts by one third, or not to lead evidence on crime sites or incidents which the Chamber believed were not reasonably representative of the crimes charged. The Prosecution has routinely declined invitations to reduce its case, arguing that leadership cases often depend upon establishing the pattern and the duration of crimes by subordinates, and proof of such actions is inherently time-consuming. Ultimately, the Prosecution has been cooperative in identifying parts of an indictment on which not to proceed or lead evidence. However, sometimes the Chambers will allow the Prosecution to include evidence relating to such counts crime sites or incidents for the limited purpose of establishing a pattern or context.

H. Narrowing the matters in dispute

61. In-court litigation is expensive, time consuming and stressful for witnesses who must re-live traumatic and upsetting experiences. As a result, the efficient running of all trials, whether war crimes, domestic crimes or civil disputes, requires that only matters that are truly in dispute are proved by presenting evidence from live witnesses in court.
62. The scope of matters in dispute can be narrowed in two ways: if the parties agree regarding facts that do not need to be proven in court, or if the Tribunal takes judicial notice of facts already proven in earlier cases. Both these topics are discussed below.
63. Very often judicial intervention can help protect the rights of both parties. The Defence must not be pressured into agreeing to admit objectionable evidence. At the same time, the Defence must not be allowed to frustrate the efficient trial process by refusing to agree facts which cannot be contradicted.

H.1 Agreed facts

64. A standard issue on the agenda of a pre-trial meeting is whether parties are in a position to arrive at a set of agreed facts that need not be proven at trial. The most common form of agreed facts concerns the "crime base" facts; in other words, those facts which establish that a crime occurred, as opposed to facts which establish criminal responsibility for the crime. In most cases, the number of agreed facts will be minimal and will do little to narrow the issues in dispute.
65. An accused may be motivated to agree to certain underlying "crime base" facts in order to demonstrate a general level of cooperativeness, as well as because he desires to narrow the issues at trial to those which are relevant to his or her individual responsibility and most in dispute. On the other hand, an accused may choose to dispute the underlying facts for quite legitimate and genuine reasons.

H.2 Judicial notice

66. In the interest of judicial economy, a Trial Chamber will not require proof of facts that involve common knowledge, but will instead take judicial notice of such facts.⁸¹ Judicial notice of previously adjudicated facts

81 Rule 94(A), ICTY RPE.

- as opposed to facts of common knowledge - is a discretionary matter and one which has been much litigated at the Tribunal.⁸²
67. The aim of taking judicial notice is to achieve judicial economy and harmonise Tribunal judgements by conferring the Trial Chamber with discretionary power to take judicial notice of facts or documents from other proceedings. This power has to be exercised "on the basis of a careful consideration of the accused's right to a fair and expeditious trial" in keeping with the principle of a fair trial.⁸³
68. The Appeals Chamber has suggested that a request for the admission of adjudicated facts "must specifically point out the paragraph(s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to facts, as found by the trial chamber".⁸⁴ Regarding the effect of taking judicial notice, the Appeals Chamber has further held that "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial."⁸⁵ Thus, "in the case of judicial notice, the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the Defence may then put the point into question by introducing reliable and credible evidence to the contrary".⁸⁶ Importantly, however, "the judicial notice of adjudicated facts does not shift the "ultimate burden of persuasion which remains with the Prosecution".⁸⁷
69. According to the Tribunal's settled jurisprudence, in deciding whether to take judicial notice, the Trial Chamber must consider whether the facts meet at least the following requirements:
- ◆ distinct, concrete and identifiable;⁸⁸
 - ◆ pertinent and relevant to the case;⁸⁹
 - ◆ include findings or characterisations that are of an *essentially* legal nature;⁹⁰
 - ◆ not based on a plea agreement or on facts voluntarily admitted in a previous case;⁹¹
 - ◆ "truly adjudicated" *i.e.* if contested on appeal, the fact has been settled ;⁹²
 - ◆ not go to the accused's act, conduct or mental state ;⁹³
 - ◆ the formulation proposed in the moving party's motion for admission must not differ in any significant way from the way the fact was expressed when adjudicated in the previous proceeding.⁹⁴

82 The following paragraphs are drawn from *Prosecutor v. Momčilo Perišić*, IT-04-81-PT, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008, paras.13-17.

83 *Karemera et al.* Appeal Decision, para.41.

84 See *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to admit additional evidence pursuant to Rule 115 and for judicial notice taken pursuant to rule 94(B), 8 May 2001, ("*Kupreškić et al.* Decision"), para.12.

85 See *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, ("*Slobodan Milošević* Appeal Decision"), p. 4 (footnote omitted); *Karemera et al.* Appeal Decision, para.42; see also *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović et al.* Decision"), para.20.

86 *Karemera et al.* Appeal Decision, para.42.

87 *Prosecutor v. Dragomir Milošević*, IT-98-29/1- AR73.1, Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts, 26 June 2007, paras.19-22 ("*Dragomir Milošević* Appeal Decision"), para.16 citing *Karemera et al.* Appeal Decision, para.42.

88 See, e.g., *Krajišnik* Decision, para.14.

89 *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 ("*Nikolić* Appeal Decision"), para.52

90 *Dragomir Milošević* Appeal Decision, paras.19-22.

91 *Popović et al.* Decision, para.11.

92 *Kupreškić et al.* Decision, para.6; *Krajišnik* Decision, para.14; *Prosecutor v. Prlić et al.*, IT-04-74-PT, Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 14 March 2006, ("*Prlić et al.* Pre-Trial Decision"), paras.12, 15.

93 *Karemera et al.* Appeal Decision, para.51.

94 *Krajišnik* Decision, para.14; *Prlić et al.* Pre-Trial Decision, para.21.

70. It is not required that the proposed facts be beyond reasonable dispute between the parties.⁹⁵ However, since the decision to take judicial notice is discretionary, the Trial Chamber always retains the right to refuse to take notice of a fact, even if the request meets all of the requirements, if the Chamber does not believe that taking notice would serve the interests of justice.⁹⁶ Indeed, the Appeals Chamber has emphasized that the Trial Chamber's determination to take judicial notice should be based on whether the decision to take notice of facts will promote the interest in achieving judicial economy while preserving the accused's right to a fair, public and expeditious trial.⁹⁷

I. Guilty pleas

71. Since the Tribunal's inception, eighteen accused individuals have been sentenced after the entry and acceptance of a guilty plea to one or more of the counts of an indictment. The Rules set forth stringent conditions for a Trial Chamber's acceptance of an accused's guilty plea, which must be voluntarily made, informed, unequivocal and accompanied by proof of a sufficient factual basis for the crime and the accused's participation in it.
72. Plea agreements involve accord between the Prosecutor and the Defence to the effect that the accused will plead guilty to one or more counts in an indictment. In exchange, the Prosecutor agrees to amend the indictment pursuant to the plea, submit that a specific sentence or sentencing range is appropriate and/or not oppose a request by the accused for a particular sentence or sentencing range. Judges are not involved in plea negotiations between the parties. As a result, when plea negotiations between the parties fail, the discussions remain confidential between them and cannot be referred to in the trial process. The Trial Chamber is not bound by the terms of a plea agreement between the Prosecutor and Defence.
73. Guilty pleas and plea agreements reflect the adversarial component of the Tribunal's hybrid legal system, and the major developments over time have been in the interest of ensuring that the rights of the accused are sufficiently protected. Tribunals must be especially careful when accepting guilty pleas since an accused is making a judicial admission of guilt, and is waiving or obviating the need for a trial to establish guilt. The effect of guilty pleas on other related cases before the ICTY is rather limited, in that Trial Chambers usually refuse to take judicial notice of facts underlying a plea agreement on the grounds that they were not established in litigation.
74. A guilty plea almost always involves a lesser number of counts than are charged in the indictment. Since a guilty plea involves the admission by an accused of the factual basis underlying the legal elements of the crime to which he or she is pleading, it relieves the Prosecutor of establishing the evidence on these charges.
75. Although some may refer to the guilty plea and plea agreement process as "plea bargaining", this characterisation is inaccurate for two reasons. First, a guilty plea may be entered without the benefit of a plea agreement, and without regard to the Prosecutor's views. Second, any agreement that is reached on the basis of mutual negotiations is not binding on the Trial Chamber. In fact, the non-binding nature of plea agreements creates a disincentive to plead guilty and is probably the single largest reason that more guilty pleas do not occur, as an accused cannot be sure that the sentence or sentencing range negotiated with the Prosecutor and submitted by the Prosecutor to the Trial Chamber as appropriate will in fact be accepted by

⁹⁵ *Karemera et al.* Appeal Decision, para.40; see also *Dragomir Milošević* Appeal Decision, para.27; *Popović et al.* Decision, fn.19.

⁹⁶ *Karemera et al.* Appeal Decision, para.41; *Popović et al.* Decision, para.16.

⁹⁷ *Nikolić* Appeal Decision, para.11, with further references.

the Trial Chamber. In practice, it takes only one instance wherein a Trial Chamber significantly exceeds the recommended sentencing range for other accused, to disregard the prospective benefits of pleading guilty pursuant to plea agreements.

76. A plea of guilty is often made to a lesser number of counts than are charged in the indictment. It may also include a plea to what the accused perceives to be the least responsible mode of liability (*e.g.*, aiding and abetting rather than ordering), and a promise of cooperation in the investigation or Prosecution of other accused before the Tribunal. In consideration for a guilty plea, the Prosecutor typically agrees to recommend to the Trial Chamber a specific sentence or sentencing range as being appropriate for the crimes to which the accused has pled guilty. The Prosecutor may also agree to not pursue the charges which remain after acceptance of the guilty plea, and may even amend the indictment to conform to the terms of the guilty plea. ICTY practice is to formalise the agreement in writing and to include language designed to record the accused's clear understanding that an informed and unequivocal plea is being made voluntarily and on a sufficient factual basis.
77. In addition to saving time, other advantages are attributed judicial acceptance of a guilty plea. Since the guilty plea obviates the need for witnesses to testify, acceptance of the plea benefits witnesses who may be under considerable physical, mental or emotional strain. Since a guilty plea involves a personal admission of guilt, the plea can have a restorative effect on a war-torn society that is trying to come to terms with its past. The restorative effect can be particularly potent when made by a high-ranking political or political leader, and can lead the country in the direction of reconciliation and away from revisionism. On the other hand, sentences imposed following a guilty plea may be viewed as inadequate by the surviving victims.

VII. Annex 5: Timelines for the pre-trial stage

STAGE 1	Timeline
Arrival of an accused	<i>Day 0</i>
Assignment of the case to a Trial Chamber by the President (Rule 62(A))	<i>Typically arrival + 1 day</i>
Issuance of orders for the initial appearance by Presiding Judge of the Trial Chamber (designation of Judge for initial appearance (Rule 62(A)), scheduling the initial appearance (Rule 62(A)) audio-visual recording and photography (Rule 81(D)) detention on remand (Rule 64)	<i>Typically arrival + 1-2 days</i>
Assignment of "duty counsel to accused" (Rule 45(C))	<i>Typically arrival + 1-2 days</i>
Initial appearance of accused (Rule 62)	<i>Typically arrival + 1-3 days</i>
Designation of a Pre-trial Judge by Presiding Judge of Trial Chamber (Rule 65ter(A))	<i>Initial appearance + within 7 days</i>
Assignment of permanent counsel to accused (Rule 62(B) and Rule 45)	<i>Initial Appearance + within 30 days</i>
Entry of pleas (unless entered at initial appearance)	<i>Initial appearance + within 30 days</i>
Disclosure to accused of supporting material accompanying the indictment and prior statements of accused obtained by the Prosecution under Rule 66(A)(i) (Rule 66(A)(i))	<i>Initial appearance + within 30 days</i>
Senior legal officer meeting (Rule 65ter) with parties for implementation of Pre-trial Judge work plan (Rule 65ter(D)(iii))	<i>Typically after Rule 66(A)(i) disclosure and before Defence preliminary motions, and thereafter as needed (There is no timeline established in the Rules for this meeting to occur, although it is usually held one month after disclosure to an accused of the supporting material accompanying the indictment by the Prosecution. In some instances, (e.g., lack of pro-activity), this meeting might not place until shortly before the first status conference held as late as 120 days after the initial appearance)</i>
Filing of Defence preliminary motions (Rule 72(A).)	<i>Rule 66(A)(i) disclosure + within 30 days</i>

VII. Pre-Trial

STAGE 2	Timeline
Decision on Defence preliminary motions (<i>Rule 72(A)</i>)	<i>Filing of Defence preliminary motions + 60 days</i>
First status conference	<i>Initial Appearance + within 120 days</i>
Disclosure to accused of copies of witness statements of Prosecution under Rule 66(A)(ii) (<i>Rule 65bis(A)</i>)	<i>Pursuant to time established by Pre-trial Judge (This material must logically be disclosed by the time of the filing of the Prosecution's pre-trial brief pursuant to Rule 65ter(E).)</i>
Disclosure of exculpatory and other relevant material by Prosecution under Rule 68 (<i>Rule 68</i>)	<i>Ongoing obligation</i>
Further Rule 65ter meetings <i>Following the initial Rule 65ter meeting, they are typically conducted just prior to (and in preparation of) status conferences</i>	<i>Depending on case priority</i>
Further status conferences (<i>Rule 65bis(A)</i>)	<i>First status conference + within 120 days</i>
Decisions on other motions (<i>Rule 73</i>)	<i>Pursuant to time established by Pre-trial Judge (Decisions which might substantially affect the course of trial proceedings are typically left pending for the trial bench to be composed, especially where the designated Pre-trial Judge will not be the Presiding Judge at trial)</i>
STAGE 3	Timeline
Scheduling order for filing of pre-trial briefs and Pre-Trial Conference (<i>Rule 65ter(E)</i>)	<i>Typically ordered when priority is to make case "trial ready"</i>
Pre-Trial Brief Prosecution (<i>Rule 65ter(E)</i>)	<i>Not less than 6 weeks prior to Pre-Trial Conference</i>
Pre-Trial Brief Defence (<i>Rule 65ter(F)</i>)	<i>Not less than 3 weeks prior to Pre-Trial Conference</i>
Pre-Trial Conference (<i>Rule 73bis</i>)	<i>Prior to start of trial (typically within 1 week of start of trial)</i>
Start of trial (The start of trial is deemed to be the time for opening statements before presentation of evidence by the Prosecutor)	<i>Typically not less than one year after arrival of accused, although possibly as soon as 8 months</i>

VII. Annex 6: Practical example: projecting the estimated length of a trial at the pre-trial stage

- *Perhaps the Chamber's most practical and important assessment in the pre-trial stage involves a projection regarding the length of the trial. In the context of overall judicial administrative planning, it is crucial to have as realistic an estimate as possible. If estimates are poorly calculated or otherwise inaccurate, the projections can lead to major difficulties in establishing priorities among trials and assigning trial chambers.*
- *Clearly, the starting point for any projection of trial length is the Prosecution's proposed estimate of the time needed to conduct the examination-in-chief questioning of its witnesses, as reflected in its filing of the witness list under Rule 65ter.*
- *From this time estimate, a rule-of-thumb estimate regarding the length of the entire trial can be calculated, taking into account such factors as the number of accused being tried, the perceived complexity of the trial (which may be based on the number of counts and crime sites in the indictment, as well as on the alleged mode of liability), and whether there are previously adjudicated facts which the Chamber may accept. The following exercise demonstrates just some of the many factors involved. For the purpose of this exercise, we use a 200 trial-hour estimate of time for the Prosecution to conduct examination-in-chief of its witnesses.*
- *Calculations of length of trial based on a hypothetical 200 trial-hour Prosecution examination-in-chief estimate in a single-accused case. To begin the calculation, certain case-specific estimates must be established. These assumptions are always necessarily subject to debate.*

Assumptions:

- *That there are 17.5 effective trial hours per week (i.e., 3.5 hours per day, five days per week). For the purposes of this example, it is assumed that the Presiding Judge does not allow the parties to consume much trial time on administrative matters. "Effective" trial hours mean those hours in which witness examination is being conducted. The figure of 3.5 effective trial hours per day is based on the typical ICTY daily court system of one session per trial per day, lasting from 09:00 hours to 13:45 hours or from 14:15 hours to 19:00 hours.*
- *That there are 41 effective trial weeks per year. This estimate takes into account two three-week recesses (summer and winter), plus two weeks additional recess of each chamber's choosing. Many circumstances could lessen the number, including an accused with chronic health problems, unpredictable illnesses of judges or counsel, or witnesses who cannot appear as scheduled.*
- *That certain Prosecution's motions are granted. The Prosecution routinely assumes that its estimate of time needed for examination-in-chief of its proposed witnesses on the Chamber is based on the Chamber granting all motions it has filed with respect to use of written statements in lieu of vive voce testimony. Whether the Chamber's calculation of the projected length of trial includes this assumption depends upon an early rough assessment of the merits of the motions.*
- *That the Defence will need a certain percentage of the time required by the Prosecution for examination-in-chief to cross-examine the Prosecution's witnesses. While some trial chambers automatically assume that the ratio of time for examination-in-chief by the Prosecution and cross-examination by the Defence to be 1:1, practice has shown that the Defence in a single-accused trial does not require any more than about 60% of the time used by the Prosecution to conduct cross-examination of the Prosecution's witnesses. In the latter years of the Tribunal, when Chambers were making more extensive use of previously adjudicated facts and prior*

statements of a witness under Rule 92ter, the percentage has risen to as much as 150% of the figure estimated by the Prosecution for its examination-in-chief. In a multi-accused trial, the Defence counsel may altogether require between 125%-150% of the time needed by the Prosecution to conduct its cross-examination. The amount of time needed depends on how the various accused's cases are united and organized based on a particular Defence theory.

- That re-examination and examination by the Trial Chamber will be about 20% of the total number of hours for examination-in-chief. It is always in the discretion of a particular trial chamber to allow re-examination by the Prosecution and Defence counsel, and to ask questions of a witness itself. This figure is not easy to predict, and is sometimes best gauged on whether the majority of the composition of the Chamber accepts the adversarial system methodology of permitting the parties to have ultimate control of the direction of the evidence, or the inquisitorial system methodology which tolerates more judicial intervention in questioning of the witnesses. In any event, 20% is a fairly reliable figure to account for any mixture of Chamber composition.
- That the Defence will need only about 60% of the total time needed by the Prosecution for presentation of its case-in-chief. This figure is a rule-of-thumb based on it being a single-accused case; however, it is the most unpredictable of all the assumptions, as the Defence is not required to provide its witness list until after the close of the Prosecution's case. The possibility exists, and has actually occurred, that the Defence rests after the Prosecution's case without calling a single witness. In a multi-accused trial, the safest assumption is that the combined Defence will require at least an equal 1:1 amount as used by the Prosecution for presentation of its case. Some may contend that a fair trial requires that the Defence be apportioned an equal amount of time for cross-examination as the Prosecution uses for examination-in-chief, and likewise that the Defence case-in-chief be equal in length to that of the Prosecution. Practice has shown, however, that the time needed for the Prosecution's case is greater due to the burden of proof it must carry on each element of every count in an indictment.
- That the Prosecution will need 100% of the Defence time for cross-examination of each Defence witness. For a variety of reasons (related to Rules governing Defence disclosure to the Prosecution, as well as the Prosecution's burden of proof), the Prosecution typically requires more time to cross-examine Defence witnesses as the Defence does the Prosecution witnesses. Ideally, the Prosecution will need only one-half to one-third, overall, of the time used by the Defence for examination of its witnesses, to cross-examine. Nonetheless, a 1:1 ratio is best for planning purposes.
- That there are no witnesses called by the Trial Chamber and no rebuttal case presented by the Prosecution. Typically, the time spent for such witnesses - in the event they are deemed necessary - is negligible in overall planning of the estimated length of a trial. If needed, they are fit into the schedule as required.
- That the time to adjudicate the Prosecution's case pursuant to a motion for acquittal filed by the defense at the end of the Prosecution's case will take no more than two weeks, and that the time between the completion of the evidence and the issuance of the Trial Judgement will not exceed 3 months. Experience has shown, as the ICTY has developed more progressive Rules of Procedure and Evidence and electronic court management systems, that such times are possible, and indeed probable. The delivery of a trial judgement, however, is always particularly susceptible to extension of time due to the deliberative nature of arriving at a fair and just conclusion.

Calculations:

- Prosecution case:
 - 200 hours examination-in-chief

- 120 hours cross-examination ($200 \times 60\% = 120$)
- 40 hours re-examination and Chambers examination ($200 \times 20\% = 40$)
- Defence case:
 - 120 hours examination-in-chief ($200 \times 60\% = 120$)
 - 120 hours for cross examination ($120 \times 100\% = 120$)
 - 24 hours re-examination and Chambers examination ($120 \times 20\% = 24$)
- Total trial hours: 624
- Total trial in weeks: 35.66 (624 trial hours divided by 17.5 trial hours per week)
- Total trial in calendar years/months: 10.5 months (35.66 total trial weeks divided by 41 effective trial weeks per year equals about 0.87 of a year, or about 10.5 months).
- Additional time must be added for disposing of the motion of acquittal and the drafting of the final Trial Judgement. Assuming that two weeks are needed for disposing of such motion and that 2-3 months are needed for deliberations and drafting of the final Trial Judgement, the trial should be estimated to take 13-14 months to complete from opening statements to the delivery of the Trial Judgement.

Additional factors:

- There are many factors which can affect the overall estimate of the length of a trial at the pre-trial stage. Already mentioned are the number of accused and the complexity of a case. Additionally, whether an accused is represented by counsel or conducting the Defence pro se can affect the length of trial, as even accused who are trained in the law typically request the accommodation of additional time for self-representation. Factors which may reduce the length of the trial usually involve reducing the Prosecution's time permitted for examination-in-chief of its witnesses, as this is the starting point for all projections. Of course, such reductions must be made in the pre-trial stage, and may include any or all of the following:
 - The Chamber may invite the Prosecution to reduce the number of hours needed for examination-in-chief of its witnesses simply by re-visiting its Rule 65ter witness list and looking to eliminate unnecessarily cumulative presentation of evidence.
 - The Chamber may encourage the parties to agree on certain facts which are not the subject of dispute. Typically, this will involve what is called "crime base" evidence, or evidence which establishes the fact that a particular criminal act has occurred, as opposed to who is responsible for the act.
 - The Chamber may take judicial notice of previously adjudicated facts. Naturally, this can only be possible well into the lifespan of a tribunal where certain facts have already been settled by judgement of the Appeals Chamber.
 - The Chamber may invite the Prosecutor to reduce its indictment or even order reduction of an indictment under Rule 73bis(D) or (E).
- As to the first means of reduction - inviting the Prosecution to trim away unnecessarily cumulative evidence - the Chamber will typically do so only after being well-informed of the Prosecution's proposed case-in-chief by analysing its Rule 65ter list, which typically lists: the name of each witness proposed to be called to give evidence; what count or crime site in the indictment the evidence relates; the type of evidence the witness is proposed to give; and the amount of time estimated for the giving of such evidence. The best means of conducting such an analysis is to categorise the number of proposed hours according to:
 - Witness totals by type of evidence to be presented. The type of evidence is usually one of several different

categories: vive voce (or "live" testimony); vive voce under Rule 92ter; vive voce under Rule 94bis; Rule 92bis; Rule 92quater.

- *Witness totals by category. For example, linkage witnesses, crime base witnesses, international witnesses, expert witnesses, other witnesses (e.g., intercept operators and Prosecution investigators, military intelligence analysts and technical assistants).*
- *Witness totals by component part of the case: This pertains to different crimes sites in an indictment.*

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1. In the ICTY, trials are controlled by panels of Judges who collectively have adopted an approach which has been described as "managerial judging". Under this approach, the Judges regulate the parties' activities using an essentially adversarial procedure. ICTY trials are conducted under very precise timetables, and prosecutions are controlled before the Trial Chambers more strictly than is typical in national courts. Judicial control extends to the scope of the indictment, the number of witnesses a party may lead, and the exact time to be allotted for examination and cross examination of each witness.
2. Nevertheless, the crimes that merit prosecution in the international forum are by definition broad, both in time and place. Most involve:
 - ♦ widespread attacks on civilian populations in which thousands of innocent people were affected;
 - ♦ accused usually in high positions of command or leadership;
 - ♦ evidence which often consists of many pieces of circumstantial evidence. Bringing that evidence forward to prove or rebut charges of the magnitude contained in ICTY indictments is a substantial undertaking for the parties. Hearing the evidence in sufficient detail to allow a Trial Chamber to decide the accused's guilt beyond reasonable doubt, and with all the necessary procedural safeguards, presents a major challenge for the Tribunal.

A. Avoiding delays - controlling the timetable

3. Given the potential time periods covered by ICTY charges, and the wide range of crimes being tried, the indictments are, by domestic standards, enormous in their temporal and subject matter scope. Because of this, it became necessary to find ways to control the timetable. One tool employed by the ICTY has been to establish time limits for the presentation of the evidence in the case. These time limits establish, at the outset of the trial, the maximum numbers of hours that can be used by the parties in presenting their evidence. Time limits have proven to be a particularly important tool for managing the timetable in cases when six or more accused are jointly tried in a single trial.⁹⁸ In *Prosecutor v. Milutinović, et al.* the Prosecution initially estimated that it would require 280 hours to present its case.⁹⁹ After it had used approximately 40 hours of its time, the Chamber issued a decision limiting the remaining presentation to a total of 220 hours.¹⁰⁰ Subsequently, during the Pre-Defence Conference, the Trial Chamber decided to allocate to the Defence a maximum of 240 hours for the presentation of their case.¹⁰¹
4. In light of the voluminous materials presented, the period of alleged criminal acts spanned in the indictments, and the inherent case management issues arising during the litigating of international criminal matters, particularly in multi-accused cases, the presentation of evidence could conceivably continue indefinitely. Consequently, the imposition of global time limits is viewed as a necessary and useful measure. The Tribunal's general practice has been to set global time limits during the pre-trial phase of the case, but after the parties have filed their witness and exhibit lists, which are generally required to be set forth in accordance with Rule 65ter (E) for the Prosecution and Rule 65ter (G) for the Defence. In relation to the Prosecution's case, the establishment of time limits may occur in the pre-trial phase, but generally happens only after the case has been assigned to a Trial Chamber for the trial phase. For the Defence, the establishment of time limits occurs after the close of the Prosecution's evidence, and thus in the trial phase.
5. By requiring a sufficient level of detail in the parties' filings, Chambers have been able to broadly assess the length of time necessary to hear the evidence involved in the cases. By establishing time limits, the Chamber achieves a number of advantages: encouraging the parties to be highly organized prior to the trial's commencement; bringing a more efficient order of evidence presentation by, for example, encouraging parties to present evidence in writing through statements made under Rules 92bis and 92ter and to select only the most important and valuable evidence to be presented through live testimony.
6. A case study demonstrates the practicalities of using time limits to manage cases before the Tribunal (see text box *Popović et al. case - Presentation of evidence and time-limits*).

B. Presentation of evidence

7. By their very nature, trials are dynamic. The large temporal and subject-matter scope of ICTY indictments can involve voluminous materials and hundreds of witnesses, and the ICTY's judges have adopted various

⁹⁸ Global hours limits were set, for example, in the cases of *Prosecutor v. Prlić, et al.* and *Prosecutor v. Milutinović, et al.*

⁹⁹ See *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T ("*Milutinović et al.*"), Decision on Use of Time, 9 October 2006; *Milutinović et al.*, Case No. IT-05-87-PT, T. 253 (17 May 2006); see also Prosecution's Submissions Pursuant to Rule 65ter(E), 10 May 2006.

¹⁰⁰ *Milutinović et al.*, Decision on Use of Time, 9 October 2006.

¹⁰¹ See *Milutinović et al.*, Pre-Defence Conference, T. 12847 oral order pursuant to Rule 73ter (22 June 2007).

mechanisms for facilitating the presentation of evidence. The following sections detail some of the practices that have evolved during the ICTY's operation which have contributed to a more efficient trial process.

B.1 The use of written statements

8. One of the unique features of the ICTY is the blending of the civil law and common law traditions. In cases before the ICTY counsel for the parties have the primary responsibility for the presentation of evidence. Prosecution counsel utilise witness testimony, documentary evidence, and the presentation of physical evidence to attempt to establish proof beyond reasonable doubt. The defence may do the same to create a reasonable doubt if they elect to present evidence at all.¹⁰²
9. During the initial years of the ICTY's operation, various Chambers found that it was time consuming, and not always efficient, to hear live witness testimony.¹⁰³ Consequently, in December 2000, the Judges adopted Rule 92bis, which provides for the admissibility of written statements in place of live witness testimony in certain circumstances.¹⁰⁴

Popović et al. case - Presentation of evidence and time-limits

In Prosecutor v. Popović et al., the Prosecution's presentation of evidence began on 24 August 2006 and was completed on 7 February 2008. The Decision on Defence motion for acquittal was issued orally on 3 March 2008. The Defence case began on 2 June 2008.*

In its "Order Concerning Guidelines on the Presentation of Evidence and the Conduct of Parties During Trial Proceedings" issued on 14 July 2006 ("July 2006 Order"), the Trial Chamber decided not to set a specific limit on the Defence for the cross-examination of Prosecution witnesses.

To date the Trial Chamber has found it necessary to set time-limits for the examination-in-chief and cross-examination on one occasion only.

As the Prosecution case approached completion, the Trial Chamber considered it necessary to establish a timetable for the close of the Prosecution case-in-chief, the hearing of oral submission and the commencement of the Defence case. Following this order the Trial Chamber consistently took action to promote adherence to the timetable that had been established.

*While the Prosecution case was completed slightly later than anticipated,** the hearing of oral submissions pursuant to Rule 98bis began on the date scheduled. The dates set for the Pre-Defence Conference and the commencement of the Defence Case will not be altered, unless exceptional unforeseen circumstances arise.*

*The Trial Chamber set the maximum time for the Defence to address the Chamber in relation to its motion for acquittal and for the Prosecution to respond. These restrictions on use of time were rigorously enforced. On 14 and 15 February 2008, each of the Accused, except Vujadin Popović, made oral submissions to the Chamber requesting an acquittal upon some or all counts in the Indictment applicable to them. On 15 and 18 February 2008, the Prosecution responded to the Defence submissions. The Decision pursuant to Rule 98bis was issued on 3 March 2008.****

* Prosecutor v. Popović et al., Case No. IT-05-88.

** See Order Varying the Date on which the Prosecution Shall Close its Case-in-Chief, 1 February 2008.

*** Scheduling Order, 25 February 2008, p. 1.

102 In the case of *Prosecutor v. Haradinaj, et al.*, Case No. IT-04-84, the Defence presented no evidence or witnesses, and rested its case immediately following the close of the Prosecution's case. Two of the three accused were acquitted.

103 Judge O-Gon Kwon discusses these inefficiencies, saying, "While in my years at the Tribunal I have come to appreciate that the common-law adversarial model has many strengths, perhaps its greatest weakness is its tendency to produce lengthy and often irrelevant exchanges between the examining party and the witness [...] and [...] the witnesses are often unfamiliar with the adversarial method of examination and cross-examination." Judge O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 Journal of International Criminal Justice 360, 364 (2007).

104 For a complete treatment of the subject of Presentation of Evidence, see "The Challenge of an International Criminal Trial as Seen from the Bench," Judge O-Gon Kwon, *supra* note 102, at 360. He goes on to state that: "Rule 89(F) is contained in the introductory provisions on rules of evidence, and states that '[a] Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.' Rule 92bis is a much more extensive provision, allowing written witness statements to be admitted in lieu of oral testimony as long as they do

10. The Rules provide for two methods by which a party can implement Rule 92*bis*: (1) through a person authorised to witness such a declaration in accordance with the law and procedure of a State; or (2) through a Presiding Officer appointed by the Registrar of the Tribunal for the purpose of witnessing a Declaration. The Chamber must decide which method to apply. Then, the Registry must inform the party that it is important for the relevant State to have a functioning notary system and encourages it to go through the diplomatic channels in The Hague to secure a certified notary to assist with the process.
11. In 2001, a Practice Direction on Procedure for the Implementation of Rule 92*bis*(B) was issued to provide a procedure for completion of the declaration process. The Rule 92*bis* procedure is implemented for both the Defence and the Prosecution in the same manner. If necessary, a Registry interpreter can provide verbatim interpretation to the witness.
12. The use of written evidence may be a more efficient mode for presentation of certain types of evidence, particularly evidence dealing with factual portions of a case, evidence relating to sites where crimes are alleged to have occurred ("crime based evidence"), and background historical, sociological, and statistical evidence. The admission of written statements in lieu of oral evidence, when used to prove a matter other than the accused's acts and conduct, has enhanced the chambers' ability to manage trials of a vast scale, and does not impinge fair-trial rights, provided that the statement declarant can be called for cross-examination.¹⁰⁵ However, the use of such statements has been complicated by lengthy statements, as well as by issues related to the evidential status of documents referred to as sources in such statements (e.g., footnoted reports that the statement-maker's conclusions are based on other information). Another disadvantage of relying on written evidence is that the public may find it more difficult to follow the proceedings. However, this disadvantage is not sufficient to outweigh the advantages gained.
13. In September 2006, the ICTY further modified its evidentiary procedure by adding Rules 92*ter* and 92*quater*. Rule 92*ter* codifies a jurisprudential practice that permits the presentation of a written statement or transcript where the witness is present in court and available for cross-examination and questioning by the judges. In most instances, these rules enable witness testimony to be presented more concisely. Unlike the Rule 92*bis* mechanism, witnesses presenting testimony in this manner can provide information about an accused's acts and conduct.¹⁰⁶ This evidentiary tool has been used primarily by the Prosecution to present the evidence of its witnesses where in-court oral testimony would otherwise exceed the time permitted.
14. During trials, Rules 92*bis* and *ter* have been applied somewhat flexibly, if not confusingly. For instance, the Chamber can partially receive a statement whilst allowing, under Rule 92*ter*, the witness to orally append additional, often updated, information. This testimony can be followed by cross-examination of the witness on the whole of his or her testimony.¹⁰⁷
15. Rule 92*quater* provides a means for presenting the testimony of a witness who has died or is unavailable due to mental or physical infirmity or disappearance. This evidentiary rule is an important development as it has enabled the presentation of witness evidence which otherwise may have been inadmissible. However, the

not go to the facts and conduct of the accused.' Unless the witness in question has died or cannot be found with reasonable diligence, any statement admitted under Rule 92*bis* must be accompanied by a declaration, sworn by the witness before an Officer of the Tribunal's Registry, that its contents are true and correct. Under Rule 92*bis* (E), the Trial Chamber retains the discretion to call the witness for cross-examination despite this declaration if it deems it necessary and appropriate". *Ibid*, at 364-65.

¹⁰⁵ Kwon, *supra* note 103, at 365.

¹⁰⁶ The right to include information going to the acts and conduct of the accused in Rule 92*ter* statements is justified on the basis that the witnesses are available in court for cross-examination in relation to their statements.

¹⁰⁷ See, e.g., *Prosecutor v. Prlić, et al.*, Case No. IT-04-74, T. 13398 - 13442 (1 February 2007), T. 13932 - 13956 (12 February 2007); *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87, T. 3823 - 2865 (25 September 2006), T. 4229 - 4282 (28 September 2006).

process has raised concerns because of its interplay with an accused's right to be tried in the presence of opposing witnesses and to cross-examine them, and to obtain the attendance and examination of witnesses on the accused's behalf under the same conditions as witnesses against the accused.¹⁰⁸ The tension which arises between the preservation of the testimony of deceased witnesses, or witnesses who are otherwise unavailable, and the right of an accused to examine and confront witnesses, has been addressed by the ICTY's jurisprudence requiring that evidence presented under Rule 92*quater* be corroborated.¹⁰⁹

16. One means by which the ICTY has facilitated the presentation of documentary evidence is through the tendering of documents from the bar table, that is, directly to the court, without testimony about the documents by a witness. This approach allows the parties to file written applications directly seeking the admission of documents, rather than having all exhibits admitted through a live witness. Rule 89 sets out the following basic requirements that must be satisfied before those documents can be admitted into evidence:
 - ◆ relevance;
 - ◆ probative value; and

Milutinović et al. case* - Applying the criteria for admission of documentary evidence from the bar table

Trial Chamber III of the Tribunal has been seized with numerous requests for the admission of documentary evidence from the bar table. The Chamber set forth its approach to the admission of documentary evidence at an early stage of the case, stating that "the Appeals Chamber has also held that evidence is admissible only if it is relevant and it is relevant only if it has probative value, general propositions which are implicit in Rule 89(C)". The Trial Chamber considers that reliability of a hearsay statement is a necessary prerequisite for probative value under Rule 89(C). The opposing party or parties may object to the admission of a proposed exhibit tendered by a party on grounds of relevance or probative value (including authenticity). If no challenge is made to the proposed exhibit, it shall be admitted into evidence. If a party challenges the authenticity of an item of proposed evidence, it must specify its reasons for doing so. After hearing such an objection and any further submissions from the parties that are necessary, the Chamber shall rule on admissibility. The weight to be ascribed to an admitted item of evidence shall be determined by the Chamber during its final deliberations, in the context of the trial record as a whole.

In relation to applications for the admission of documents from the bar table, the Chamber established a clear process, stating:

"Given the depth and breadth of this case, the Trial Chamber is generally sympathetic to parties presenting documents from the bar table. However, if that is to be the case, the offering party must be able to demonstrate, with clarity and specificity, where and how each document fits into its case... Whatever the number of documents the party seeks to have admitted through its Motion, it must satisfy the requirements of the rules governing the admission of evidence in relation to each one. The following decision seeks to strike a proper balance between ensuring a fair trial and not over-burdening the parties in regard to the admission of evidence."

In an effort to control the number of documents being tendered from the bar table, and to ensure that they adhered to the general standards required for the admission of evidence, the Chamber took certain measures. First, the Chamber asked for detailed reasons supporting the admission of each document. Second, the Chamber noted that it maintains a discretionary power over the admission of evidence, and therefore, the Chamber may restrict the admission of evidence so long as the restrictions have a legitimate purpose, namely that of judicial economy, and they do not impinge on the fair trial rights of the parties.

* Case No. IT-05-87-T. Decision on Prosecution Motion to Admit Documentary Evidence, 10 October 2006, para.18, 19.

108 Art. 14, ICTY Statute.

109 See, e.g., *Prosecutor v. Haradinaj, et al.*, Case No. IT-04-84, Judgement, para.10.

♦ authenticity.¹¹⁰

17. In certain instances, parties have asked for the admission of extremely large numbers of documents through Rule 89. The following case study demonstrates one Chamber's approach to dealing with motions for the admission of documents from the bar table, and the various case management issues arising during the Rule 89 procedure (see text box *Milutinović et al. case - Applying the criteria for admission of documentary evidence from the bar table*).

B.2 Detained witnesses

18. Detained persons may be heard before the ICTY as witnesses. Their appearance requires an order by the Chamber for the temporary transfer of a detained witness. In order to secure the appearance of a convicted person serving sentence in another State as a witness, close coordination between the Registry and the Host State is needed since the witness will need to be detained at the United Nations Detention Unit. To facilitate the process, the Registry adopted a policy to guide those Registry Sections involved with the transfer and appearance of a detained witness. The policy delineates responsibilities between the relevant Sections. A detained witness may require legal representation and have specific psychological needs. Close cooperation between the victims, the witness support staff, and the Detention Unit is necessary and special care must be taken during the court breaks to ensure the well-being of the detained witness. The fact that a detained person will testify against an accused, while serving his own sentence, is capable of generating much stress depending on the witness' personal circumstances. The difficulties were tragically illustrated when one person convicted by the Tribunal, Milan Babić, was transferred back from the prison facility in the country where he was serving his sentence to the UNDU, on 7 February 2006 for the purpose of testifying for the Prosecution in another case and committed suicide in his cell on 5 March 2006. The death occurred during a weekend, after he had already testified for seven days, and while his evidence was to continue the following day. The President of the Tribunal ordered an inquiry into the circumstances surrounding his death, and the inquiry identified a number of circumstances which may have had a bearing upon Mr. Babić's decision to take his own life. These circumstances included difficulties related to the detention, his family situation and relocation process, and difficulties related to his testimony. Despite these circumstances, the inquiry concluded that no one - not even his family, the staff of the UNDU, the protection officers and security guards, or his counsel who had spent long hours with him in proofing sessions and in court during his testimony - noticed any signs that he might commit suicide. The inquiry found that there was no reason to conclude there had been any neglect on the part of the UNDU staff in assessing whether there was a risk of suicide or self harm. The inquiry report did make two recommendations: (1) a record of any medication that a detainee is taking on arrival at UNDU, as well as the detainee's continued use of the medication, should be noted in the medical records of a UNDU detainee for assessment and treatment by the UNDU psychiatrist. However, the report clarified that medications were of no relevance to the death of Mr. Babić or his treatment and supervision; (2) in the case of a segregated detainee, the detainee's condition should be reviewed every week, and a weekly report should be sent to the Registrar. The Report finally noted that the events of this case emphasise the importance of the arrangements made for detainees to serve their sentences, especially in cases when family protection is necessary, as well as arrangements for the relocation of families. Of course, resolution of these issues depends on the decision of governments who can give long-term assurances. Care should be taken that these difficulties are fully explained to the detainees and their families to avoid creating unrealistic expectations.

110 Rule 89, ICTY RPE provides that: "(C) A Chamber may admit any relevant evidence which it deems to have probative value; (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial; (E) A Chamber may request verification of the authenticity of evidence obtained out of court."

19. Specific arrangements for a detained witness include:

- ◆ a request to the Enforcing State or prison authorities to provide a copy of the medical record of the transferee;
- ◆ the witness may be entitled to legal aid under the Tribunal's legal aid budget;
- ◆ an effort to ensure that the detained witness is provided with the necessary psychological and emotional support from Support Officers during testimony.

C. Proofing of witnesses

20. The practice of witness proofing has existed since the Tribunal's inception.¹¹¹ There is no set definition of the concept of "proofing,"¹¹² but generally, it refers to "a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness' evidence."¹¹³
21. In some jurisdictions, the concept of preparing witnesses in advance of a trial is considered a basic and fundamental requirement of good trial practice,¹¹⁴ and the failure to do so can constitute grounds for a finding of ineffective assistance of counsel,¹¹⁵ legal malpractice, or counsel incompetence.¹¹⁶ On the other hand, in civil law jurisdictions where an investigating judge is assigned to a case, counsel and Prosecution are not allowed to have contact with the witness prior to his or her testimony in court.¹¹⁷
22. At the ICTY, counsel are not prohibited from preparing witnesses in advance of trial.¹¹⁸ Needless delays due to witnesses being unavailable or their intended areas of testimony altering can be avoided by conducting proofing sessions sufficiently in advance of the witness' appearance in court. Where a witness has testified in a number of cases, further "familiarization" may be unnecessary, particularly where the witness is to testify about similar crime base evidence. However, significant delays in the trial process can result from substantive changes to a witness statement during the proofing process. Complaints may be made by other parties due to lack of proper notice which must be provided where a modification has occurred. When a witness modifies a statement during witness proofing, and then is withdrawn as a witness by the party who intended originally to call him, issues may arise concerning the obligation to disclose the modification under the Prosecution's obligation to disclose exculpatory information under Rule 68. Although it is not mandatory to have the proofing sessions tape-recorded, the proofing party can provide the notes of the proofing session to the other

111 *Prosecutor v. Haradinaj, et al.*, Case No. IT-04-84-T "Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions", 23 May 2007; *Prosecutor v. Limaj, et al.*, "Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses", 10 December 2004.

112 *Prosecutor v. Haradinaj, et al.*, Case No. IT-04-84-5, "Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions", 23 May 2007, paras.8 - 9.

113 *Ibid.*, at para.8 (citing *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87, "Decision on Ojdanić Motion to Prohibit Witness Proofing," 12 December 2006).

114 See *R v. Momodou* [2005] England and Wales Court of Appeal Criminal Reports 177, para.62.

115 See, generally, *Defending Against Claim of Ineffective Assistance of Counsel*, 82 American Jurisprudence Trials 1, Section 46; see also *Cotton v. United States*, 2008 WL 410648 (N.D. Miss, February 12, 2008); *People v. Duy Le*, 2008 W.L. 544383 (Cal. App., 6th Dist., February 29, 2008); *Carr v. Baynham*, 2008 WL 1696881 (E.D. Texas, April 9, 2008).

116 See, e.g., *Lai v. Chamberlain* [2005] New Zealand Court of Appeal 37, para.158 (abolishing barrister immunity under New Zealand law for civil cases. Barristerial immunity was also abolished in relation to criminal cases in the judgement of the Supreme Court on appeal from the Court of Appeal holding).

117 See the jurisdictions listed in *Prosecutor v. Thomas Dyilo Lubanga* ICC-01/04-01/06-679, "Decision on the Practices of Witness Familiarisation and Witness Proofing", para.37.

118 *Prosecutor v. Thomas Dyilo Lubanga* ICC-01/04-01/06-679, "Decision on the Practices of Witness Familiarisation and Witness Proofing", paras.24-26.

party consistently with the requirements of a fair and impartial proceeding. Concerns regarding the possibility of witness coaching can be addressed by tape-recording the proceedings.

23. Additionally, the Victims and Witnesses Section recommends that prosecutors, defence teams and others involved in preparing a witness to testify, be provided with information that might help reduce the stress on witnesses required to recall traumatic events. Whilst it is not possible to totally avoid post trauma reactions triggered by the proofing process, there are a range of strategies that the VWS suggests to assist in minimizing the trauma and reducing such reactions (see Annex 7 - *VWS recommendations on proofing of witnesses*). These factors include informing the witness about the process, and the content of his testimony, but also focus on how confident or empowered the witness seems to be regarding his or her presence in court as a witness.
24. Sensitive and appropriate preparation during the proofing phase can only contribute to enhance a witness' sense of control and confidence, and can produce positive results for the court process. Likewise, a proper conclusion of the witness' relationship with the legal team can contribute to a sense of completion for the witness. For the legal staff, this sense of completion can provide also means of finalising their relationship with witnesses, without whom, they would have no case.

D. Use of subpoenas

25. The Tribunal has attempted to use subpoenas in several cases to compel the attendance of witnesses and the presentation of evidence. The generally broad wording of Rule 54 allows the Chamber to issue "orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."¹¹⁹ Rule 54 can be used to compel both the attendance of a witness, and the production of evidence.¹²⁰ Subpoenas have also been used to obtain documents from a State in accordance with Rule 54*bis*.

D.1 Subpoenas to compel testimony under Rule 54

26. The use of subpoenas to compel testimony has produced mixed results. The ICTY must rely upon the state in which a witness resides, to arrest and deliver a witness who has refused to appear pursuant to such a subpoena. Unlike domestic jurisdictions, the ICTY is not equipped with a police force capable of forcibly compelling compliance with its legal process.
27. Immediately upon filing, a subpoena is served by the Registry through the relevant diplomatic channels in The Hague. The Registry issues a certified copy of the subpoena to the state in the language of the person who is being subpoenaed and it must be handed to that person directly by a designated official of the state completing the service of process. A memorandum of service is appended to the subpoena, which is returned to the Registry upon completion, showing that the order was implemented, and then it is filed into the case file. The ICTY does not have jurisdiction to implement a subpoena itself, so the Registry is obliged to serve the certified copy through the diplomatic channel (*i.e.* Embassies present in The Hague). The service of process is complicated when a government is not represented in The Hague. In those circumstances, an alternative channel must be utilized, such as a courier service or in person delivery by a Tribunal representative to the regional court.

¹¹⁹ Rule 54, ICTY RPE.

¹²⁰ Many of the orders granting a subpoena are filed confidentially, and thus are not footnoted here. However, as a sample only, see *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.

28. In the *Haradinaj, et al.* case, the effort to compel testimony through the use of subpoenas did not prove totally satisfactory. It resulted in several contempt cases being instigated, but the Trial Chamber also denied several requests for subpoenas¹²¹ and looked for alternative ways to obtain the testimony and evidence.¹²²
29. The use of subpoenas can result in procedural delays that may stall proceedings. Witnesses may seek relief from the subpoena in various forms.¹²³ For example, a witness may seek to have the subpoena set aside¹²⁴ or submit medical documentation indicating that he or she cannot appear.¹²⁵ In some instances, there have been motions to vacate the issued subpoena. Some witnesses have been ordered to appear before an investigative judge to explain their reasons for refusing to appear pursuant to a subpoena, and have cited fear of repercussion to themselves or their families if they complied.
30. Subpoenas tend to be issued only after a chamber has exhausted other tools and devices to obtain the voluntary appearance of a witness. These other devices can include, the use of Rules 92*bis* and *ter*, which permit substitution of documentary evidence in place of witness testimony or hearing testimony by videolink.
31. To address the difficulties the Chamber encountered in the *Haradinaj* Case regarding the appearance of witnesses, specific arrangements were put in place by the Registry - after consultation with the Chamber - to ensure that witnesses were well informed about the consequence of their failure to appear before the Tribunal in response to a subpoena. In doing so, the Registry reviewed the arrangements for the service of the subpoena, and asked the competent State authorities to provide witnesses with an explanatory note drafted by the Victims and Witnesses Section.
32. When a subpoena is the only alternative for obtaining the testimony, it is important to involve the authorities of the state in which the witness resides to ensure that the subpoena will be enforced. In the event that a subpoena is not executed, the State will need to invoke the necessary process for bringing the witness before the Tribunal to face contempt proceedings. Contempt proceedings are time-consuming, and may not, in the end, produce the evidence that is being sought. Several Chambers have been reluctant to suspend their trial proceedings to undertake contempt proceedings, especially when the contempt proceedings are unlikely to expedite completion of a case.

E. Chamber witnesses' testimony under Rule 98

33. Upon completion of the Prosecution and Defence cases, the Chambers may hear from additional witnesses not called by either of the parties *proprio motu*. Generally, a Chamber will do so only when it believes that the testimony of a particular witness will assist in clarifying a matter of importance. Various logistical and procedural modalities have been adopted to facilitate the Chamber's examination of witnesses. A Chamber, unlike the parties, has no investigative resources that it can use to identify potential witnesses or take their statements. In the *Krajišnik* Case, for instance, the Chamber's Legal Officer in The Hague interviewed and

121 See *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84, "Decision on Prosecution's Motion to Have Witness 25 Subpoenaed to Testify", 30 October 2007, "Prosecution's 23rd Application for a Subpoena Ad Testificandum," 19 October 2007.

122 See *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84, "Decision Denying Subpoena Ad Testificandum for Witness 15 And Instead Conditionally Admitting the Witness's Statements Pursuant to Rule 92*bis*," 2 November 2007.

123 *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84, "Decision on Motion by Witness 28 to Set Aside Subpoena or for Alternative Relief", 5 September 2007.

124 *Ibid.*

125 Due to the confidential nature of filings where such requests have been made, none is cited here. However, there have been numerous such requests decided upon by the various Chambers.

proofed the witnesses (see Annex on CD-Rom - *Finalised Procedure on Chamber Witnesses; Decisions and Orders on Several Evidentiary and Procedural Matters of 24 April 2006, IT-00-39-T*)

34. To assess the willingness of a person to testify as a Chamber witness, a Chamber legal officer can conduct a teleconference in the presence of a Court Officer and interpreter. The teleconference is audio-recorded. A few witnesses have requested counsel during these preliminary interviews, and it has been necessary for the Chamber to grant permission for the lawyer's participation.
35. Once the prospective Chamber witness has agreed to testify, the Victim Witness Section organizes the transport of the witness to The Hague for a preliminary interview. At the preliminary interview, the Chamber's Legal Officer asks the witness a set of questions in the presence of a Court Officer. The Court Officer takes minutes during the procedure, in the presence of an interpreter, a court reporter provides an English transcript of the interview, and the interview is audio-recorded. The Chamber Legal Officer then transforms the witness's answers into a statement which is read back to the witness through the interpreter in the presence of the Chamber legal officer and the Court Officer. The finalized statement is then signed by the witness, and the Chamber provides copies of the statement in English and Bosnian-Croatian-Serbian (BCS) to the witness and the parties.
36. The Victim Witness Section organises the attendance of the witness in The Hague for the testimony. During the testimony itself, the Chamber Legal Officer has no contact with the witness who generally begins his testimony by adopting his statement, which is then entered into evidence. The witness is cross-examined by the Judges and the parties. The examinations should be limited to the subject matter of the statement.

Milutinović, et al. case - Evidence post-prosecution case

In Prosecutor v. Milutinović, et al., one of the Defence teams filed a confidential motion in July 2007, arguing that the Prosecution should not be permitted to have any contact with individuals who had been identified as potential Defence witnesses. This motion was re-filed as a public motion.** As support for its motion, the Defence argued that, by advising a potential Defence witness of his rights, as required under Rule 42, the Prosecution was implicitly threatening the witness, thus interfering with the accused's fair trial right to present his defence.*

The Trial Chamber was ultimately not required to decide this motion, as the Prosecution announced its willingness to forego further interviews of potential Defence witnesses, rendering the motion moot.

* Case No. IT-05-87.

** Prosecutor v. Milutinović, et al., Case No. IT-05-87, "Sreten Lukić's Re-filed Motion for an Order Barring Contact with Defense Witnesses", 8 August 2007.

F. Evidence post-prosecution case

37. One of the great challenges for trials of the scope and nature of those tried at the ICTY is that the evidence continues to evolve during the course of a case. The opportunity to assemble and develop the evidence has not typically been undertaken in a sterile crime-scene or controlled environment. Rather, the scope and nature of the evidence continuously changes.
38. The willingness of a State to allow investigators, prosecutors and defence access to military and political documents and witnesses who are or were in positions of responsibility during the conflict, can present insurmountable challenges to both the Prosecution and the Defence as they attempt to gather sufficient evidence to present their cases (see text box: *Milutinović, et al. case - Evidence post-prosecution case*).

39. Ideally, the evidence to be presented will be known and analysed prior to the start of a case, preferably during the pre-trial phase. However, the politically charged and sometimes volatile climate surrounding ICTY cases can make it impossible to achieve that level of preparation. In many instances, additional evidence will be discovered as the trial proceeds. Further, due to the length of proceedings, political conditions may change so that material that was previously inaccessible becomes available.

G. Motions for acquittal

40. Rule 98bis allows, at the close of the Prosecution's evidence, for the presentation of oral submissions requesting a judgement of acquittal. The Rule directs the Trial Chamber to enter a judgement of acquittal on any count "if there is no evidence capable of supporting a conviction." The Appeals Chamber described this standard in the *Jelisić* Appeal Judgement¹²⁶: "the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could". In doing so, the Trial Chamber is "required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence."¹²⁷
41. The Tribunal added Rule 98 to the Rules in July 1998. As originally drafted, the Rule read:
- If, after the close of the case for the Prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more of the offences charged in the indictment, the Trial Chamber, on the motion of an accused or proprio motu, shall order the entry of a judgement of acquittal on that or those charges.*¹²⁸
42. The Rule went through various iterations following its adoption. In November 1999, the Rule was amended to require the filing of a written motion for acquittal at the close of the Prosecution case. This process was regarded as too cumbersome, because it involved a large amount of paperwork. Consequently, in December 2004, the Rule was amended to only permit oral submissions, which are dealt with by an oral ruling delivered by the bench.
43. Experience has shown that it is preferable, in order to facilitate a fair and expeditious trial, to allow an oral motion for a finding of "not guilty" to be made at the close of the Prosecution's case, and to deal with this motion by way of oral ruling. That is the mechanism provided in the current Rules.
44. The Initial Working Group on Speeding Up Trials noted in its February 2006 report that, at the close of the Prosecution case, "the Prosecutor is bound to review the evidence to deal with any submission under Rule 98bis".¹²⁹ The Working Group suggested in 2006 that the Trial Chamber taking Rule 98bis decisions should take a "robust" approach by dismissing charges that are unsupported by sufficient evidence.
45. This concept - of using the motion for acquittal at the end of the Prosecution's case to refine the remaining case against an accused - has clear advantages. When the Defence believes that some of the charges could not support a conviction under the 'beyond reasonable doubt' standard, it is advantageous for it to file a motion for acquittal. The Defence is under no obligation to put a defence at all. However, it may be risky for it to fail

¹²⁶ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeal Judgement, para.55.

¹²⁷ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Appeal Judgement, para.55.

¹²⁸ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 13, 9 and 10 July 1998.

¹²⁹ Report of the Working Group on Speeding Up Trials, February 2006, p. 16.

VIII. Trial Management

to do so even when charges appear to be weak. If the Trial Chamber agrees that there is insufficient evidence regarding some of the charges, the Defence can focus its case on other aspects of the indictment. There is also a clear benefit in terms of judicial economy.

46. Although the Tribunal allows appeals from convictions, as well as appeals from acquittals, it may be problematic to require that appeals from decisions on motions to acquit be brought at the end of the trial along with an appeal of the judgement. This is particularly so with respect to decisions granting partial acquittal. Indeed, if the Prosecution were only able to challenge such a decision at the end of the trial, the Appeals Chamber would have limited options available to it for remedying an erroneous decision by the Trial Chamber to acquit on some charges. Those options would include the possibility of ordering a retrial on the charges in question, or to decline to reverse the acquittal. In the *Jelisić* case, the Appeals Chamber found exceptional circumstances, but concluded that it was not in the interests of justice to grant the prosecution's request for retrial, citing the following reasons: Jelisić had pled guilty to criminal conduct on the basis of which he was found guilty of 31 counts of violations of the laws or customs of war and crimes against humanity and sentenced to 40 years' imprisonment; a potential retrial would deal with a count of genocide by killing and the prosecution had brought no further charges of killing in respect of that count; a retrial would be limited to the question of whether he possessed the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such; it was through no fault of Jelisić that the Trial Chamber erred in its legal ruling; Jelisić had been under detention in the Tribunal since 22 January 1998, the Trial Chamber had recommended that he receive "psychological and psychiatric follow-up treatment", and a prison would generally be in a better position to provide that treatment than the United Nations Detention Unit. The Appeals Chamber also took into account the fact that considerable time had elapsed since the date when the offences were committed in May 1992 and the date of any potential retrial. Emphasis was also placed on the *ad hoc* nature of the International Tribunal which, unlike a national legal system, has limited resources and man-power, and uncertain longevity.
47. Subsequently, the Tribunal has developed a process for dealing with appeals against Rule 98*bis* decisions prior to the presentation of the Defence's case. Thus, in the *Brdanin* case for instance,¹³⁰ the accused was acquitted of a genocide count, and the Prosecution was granted leave to appeal that Rule 98*bis* decision. The Appeals Chamber upheld the Prosecution's appeal and reinstated the genocide charge.¹³¹
48. Experience shows that the best practice is to have Prosecution appeals against Rule 98 acquittals dealt with on interlocutory appeal rather than on the final appeal. The Prosecution's interlocutory appeal will resolve whether an accused needs to present evidence as to a specific count, and helps preserve the accused's right to remain silent as to that offence while the Appeal determines whether there should be a judgement of acquittal on that. Further, by resolving the acquittal issues at the 98*bis* stage through an interlocutory appeal, the accused does not risk losing evidence through delay.

H. Confidential material from States and other organisations

49. Rule 70 established a set of specific evidentiary guidelines for the ICTY's receipt and use of materials provided confidentially. The Rule has been called an "exceptional but strictly delineated right".¹³² The rationale for this Rule is to encourage the use, as appropriate, of materials that would not otherwise be provided to the

¹³⁰ *Prosecutor v. Brdanin*, Case No. IT-99-36-T.

¹³¹ *Prosecutor v. Brdanin*, Case No. IT-99-36-T Decision on Interlocutory Appeal, 19 March 2004.

Prosecutor, or would have been unusable due to their confidential nature.¹³³ Rule 70 provides that the Prosecution shall not disclose confidentially received information or materials, and similarly limits the Chamber's powers to order the production and disclosure of information in the possession of the Prosecution or Defence that has been provided on a confidential basis. These restrictions have been applied to information and evidential material in many of the Tribunal's trials. In this regard, the regime governing disclosure of potentially exculpatory material under Rule 68 requires that the Prosecution take reasonable steps to obtain the consent of the provider to disclose confidential material or the fact of its existence. Rule 68 is, however, specifically subordinated to Rule 70 which provides that the Prosecution need not to disclose exculpatory material and information obtained under condition of confidentiality unless the provider consents to that disclosure. The priority of Rule 70 is attributable to the fact that there was previously uncertainty about whether Rule 68 or Rule 70 controlled the process, and this uncertainty caused States to stop providing Rule 70 material to the Prosecution unless and until their right to confidentiality was given priority. This led to a Rule change subjecting Rule 68 to the provisions of Rule 70.

50. Typically the Rule 70 restrictions apply to information provided by States and organisations, including UN organisations. Such restrictions can result in difficulties and shortcomings in the evidentiary record, and can interfere with the requirement of a fair and expeditious trial. The Tribunal's Rules do not allow a Chamber to order a Rule 70 provider to produce to it confidential information protected under the Rule. Occasionally, compromises can be reached with the providers of information or, exceptionally, consent may be obtained after the issue has come before a Chamber, but such situations have been most unusual in ICTY. When doubts exist as to whether information has been provided under Rule 70, the Chamber should invite the material provider and the Prosecution to make submissions on the issue, and should assess whether the Rule 70(B) criteria have been satisfied.
51. When material that is subject to restrictions is to be disclosed to the other parties in a case, it is recommended that they be disclosed in their original format, rather than in summary format, subject to the necessity for specific redactions.¹³⁴
52. In cases where providers of materials have agreed to the disclosure and use in trial proceedings of the materials provided subject to Rule 70 restrictions, various measures have been utilised to accommodate the requirements of those material providers. These measures, generally designed to protect national security interests of States, include the following: 1) tailoring the examination-in-chief to exclude confidential information; 2) limiting cross-examination to matters raised in the examination-in-chief; 3) limiting questions on credibility to those for which the answers will not reveal confidential information; and 4) allowing representatives of the material provider to be present.

132 *Prosecutor v. Blaškić*, Case No IT-95-14-T, Decision of Trial Chamber 1 on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, para.10.

133 *Prosecutor v. Blaškić*, Case No IT-95-14-T, Decision of Trial Chamber 1 on the Prosecutor's Motion for Video Deposition and Protective Measures, 11 November 1997, para.10.

134 See, e.g., *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to Be Imposed Pursuant to Rule 68bis and Motion for Adjournment While Matters Affecting Justice and a Fair Trial Can Be Resolved, 30 October 2002, para.26 (holding that, within context of fair trial, obligation to disclose exculpatory material implies disclosure of exculpatory material in its original form, and not in form of summary).

I. Self-representation

53. Self-representation has presented difficult problems in a number of the Tribunal's cases. Article 21 of the ICTY Statute establishes the right of self-representation as a fundamental right,¹³⁵ but self representation may be undesirable in complex cases dealing with crimes that occurred within the theatre of armed conflict. There are various reasons:
- ◆ the court may be abused as a political platform;
 - ◆ the accused may not have a clear objective view of the case to be met, indeed may 'fail to see the forest for the trees', and therefore may not conduct the case in his best forensic or legal interests;
 - ◆ the accused may not be able to cope with the volume of material;
 - ◆ any sanctions imposed for breaches of orders may have adverse side effects on the conduct of the trial.¹³⁶
54. In addition to these concerns, additional challenges posed by an accused who chooses self-representation are demonstrated by the *Šešelj*¹³⁷ and *Tolimir*¹³⁸ cases. Both cases involved the accused's right to be provided with statements in a language he understands. While this right extends to disclosures of certain materials identified under the Rules, *i.e.* material relied upon to have the indictment confirmed and all previous statements taken from the accused, it does not extend to exculpatory materials subject to disclosure under Rule 68. The challenge that arose in both of these cases was whether an accused that elects to represent himself is prejudiced by not being entitled to receive exculpatory material in a language that he understands. It is clear that the right to receive exculpatory information is far less effective when the information is presented in a language that the accused does not understand. These problems can be avoided when an accused is represented by Counsel who must be able to work in one of the two official languages of the Tribunal (French or English). If the Tribunal must translate materials into a language a self-representing accused understands, the process imposes an enormous burden on a tribunal's typically limited resources. Increased demands for translation services can be unpredictable and can make it difficult to engage in adequate institutional planning regarding required translations of Rule 68 exculpatory information.
55. One accused, Zdravko Tolimir, has repeatedly insisted on receiving submissions from the Prosecution and the Chambers only in the Cyrillic script, the production of which imposes a great burden on the Conference and Languages Services Section (CLSS). However, the Appeals Chamber affirmed the Trial Chamber's ruling that the "right to receive relevant material in this Tribunal in a language [the accused] can understand, [...] does not translate into a right for an accused, regardless of his or her background, education, experience, to come before this Tribunal and demand the production of documents in any language or script that he or she chooses" (*Prosecutor v. Zdravko Tolimir*, Appeals Chamber decision of 28 March 2008, paragraph 15). Absent a factual finding that Tolimir truly did not understand the Latin script, the tribunal was not required to honor the demand. Furthermore, the Tribunal's decision to assign two legal assistants to the accused helped assure that the accused could prepare his defence.
56. Another challenging issue in cases involving self-representation is the effort to use outside resources to assist an accused. Such outside resources are sometimes considered by the Chamber or the Registry in an attempt to attempt to overcome obstacles to self-representation. In the *Šešelj* case¹³⁹, the accused asked the Pre-Trial

135 Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 21.

136 *Journal of International Criminal Justice* 5, p. 356.

137 *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.

138 *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2.

139 *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67.

Chamber to authorise the payment of certain associates that he claimed were assisting in his legal defence. As the accused did not want any of these associates to serve as counsel, since he insisted on his right to self-representation, the request did not fall squarely within the funding scheme for Legal Aid resources.

57. The *Šešelj* decision highlights the challenges posed by requiring a self-representing accused to prepare his case while being held in detention. The decision's reasoning sets out the arguments on both sides: in favour of finding a method to allow some support for a self-representing accused in the form of funding associates, but at the same time balance the Tribunal's need to carefully limit the payment of sums by ensuring that funds are utilised only for authorised purposes.
58. Following the decision of the Chamber in *Šešelj*:
 - ◆ the accused would have to first establish indigence in order to qualify for financial support for his assistants;
 - ◆ the accused must identify one associate who qualifies for appointment and assignment as counsel under the requirements of Rules 44 and 45 for; and
 - ◆ the Registrar, taking into account the complexity and approximate length of the trial, should establish reasonable and necessary amounts to be allocated to the accused for preparation of his defence.¹⁴⁰
59. The decision requires:
 - ◆ that the accused establish his indigence, as is required for any accused seeking legal aid;¹⁴¹
 - ◆ that at least one of the assistants of the accused be qualified for appointment or assignment as counsel under the Rules.¹⁴² This latter requirement is necessary to ensure that there is a method of regulating the work to be performed to ensure that public funds which might be used to cover the costs of such assistants is used for actual preparation of the defence;
 - ◆ also empowers the Office for Legal Aid and Detention Matters to monitor the work of, and to provide payment as authorized, to such assistants once one assistant qualifies under Rule 44 or Rule 45. Such a requirement is also pivotal to ensure that there would be some enforcement mechanism for any violation of the obligation to protect witnesses who have been afforded protective measures, and to ensure that confidential information is not disclosed.
60. The self-represented accused (SRA) case can pose special challenges for the trial process and the Registry specifically. The lack of an experienced counsel may cause confusion and delay, especially because the accused may ignore the Tribunal's procedures and practices.
61. Although an accused has a right under Article 21(4)(b) of the Statute "to have adequate time and facilities for the preparation of his defence", the Tribunal has no specifically enumerated Rule or Article that establishes the procedures and practices of self-representation. However, after *ad hoc* procedures were put into place by many offices during the Slobodan Milošević trial, the Registry decided that a more coordinated effort was necessary to ensure consistency and speed in dealing with issues arising from self representation. The Registry formed the *Pro Se* Office to provide specialized assistance to accused who chose to proceed without legal representation. The intended results include better coordination of information and requests between sections of the Registry and the Self-Represented Accused, lessening on assigned legal officers, and keeping the SRA and his team better informed of their responsibilities and obligations before the Tribunal. This structure contributes to the more efficient and equitable conduct of the trial without compromising the neutrality and impartiality of the Registry.

140 *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Decision on the Financing The Defence of the Accused", 30 July 2007.

141 In fact no funds have yet been paid to any assistant in the *Šešelj* case because the accused has declined to complete the necessary process to establish his indigence.

142 Rule 44 or Rule 45, ICTY RPE.

62. In addition, all of the Registry's Judicial Services Sections were required to devote additional resources to the challenges presented by cases involving self-representation. For example, Court Management and Services Section (CMSS) is normally responsible for accepting all exhibits offered into evidence and ensuring the expeditious conduct of Tribunal proceedings. Since Self-Represented Accused are usually inexperienced as trial attorneys, CMSS Court officers must play a more active role in the process. The Registry Court Officer, as the primary facilitator for the SRA, assists in the preparation of evidentiary material, ensures that the Self-Represented Accused is fully informed of case filing and evidence tendering procedures. In addition, they help explain the practice directives on page limits and word limits, and ensures that the Self-Represented Accused follows them.
63. During the Defence phase of a case involving self-representation, a separate Pro Se Legal Liaison Officer must be appointed to ensure adequate assistance to the Self-Represented accused in the preparation and presentation of his case. The Liaison Officer administers the Self-Represented Accused's requests, and performs a coordinating and liaison role with all relevant sections of the Tribunal. The assistance may be direct or indirect. Direct assistance occurs when the Liaison Officer gives immediate attendance to the Self-Represented Accused regarding issues related to the presentation of the defence. This assistance can include helping the accused with witness related arrangements involving either testimony or proofing sessions (all witnesses will likely need to come to the seat of The Tribunal twice, once for proofing and once for testimony), ensuring access to the law library and other legal reference material available to the SRA, ensuring access to standby counsel if needed, requesting and compiling documents to be tendered as evidence, requesting translations of potential documents to be tendered as evidence, providing instructions regarding requirements for filing, assisting in identifying suitable and available support staff (legal assistants, interpreters, etc.) that could be remunerated under the Remuneration Scheme, if the Self-Represented Accused seeks such assistance, and executing all relevant orders issued by the President, the Trial Chamber, the Appeals Chamber and the Registrar.
64. In the way of indirect assistance, the Liaison Officer should process the SRA's requests relating to various sections of the Tribunal and coordinate responses to those inquiries. The Liaison's tasks include communicating with UNDU regarding space and material needs for the detained SRA; communicating with VWS in relation to witness travel arrangements; communicating with other sections of the Tribunal and external entities on behalf of the SRA; and coordinating responses of the above sections and entities. Both the immediate response and the streamlining role require the Liaison Officer to introduce and maintain internal request-logs and thus ensure consistency in dealing with different aspects within each self represented case. It is essential that the Liaison Officer preserve the neutrality of the Registry at all times by avoiding potential conflicts of interest, providing no legal strategy to the accused or his legal associates, and keeping his or her services within the scope of the facilitating mission of the *Pro Se* Office at all times.
65. The *Krajišnik* appeal¹⁴³ also dealt with the issue of funding assistants for SRA. In that case, the accused opted to represent himself during the appeal phase of the case. However, in ruling on its obligation to finance associates to assist the accused in preparing his appeal, the Appeals Chamber took the view that while Article 21(1) may require that accused in similar circumstances receive roughly comparable treatment, it does not require that an accused who opts for self-representation receive all the benefits held by an accused who opts for counsel. To the contrary, as part of the choice to self-represent, Mr. Krajišnik must accept responsibility for the disadvantages this choice may bring.¹⁴⁴

¹⁴³ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A.

¹⁴⁴ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, "Decision on *Krajišnik* Request and on Prosecution Motion", 11 September 2007 (citing *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, "Decision on the Interlocutory Appeal by the Amici Curiae against the Trial Chamber

66. An accused who is convicted of war crimes, crimes against humanity, or genocide, will typically face a lengthy prison term. In deciding upon a set of practices regarding self-representation, every effort should be made to discourage an accused from attempting to represent him or herself in such a high-risk setting.
67. When an accused insists upon the right of self-representation, and where that right is, although not absolute, enshrined in the enabling statute, as is the case in the ICTY, there must be clear guidelines governing the procedure for exercising the right of self-representation, as well as for holding an accused to his or her decision. The ICTY's rules do not change simply because an accused has opted to exercise the right to self-representation. As was established in *Krajišnik*¹⁴⁵, the accused must still satisfy the Tribunal's requirements for financial assistance for Defence team assistants. Additionally, the Chamber should make clear to an accused that, by foregoing the right they have to the assistance of a qualified defence counsel, the accused assumes the detriments as well as the benefits of the self-representation, along with possible limitations on preparation of the accused's defence.

J. Absence of an accused

68. One of the essential rights of an accused, enshrined in the ICTY Statute, is the right to be present at all sessions of his or her trial.¹⁴⁶ The right to be present is found in most domestic jurisdictions, and is included in Article 14 of the International Convention on Civil and Political Rights and other international conventions.¹⁴⁷ It is considered an "indispensable cornerstone[s] of justice".¹⁴⁸
69. While the ICTY has held that the right of an accused to be physically present before the court is one of the most basic and common precepts of a fair criminal trial,¹⁴⁹ it is well-established that in certain instances a trial may proceed despite the accused's absence.¹⁵⁰ For example, when an accused has disrupted the proceedings and been previously warned,¹⁵¹ he or she can be excluded from the court proceedings.
70. Further, while an accused's attendance at the trial is a "right", an accused may waive that right after being fully informed of the consequences. For example, when an accused has been ill for a short period of time, the Defence should submit a form demonstrating that Defence Counsel has informed the accused of his or her rights, and indicating that the accused is unwell and unable to come to court. This waiver should be submitted to preserve the record. The form used to record a waiver of the right to be present is included in Annex 9 - *Form used to record a waiver of rights*.

Order Concerning the Presentation and Preparation of the Defence Case", 20 January 2004, para.19).

145 *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik Request to Self-Represent, on Counsel's Motions in Relation to Appointment of *Amicus Curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007.

146 Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 21(4)(d).

147 See, e.g., the European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 6(3)(C); *Case of Stoichkov v. Bulgaria*, Application No. 9808/02, Judgement, 24 March 2005, para.56; *Case of Sejdic v. Italy*, Application No. 56581/100, Judgement, 1 March 2006, para.84; *Case of Michael Edward Cooke v. Austria*, Application No. 25878/94, Judgement, 8 February 2000, paras.35, 42, 43.

148 *Protais Zigiranyirazo v. The Prosecutor*, ICTR Case No. 2001-73-AR73, "Decision on Interlocutory Appeal", 30 October 2006, para.8; *Slobodan Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel," 1 November 2004, paras.11, 13.

149 *Protais Zigiranyirazo v. The Prosecutor*, ICTR Case No. 2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para.11.

150 Rule 80(B), ICTY RPE; See, e.g., *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR 99-52-A); *Prosecutor v. Stanišić and Simatović*, Case No. IT 03-69.

151 Rule 80(B), ICTY RPE.

71. The Registry records the absence of an accused from court in the minutes of the hearing. In 2006, the Registry adopted a Protocol setting out the procedure to be followed when a detainee declares himself to be too ill to attend court. In circumstances where the accused waives his right to be present during a proceeding, the accused must submit a signed letter waiving his right and permitting counsel to be present on his/her behalf. The form or letter are filed in the case file.
72. When an accused does not wish to attend court proceedings for reasons other than illness, the best practice is to request that Defence counsel affirmatively state to the court that the accused was previously informed of his/her right to be present and wishes to be voluntarily absent. The Appeals Chamber squarely addressed this issue in *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*.¹⁵² One of the accused in that case, Barayagwiza, refused to attend the trial from its very first day on 23 October 2000 until its last day on 22 August 2003.¹⁵³ The Appeals Chamber concluded that insofar as it is the accused himself who chooses not to exercise his right to be present, such waiver cannot be assimilated to a violation by a judicial forum of the right of the accused to be present at trial. Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it.¹⁵⁴
73. Special difficulties arise where there are two or more accused being tried jointly, and one of the accused is unable to attend due to illness. In *Prosecutor v. Stanišić and Simatović*,¹⁵⁵ one of the accused suffered from a medical condition, but elected not to waive his right to attend trial, and yet submitted evidence suggesting that he was too ill to appear. In that case, the Trial Chamber ordered the proceedings to continue, with a video presentation of the case, and access to counsel being arranged by telephone. In response to an the appeal by the Defence team against this ruling, the Appeals Chamber held that the "adjournment of the trial is still the best solution insofar as it would more fully respect the fundamental right of an accused to be present at trial."¹⁵⁶ The Appeals Chamber emphasised that all the potential options should be given adequate consideration; in this case, that included the possibility of maintaining the case in its pre-trial phase for a further three to six months, to allow time for the accused to recuperate and for further medical reports to be obtained.¹⁵⁷ It accordingly granted the request by the Defence for Jovica Stanišić to adjourn the trial for a minimum of three months and to reassess the accused's state of health before determining when the trial should commence.¹⁵⁸
74. Instances of waiver by an accused or temporary absence from trial should not be confused with trial *in absentia*, which involves conducting the trial while the accused is completely absent from all or part of the proceedings. Trials *in absentia* are not provided for under ICTY regime although they are acknowledged in International Law¹⁵⁹ and are compatible with Human Rights Law under strict conditions.¹⁶⁰

152 *Nahimana, et al. v. Prosecutor*, Case No. ICTR 99-52-A.

153 *Nahimana, et al. v. Prosecutor*, Case No. ICTR 99-52-A, para.95.

154 *Ibid*, para.107.

155 *Prosecutor v. Stanišić and Simatović*, Case No. IT 03-69.

156 *Prosecutor v. Stanišić and Simatović*, IT-03-69AR73.2, Decision on Defence Appeal of the Decision on the Future Course of Proceedings, 16 May 2008, para.21.

157 *Prosecutor v. Stanišić and Simatović*, IT-03-69AR73.2, Decision on Defence Appeal of the Decision on the Future Course of Proceedings, 16 May 2008, para.19.

158 *Prosecutor v. Stanišić and Simatović*, IT-03-69AR73.2, Decision on Defence Appeal of the Decision on the Future Course of Proceedings, 16 May 2008, para.22. In *Prosecutor v. Prlić, et al.*, a similar issue arose in relation to the accused, Pusić, who did not attend trial for several weeks in 2008. In this instance, however, the accused executed a waiver of the right to attend.

159 Article 61(2) of the Rome Statute of the ICC allows for proceedings *in absentia* at the pre-trial stage, and Article 22 of the Statute of Lebanon Special Tribunal allows trial *in absentia* for any proceeding, under the conditions derived from relevant Human Rights Courts.

75. ICTY practice has clearly established that the right of an accused to be present during trial proceedings is a fundamental right, and that Chambers should seek to uphold this right by taking into consideration all reasonable alternatives. The right must be balanced against the right to a fair and expeditious trial, thus necessitating a fine balancing of the interests involved, and a detailed consideration of the various possible alternatives.

K. Case management tools

K.1 E-court - Electronic Document Management Systems

76. In its early cases, the ICTY found that difficulties encountered in managing the vast amounts of paper arising during trial proceedings created delays and inefficiencies in the use of courtroom time. Trials conducted before international tribunals are necessarily very document-intensive, including not only witness statements, but also records from the archives of the countries involved in the conflict. Indeed, a single case might involve as many as 10,000 documents, depending on the need to lead evidence of the historical and political context of the crimes alleged.¹⁶¹
77. An e-court application allows the ICTY to store electronic copies of documents and facilitates easy distribution to the required parties.¹⁶² Evidential documents uploaded to the e-court system are then distributed by the uploading party to the other parties and the Chamber through an electronic "release" of the documents. Before the trial starts, the Prosecution has to upload all the exhibits into e-court. During trial proceedings, documents stored in e-court enable the Court Officer to "publish" the documents in the courtroom during the proceedings. The e-court system permits a witness to mark documents, for example a map, or diagram, during trial proceedings.¹⁶³ This system has facilitated the smooth management of documents during proceedings, and the simultaneous and synchronised presentation of such documents to all parties in real-time.
78. The system offers other strengths related to the Registry court officer's preparation and compilation of the official court exhibit and witness lists. In a non- e-court courtroom, the Registry Court Officer must manually enter all information on witnesses and exhibits, e.g. the description of the document, the status, date received, etc. With an e-court system, the parties are able to generate their own reports and access the information instantly. At the close of a case and prior to rendition of the Judgement, official electronically generated Registry exhibit and witness lists are stored in the case file.
79. The e-court system allows each party to make their own markings on a document or record. These electronic tags are confidential and cannot be accessed by the other parties. Such markings have been used by various

160 Trials *in absentia* potentially conflict with accused rights to defend himself in person or through a counsel of his own choosing, and his right to examine witnesses against him, as provided for under Article 14 (3) (d) of the International Covenant on Civil and Political Rights, Article 8 (2) (d) (f) of the American Convention on Human Rights, and Article 6 (3) (c) and (d) of the European Convention on Human Rights. However, according to the case-law of the European Court of Human Rights, trials *in absentia* are admissible when held in respect for the rights of the accused, when non - appearance is attributable to a waiver to the right to be present at trial, provided that sufficient guarantees are afforded to the accused, including an effective notice of the pending proceedings (awareness) and the possibility of retrial upon appearance after conviction (e.g., in *Krombach v. France*, Judgment, 13 February 2001; *Sejdovic v. Italy*, Judgment, 1 March 2000).

161 Chambers have somewhat reduced the large number of documents involved in trials through the technique of taking judicial notice of facts established in earlier proceedings, as discussed above in the section entitled "Judicial Notice" (see Chapter VII - Sub-section H.2: Judicial notice).

162 Documents include filings, evidential materials, and records of non-documentary pieces of evidence.

163 Documents produced by the parties during trial proceedings are given a temporary XX number, pending their scanning and entry into the e-court system.

Chambers to enhance the analysis of evidence. Electronic search utilities facilitate the searching of document titles according to various search criteria. However, the system is unable to carry out reliable full text searches of uploaded documents. Consequently, the titles given to various documents under e-court, and the meta-data entered concerning, *inter alia*, their date of creation and date of admission into evidence, are extremely important. If this information is incorrect or inaccurate, the utility of the search tools is reduced in relation to that document. Best practice in this area requires that the parties accurately enter the information relating to the document, and maintain a system where documents are given clear, accurate, and informative titles.

80. Within e-court, the translation of a document is attached to the document, and should be provided with the list of witnesses and documents that each party submits to the Court and to the other parties. In certain instances this will not be possible, but the translation should be provided when a document is noted as potentially to be used in association with a witness, and should be provided before the document is admitted as evidence in the case. In trials involving multiple accused and large numbers of documents, translation demands can delay the trial and appeal process. It is important for the Chamber to inform the parties of their obligation to translate all materials intended to be used with a witness, in advance of that witness' testimony, and in accordance with the disclosure and notification obligations under the Rules.
81. In establishing an e-court system, it is important to ensure that there is full integration with existing IT systems. The Chambers, the Prosecution and Defence all use hard-copy documents on occasions in court, particularly for large documents that are presented to a witness. There is a shared view that strict adherence to a "paperless" system can frustrate the efficient and effective flow of the case, and that appropriate exceptions should be made.
82. One lesson learned with e-court is that it is advisable to design the whole system on an e-basis, *i.e.* from investigation to the outset of trial. That was not possible at the ICTY in the 1990s, when Tribunal's IT programmes were in their infancy. The introduction of e-Court late in the day, when OTP was already fairly advanced in its own computerisation, caused some difficulties even for such simple tasks as assigning numbers to exhibits. Any Tribunal that begins operations now should avoid developing its prosecution document handling systems in isolation, and later trying to patch systems together using a court software package. The "evidence pipeline" should be viewed holistically. It is also important to realise that e-Court is not designed as an evidence presentation package, and that there are advantages in allowing the Prosecution to continue to use its own programme in conjunction with the Registry product.

K.2 E-court - Transcript Management System

83. Many problems have been caused by not having BCS as the Tribunal's working language. For whatever reason (three languages, shortage of BCS staff etc.) the use of BCS has meant that accused do not have transcripts of proceedings readily available in a language that he/she could understand, but either must use audio/visual tapes or wait for further translations to be completed. In other respects, BCS has effectively become a working language.
84. The vast amounts of witness testimony presented during trial proceedings have the potential to create delays and inefficiencies in the use of courtroom time. Cases can sometimes involve hundreds of witnesses. To more effectively manage the large amounts of witness transcripts generated in its cases, the ICTY introduced an electronic transcript management application for the recording, storage, and use of witness testimony transcripts throughout trial and appellate proceedings.

85. The use of electronic transcripts allows for real-time recording and presentation of witness testimony. This permits the courtroom participants to see the testimony in text, on their computer screens, as the evidence is being given. The user can pause the rolling text and scan back up the transcript to check previous questions and answers.
86. The system permits each party to make individual markings on their versions of the transcripts. These electronic tags, which are confidential and cannot be accessed by other parties, have been used by various Chambers to improve their analysis of evidence. The application contains a number of search utilities that facilitate the electronic searching of document titles according to various search criteria. The system can be used both in the courtroom and remotely from the user's workstation (see text box *Halilović case - The impact of e-court on the Judgement Drafting process*).
87. If an electronic document management system is implemented by other tribunals, a decision to do so should be made early in the process so that the following activities can begin as soon as possible:
- ◆ standardization of processes and formats for document capture, storage, and display;
 - ◆ advising of parties to upcoming trials that they should prepare their evidence in the proper electronic form;
 - ◆ procurement and installation of the necessary equipment in courtrooms;
 - ◆ writing and agreeing on protocols and practice directions for technology implementation (the absence of practice directions and protocols was a source of great early difficulty at the ICTY); and
 - ◆ scheduling and implementation of appropriate training programs.
88. It is also recommended that a project manager be designated to oversee the implementation of an electronic system, and that the manager be provided sufficient resources and support from high levels (Prosecution, Defence, Chambers, and Registry) to see the mandate through. This strategy may require that a Tribunal provide support to Prosecution and Defence teams so that they can get their evidence format in an

Halilović case - The impact of e-court on the Judgement Drafting process

Following the issuance of the Halilović Judgement, a review of e-court's impact on the drafting process was conducted by Trial Chamber I**. Areas in which the e-court had an impact were as follows:*

1) E-court issue report v. Compilation of evidence:

*In Halilović both e-court "issues reports"*** and the traditional compilation of evidence approaches were utilised. It was estimated that in Halilović the use of e-court saved approximately 96 work hours.*

2) Searching transcript and exhibits:

The major timesavings during the judgement drafting process were due to the ability to search and compare exhibits and passages in the transcript.

3) Footnote verification:

Using e-court saved time by improving the integrity of the footnotes. Moreover, e-court made it very easy for team members, when reading a draft, to quickly check the information provided in the draft.

4) Overall assessment:

As with other cases, work on the law and facts sections of the Halilović judgement started prior to the close of the case. However, the actual drafting process, where the Judges deliberated on the evidence and provided direction for the drafts, took just over two months (or 9.5 weeks).

In comparison with other non-e-court cases of a similar magnitude, the drafting of Halilović's 285 page judgement, was completed significantly faster, with a saving of approximately 40% of the time.

* Prosecutor v. Sefer Halilović, Case No. IT-01-48, Judgement, 16 November 2005.

** A review of e-court's impact on the conduct of trials was also carried out by the Court Management and Support Section, which was publicised in June 2005.

*** "Issues reports" compile the various sections of testimonial and documentary evidence that have been electronically marked with pre-designated issues, which usually relate to places, individuals, and themes that are relevant to the judgement.

appropriate and timely fashion. This is particularly critical for a large case, where the number of documents can be substantial.

L. Multi-accused cases

89. As a matter of good prosecutorial and judicial practice, people accused of committing the same crimes should normally be jointly tried. In this respect, the strategy adopted by the Tribunal in 2006 to join multiple accused in a single trial has resulted in significant time savings and efficiency gains. Among the multiple accused cases, there have been at least three trials that involved six or more accused.¹⁶⁴ Other multi-accused cases have involved two, three or four accused jointly charged and tried.

90. The decision to join accused is governed by Rule 48 RPE which provides:

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

91. The following sections highlight a number of specific issues that should be considered when managing a joint accused trial.

L.1 Careful review of the indictment

92. Before determining that joining multiple accused in a single trial will benefit the process, the Chamber must carefully review the indictments of the various accused. In making the decision to order joinder, the Chamber must carefully consider whether the accused might be called as a witness for another accused. In making that determination, it is important to balance the judicial economy that will derive from joinder, with the right of each accused to a fair trial.

93. One reason for carefully reviewing the indictment is that Rule 82(A) specifically guarantees that "each accused shall be accorded the same rights as if such accused were being tried separately." This Rule, in particular, poses challenges in application. Any single accused could, potentially, call a co-accused as a possible exculpatory witness if they are tried separately. Where the accused are tried jointly, the right to call any of the co-accused may be restricted as the co-accused also enjoys the right to silence, and thus cannot be compelled to testify.¹⁶⁵

L.2 Treatment of statements by suspects

94. In the joint trial cases of *Milutinović*,¹⁶⁶ *Prlić*,¹⁶⁷ and *Popović*,¹⁶⁸ the Trial Chambers had to address whether statements made by one accused could be admitted, and whether the statements were admissible against the co-accused in the joint trial.

¹⁶⁴ These included *Prosecutor v. Popović, et al.*, *Prosecutor v. Milutinović, et al.*, and *Prosecutor v. Prlić, et al.*

¹⁶⁵ Cf. the procedure under Rule 90(E), whereby an accused from a different trial, or someone against whom criminal proceedings are contemplated, may be summoned to give evidence by a Chamber with the proviso that such evidence will not be used against them in the criminal proceedings.

¹⁶⁶ *Prosecutor v. Milutinović, et al.*, Case No. IT -05-87.

¹⁶⁷ *Prosecutor v. Prlić, et al.*, Case No. IT-04-74.

¹⁶⁸ *Prosecutor v. Popović, et al.*, Case No. IT-05-88.

95. In *Prlić*, the Trial Chamber concluded that the statement of the accused, Jadranko Prlić, taken in conformity with the requirements of Rules 42 and 43 of the Rules of Procedure and Evidence (protecting the rights of the suspect), "may be admitted and used without cross-examination even if it goes to the acts and conduct of the co-accused."¹⁶⁹ The Appeals Chamber subsequently affirmed that decision.¹⁷⁰
96. The *Milutinović* case demonstrated that the contours of the trial would determine the permissible use of a co-accused's statement. The Trial Chamber did not resolve that question prior to conclusion of the Prosecution's evidence. However, the Prosecution conceded, prior to closing its case, that it would not seek to use the evidence of any single accused against his co-accused.¹⁷¹ Following the decision in *Prlić*, the Prosecution sought to revise its position on the issue, thus taking advantage of the Appeals Chamber's more favourable interpretation of the rule in that case. The Chamber declined to allow the Prosecution to revise its position, finding that the Defence had reasonably relied upon the Prosecution's representation.¹⁷²
97. The foregoing discussion highlights a best practice issue for courts addressing multiple accused cases. It is advisable to resolve at an early stage of a trial whether there are statements of the co-accused, and, if so, how this information will be dealt with by the Chamber during the trial.

L.3 Presentation of Defence evidence

98. A significant issue, which a Chamber handling a joint accused trial must address early in the process, concerns the length of time provided to each of the accused to present evidence. The usual practice at the Tribunal has been that an accused is entitled to the same length of time to present its case as the Prosecution was afforded. Where there are six or seven accused jointly tried, however, the Defence should not require six or seven times the length of the Prosecution's case to present their case.
99. In general, the Tribunal has resolved the issue of time by determining the total length of the Prosecution case, and then dividing equitably that time among the multiple accused.¹⁷³ This approach, however, has been criticised.¹⁷⁴ As stated above, the Rules afford an accused the same rights as if he or she were tried separately. Consequently, the practice of dividing the time for presentation among multiple accused can be viewed as failing to guarantee each accused the same rights as if he/she were tried separately.
100. It is important that the Trial Chamber not feel strictly bound to grant the Defence the same time as the Prosecution. In order to ensure a fair trial, the Chamber should carefully assess the amount of time the Defence requires to present its evidence. Additionally, the Chamber, in assigning time to each Defence team, must carefully consider the proposed evidence submitted in the exhibit and witness list submissions,¹⁷⁵ and assign time for Defence evidence based upon the principles of a fair and expeditious trial.

169 *Prosecutor v. Prlić, et al.*, Case No. IT-04-74, "Decision on Request for Admission of the Statement of Jadranko Prlić", 22 August 2007.

170 *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-AR73.6, "Decision on Appeals Against Decision Admitting Transcript of Jandranko Prlić's Questioning Into Evidence", 23 November 2007.

171 *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Use of Prosecution Interviews of Accused, 20 March 2008, para.6.

172 *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Use of Prosecution Interviews of Accused, 20 March 2008, para.9.

173 See, e.g., *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Oral Ruling, T. T. 12821-12848 (22 June 2007). *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Pavković Motion for Partial Severance, 31 August 2007

174 *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision Amending Agenda for Pre Defence Conference of 21 April 2008, 13 April 2008.; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Jadranko Prlić's Motion for Severance, 19 June 2007.

175 These lists are filed pursuant to Rule 65ter (G), ICTY RPE.

L.4 Examination of witnesses

101. An additional challenge for the Trial Chamber posed by multiple accused cases is how to handle the presentation of evidence during the Defence case-in-chief. In some cases, the accused may work collaboratively to present Defence evidence. However, Defence Counsel might not always notify the Chamber of such collaborative efforts. This becomes important in terms of the mode and order of examining witnesses. For example, it is generally the rule in examining a witness that the party calling the witness asks non-leading questions on direct examination. Moreover, in a multiple accused case, it would serve the Trial Chamber well to know whether witnesses are being called as joint witnesses by a party. Having this knowledge would enable the Chamber to properly moderate the mode of questioning, and the order in which a witness is questioned. For example, two of six accused might wish to jointly present the evidence of a witness. Those two accused would conduct direct examination of the witness, followed by cross-examination by the remaining four accused, as well as cross-examination by the Prosecution.
102. This issue raises significant concerns with respect to assessing credibility. If a Defence team that did not call the witness is permitted to lead the defence witness of another accused through favourable testimony, the procedure raises questions of fairness as well as questions of credibility that could possibly influence the Chamber's essential decisions in an inappropriate way.
103. The Rules of Procedure and Evidence, which draw upon civil law while maintaining a generally adversarial system, refer to the concept of "cross-examination" a number of times. However, cross-examination is not clearly defined in the Rules. Consequently, the Tribunal's Judges have spent inordinate amounts of time resolving the meaning of the term "cross-examination". A common law adversarial model of examination imposes limits on the form of questioning. Thus, under the common law, leading questions can only be used on cross-examination, or when a witness has been declared "hostile" to the party that called the witness, and in other limited circumstances.¹⁷⁶

M. Site visits and hearings away from the seat of the Tribunal

104. Rule 4 states that "[a] Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice". This Rule is the basis upon which Chambers order both site visits and judicial hearings away from the seat of the Tribunal in The Hague.

M.1 Site visits

105. The first site visit was organised in the *Brđanin* case¹⁷⁷ in March 2004. Since then, a number of Trial Chambers have considered it useful to organise site visits to acquaint themselves with the locations referred to in the relevant indictments, thus allowing themselves to acquire a better understanding of the terrain and other features. Site-visits are not fact-finding missions and no evidence can be collected. The following remarks

¹⁷⁶ See, e.g., the Transcript in *Prosecutor v. Prlić, et al.*, Case No. IT-04-74.

¹⁷⁷ *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36.

were compiled after observation and participation in the *Brđanin*,¹⁷⁸ *Orić*,¹⁷⁹ *Popović*,¹⁸⁰ *Hadžihasanović* and *Kubura*,¹⁸¹ and *Prlić*¹⁸² site visits.

M.1.1 Steps to be taken prior to the visit

106. Preparing a site visit is a lengthy process involving a number of different sections of the Tribunal, including the Tribunal's field representatives and domestic authorities. Due to the work and expense involved in organising a site visit, a court should closely consider whether the visit will sufficiently benefit and advance the trial. If a site visit is determined to be worthwhile, the court must consider how the visit can be successfully carried out. Ideally, preparations should start more than four months prior to departure.
107. It is possible to conduct the visit at any stage during the trial. But, if the visit takes place after the hearing of evidence, the Judges can better understand the site and more efficiently compare witness testimony against the realities on the ground. Alternatively, conducting an on-site visit at the beginning of a trial allows the Judges to familiarize themselves with the region and to establish a working relationship with the Parties, through contact with the representatives of the Parties that attend the site visit.
108. The first step in organizing a site visit is to inform the Registrar that the Trial Chamber wishes to conduct a visit, and ask it to determine whether the necessary funds can be provided. If so, the Chamber's Legal Officer should contact the Registry's Chief of the Security Department to request a security assessment of the locations to be visited. Depending on the location, the Chief of Security will liaise with different local partners, and will consider such circumstances as the route to be taken, the political situation, and even the weather. Only after receiving a temporary "green-light" from the security department may further preparations be made.
109. It is advisable for the court to consult with the Prosecution and the Defence to determine the locations to be visited. The itinerary usually corresponds to the crime sites listed in the indictment. However, after consultation with the Parties, Trial Chambers have also included sites that the Defence considered relevant to its case. Authorisation from domestic authorities to enter buildings may be required. The Legal Officer should, with sufficient prior notice, send requests for assistance to domestic institutions on behalf of the Chamber.
110. The parties must then agree upon a protocol for the site visits. As the site-visit is neither a fact-finding mission nor an extension of the proceedings, the parties must agree not to make any submission to the Trial Chamber during the visit unless requested to do so by the Chamber. Even then, every submission by the parties will be recorded. For example a site visit protocol might contain the following language:
111. Protocol: 1. The guide shall only indicate geographical locations without giving any commentary regarding events that allegedly occurred in those locations. 2. During the site-visit, neither Prosecution nor Defence counsel shall submit any views on additional site-information, offer advice or opinion or make any submissions, unless the Judges request it.
112. In organizing a site visit, the Chamber's Legal Officer should liaise with other Tribunal units, including the Travel and Visa Unit, the Finance Unit, the Security Unit, and the Court Language Services Section, all within the Registry, along with the Parties, to make sure that all administrative and logistical matters are dealt with

178 *Ibid.*

179 *Prosecutor v. Orić*, Case No. IT-03-68.

180 *Prosecutor v. Popović, et al.*, Case No. IT-05-88.

181 *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47.

182 *Prosecutor v. Prlić*, Case No. IT-04-74.

(plane tickets, hotel arrangements, completion of the "security in the field" test by judges and staff going on the mission, laissez-passers, and visas for defence counsel). The Legal Officer, or the Prosecution with the agreement of the Defence, also provides the Judges with a dossier containing information on all places to be visited (specifying, *inter alia*, the crimes alleged to have occurred in a place, and photos that have been or will be tendered into evidence). A week or two before the visit, the guide (or, if agreement is not reached on a single guide, the Prosecution guide and Joint Defence guide), and security personnel will go on a reconnaissance tour of the places to be visited. Therefore, the itinerary may have to change, right until the last minute, for security reasons.

M.1.2 Participants

113. Typically, the Prosecution is represented on site visits by at least one trial attorney, each accused is represented by one counsel or co-counsel, and each party sends at least one investigator who is familiar with the region and may assist the Chamber as a guide in discovering the locations to be viewed.
114. The presence of a Registry representative is important as a facilitator of the visit and a recorder of the minutes.
115. Once the itinerary is set, the Chamber should ask the parties to prepare material that will assist the Chamber during the visit. It is useful to organize this material by site and to include maps, relevant passages of the indictment and, to the extent available, reference to the evidence already presented to the Chamber.

M.1.3 Organisation during the visit

116. The Chamber's Legal Officer should ensure that a laptop is made available, with access to a common drive, that contains the transcripts and other essential materials necessary to successfully complete the visit. The laptop should also contain all other materials that may be required during the visit, such as maps and photos.
117. During the visit, the "guide", in cooperation with the security personnel, is responsible for organization. It is important that all participants follow the lead of the security personnel and adhere to all instructions provided.

M.1.4 Post-visit reporting at the seat of the Tribunal

118. On the first court hearing after the visit, the Chamber should read a short oral statement explicitly stating the following:
 - ◆ that the protocol was respected;
 - ◆ a short summary of the places that were visited.
119. On behalf of the Judges, letters of gratitude are sent by the Legal Officer, to the domestic and international authorities which co-operated in orchestrating the site visit.

M.2 Hearings away from the seat of the Tribunal

120. In order to ensure feasibility before confirmation of the trip, all of the pre-departure initial steps should be commenced prior to the official filing of the Trial Chamber's decision pursuant to Rule 4. The following steps should be followed to ensure that an off-site judicial hearing is a success.

M.2.1 Initial contact with foreign court

121. The initial contact must be made with the Registry equivalent of the foreign court by the Court Management and Services Section (CMSS) court officer ("Registry Official") who makes a preliminary visit to the proposed venue for the judicial hearing. An assessment of the capacities of the foreign court should involve several issues. First, the schedule and availability of the Foreign Court must be discussed with the goal of finding a suitable date for the hearing court that will allow for the expeditious conduct of the Tribunal proceedings. Security issues must be considered in tandem with officers and security officials of the foreign court to ensure that the foreign jurisdiction has the ability to keep the Tribunal members safe and to highlight any potential security problems that must be taken under advisement by the Tribunal.
122. The accused has a right to be present at all trial proceedings and thus the Registry will usually need to make the appropriate arrangements for his transfer, detention, and attendance at proceedings in the foreign country unless that right is waived. Thus, if the accused does plan to attend the off-site proceedings, detention issues must be discussed with the foreign court. This discussion should include talks with the Registry equivalent at the foreign court to ensure that the accused's food and medical needs can be accommodated while the accused is housed in the foreign jurisdiction.
123. The Registry Official must also determine if it will be feasible for employees of the foreign court to serve as court reporters, translators (to and from the official languages of the Tribunal), and whether the court can provide other support staff as needed. If the foreign court does in fact have qualified employees who can perform these tasks, their familiarity with the courtroom and the logistical ease of using local support staff will be highly beneficial to the expeditious and successful proceeding of the off site judicial hearing.
124. Finally, a determination must be made regarding the technological feasibility of holding a Tribunal hearing in the courtroom proposed by the foreign jurisdiction. The Tribunal's unique audio, video, translation, and other technological requirements cannot be accommodated by every foreign jurisdiction.

M.2.2 Registry players meeting

125. After the Registry Official has discussed the relevant issues with the foreign jurisdiction, a meeting must be held with all of the Tribunal's relevant Registry sections, including representatives from Security, Victims and Witnesses Section, Conference and Languages Services Section (CLSS), Information Technology Support Services/Audio Visual (ITSS/AV), and the Office for Legal Aid and Detention Matters (OLAD), to determine the logistics of the on-site hearing. The Registry Official will report on what he has learned from the representatives of the foreign jurisdiction and facilitate the channels of communication between each Registry section and their equivalent in the foreign court, to ensure a smooth fulfilment of each section's responsibilities.

M.2.3 Pre-departure meeting

126. Once the Registry has completed the initial preparations in concert with the Foreign Court, a pre-departure meeting needs to be convened by the Registry Official with both representatives of the Chambers and the Parties. The goal of this meeting is to discuss the plans for the Rule 4 hearing and any issues that may arise during the process. The meeting should include discussion of any evidence that will be introduced or used in the off-site hearing. Once entered into evidence, the exhibits will be in the possession of the Registry Official.

M.2.4 Joint Registry/foreign court meeting/conference call

127. Finally, a conference call or meeting must be held with the Tribunal's Security, CMSS, and ITSS/AV representatives as well as their counterparts from the foreign jurisdiction to ensure that all preparations are complete and that the hearing will run smoothly.

M.2.5 Exchange of letters and final preparations

128. After all of the preliminary discussions and arrangements for the hearing have been completed, the President and the foreign court execute the formal exchange of letters authorizing the foreign court to host Tribunal proceedings.

M.2.6 Pre-departure steps

129. The Registry Official together with the Chambers must work with the Tribunal's Travel Unit to make the necessary travel arrangements for all parties travelling to the foreign jurisdiction. The Registry Official is responsible for printing out all necessary trial records, including protected witness lists, minutes, and e-court records. The Registry Official must also ensure that there will be an adequate number of hard copies of documents for the interpreters, the Judges, Chambers legal staff, and the Registry, and make sure that the Judges' robes, the UN flag (which will likely be displayed alongside the flag of the foreign state court jurisdiction), and any other necessary items for court proceedings are prepared for travel and shipped.

VIII. Annex 7: VWS recommendations on proofing of witnesses

Scheduling of Proofing

- *It is well established in the ICTY's jurisprudence that certain crimes have chapeau requirements that must be proved in addition to the elements of the underlying crime. These are as follows:*
 - *If proofing is absolutely necessary on the day of witness' arrival, then it should occur no sooner than 4 hours after the witness' arrival at the hotel and after the consumption of a meal to ensure the witness' experience does not result in further harm and is experienced as a positive event.*
 - *The duration of proofing per day should be limited to the length of a "Court day." Each court day consists of three 90 minute sessions with 20 minute breaks in between. This limit on proofing is recommended because it helps the witness orient to the Court's work schedule, and provides a reasonable amount of work for one day.*
- *Where possible, a witness' proofing and trial testimony should be scheduled on different days to reduce stress.*

Organisation of a Proofing

- *Apply general principles of hospitality, i.e. arriving at the arranged time to meet with or pick-up witnesses on time is very important, as is offering them refreshments.*
- *Inform the witness of your intended starting and finishing times, and the scheduled time for breaks. Be explicit regarding the schedule and avoid last minute changes. This shared knowledge of the intended time-structure assists the witness in feeling equal in the process.*
- *Insist that the witness makes you aware if he or she needs a break at any time prior to the planned or intended/agreed upon break. Importantly, mention that a request for an early break is normal and acceptable, and would have only a positive effect on the task at hand. The aim is to empower the witness, ensure a sense of control over the proceedings, and communicate to witnesses that breaks will not be a burden or cause difficulty for the staff (even if it may).*

Things to do if a witness breaks down during the proofing process

- *Immediately stop the proofing as this is the obvious time for the witness to take a break.*
- *Ask the witness if he/she would prefer to be alone for a short period or if he/she would prefer to have a staff member (e.g. Support Officer) present.*
- *Do not be afraid of being silent during this period, and allow yourself to be guided by the witness in terms of conversation content. He or she will know when they are best able to resume the proofing focus.*
- *If recovery is taking much longer than is either predictable or comfortable, offer to end the proofing and inform a Support Officer of VWS.*
- *Inform VWS Support Officers if a witness is having difficulty during the proofing, as it can be an advantage for the witness to meet a Support Officer prior to the day of testifying in the waiting room, to become familiar and to learn about the role of the Support Officer before they begin to testify.*

VIII. Annex 8: Explanatory note for witnesses about subpoenas

□ **BEING A WITNESS**

- *Being a witness is an important responsibility. If you have given a statement to an ICTY investigator and are then asked to go to the ICTY to give evidence, you must do so.*
- *Your role is crucial as your testimony helps ensure that justice is done. With your help, we can get to the truth and make sure that the right judgement is rendered. Your role is vital and without you cases can collapse.*

□ **WHAT IS A SUBPOENA?**

- *A subpoena is a judicial order that requires you to appear in person before the Tribunal in The Hague on a certain date and time to testify about the facts you reported to the investigators.*
- *Should you fail to appear before the Tribunal in response to a subpoena, you are subject to a penalty.*

□ **WHAT IF YOU DO NOT WANT TO GO TO COURT?**

- *It is a criminal offence for a person who has been subpoenaed as a witness to fail to appear in Court unless you have a reasonable excuse.*
- *If you are served with a subpoena, you cannot ignore it. If you do, you risk being held in contempt of Court.*
- *If you fail to personally appear as the subpoena orders, and you are not excused, the Court has the right to issue a warrant for your arrest, in which case you will be arrested and brought to the Court to be prosecuted for having disobeyed the Court. You may be found in contempt of the Court which may also mean a fine or a jail term.*

□ **WHAT IF YOU CANNOT GO TO COURT?**

- *If it is impossible or extremely difficult for you to appear at the time required by the subpoena for a justifiable reasons (personal, medical, security or other), please contact the Tribunal's Victims and Witnesses Section (00 31 70 512 88 77) to explain your concerns as there may be ways of resolving the difficulties you face. The VWS is responsible for ensuring that all witnesses can testify in safety and security, and that the experience of testifying does not result in further hardship, suffering or traumatisation.*
- *You can also inform the Police official who serves the subpoena that you would like to be contacted by the Tribunal's Victims and Witnesses Section to explain your personal, medical or security concerns.*
- *If time or dates for your appearance before the Court are inconvenient, it may be possible for you to come at a different time. Also, if you have legitimate concerns about travelling to The Hague, the Judges may agree to hear your testimony through video link from a location close to your place of residence.*
- *If you have any security concerns about coming to the court or giving evidence, the Victims and Witnesses Section may request protective measures on your behalf.*
- *Special arrangements can be made by the Victims and Witnesses Section for elderly or disabled witnesses or for your dependant children. Special arrangements can also be made should you require to be accompanied by a support person.*

□ **YOUR CONTRIBUTION AS A WITNESS IS MUCH APPRECIATED. THANK YOU FOR YOUR TIME AND TROUBLE.**

VIII. Annex 9: Form used to record a waiver of rights

ABSENCE FROM COURT DUE TO ILLNESS
OTSUSTVO SA SUDA ZBOG BOLESTI
MUNGESË NGA GJYKATA PËR SHKAQE SHËNDETËSORE
ОТСУСТВО ОД СУД ПОРАДИ ЗДРАВСТВЕНИ ПРИЧИНИ

Detainee / Pritvorenik / I paraburgosur / Прии́твороеник

I, the undersigned, hereby declare that:
Ja, dolje potpisani, izjavljujem da:
Unë, i nënshkruari, deklaroj se:
Яс, долу̀йойи́иинииоий, изјавувам дека:

☐ I am unable to attend court proceedings on this date due to illness.
Danas nisam u stanju prrsustvovati sudenju zbog bolesti.
Sot nuk mund të marr pjesë në gjykim për shkak të sëmundjes.
Денес не сум во соси́йоџа да ѝрисуси́вувам на судење ѝоради болеси́л.

☐ I have discussed the matter with my counsel.
Razgovarao sam o ovome sa svojim advokatom odbrane.
Këtë çështje e kam biseduar me avokatin tim të mbrojtjes.
Ова ѝрашање сум зо разго́варал со мојойи́ адвокаи́л.

☐ I understand that I have a right to be present at all trial proceedings against me, however I waive my right to be present in court on this date and give my consent for the proceedings to continue in my absence but in the presence of my counsel.
Razumijem da imam pravo prisustvovati svim sjednicama sudenja protiv mene, međutim odričem se tog prava danas i dajem svoje dopuštenje da se sudski postupak nastavi u tome odsustvu, ali u prisustvu mog advokata odbrane.
Kuptoj se kam të drejtë të marr pjesë në të gjitha seancat gjyqësore kundër meje, mirëpo sot heq dorë nga kjo e drejtë dhe pajtohem që seanca gjyqësore të vazhdojë pa prezencën time, me kusht që avokatit im të jetë present.
Разбирам дека имам ѝправо да ѝрисуси́вувам на сии́ле судски седници ѝрои́тив мене, межу́йоа денес се одрекувам од ѝшоа ѝправо и се созласувам судскаи́ла ѝоси́яйка да ѝродолжи во мое ои́исуси́во, но во ѝрисуси́во на мојойи́ адвокаи́л.

Date
Datum
Data
Датум _____

(PRINT NAME)
(IME I PREZIME STAMPANIM SLOVIMA)
(EMRI E MBIEMRI ME SHKRONJA SHITUR)
(ИМЕ И ПРЕЗИМЕ СО ПЕЧАТИМ БУКВИ)

(SIGNATURE)
(VLASTORUČNI POTPIS)
(НЕНШКРИМ)
(ПОТПИС) _____

Date
Datum
Data
Датум

IX. Trial Judgement Drafting

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1. Given the size and complexity of war crimes cases, as well as crimes against humanity and genocide, the judgement drafting process may differ from the process used to draft judgements in cases involving domestic crimes. Since fairness requires that judgements be issued within a reasonable period of time, it is not possible to wait until the close of the case to begin the judgement drafting process. Preliminary preparation for the drafting should begin at the outset of the case. While judges cannot rush to early conclusions prior to hearing all the evidence, there are numerous steps that can be taken early in the process, that will place the bench in the best position to prepare a reasoned, clear and concise judgement within an acceptable time frame. This Chapter will focus on the various stages of the judgement drafting process, from the preparation of a judgement outline to the process of reviewing the final draft.

A. Judgement outline

2. The first step in the judgement drafting process involves the preparation of a preliminary judgement outline. Preparation of the outline should begin at the start of the case, even before the trial begins. At the ICTY, where there is a party-driven system similar to those used in common law jurisdictions, the outline is generated on the basis of the indictment and the parties' pre-trial briefs. The advantage of early preparation of a judgement outline is that it focuses attention during the trial on information that will be relevant to the judgement (and for orders on potential motions for acquittal after the Prosecution case, as provided by Rule 98bis).
3. A judgement outline is a work in progress. If information emerges during the trial that is not provided for in the judgement outline, the outline will need to be amended.
4. An initial judgement outline need not be extremely detailed; it suffices if the outline includes the chapter headings from what will eventually become the judgement's table of contents. Indeed, there are good arguments against including too much detail at the beginning because it is impossible to predict exactly how a case will develop. It is best to let the case take its course and to shape the detailed aspects of the outline at a later stage. Most importantly, a good judgement outline will ensure that questions regarding criminal responsibility and all alleged crimes will be addressed in the most logical and efficient manner possible, minimising repetition.

5. Early preparation of the judgement outline allows the Judges to make early decisions regarding drafting priorities. Early decision-making can assist the judges in identifying weaknesses in the prosecution case and issues about which the Judges may wish to ask the parties for more information.
6. A few different outline models appear to have developed at the ICTY. One favoured ICTY model includes the following components:
 - ◆ a summary of the charges;
 - ◆ a statement of general considerations regarding the evaluation of evidence;
 - ◆ a general overview;
 - ◆ a statement of general requirements for the crimes alleged in the indictment;
 - ◆ a statement of individual criminal responsibility;
 - ◆ a statement regarding the accused's role and responsibility in general;
 - ◆ a statement of the charges and findings, *i.e.* Murder as a Crime against Humanity and/or a War Crime;
 - ◆ a statement of sentencing considerations (in case of conviction);
 - ◆ the disposition;
 - ◆ the annexes: glossary of terms and procedural background.
7. Summary of Charges: The Summary provides a brief summary of the charges set out in the Indictment and further detailed in pre-trial submissions.
8. General Considerations Regarding the Evaluation of Evidence: This document sets forth the framework within which the Trial Chamber conducts its analysis of evidence and the basis upon which it reaches its conclusions. As a starting point, this document includes the presumption of innocence and the standard of proof (*i.e.* the prosecution bears the onus of proving guilt beyond a reasonable doubt). In addition, the document should specify the findings to which this standard of proof applies, including not only the ultimate finding of guilt, but also those elements of the crimes and modes of liability upon which the conviction relies. The document should also address how the Chamber deals with circumstantial evidence *i.e.*, the conclusion drawn from such evidence must be the only reasonable conclusion available. The document could also clarify what factors the Trial Chamber will take into account when determining whether inconsistencies discredit evidence, as well as factors such as the amount of time that has elapsed since the events occurred. Other general issues that should be addressed at this stage include the need (if any) for corroboration, the difference in weight to be given to evidence from witnesses' own recollections as opposed to evidence given from notes recording what others told them, and the approach taken towards hearsay evidence. The Trial Chamber in the *Krnjelac* case, addressing all of the above, stated that its approach "has been to determine whether the evidence of the witnesses upon which the prosecution relied should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence given by the accused and the witnesses upon which the Defence relied".¹⁸³
9. General Overview: This document provides the background information on the conflict to situate the alleged crimes, and gives the court the chance to tell the "story" of the conflict, starting generally (for example, noting the conflict in Bosnia) and then narrowing the discussion to the specific crimes at issue (focusing on a particular region, city, village or combination thereof). Major themes and timelines should be reflected here in order to make it possible to understand the context in which the particular crimes took place. It would be appropriate to mention the crimes that are the subject of the case at this stage because it places them in context. However, the statement of crimes should be done only in a general manner, leaving detailed examination to a later stage. Since this section represents the first factual findings of the Trial Chamber in the

183 *Prosecutor v. Krnjelac*, Case No. IT-97-25-T, Judgement, 15 March 2002, para.68.

judgement, it is therefore important that the General Considerations on the Evaluation of Evidence section precede this section, so that the basis on which the Trial Chamber is proceeding is clear to all.

10. General Requirements for the crimes alleged in the indictment: Most of the crimes within the ICTY's jurisdiction require the establishment of what are known as "general" or "chapeau" requirements. This is the case for Grave Breaches of the Geneva Conventions (Article 2 ICTY Statute), Violations of the Laws and Customs of War (Article 3) and Crimes Against Humanity (Article 5). For those crimes, there are contextual elements that must exist before the underlying act may be found to constitute the crime in question. For example, before determining whether a particular killing or act of torture may be considered as a Grave Breach, it must first be established that there was an armed conflict and a nexus between the acts in question and the armed conflict (see Annex 10 - *Chapeau requirements*).
11. In terms of trial judgement drafting, it is advisable that chapeau requirements for different crimes be addressed together prior to analysing the specifically charged acts. A section on Chapeau Requirements for the Crimes Alleged in the Indictment should set these out and make findings regarding whether these requirements have been fulfilled, drawing conclusions from an application of the factual information provided in the General Overview to the legal requirements. If the requirements have been satisfied, then the Chamber can proceed to analyze the individual crimes alleged. If the requirements are not satisfied, then the Chamber need not analyze the individual acts as they cannot legally amount to the crimes in question.
12. There are a few advantages to conducting the chapeau analysis at this point in the drafting process. Coming immediately after the General Overview which provides the factual basis, the Tribunal's conclusions should be clear to the reader. Indeed it is easier for the drafter to follow the chapeau analysis since the factual information supporting the conclusion is not at this stage intertwined with the far more detailed information regarding the individual acts charged. Moreover, the factual information bearing on the individual acts is not needed for analysis of the general chapeau requirements. Further, once the chapeau requirements have been established, their analysis need not to be repeated, allowing for a clearer and more focused analysis of the individual acts charged as crimes.
13. Individual Criminal Responsibility: Assuming that the chapeau requirements are established for at least some of the crimes charged, the judgement should then proceed to examine the accused's individual criminal responsibility. This section should first detail the legal requirements for the modes of liability charged. At the ICTY, the modes of liability are found in Article 7(1) and (3), providing, respectively, for direct liability (planning, instigating, ordering, committing, or otherwise aiding and abetting) and indirect liability (superior responsibility). ICTY jurisprudence has established that this also includes joint criminal enterprise (JCE) as a form of committing.
14. Accused's Role and Responsibility in General: When an accused is charged with a wide range of crimes, many aspects of his or her role and responsibility will be relevant to the charges. For common facts, it is advantageous to examine these aspects once at the beginning, leaving specific aspects that are relevant only to individual charges to be treated separately in the analysis of those specific charges. Based on this information, the Chamber can make general findings in relation to the relevant modes of liability, leaving specific findings in relation to the crimes charged to be addressed in the sections dealing with those charges. This avoids significant repetition of information (see text box *Krnjelac case - The Accused's Role and Responsibility in general*).
15. Charges and Findings: With all of the preceding analysis in place, the next section of the judgement should address the specific charges and findings. For clarity of analysis, each crime should be addressed in different

chapters or sections. With respect to an individual crime, it is advisable to first set out the law regarding that crime, keeping in mind that it is not necessary to repeat the analysis regarding chapeau requirements. On the contrary, it is sufficient to provide a footnote cross-referencing the relevant conclusions that those requirements have been fulfilled. It is then appropriate to set out the factual analysis and findings with respect to whether the alleged crime occurred. Finally, it is necessary for the Chamber to draw conclusions regarding the establishment of responsibility of the accused for the particular crime.

16. There are several advantages to this approach. First, by closely linking the definition of the crime, the factual findings and the conclusions as to responsibility, there is maximum clarity concerning the factual basis for the conclusions as to responsibility. This is beneficial both for the reader in general as well as for the Appeals Chamber should it be faced with the need to establish the basis on which the Trial Chamber drew its conclusions. Using this approach maximises the likelihood that the Trial Chamber will adopt a strict element-by-element approach to establishing whether a crime has occurred and whether the accused is criminally liable for that crime. The virtues of such an approach are discussed in more detail below, in the section on factual findings. It is important to note that there may be a structural advantage to addressing alleged crimes in a certain order in the judgement. Certain crimes are "umbrella" crimes in the sense that they potentially incorporate a vast number of acts that may or may not also be charged as individual crimes in and of themselves. Genocide and persecution are examples of umbrella crimes. Either of these crimes may include killings as component acts. Those killings may be (and, in ICTY practice, usually are) charged individually in addition to being charged as genocide and/or persecution. When this is the case, it is best to conduct the necessary analysis only once to minimise repetition. For clarity of presentation, it is advised that the analysis be conducted under the discrete crime (e.g. murder), rather than under the umbrella crime (e.g., genocide or persecution). When the act/crime needs to be addressed again under the section or chapter dealing with the umbrella crime, the previous analysis can simply be incorporated by reference, followed by any additional analysis that might be required for the purposes of the umbrella crime (see text box *Brđanin case - The analysis of the acts/crimes amounting to persecution*).

Krnojelac case - The Accused's Role and Responsibility in general

Milorad Krnojelac was warden of the KP Dom prison facility in Foča town (in what is now Republika Srpska) from 18 April 1992 until the end of July 1993. He was charged with crimes against humanity and violations of the laws and customs of war pursuant to both Article 7(1) (direct responsibility) as well as Article 7(3) (superior responsibility) of the ICTY Statute.

As a preliminary step in examining the charges against Krnojelac, after setting out the law with respect to the modes of liability charged, the Trial Chamber examined his position as the warden of the KP Dom in a separate section of the judgement. After establishing that Krnojelac was indeed the warden during the period in issue, the Trial Chamber examined the scope of that position's duties, responsibilities and powers, as a means of providing the necessary context for an examination of the charges against him.

In making general findings with respect to the role of the accused, it accepted "that the powers of a warden within a prison system are not unlimited" and noted that there "were also certain groups who entered the KP Dom over whom the accused could exercise only limited control. These included the investigators and the paramilitaries." It further specified with respect to the limitations on Krnojelac's powers that it was "not satisfied that, in his position as temporary warden and then warden, the accused could unilaterally order or grant the release of any detainees. The release of non-Serb detainees was a matter for the military and Crisis staff."

The Trial Chamber concluded that Krnojelac held the position of warden as that term is generally understood and that he exercised supervisory responsibility over all subordinate personnel and detainees at the KP Dom. This general conclusion allowed it to proceed to an examination of each of the crimes charged and the accused's individual criminal responsibility for those crimes.

17. By the end of the sections addressing individual crimes, the Trial Chamber should have reached its conclusions with respect to the establishment of the crimes and the individual responsibility of the accused. In the event that the Trial Chamber concludes that the accused is responsible for at least some crimes, it is necessary to consider sentencing.¹⁸⁴ Before doing so, in the ICTY's practice it has been necessary to give preliminary consideration to the issue of cumulative convictions. The ICTY's jurisprudence has established that, while cumulative charging is permissible, cumulative convictions entered under different statutory provisions but based on the same conduct are only permissible if each statutory provision involved has a materially distinct element not contained in the other. Only once this analysis has been carried out is it possible for the bench to know the exact convictions for which the accused is to be sentenced. Analysis of cumulative convictions may be carried out in a separate section but can also conveniently be placed as a preliminary sub-section in the section on Sentencing (see text box *Čelebići, Jelisić and Kordić and Čerkez cases - Cumulative convictions and "materially distinct" elements of the crimes*).

18. Sentencing considerations: The sentencing section must address consideration mandated by law. In the case of the ICTY, these considerations include the following:

- ◆ the general practice regarding prison sentences in the court of the former Yugoslavia;
- ◆ the gravity of the offences;
- ◆ the individual circumstances of the convicted person;
- ◆ any aggravating and mitigating circumstances;
- ◆ the extent to which any penalty imposed for the same act has already been served.

Brđanin case - The analysis of the acts/crimes amounting to persecution

Radoslav Brđanin, a political leader in the "Autonomous Region of Krajina", was charged with numerous crimes including persecution as a crime against humanity. The crime of persecution is defined as an act or omission which "discriminates in fact or denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus)" and "was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the mens rea)".

As the trial judgement in that case makes clear, the "act or omission constituting the crime of persecution may assume different forms. However, the principle of legality requires the Prosecution to charge particular acts amounting to persecution rather than persecution in general." Accordingly, persecution functions as an "umbrella" crime that consists of different underlying acts or crimes.

The Prosecution charged five different categories of acts as persecution. Several of these acts were charged separately.

The Brđanin trial judgement was structured in such a manner that acts separately charged were analysed prior to the examination of the crime of persecution. Thus, where the Trial Chamber had previously found that the incorporated crime had been established (e.g. certain killings), it limited its examination for the purposes of the crime of persecution to a determination of whether the killings in question were discriminatory in fact and carried out with the requisite discriminatory intent. The same approach was taken where the previous examination led to a conclusion that the acts had taken place but not that a crime had been committed (e.g. with respect to unlawful and wanton extensive destruction and appropriation of property not justified by military necessity), because the act charged as persecution need not amount to a crime in and of itself. For those acts charged only as persecution and therefore not previously analysed in the judgement (e.g. denial of fundamental rights), the Trial Chamber was required to first address the constituent elements before applying them to the facts of the case.

¹⁸⁴ In the early practice of the Tribunal, sentencing was a separate process which took place only after a judgment had been issued in which one or more convictions were entered. For reasons of efficiency, Trial Chambers quickly moved to a procedure in which sentencing submissions were made as part of the trial process. These could then be considered by the Chamber concerned in the event that they were to reach a verdict of guilt.

19. In ICTY practice, sentencing remains in the Judges' discretion. As a result, appeals are generally directed toward the issue of whether the Trial Judges abused their discretion. The chances of a sentence being overturned on appeal are minimised by ensuring that the above listed factors are expressly considered in the trial judgement.
20. **Disposition:** Following the Sentencing section, the Trial Chamber's judgement should set forth its disposition which contains its findings of acquittal or conviction for each of the counts charged. The ICTY also pronounces the sentence here, and acknowledges that any time already served by the accused will be credited towards that sentence. When a decision on a particular charge is not unanimous, the ICTY's practice is to reflect the split in the Disposition (e.g. "DECIDES, by majority, Judge XXX dissenting, that"). When a Judge or Judges appends dissenting or separate opinions to a judgement, these opinions are noted in the Disposition following the dispositive paragraphs and the signatures of the Judges.
21. **Annexes:** ICTY trial judgements normally include a number of annexes. Some judgements include the operative indictment as an annex because of the length of some judgements and indictments. Judgements fairly consistently include a Glossary of terms as an annex, and a Procedural Background, both of which generally prove helpful to the parties and the Appeals Chamber. Examples of both may be found in the Trial Judgements in the *Orić*, *Halilović* and *Galić* cases. Some judgements have included other types of annexes such as a list of destroyed or damaged buildings or structures (*Strugar* Trial Judgement), a list of victims by name (*Stakić* Trial Judgement) or maps, photos and sketches (*Orić* Trial Judgement). There is no firm rule for what may be included in an annex. This should be decided on a case by case basis, depending on the nature of the judgement.
22. By way of comparison, it is useful to make brief reference to an alternative model of judgement drafting. This model favours the inclusion of an overview of all facts in the case followed by a separate section on the law (all charged crimes and pleaded modes of responsibility), findings with respect to the crimes, and finally a section on findings of responsibility. The disadvantage to this approach is that the opinion does not clearly draw a link between a particular crime, the facts and the findings, and therefore this approach makes the judgement more confusing for the general reader and more difficult for the bench on appeal to follow the reasoning at trial. In some instances, the Appeals Chamber has been required to spend considerable effort

Čelebići, Jelisić and Kordić and Čerkez cases - Cumulative convictions and "materially distinct" elements of the crimes

The law regarding cumulative convictions depends on the notion of "materially distinct" elements. An element is materially distinct from another if it requires proof of a fact not required by the other. The relevant law was clarified in the Čelebići Appeal Judgement:

Having considered the different approaches expressed on this issue both within [the ICTY] and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify [cumulative] convictions, lead to the conclusion that [cumulative] criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under [the] provision requiring the additional materially distinct element.

In practice, the application of this test has considered both the general requirements as well as the requirements specific to a crime. This approach has resulted in more convictions being permissibly cumulative than would be the case if the general requirements were not considered.

identifying the facts found by the Trial Chamber in support of a finding of criminal liability on a particular charge, and in the end a number of charges have been reversed on appeal because the requisite findings were absent.

B. Preliminary considerations

23. Before a judgement can be drafted in the structure suggested above, there is a great deal of work to be done. As a first step, it is helpful to identify preliminary considerations that will facilitate the drafting process.
24. In order to ensure consistency within a judgement, and indeed between judgements, it is advisable to adopt an electronic judgement template. In a more advanced format, the template involves a toolbar that includes readily available judgement headings and other formatting tools (as is the case at the ICTY). When this is not possible, it would suffice to agree upon the format in advance (see Annex 11 - *Electronic Judgement Template*).
25. The ICTY found it helpful to maintain a shared folder on a common computer hard drive when drafting judgements. All documents important to the judgement-drafting process can be kept in this central folder for Judges and any staff members to access at their convenience. Folder access should be limited so that only those working on a particular case can obtain access. There are a number of documents that can be usefully stored here, including the:
 - ◆ operative Indictment (and earlier versions, as necessary),
 - ◆ pre-trial and pre-defence brief,
 - ◆ important decisions of the Trial Chamber,
 - ◆ witness testimony and exhibit summaries,
 - ◆ judgement outline,
 - ◆ judgement drafts,
 - ◆ style guide,
 - ◆ glossary,
 - ◆ master document indicating division of tasks, deadlines.
26. A style guide should be agreed upon in advance to avoid the need to spend time and effort standardizing numerous things, including language, spelling, formatting, punctuation, capitalisation, numbers and dates, abbreviations and acronyms, quotations, footnotes, citations and glossary usage. This guide need not be long and complicated in order to be effective. However, the guide will save a lot of time if it is followed from the start by all drafters. Ideally a single style guide should be agreed upon by all Chambers, thus leading to tribunal/court-wide consistency. At the ICTY, different guides have been used by different Chambers, and they developed over time into long and detailed documents.

C. Witness testimony and exhibit summaries

27. With a judgement outline and a judgement template in place, preliminary preparation of the judgement can begin immediately after the first witnesses are heard and the first exhibits are entered into evidence. However, courts take different approaches to the drafting process, and these differences are often

attributable to whether a court is using some kind of electronic court system, or whether judgement drafting is to be done primarily through the use of Word documents. The ICTY has had the experience of both systems, migrating from the "traditional" word-document approach to the electronic court system or "e-court" approach during the *Halilović* trial in 2005.¹⁸⁵ As many domestic courts are not using e-court, it is useful to set out aspects of both approaches below.

C.1 The traditional approach

28. Under the traditional approach, judicial personnel summarize the testimony of each witness that appears before the Trial Chamber. Such summaries must be checked against the actual transcript during the drafting process, but are used by the Trial Chamber in deliberations as well as in drafting the judgement. It is important that summaries be completed as soon as possible after a witness testifies, because the impression is fresh in the drafter's mind and because there is a risk that a backlog will develop. Ideally, all summaries of witness testimonies should be completed within one to two weeks of the witness testifying (and thus should be completely finished within two weeks of the close of trial).
29. The form that a witness testimony summary should take is subject to judicial discretion. The ICTY has, at times, used uniform structures for summaries. However, since witnesses do not all follow the same structure when testifying, a uniform structure can be counter-productive, and it may ultimately be easier to summarise the evidence in the order in which it is delivered. At a later time, the summary can be restructured in a different way as needed for the judgement outline.
30. Relevant trial exhibits must also be summarised. This can be done either in conjunction with a witness testimony, if the exhibit was used in conjunction with that testimony, or it can be done as a separate exercise. As with the witness testimony summaries, the summary of exhibits should be checked against the actual exhibit, and ideally the summary should be completed within two weeks of the close of trial. Only the relevant part of a particular exhibit should be summarised. For example, when only a few pages of a book have been entered into evidence, there is no need to summarise the entire book.
31. Upon their completion, and consistent with the judgement outline, verified summaries of witnesses' testimonies and exhibit summaries may be immediately cut and pasted into appropriate sections of the draft judgement. For example, if a witness's testimony provides information regarding the conflict in general, it can be immediately inserted into the General Overview chapter. If relevant to a particular crime, the testimony should be inserted into the section dedicated to that crime. If it is relevant to more than one chapter of the judgement, then the relevant portions of the summary can be pasted into each relevant chapter. Later in the judgement drafting process, it will be necessary to edit discussions of the summaries in order to avoid unnecessary repetition. However, during the early stages of the drafting process, it is advisable to be as comprehensive as possible, and to do a more detailed edit at a later stage, when the court has enough information to make more reasoned judgements as to where information is best placed.
32. After the summaries have been prepared, the practice has differed from Chamber to Chamber and even Judge to Judge. Some Judges have preferred to see the summaries immediately after completion so that they can compare the summaries with their notes and request amendments. Other Judges have preferred to wait to see the summaries until the testimony appears in a first draft of a particular section of the judgement, and they then request any necessary clarifications. The approach to be used is ultimately decided by the bench or the individual judges themselves.

185 *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgement, 16 November 2005.

33. It is essential that the summary reflects the Judges' findings regarding the credibility of the witness concerned. In particular, it is important to know whether the bench finds that a witness is not credible - in which case the evidence will be disregarded - or whether the bench has reservations regarding credibility, so that the bench requires corroboration. A note regarding credibility should be appended to the summary with a view to ensuring that the judges attach the proper weight to the testimony when making findings of fact or determining criminal responsibility. The ICTY court system also makes pictures of the witnesses available to the Judges in order to assist them in refreshing their memories and to help judges place evidence in context at the end of lengthy proceedings.
34. By the end of the case (or the end of the Prosecution case when the legal system provides for a possible motion for acquittal, as at the ICTY), it should be possible to start the preliminary drafting process. By that time, each section will contain summaries of all of the relevant testimony/exhibits contained in it for the drafter to consider.

C.2 The e-court approach

35. E-court¹⁸⁶ was introduced in the ICTY primarily to help manage evidence during trials. The ICTY system incorporates both the transcript of the court proceedings and all documentary evidence adduced at trial. The goal is to become "paperless" so that all participants have access to transcripts and documentary evidence via the computers in the courtroom, as well as remotely from their offices in the ICTY building, or even outside of the building itself. The e-court system substantially eliminated the need for the parties, Registry court officers, and Judges to bring to court numerous binders of documents and other materials that might be needed during the course of a particular trial session.
36. In addition to the practical benefits of an entirely electronic system, e-court has helped the court in its drafting of trial judgements. The ICTY system provides a method for marking, organizing, annotating and transcripts and documentary evidence on an ongoing basis. In some cases, that feature has effectively eliminated the need for preparing lengthy summaries of evidence and documents at an early stage in the judgement drafting process.
37. While evidence is being presented, it can be simultaneously marked electronically in e-court as relating to particular issue or issues from a list. This list of issues is prepared prior to the commencement of the trial and is based on the judgement outline described above.¹⁸⁷ However, a more detailed list of issues can be helpful. The preparation of a detailed list requires an intimate familiarity with the contours of the case and the topics and sub-topics most likely to form the core of the judgement. A typical list would include one issue for each accused in the case, plus one issue for each crime-site charged in the indictment. Thus, each time a witness or a piece of documentary evidence is admitted during the trial, especially evidence that discusses a particular accused or the events at a particular location, the relevant section of the transcript or document can be marked as relating to that issue. For complex cases, particularly cases with multiple accused, the list of issues can be quite lengthy, and it is necessary to rigorously mark the evidence in a way that reflects every issue connected to it. Should it prove impossible to do the issue-marking when the evidence is introduced, office computers can be used to add issue notations to the evidence after the day's court session has ended.
38. It should be emphasised that all participants in a trial, including the Prosecution, Defence, and Judges, have their own areas in the e-court system. As a result, only the parties can see how they have marked or added notes to the evidence, and the Judges can create their own personal e-court files that are inaccessible to the

¹⁸⁶ For a detailed introduction to e-court, see the chapter on Trial Management.

¹⁸⁷ See Chapter IX section A - "Judgement Outline".

- other Judges or to any legal staff that might be assisting with trial.
39. When evidence has been marked with these issues, an "issue report" can be run in e-Court. This report can retrieve all of the evidence that has been marked as relating to a particular issue. The system can quickly identify all transcript sections and documents that have been marked as relevant to a particular crime site or accused. The evidence on that particular issue can then be analysed and incorporated into the draft. This process is conducted on an ongoing basis throughout the trial so that drafts can be comprehensive and include relevant evidence by the close of the proceedings.
40. While e-court removes the need to insert detailed summaries of witness testimony in text form into draft judgement sections, the ICTY's practice is to prepare new short-form summaries of witness testimony in some cases. These summaries provide a short overview of the areas of evidence covered by a particular witness, and include basic information about the witness. These short-form summaries are useful, particularly in large cases lasting many months, as quick references for each witness. The summaries allow Judges to refresh their recollections regarding the content of witness testimony, as well as regarding challenges to the witness evidence and credibility. In at least two of the ICTY's larger cases, the Judges held preliminary deliberations regarding witness testimony immediately after it concluded, and the comments expressed in these deliberations were recorded in testimony summaries that could be used for future reference.
41. There are limitations to the ICTY's current e-court system, but the system is nonetheless advantageous because it permits participants to mark issues, and append notes to particular passages or sections of documents, in a way that produces a more efficient Judgement drafting process. In addition, the system provides Judges with the capacity to quickly and easily search and access transcripts and documentary evidence from their office computers (see text box *Limitations of the e-Court system*).

Limitations of the e-court system

The e-court system is a helpful tool in the analysis of evidence and drafting of trial Judgements at the ICTY. However, it has certain limitations when it is being used for purposes of Judgement drafting.

First, the effectiveness of the system is dependant upon the competence and vigilance of the users. For example, when the parties load documents into the system, they give them a title. Often, that title contains errors, or misrepresents the actual name of the document. This causes problems when the Judges or legal staff members are searching for documents with particular key words in the title, or for classes of documents. The same document can be uploaded more than once, by different parties, with slightly different titles, and this can cause confusion. In addition, when a document is introduced in court, the legal officer attending proceedings must be careful to ensure that it is correctly marked with all of the relevant issues, so that it shows up when drafters are later running issue reports on particular issues. If a relevant issue is not marked on the document, the drafter has no means of knowing that that document could be relevant to his/her section.

Second, there are some technical limitations in the system currently in use at the ICTY. Most relevant from a judgement drafting perspective is that it is not possible at present to electronically search documents in e-court for particular terms. In other words, although one can search the title of documents to see how many have a particular word (the name of an accused, for example) in the title, one cannot search the actual contents of the documents (either individually, or all documents collectively) for that particular word. This would be a helpful tool to add to the system. In Livenote (i.e. the transcript), it is possible to search for particular words, but not for multiple words, or phrases. Again, it would be helpful to be able to search for a term that may contain more than one word (e.g. International Tribunal, or Supreme Defence Council).

D. The applicable law

42. In general, sections of the judgement that delineate the applicable law may be drafted immediately. Early drafting of these sections provides an opportunity to identify points of law on which testimony is needed.
43. While the chapeau requirements form part of the definitions of individual crimes, the judgement-drafting approach described here does not require the repetition of these requirements at this stage as they are dealt with in an earlier chapter. The applicable law therefore should focus only on the underlying crimes (e.g. murder). When domestic systems incorporate the ICC Rome Statute's crime definitions, in which general and crime-specific requirements are mixed, it may be necessary to consider whether an alternative drafting approach is preferable.
44. Drafting of sections on the law should, to the extent possible, be finalised by the close of the case. It may be that it is necessary to adjust the draft sections to accommodate information that is submitted in the closing briefs and arguments. Nonetheless, it is important to finalise the section on the applicable law as soon as possible because the next drafting stage will involve findings based on the application of the law to the facts elicited from the witnesses and exhibits. This process is greatly facilitated by a strict elements-based system that sets forth the physical and mental elements of the crimes charged and the forms of responsibility.

E. Factual findings

45. When making factual findings, it is important for the Chamber to make explicit findings with respect to each element of the crime at issue. This process is facilitated by the adoption of an appropriate structure for presentation of the judgement as suggested above. By setting out the applicable law immediately before making findings of fact relevant to the particular charge at issue, it should be easier for the Trial Chamber to ensure that all the necessary findings have been made. These findings of fact must be made beyond reasonable doubt.
46. Since the ICTY's cases involve complex crimes of wide temporal and geographic scope, they tend to involve much more evidence than might be expected in a normal domestic criminal case. As a result, it becomes correspondingly more difficult to track all of the necessary facts for the purposes of making findings. Again, the structure of the outline (or, where an e-Court system is available, a comprehensive list of issues) plays an important role in making sure that all of the relevant evidence is taken into account in the final decision. As detailed above, using the traditional approach, where all summaries of testimony relevant to a particular crime (e.g. persecution) are systematically added to that section of the draft judgement as the case develops, the bench can be sure that it will have all the evidence before it when it makes its findings of fact and the legal conclusions relevant to that crime.

47. It may seem obvious to stress the need to make the necessary findings of fact with respect to each element of a crime or mode of liability, but the ICTY's experience demonstrates that this does not always happen. Since, under the ICTY Rules, Trial Chambers make no separate reports to the Appeals Chamber on the reasons underpinning their judgements, the result of a failure to make systematic findings in the judgement itself can be the reversal of those findings on appeal or the reversal of a conviction (see text box *Kordić & Čerkez, Kvočka et al. and Orić cases - The failure to make findings on each element of the crime or each underlying crime*).

F. Tracking procedural history

48. Tracking the major procedural issues that arise during the trial will facilitate the drafting of a procedural history at the end of the case. A more detailed tracking of procedural issues will also assist in the resolution of issues during trial.
49. While there will likely be a system in place to track written decisions during trial, it is also important to track oral decisions in order to avoid having to search for them at the end of the trial. As a result, oral decisions should be tracked daily in court in a document that is maintained on a common computer hard drive. This ensures that all oral decisions are comprehensively recorded in one place, with the necessary data and transcript references, for easy access.
50. If there is a site visit during the case, the details of that event must be tracked for purposes of the procedural background. If the purpose of the site visit is to take evidence, the accused should be present as he has a right to be present at his or her own trial.

Kordić & Čerkez, Kvočka et al. and Orić cases - The failure to make findings on each element of the crime or each underlying crime.

In Kordić & Čerkez, the Trial Chamber concluded that war crimes and crimes against humanity had been committed, without making explicit factual findings with regard to each element of the crimes. As a result, the Appeals Chamber reconsidered the crimes element by element, and location by location, in order to determine whether a reasonable trier of fact could have made the Trial Chamber's factual findings establishing the required elements of the crimes charged. In so doing, the Appeals Chamber determined that on several occasions the evidence before the Trial Chamber did not support the finding that certain crimes were committed.***

*Similarly, in Kvočka et al.***, the Trial Chamber did not organise its factual findings so as to individually address each incident contained in the schedules of incidents annexed to the indictment. Instead, the Chamber made factual findings more generally with respect to the conditions of detention and treatment in the Omarska camp. While the Appeals Chamber considered that this would not invalidate the Trial Judgement as long as the Trial Chamber did actually make factual findings of at least some individual crimes underlying the convictions of the Appellants, it expressed a clear preference for the systematic approach adopted by the Krnojelac Trial Chamber.**** That Chamber, faced with a similarly structured indictment including schedules of particular incidents relating to the various crimes charged first made factual findings in relation to each incident listed in the schedules annexed to the indictment before looking at the accused's responsibility.*

In Orić, the Trial Chamber convicted the accused of failing to discharge his duty as a superior to take necessary and reasonable measures to prevent the occurrence of murder and cruel treatment. On appeal, the Appeals Chamber found that the Trial Chamber failed to make the findings necessary to support a conviction pursuant to command responsibility. Specifically the Trial Chamber erred in failing to resolve two crucial issues: the criminal responsibility of Orić's subordinate, and whether Orić knew or had reason to know that his subordinate was about to or had committed crimes. The Appeals Chamber found that these errors invalidated the Trial Chamber's decision. Having also dismissed the Prosecution's appeal in the case, the Appeals Chamber accordingly acquitted Orić.

* Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Judgement, 26 February 2001.

** Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004.

*** Prosecutor v. Kvočka et al, Case No. IT-98-30/1-T, Judgement, 2 November 2001.

**** Prosecutor v. Kvočka et al, Case No. IT-98-30/1-A, Judgement, 28 February 2005, paras 69-73.

G. Motions for acquittal

51. The ICTY rules - modelled largely on a common law party-driven system - provide for the possibility of a judgement of acquittal after the close of the Prosecution's case. It is very common for accused to move for an acquittal on the basis that the Prosecution has offered insufficient evidence to support a conviction. While no Trial Chamber has yet completely acquitted an accused at the end of the Prosecution's case following a motion for acquittal, individual counts have often been dismissed at that stage (see text box *Delalić et al., Naletelić and Martinović, Stakić, Orić cases - Dismissing charges after the Prosecution case*).
52. For a Chamber to rule on a motion for acquittal after the conclusion of the Prosecution's case, it must be clear on the legal elements of the crimes and/or modes of liability at issue. Consequently, the legal sections of the draft judgement must be sufficiently advanced to allow the Chamber to render its decision.
53. If an accused is acquitted of any of the counts in the indictment at this stage, the acquittal should be reflected in the draft judgement. Moreover, the acquittal should be noted at the very beginning of the Summary of the Charges section.

Delalić et al., Naletelić and Martinović, Stakić, Orić cases - Dismissing charges after the Prosecution case

The Appeals Chamber in the Delalić et al. case established the test to be applied in determining whether evidence is insufficient to sustain a conviction, namely whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.

In the Naletelić and Martinović case, the Trial Chamber applied this standard and held that the Prosecution had presented sufficient evidence to meet the standard on all of the counts charged. However, it also found that no or insufficient evidence had been presented concerning the incidents described in two specific paragraphs of the Indictment. In the Stakić case, the Trial Chamber applied the standard with the result that charges of instigation in a number of counts were dropped for insufficient evidence

In 2004, ICTY Rule 98bis was amended to provide for such motions to be dealt with orally. In the Orić case, the first to apply the new oral procedure, oral submissions were made by the parties and an oral judgement was rendered in which the Trial Chamber found that the Prosecution had failed to adduce evidence capable of supporting a conviction for the crime of plunder of public or private property, and thus acquitted the accused of two counts in the indictment. The Trial Chamber further found that the Prosecution had failed to adduce evidence capable of supporting a conviction for certain other incidents charged as crimes, but this resulted in the removal from the indictment of these alleged incidents only as evidence was presented of other incidents which supported the maintenance of the broader counts.

H. Implications of multi-accused trials

54. Since its establishment, the ICTY has conducted numerous trials involving more than one accused, including some with six or seven accused on trial together. Adding to the complexity inherent in multi-accused trials is the fact that the indictments are often lengthy, incorporating charges covering large geographic areas and/or long periods of time. As a result, one indictment can contain numerous individual charges, and of vast quantities of evidence, including court transcripts consisting of tens of thousands of pages, and the likelihood of several thousand admitted exhibits, and correspondingly lengthy judgements. Moreover, in several ICTY multi-accused trials, the persons on trial are individuals who held senior positions in the political, military or police structures of their countries, and they are not charged with direct, physical perpetration of any crime, but rather with being responsible for crimes on a large-scale by virtue of their leadership positions. This fact

IX. Trial Judgement Drafting

- adds significantly to the complexity of the evidence and increases the amount of law and fact analysis required for the final judgement.
55. In multi-accused trials, it is particularly important to commence the process of organising and analysing evidence for the judgement at the very outset of the trial proceedings. Otherwise, this is a risk of long periods of delay between the close of proceedings and the issuance of the judgement. Prior to the trial's beginning, there must be some understanding regarding the issues likely to be in contention during the trial, resulting in the preparation of a judgement outline and (for cases using e-Court) a detailed lists of issues. Since there should be more than one drafter, the court needs to make clear assignments for each section of the judgement so that each "drafter" analyses and incorporates the evidence relevant to their section(s) on an ongoing basis throughout the trial.
 56. Drafters should be assigned, as far as possible, to handle discrete subjects. The assignments may mean that a drafter assumes responsibility for an entire section that may involve one or more issues. When a section is divided into sub-sections, which are in and of themselves large (such as the section on crimes and findings), a drafter can be assigned a sub-section on a specific crime.
 57. As noted above, the style adopted in a final judgement is primarily dependant upon the views of the particular Judges of the Trial Chamber. However, in cases of multiple accused, and in order to avoid judgements of more than a thousand pages, the style may need to devote less discussion to certain issues than in smaller cases. Indeed, in cases involving senior military, political, or police leaders, who are not charged as physical perpetrators, but rather as persons ultimately responsible for the actions of hundreds or thousands of physical perpetrators, the events charged as crimes in the indictment may not be significantly challenged by the Defence. Instead, in senior leadership cases, the Defence may focus on the chain of responsibility between the events and the accused. If so, the judgements will tend to focus on these issues rather than on evidence pertaining to the crime-sites.
 58. It is likely that important trial issues will be relevant to more than one accused in a multi-accused case, such as, for example, how an army was structured and functioned during the relevant period. To avoid repetition in the judgement on such issues, additional sections may need to be added to those outlined above, prior to the discussion of each accused's individual criminal responsibility. For example, if the allegations suggest that the accused were members of a large Joint Criminal Enterprise (JCE), and that they participated in that enterprise through their membership in official or unofficial organs of command, it will be necessary to discuss whether those organs existed and what their powers were before addressing each accused's alleged participation in the JCE.
 59. These large trials create the danger that the drafters will fall too far behind in the drafting process, and will cause long delays at the close of proceedings prior to the issuance of the judgement. Creating a timetable for the production and review of drafts is an essential part of this process. It is important to organise the sequence of preliminary deliberations and to review drafts as the case proceeds.

I. General Considerations

60. It is advisable to establish a timetable for preparation of the draft judgement whereby different sections are completed at different times. A staggered timetable reflects the reality that some sections take longer to prepare than others, and that some sections will be started and finished earlier than others. In addition, the

Judges can review only one draft at a time so a staggered process maximizes efficiency. An added benefit of a timetable is that every draft should have been reviewed at least once if not twice before the entire draft is consolidated and distributed as the "first draft judgement". Thus, the first draft should be fairly advanced.

61. Certain sections can be conveniently drafted early in the trial process. Included are such sections as the Summary of the Charges and the General Considerations on the Evaluation of Evidence. With respect to the latter, it is important that this section be completed early so that everyone is aware of the parameters within which they must work. The sections on the law can also be considered separately and in advance of any factual findings.
62. It is beneficial for the Judges to meet and discuss a draft among themselves, and to include any staff members who are providing assistance. Such meetings should be held as soon as possible after a draft is completed, following the timetable mentioned above.
63. There is no agreement at the ICTY regarding the ideal length of a trial judgement. In general, judgements are as long as the Judges feel is necessary to address the matters at issue. That said, trial judgements have ranged greatly in length (for example, contrast the *Furundžija* Trial Judgement, at just over 100 pages, with the *Hadžihasanović* and *Kubura* Trial Judgement, at nearly 700 pages in the English translation and the *Milutinović et al.* Trial Judgement at over 1700 pages).
64. Judgement drafters must keep in mind that the length of the judgement affects the amount of translation required, and the ease with which an appellate court can adjudicate an appeal. At the ICTY, trial judgements must be systematically translated into Bosnian-Croatian-Serbian (BCS) in order for the accused to have input on appeal. Because translation requires time, and places a heavy burden on ICTY translation resources, there had recently been a number of delays in the appeal briefing process causing delays in the completion of appeals. The length of the Trial Judgement can also affect the ease with which the Appeals Chamber can find the information necessary to decide the appeal. While not always the case, a longer judgement might make it more difficult for the Appeals Chamber to identify the information it seeks than would be the case with a shorter, more concise, Trial Judgement.
65. It is extremely important that a consistent approach be taken with respect to the way in which confidential information is reflected in the Trial Judgement. In ICTY practice, confidential information is routinely included in draft judgements so that the judges can be certain they are making their decision based on all the information available to them. However, this confidential information is identified (such as by using a different colour font) in order to ensure that it is not disclosed in its confidential form. Prior to the judgement being finalised, the judges must make a decision regarding whether confidential information can be included because (Article 23(2) of the Statute), the Trial Judgement is a public document. There are at least three possibilities for handling confidential information in the judgement: (1) it can be included if it need not in fact remain confidential (thus, by including it, the Chamber lifts the confidentiality); (2) it can be referred to in a manner that conveys the essential point without referring to anything confidential (including reference to confidential witness testimony by transcript pages in a footnote that does not identify the protected witness, and would not be accessible to the public); or (3) it can simply be excluded altogether.

J. Reviewing the draft judgement

66. When circulating the first draft judgement, a timetable should be established covering the period from distribution to final judgement. At the ICTY, the practice is to circulate two or three drafts, but more may be necessary depending on the approach taken and the level of agreement between the judges on the main issues. The schedule should set out dates for:
- ◆ commenting on the first draft;
 - ◆ circulation of the second draft;
 - ◆ commenting on the second draft;
 - ◆ circulation of the third/final draft;
 - ◆ circulation of separate/dissenting opinions, if any;
 - ◆ final comments;
 - ◆ signing of judgement.
67. The schedule may also provide for deliberations between the Judges to discuss the drafts, especially any particularly contentious issues. Staff assistants involved in the judgement drafting process should attend these deliberations.
68. While the substance of the draft judgement is being reviewed, a thorough editorial review of the draft can continue with the goal of ensuring terminological and formatting consistency. There are a number of different checks that need to be made, including:
- ◆ standardisation of the text;
 - ◆ review of the text for closed or private session testimony, or references to documents under seal;
 - ◆ general confidentiality check;
 - ◆ witness ID check (to make sure that witnesses who are assigned pseudonyms are referred to by their pseudonyms and that no other information discloses their identities);
 - ◆ language check (at the ICTY it is necessary to check, e.g., the BCS diacritics);
 - ◆ style standardisation in footnotes;
 - ◆ original glossary reference (first appearance terms should be in long form, but designated in short version thereafter);
 - ◆ citation checking - the accuracy of references in footnotes;
 - ◆ removal of metadata resulting from draft comments (It is not enough to simply accept or reject track changes - the metadata behind this must be removed. This is particularly important if the judgement is to be posted in an electronic format for public access, where sophisticated computer users can look behind the document); and
 - ◆ Internal cross references, particularly in footnotes.
69. As mentioned earlier, the use of a style guide will go a long way towards reducing the amount of last-minute editing that will be needed. It is clear, however, that there will always be many things that need to be checked at the end. It is suggested that a chart be used to monitor all the different things that need to be done during the review process. A chart will ensure that all checks have been carried out on all chapters.
70. There is an advantage to delaying electronic consolidation of the draft until a relatively late stage because only one person at a time can work on the master electronic version. As long as the draft chapters are maintained as separate electronic documents, it is possible for many people to work on the judgement at the

same time. During the drafting process, it is possible to distribute draft judgements as a set of multiple documents separated by dividers, leaving only the final version for consolidation.

71. After consolidation takes place, one designated person should serve as the "gatekeeper" of the document. This person ensures that everyone is working on the correct document, and that no unauthorised work is performed on it. The gatekeeper also manages the document schedule, informing others when they might expect to be able to work on the master document.

K. Final considerations

72. As the judgement is finalised, a number of other considerations may come into play. For the delivery of judgement in open session, a summary of the judgement will need to be prepared for presentation in court. If there is a press office liaising with the public, they will need to be informed so that they can prepare an appropriate press release. Chamber personnel will also need to arrange with the printers to ensure that the judgement is delivered on time for printing and delivery.

IX. Annex 10: Chapeau requirements

It is well established in the ICTY's jurisprudence that certain crimes have chapeau requirements that must be proved in addition to the elements of the underlying crime in question. These are as follows:

- **Article 2: Grave Breaches of the Geneva Conventions** - *there are four chapeau requirements for the application of these provisions:*
 - *the existence of an armed conflict;*
 - *the armed conflict must be international in nature;*
 - *the existence of a nexus between the alleged crimes and the armed conflict; and*
 - *the victims of the alleged crimes are protected persons pursuant to the provisions of the 1949 Geneva Conventions.*
- **Article 3: Violations of the laws or customs of war** - *there are six chapeau requirements for the establishment of such violations:*
 - *the existence of an armed conflict;*
 - *the existence of a nexus between the alleged crimes and the armed conflict;*
 - *the violation must constitute an infringement of a rule of international humanitarian law;*
 - *the rule must be customary in nature or, if it belongs to treaty law, certain conditions must be met;*
 - *the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;*
 - *the violation of the rule must entail the individual criminal responsibility of the person breaching the rule.*
- **Article 5: Crimes against humanity** - *there are two chapeau requirements for the establishment of such crimes. They must be committed:*
 - *in an armed conflict, whether internal or international in character (note that this is a jurisdictional requirement of the ICTY rather than a requirement under customary international law); and*
 - *as part of a widespread or systematic attack directed against any civilian population. This requirement requires the establishment of five sub-elements:*
 - *there must be an attack;*
 - *the acts of the accused must be part of the attack;*
 - *the attack must be directed against any civilian population;*
 - *the attack must be widespread or systematic;*
 - *the accused must know that his or her acts constitute parts of a pattern of widespread or systematic crimes directed against a civilian population and know that his or her acts fit into such a pattern.*

IX. Annex 11: Electronic judgement template

- *It quickly became apparent that ICTY Chambers would benefit from an electronic judgement template that would standardise formatting. Such a template was produced by the in-house IT department and has been used for most of the judgements rendered by the ICTY. It is in fact the template used for the presentation of this Manual. The template standardises seven levels of headings as well as paragraphs, indented passages and footnotes, as shown below:*

A. Heading 2

Heading 3

(a) Heading 4

(i) Heading 5

α. Heading 6

1. Heading 7

#. Paragraph text, paragraph text, paragraph text, paragraph text, paragraph text, paragraph text, paragraph text, paragraph text, paragraph text.

Indented passage, indented passage, indented passage, indented passage, indented passage, indented passage, indented passage, indented passage, indented passage.

X. Appeals

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1. The Appeals Chamber hears appeals alleging errors on questions of law relating to Pre-Trial or Trial Chamber decisions and/or errors of fact occasioning a miscarriage of justice.¹⁸⁸ Appeals may be brought either by the Defence or by the Prosecutor. Appeals are not retrials of the issues adjudicated by the Trial Chamber, but parties may, under strict conditions,¹⁸⁹ be allowed to present additional evidence on certain issues during an appeal. The appeals process is essentially a written one¹⁹⁰ though there is an oral hearing in each case at which the parties may present their main arguments. When necessary, there may be additional evidentiary hearings. The Appeals Chamber then deliberates and drafts a reasoned judgement before delivering it at a public hearing. Occasionally, parties have been asked to supplement their briefs by written submissions prior to or after the appeals hearing.
2. The Appeals process, like any other phase of Tribunal proceedings, requires efficient management from the Chambers. Set out below are the standards of review applied by the ICTY Appeals Chamber, as well as a number of management tools developed for disposing of appeals in a fair and reasonably expeditious manner.

A. Standard of review on appeal

3. On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber or to factual errors which occasioned a miscarriage of justice.¹⁹¹

A.1 Requirements applicable to all appeals

4. In order for the Appeals Chamber to assess a party's arguments, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs of the trial judgement that are being

188 Art. 25, ICTY Statute. This may include appeals from sentencing verdicts following acceptance by the Trial Chamber of a guilty plea. Proceedings in such appeals are faster than in other types of appeals from judgment because they usually involve a more limited number of grounds of appeal than appeals from other judgments.

189 The standard applicable to the admission of additional evidence on appeal is set forth in Rule 115, ICTY RPE.

190 Rules 108 and 111-113, ICTY RPE require the filing of the following documents: Notice of Appeal, Appellant's Brief, Respondent's Brief, Brief in Reply.

191 Art. 25, ICTY Statute and 24, ICTR Statute. See, e.g., *Brdanin* Appeal Judgement, para.8; *Galić* Appeal Judgement, para.6.

X. Appeals

- challenged.¹⁹² Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".¹⁹³
5. Finally, the Appeals Chamber has inherent discretion to determine which submissions merit a detailed reasoned opinion in writing,¹⁹⁴ and it may dismiss submissions that are evidently unfounded without providing detailed reasoning.¹⁹⁵
 6. Experience has shown that appeals often contain arguments or even entire grounds of appeal that fail to meet the standard of review. The Appeals Chamber can conserve its time and resources by strict application of the review standard, and an early identification of those arguments or grounds that are insufficient, with a view toward summary dismissal. Recent appeals judgements have identified various categories of arguments that are insufficient:
 - ◆ Arguments misrepresenting the Trial Chamber's factual findings or the evidence, or ignoring other relevant factual findings of the Trial Chamber;¹⁹⁶
 - ◆ Arguments merely asserting that the Trial Chamber must have failed to properly consider relevant evidence;¹⁹⁷
 - ◆ Arguments merely asserting that no reasonable Trial Chamber could have reached a particular conclusion by inferring it from circumstantial evidence;¹⁹⁸
 - ◆ Arguments that are clearly irrelevant or that lend support to the challenged finding;¹⁹⁹
 - ◆ Arguments contrary to common sense and challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the Appellant.²⁰⁰
 7. Only a strict approach helps ensure that the Appeals Chamber concentrates its resources on Appeals with arguments or grounds of appeal that have merit. The *Brdanin* Appeal Judgement provides an example of a proactive screening approach where, after careful review of the arguments raised by the accused, the Appeals Chamber summarily dismissed challenges to factual findings that were clearly inadequate. In that case, the Appellant alleged a large number of errors of fact without pointing to the relevant paragraphs of the Trial Judgement.²⁰¹ Following instruction by the Appeals Chamber at the pre-appeal stage, the Appellant filed a table indicating how the relevant paragraphs of the Trial Judgement corresponded to each of the factual findings that, according to him, provided the basis for a conviction and could not properly have been reached beyond a reasonable doubt. Following further inquiry by the Appeals Chamber, he decided that several of the alleged errors did not actually have any impact on the conviction or on the sentence, but he did not abandon since he believed that they "are exemplary of the deficiencies in the Judgement as a whole". The Appeals Chamber recalled that "only factual errors occasioning a miscarriage of justice justify a reversal. As long as

192 Practice Direction on Formal Requirements for Appeals from Judgements, para.4(b). *Blagojević and Jokić* Appeal Judgement, para.11; see also *Brdanin* Appeal Judgement, para.15; *Galić* Appeal Judgement, para.11; *Stakić* Appeal Judgement, para.12; *Blaškić* Appeal Judgement, para.13; *Vasiljević* Appeal Judgement, para.11.

193 *Blagojević and Jokić* Appeal Judgement, para.11; see also *Galić* Appeal Judgement, para.11; *Stakić* Appeal Judgement, para.12; *Vasiljević* Appeal Judgement, para.12; *Kunarac et al.* Appeal Judgement, paras.43, 48.

194 *Brdanin* Appeal Judgement, para.16; *Galić* Appeal Judgement, para.12; *Stakić* Appeal Judgement, para.13; *Kunarac et al.* Appeal Judgement, para.47.

195 An example of an evidently unfounded argument can be found in the *Brdanin* Appeal Judgement, at para.23, where the Appeals Chamber summarily dismisses arguments in the form of mere assertions which either misrepresent the Trial Chamber's factual findings or the evidence on which the Trial Chamber relies, or ignore other relevant factual findings made by the Trial Chamber. Where such an assertion is evidently incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument.

196 *Brdanin* Appeal Judgement, para.23; see also *Galić* Appeal Judgement, paras.107-108.

197 *Brdanin* Appeal Judgement, para.24.

198 *Ibid.*, at para.25.

199 *Ibid.*, at para.26.

200 *Ibid.*, at paras.30-31.

201 *Ibid.*, at para.20.

the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement". Accordingly, the Appeals Chamber declined to discuss those alleged errors which, as Brđanin acknowledged, had no impact on the conviction or sentence.²⁰²

A.2 Standard applicable to errors of law

8. The requirement that the alleged error of law invalidate the decision applies to appeals by both the Defence and Prosecution. Only in exceptional circumstances will the Appeals Chamber hear appeals involving a legal issue that would not lead to invalidation of the decision, but is nevertheless of general significance to the ICTY's jurisprudence.²⁰³
9. The legal standard on appeal requires a party alleging a legal error to identify the error, present arguments in support of its claim and explain how the error invalidates the judgement. An alleged error of law that, if corrected, has no chance of changing the outcome of a judgement may be rejected as a basis for an appeal.²⁰⁴ Even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may conclude for other reasons that there is an error of law. In other words, the Appeals Chamber's power to correct Trial Chamber errors is not limited to issues raised by the parties' appellate briefs.²⁰⁵
10. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.²⁰⁶ Where the Appeals Chamber finds an error of law arising from the Trial Chamber's application of the wrong legal standard, it will articulate the correct legal standard,²⁰⁷ and apply the correct legal standard to evidence recorded during the trial. In doing so, the Appeals Chamber determines whether it is itself convinced beyond a reasonable doubt as to the factual finding challenged by the Defence. Only then can the Appeals Chamber confirm or reject the finding in question.²⁰⁸ The Appeals Chamber does so without reviewing the entire trial record anew. Rather, it only takes into account evidence referred to by the Trial Chamber in the judgement or a related footnote, evidence contained in the trial record and referred to by the parties and additional evidence admitted on appeal.²⁰⁹
11. There are many ways in which a Trial Chamber may err in its articulation of the correct legal standard. Most commonly, in analysing a crime or mode of liability, the Trial Chamber may fail to appreciate that a required element of the crime exists, or it may impose an unnecessary additional element. An example of the latter situation occurred in the *Krstić* case where the Appeals Chamber first established and then applied the correct legal standard for the crimes of genocide, extermination and persecution.

²⁰² *Ibid.*, at paras.20-22.

²⁰³ See *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p. 3; see also *Tadić* Appeal Judgement, paras.247 and 315-317; text box on *Issues of general significance*.

²⁰⁴ *Blagojević and Jokić* Appeal Judgement, para.7; *Brđanin* Appeal Judgement, para.9; *Galić* Appeal Judgement, para.7; *Stakić* Appeal Judgement, para.8; *Kvočka et al.* Appeal Judgement para.16, citing *Krnojelac* Appeal Judgement, para.10.

²⁰⁵ *Blagojević and Jokić* Appeal Judgement, para.7; *Brđanin* Appeal Judgement, para.9; *Galić* Appeal Judgement, para.7; *Stakić* Appeal Judgement, para.8; *Kvočka et al.* Appeal Judgement, para.16; *Kordić and Čerkez* Appeal Judgement, para.16; *Vasiljević* Appeal Judgement, para.6; *Kupreškić et al.* Appeal Judgement, para.26; see also *Gacumbitsi* Appeal Judgement, para.7; *Ntagerura* Appeal Judgement, para.11; *Semanza* Appeal Judgement, para.7; *Kambanda* Appeal Judgement, para.98.

²⁰⁶ *Blagojević and Jokić* Appeal Judgement, para.8; *Brđanin* Appeal Judgement, para.10; *Galić* Appeal Statement, para.8; *Stakić* Appeal Judgement, para.9; *Krnojelac* Appeal Judgement, para.10.

²⁰⁷ *Blagojević and Jokić* Appeal Judgement, para.8; *Brđanin* Appeal Judgement, para.10; *Galić* Appeal Judgement, para.8; *Stakić* Appeal Judgement, para.9; *Kvočka et al.* Appeal Judgement, para.17; *Kordić and Čerkez* Appeal Judgement, para.17; *Blaškić* Appeal Judgement, para.15.

²⁰⁸ *Blagojević and Jokić* Appeal Judgement, para.8; *Brđanin* Appeal Judgement, para.10; *Galić* Appeal Judgement, para.8; *Stakić* Appeal Judgement, para.9; *Kvočka et al.* Appeal Judgement, para.17; *Kordić and Čerkez* Appeal Judgement, para.17; *Blaškić* Appeal Judgement, para.15.

²⁰⁹ *Brđanin* Appeal Judgement, para.15; *Galić* Appeal Judgement, para.8; *Stakić* Appeal Judgement, para.9; *Blaškić* Appeal Judgement, para.13; *Kordić and Čerkez* Appeal Judgement, para.1, fn.12.

12. In *Krstić*, the Prosecution alleged on appeal that the Trial Chamber committed a legal error when it vacated convictions for extermination and persecution (as crimes against humanity under Article 5) on the ground that they were impermissibly cumulative with Krstić's conviction for genocide under Article 4, which was based on the same facts. The Trial Chamber held that the Article 5 requirement that crimes of persecution and extermination be part of a widespread or systematic attack against a civilian population is subsumed within the statutory elements of genocide. The Appeals Chamber observed that, according to the established jurisprudence of the Tribunal, "multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other." The Appeals Chamber noted that whereas the offences of extermination and persecution as crimes against humanity require proof that the prohibited act forms part of a widespread or systematic attack on the civilian population, and that the perpetrator is aware that his acts fit into such a pattern, the legal elements of genocide contain no such requirements. The Appeals Chamber also noted that the intent requirement of genocide, unlike that of extermination and persecution, is not limited to instances when the perpetrator seeks to destroy civilians. The Appeals Chamber accordingly found that the offence of genocide does not subsume the offence of extermination or persecution and that the Trial Chamber erred when it concluded that convictions for extermination and persecution under Article 5 and genocide under Article 4 are impermissibly cumulative.²¹⁰
13. The successive steps taken by the Appeals Chamber to assess the impact of that error on the verdict can be found in paragraph 269 of the Appeal Judgement. The Appeals Chamber recalled its conclusion that the Trial Chamber erred in setting aside Krstić's convictions for extermination and persecution as crimes against humanity, and also recalled its additional determination that Krstić's level of responsibility was that of an aider and abettor and not a principal perpetrator. However, given that the Prosecution did not seek an increase in Krstić's sentence on the basis of these convictions, the Appeals Chamber declined to take Krstić's participation in these crimes into account in determining his sentence.
14. An example of how the Appeals Chamber applies the correct legal standard to evidence contained in the trial record, in a case where additional evidence has been admitted on appeal, can be found in the *Blaškić* Appeal Judgement.²¹¹ In that case, "having examined the approaches of national systems as well as ICTY precedents", the Appeals Chamber determined what was, in the absence of *direct intent*, the mental element required for establishing criminal responsibility for ordering a crime pursuant to Article 7 (1) of the Statute.²¹² It found that the Trial Chamber had erred in articulating the applicable standard, *i.e.*, that a person who orders an act or omission with awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under Article 7 (1).²¹³ The Appeals Chamber then applied the correct standard to the relevant evidence in order to determine whether it was itself satisfied that the relevant trial evidence and the additional evidence admitted on appeal proved beyond reasonable doubt that the Appellant is responsible under Article 7(1) of the Statute for ordering the crimes committed in the Ahmići area on 16 April 1993.²¹⁴ It found at paragraph 347 of the Appeal Judgement that this was not the case.
15. As indicated earlier, in exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to invalidation of the decision but is nevertheless of general

210 *Krstić* Appeal Judgement, paras.216-229.

211 *Blaškić* Appeal Judgement, paras.345-347.

212 *Ibid.*, at paras.41-42.

213 *Ibid.*, at paras.41-42.

214 *Ibid.*, at paras.345-347.

significance to the International Tribunal's jurisprudence (see text box *Issues of general significance*).

16. Before turning to errors of fact, it is worth noting a specific type of legal error commonly alleged on appeal: defective indictments and/or convictions entered on the basis of facts that were not pleaded in the indictment. The law applicable to indictments has been presented in an earlier section.²¹⁵ When determining whether an indictment failed to plead material facts, or failed to do so with sufficient specificity and was thus defective, the Appeals Chamber places decisive weight on the Prosecutor's characterization of the alleged criminal conduct and the proximity between the accused and the crime. The Appeals Chamber has determined that, in some instances, a defective indictment can be "cured" and a conviction entered if the Prosecutor provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him.²¹⁶ This information could, depending on the circumstances, be supplied in the Prosecutor's pre-trial brief or opening statement.²¹⁷ It must, however, be emphasised that the possibility of curing defects in the indictment is not unlimited. A clear distinction must be drawn between vagueness or ambiguity in the indictment and an indictment that omits certain charges altogether. While it is possible to remedy ambiguity or vagueness in an indictment, omitted charges can be incorporated into the indictment only by formal amendment under Rule 50 of the Rules.²¹⁸

17. According to the Appeals Chamber's jurisprudence, a vague or imprecise indictment that is not cured of defects by providing the accused with timely, clear and consistent information constitutes prejudice to the accused. The defect can be deemed harmless only if it is established that the accused's ability to prepare his

Issues of general significance

A recent example of a legal issue addressed by the Appeals Chamber as one of general significance to the International Tribunal's jurisprudence is the scope of the theory of joint criminal enterprise (JCE).^{*} In *Brđanin*, the Prosecution sought a clarification regarding the applicable law of JCE without seeking reversal of the Trial Judgement or a revision of the sentence.^{**} The JCE theory of responsibility is the form of commission most commonly pleaded at the ICTY. It is settled in the jurisprudence that JCE existed as a form of responsibility in customary international law at the time of the events in the former Yugoslavia.^{***}

The Appeals Chamber decided to address the scope of JCE, as the issue was "of considerable significance to the Tribunal's jurisprudence", and it ultimately decided, following review of post-World War II cases and of the Tribunal's jurisprudence, to grant this part of the appeal.^{****} Other issues deemed by the Appeals Chamber to have been of general significance to the jurisprudence of the Tribunal include whether an accused could not be held liable under the third form of JCE set out in the *Tadić* Appeals Judgement with respect to any of the crimes alleged unless an "extended" form of joint criminal enterprise was pleaded expressly in the Indictment;^{*****} whether crimes against humanity must not have been carried out for the purely personal motives of the perpetrator;^{*****} whether all crimes against humanity enumerated under Article 5 require proof of a discriminatory intent.

The inherent power that the Appeals Chamber has to consider purely prospective/advisory "issues of general importance" has been and is still particularly important for the jurisprudence of the *ad hoc* Tribunals.

^{*} See *Brđanin* Appeal Judgement, para.361.

^{**} *Brđanin* Appeal Judgement, para.361.

^{***} *Krnjelac* Appeal Judgement, para.29.

^{****} *Brđanin* Appeal Judgement, paras. 361 and 414.

^{*****} *Krnjelac* Appeal Judgement, paras. 125-128.

^{*****} *Tadić* Appeal Judgement, para.247.

^{*****} *Tadić* Appeal Judgement, para.281.

²¹⁵ See Chapter V.

²¹⁶ *Naletilić and Martinović* Appeal Judgement, para.26; *Kvočka et al.* Appeal Judgement, para.33; *Kupreškić et al.* Appeal Judgement, para.114; *Simić* Appeal Judgement, para.23.

²¹⁷ *Naletilić and Martinović* Appeal Judgement, para.27 (citing *Kupreškić et al.* Appeal Judgement, para.117 and *Kordić and Čerkez* Appeal Judgement, para.169, respectively); *Simić* Appeal Judgement, para.24.

²¹⁸ *Ntagerura et al.*, para.32.

defence was not materially impaired.²¹⁹ When the accused's right to a fair trial was violated by the Prosecution's failure to give sufficient notice of the legal and factual reasons for the charges against him, no conviction can result.²²⁰ The burden of showing on appeal whether the accused's defence was or was not materially impaired at trial depends on whether the alleged defect in the indictment is raised for the first time on appeal. When the convicted person alleges a defective indictment for the first time on appeal, he/she bears the burden of proving before the Appeals Chamber that his/her ability to prepare a defence was materially impaired by such lack of notice. When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecutor to prove on appeal that the ability of the accused to prepare a defence was not materially impaired.²²¹

A.3 Standard applicable to errors of fact

18. When considering the Defence's alleged errors of fact on appeal, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.²²² The same standard applies to appeals by the Prosecution against an acquittal.²²³ The standard of an error of fact occasioning a miscarriage of justice is applied somewhat differently for a Prosecution appeal against acquittal than for a defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt regarding the accused's guilt has been eliminated.²²⁴
19. The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.²²⁵ In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".²²⁶ This rule is based on the premise that the task of hearing, assessing and weighing the evidence presented at trial is primarily for the Trial Chamber, whose findings of fact must be given a margin of deference. Only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact, or when the evaluation of the evidence is "wholly erroneous", may the Appeals Chamber substitute its own finding for that of the Trial Chamber.²²⁷

219 See e.g., *Simić* Appeal Judgement, para.24; *Kupreškić et al.* Appeal Judgement, para.122.

220 *Naletilić and Martinović* Appeal Judgement, para.26; *Kvočka et al.* Appeal Judgement, para.33.

221 *Simić* Appeal Judgement, para.25; *Kvočka et al.* Appeal Judgement, para.35.

222 *Kupreškić et al.* Appeal Judgement, para.30 (referred to in *Blagojević and Jokić* Appeal Judgement, para.9); *Brđanin* Appeal Judgement, para.13; *Galić* Appeal Judgement, para.9; *Stakić* Appeal Judgement, para.10; *Kvočka et al.* Appeal Judgement, para.18; *Kordić and Čerkez* Appeal Judgement, para.18; *Blaškić* Appeal Judgement, para.16; *Čelebići* Appeal Judgement, para.435; *Furundžija* Appeal Judgement, para.37; *Aleksovski* Appeal Judgement, para.63; *Tadić* Appeal Judgement, para.64.

223 *Blagojević and Jokić* Appeal Judgement, para.9.

224 *Ibid.*, at para.9; *Brđanin* Appeal Judgement, para.14.

225 *Blagojević and Jokić* Appeal Judgement, para.226; *Brđanin* Appeal Judgement, para.13; *Galić* Appeal Judgement, para.9; *Stakić* Appeal Judgement, para.37, referring to *Tadić* Appeal Judgement, para.64; see also *Kvočka et al.* Appeal Judgement, para.19; *Krnojelac* Appeal Judgement, para.220; *Čelebići* Appeal Judgement, para.458. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proven each element of that crime and the relevant mode of liability beyond a reasonable doubt. See *Stakić* Appeal Judgement, para.219; *Čelebići* Appeal Judgement, para.458.

226 *Blagojević and Jokić* Appeal Judgement, para.9; *Galić* Appeal Judgement, para.9; *Stakić* Appeal Judgement, para.10; *Furundžija* Appeal Judgement, para.37, referring to *Tadić* Appeal Judgement, para.64; see also *Kvočka et al.* Appeal Judgement, para.19; *Krnojelac* Appeal Judgement, para.11; *Aleksovski* Appeal Judgement, para.63; *Limaj* Appeal Judgement, para.12; *Hadžihasanović* Appeal Judgement, para.10.

227 *Blagojević and Jokić* Appeal Judgement, para.9; *Brđanin* Appeal Judgement, para.14; *Galić* Appeal Judgement, para.9; *Stakić* Appeal Judgement, para.10; *Kvočka et al.* Appeal Judgement, para.19; *Limaj* Appeal Judgement, para.12; *Hadžihasanović* Appeal Judgement, para.11, quoting *Kupreškić et al.* Appeal Judgement, para.30; see also *Kordić and Čerkez* Appeal Judgement, para.19, fn.11; *Blaškić* Appeal Judgement, paras.17-18.

20. On appeal, a party may not merely repeat arguments that did not succeed at trial unless the party can demonstrate that the Trial Chamber's rejection of those arguments constituted an error serious enough to require intervention by the Appeals Chamber.²²⁸ An argument may be immediately dismissed by the Appeals Chamber, and need not be considered on the merits, if it does not have the potential to cause the impugned judgement to be reversed or revised.²²⁹

B. Self representation on appeal

21. The right of self-representation on appeal from judgement was considered for the first (and so far only) time in the *Krajišnik* case.²³⁰ During the pre-appeal phase, *Krajišnik* indicated his intention to represent himself during his appeal.²³¹ While the Appeals Chamber considered self-representation on appeal to be a "complex and tricky business", it concluded that it is no more difficult (and indeed perhaps less difficult) than self-representation at trial. Both stages involve complicated factual and legal issues and require familiarity with a daunting set of procedural rules. In determining the issue, the Appeals Chamber recognised that "it may never be an individual's interest to represent himself, either at trial or at appeal" but noted that an accused or an appellant "has a 'cornerstone' right to make his own case to the Tribunal".²³² The basis of the Appeals Chamber reasoning is found in the text of the Tribunal's Statute²³³ which grants the accused the right "to defend himself in person or through legal assistance of his own choosing",²³⁴ and draws no distinction between the trial and appeal stages of a case.²³⁵ In rendering its decision, the Appeals Chamber imposed the same qualification on the right to self-representation as applies at the trial level. The right to self-representation can be overridden and counsel imposed upon a self-represented appellant who substantially and persistently obstructs the proper and expeditious conduct of the appeal.²³⁶
22. While the Appeals Chamber granted *Krajišnik* the right to represent himself, it may not be best practice to recognize a right to self-represent on appeal. As some countries regard a criminal appeal as a technical matter to be determined by a court of appeal, with the assistance of trained lawyers only, the issue may not arise. However, when it does, the task before a self-represented appellant may be daunting, and the impact of implementing self-representation might prove particularly burdensome not only for the Appeals Chamber but

228 *Blagojević and Jokić* Appeal Judgement, para.10; *Brđanin* Appeal Judgement, para.16; *Galić* Appeal Judgement, para.10; *Stakić* Appeal Judgement, para.11; see also *Blaškić* Appeal Judgement, para.13.

229 *Blagojević and Jokić* Appeal Judgement, para.10; *Brđanin* Appeal Judgement, para.16; *Galić* Appeal Judgement, para.10; *Stakić* Appeal Judgement, para.11.

230 *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Decision on Momčilo Krajišnik's Request to Self Represent, on Counsel's Motions in Relation to Appointment of *amicus curiae*, and on the Prosecution Motion of 16 February 2007, 11 May 2007 ("Decision on Krajišnik Request to Self-Represent").

231 *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel, 27 December 2006, Annex A, p. 2.

232 Decision on *Krajišnik* Request to Self-Represent, para.11; see also *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, para.11, where the Appeals Chamber considered that the "drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves." It also concluded that "[d]efendants before this Tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber's judgment that they would be better off if represented by counsel.

233 Art. 21 (4) (d), ICTY Statute.

234 *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Counsel, 1 November 2004, para.11.

235 Decision on *Krajišnik* Request to Self-Represent, para.11.

236 *Ibid.*, at paras.9 and 13.

X. Appeals

for the court as a whole. Accordingly, the purpose of this section is to stress that the impact that self-representation has on the Tribunal's resources, as described in the trial management section of this manual, exists as well on appeal. Problems include the need for translation which can adversely impact the length of the appeal process. The briefing of the appeal cannot start before the trial judgement has been translated into a language that the Appellant understands. In addition, the self-represented appellant's briefs must be translated into one of the Tribunal's working languages, and the respondent's briefs as well as any court order or decision must be translated into a language that the self-represented appellant understands. The translation process significantly slows the pre-appeal process.

23. As demonstrated by the experience in the *Krajišnik* case, the complexity of the appeals process in case of a self-represented appellant can be further increased by several factors. First, while alerting the self-represented appellant that he must accept responsibility for the disadvantages that result from self-representation, the Appeals Chamber is under a duty to ensure that the appeal is fair. In the *Krajišnik* case, in recognition of this overriding responsibility, the Appeals Chamber decided to appoint an *amicus curiae*.²³⁷ The role of the *amicus curiae* on Appeal, as set out in the Decision on *Krajišnik* Request to Self-Represent, does not include conducting new factual investigations but is limited to putting forth grounds of appeal seeking reversal of convictions or reduction of sentence and to arguing against grounds of appeal advanced by the Prosecution.²³⁸ The *amicus curiae*, as a friend of the Court, assists the Court independently from the self-represented appellant, and is not considered a party to the proceedings.²³⁹ In this sense there is no obligation on the Appeals Chamber to consider the arguments made by the *amicus curiae* but it will do so when "the interest of justice requires [it] to consider, *proprio motu*, issues not raised in [the appellant]'s appeal or in his responses to the Prosecution's appeal".²⁴⁰
24. Due to the complexity of the legal issues raised in Mr. *Krajišnik*'s appeal, and at the request of Mr. *Krajišnik* late in the appeal process, the Appeals Chamber authorized him to engage a defence counsel for the limited purpose of briefing the issue of Joint Criminal Enterprise (JCE), an area on which *amicus curiae* had already advanced arguments.²⁴¹ The rationale supporting this decision is the requirement that the appeal process be fair. The Appeals Chamber considered that the issue of JCE "might be too complex for a non-lawyer to master", that the Appellant should be afforded the "opportunity to present the most compelling case that he can" and that assigned Counsel can present the Appellant's own arguments regarding this complex issue.²⁴² In order to limit the risk of delay, redundancy and complication created by this situation, the Appeals Chamber set parameters for Counsel's representation. In particular, the Appeals Chamber imposed a strict briefing schedule in order to prevent unnecessarily long or time-consuming submissions. It further decided that in the event of a contradiction between the submissions of *amicus curiae* and Counsel, it will treat only the latter's arguments as representing his client's view, and it directed him to state with precision which arguments of *amicus curiae* he embraced and which arguments he rejected. The Appeals Chamber also decided to treat Counsel's submission as a supplementary brief on behalf of the Appellant.²⁴³

237 Decision on *Krajišnik* Request to Self-Represent, para.18. This issue also was seriously debated. See Dissenting Opinion of Judge Pocar, appended to the Decision on *Krajišnik* Request to Self-Represent.

238 Decision on *Krajišnik* Request to Self-Represent, para.19.

239 *Ibid.*, at paras.9-20.

240 *Ibid.*, at para.20.

241 Decision on Momčilo *Krajišnik*'s Motion to Reschedule Status Conference and Permit Alan Dershowitz to Appear, 28 February 2008.

242 *Ibid.*, at para.9.

243 *Ibid.*, at paras.10-11.

25. The complex process that resulted from a request for self-representation on Appeal in this case demonstrates the difficulty of balancing the right to self-representation during the process of appeal from judgement and the overall obligation to ensure fairness of the appeals proceedings.

C. Pre-appeal

C.1 Respective roles of the Pre-appeal Judge and the Appeals Chamber pre-hearing

26. While the Pre-trial Judge and other judges on the pre-trial bench are not necessarily assigned to form part of the trial bench, the same bench of the Appeals Chamber generally remains seized of the case from the moment the notice of appeal is filed through the rendering of the appeal judgement. When the judge presiding over the Appeals Chamber is a member of an appeals bench in a particular appeal, he or she automatically presides over the bench in question and may either designate himself or herself to serve as Pre-appeal Judge on the case or designate another member of the bench to that end. By way of contrast, when the judge presiding over the Appeals Chamber is not a member of the appeals bench, the judges composing the bench can elect the presiding judge for that case who also serves as the Pre-appeal Judge.
27. Appeals from judgements generate a large amount of pre-appeal work. At the formal level, the Rules impose an obligation to hold a status conference at least every one hundred and twenty days in order to allow any person in custody pending appeal the opportunity to raise issues in relation to his or her detention, including issues related to mental and physical condition.²⁴⁴ In practice, the status conference also provides an opportunity to discuss the status of the case and efficiently dispose of procedural issues raised by the parties at the hearing.
28. The Pre-appeal Judge is responsible for coordinating all work on pre-appeal motions filed prior to hearing the appeal. When those motions do not go to the substance of the appeal, the Pre-appeal Judge is competent to adjudicate them. When motions do go to the substance of the appeal, the Pre-appeal Judge takes responsibility for preparing a draft order/decision for adoption by the entire bench. Motions decided at the pre-appeal stage involve, among other things, issues related to the briefing of the appeal, *i.e.*, motions for extension of time and word limits; striking of certain portions of briefs; adding/withdrawing/modifying the grounds of appeal; presentation of additional evidence; requests for forensic experts; motions for protective measures, motions from parties in other cases (at the tribunal or before other jurisdictions) seeking access to confidential material in the case under appeal; and detention related issues.
29. The amount of pre-appeal work varies from one case to another but can be extremely time-consuming and can involve particularly complex issues.

C.2 Ensuring that briefing is completed in a reasonable time

30. An important aspect of the pre-appeal hearing stage is to ensure that the briefing is complete. Each appeal before the ICTY Appeals Chamber generates a notice of appeal, an Appellant's Brief, a Respondent's Brief and a Brief in Reply. There can be as many appeals in one case as there are parties at trial. The Prosecution has tended to appeal most acquittals and the Defence has appealed most convictions.

244 See Rule 65bis, ICTY RPE

31. The Rules provide that the briefing of an appeal must be completed no later than 160 days following the pronouncement of the Trial Judgement (or 100 days in the case of an appeal limited to sentencing).²⁴⁵ Extensions of time may be, and in practice often are, granted by the Appeals Chamber upon good cause being shown, as provided under the Rules and the Practice Directions on Procedure for the Filing of Written Submissions.²⁴⁶ Extensions of time are generally granted for two reasons. First, when the accused chooses to change lead counsel during the appeals process. When the change takes place at a later stage in the appeal process, it has occasionally led to a decision to grant the new counsel leave to supplement the existing briefing. Second, extensions of time have been routinely granted when the Defence requests that the Trial Judgement or briefs on appeal be translated into either the other working language of the Tribunal (English or French) or into BCS in order that the accused may understand the Trial Judgement and provide input on appeal. ICTY practice in the latter situation varies. In some appeals,²⁴⁷ the briefing schedule has been delayed until the judgement has been translated into BCS after which it has continued at either the normal or an expedited pace. Instead of granting the appellant a delay in the briefing schedule pending receipt of the Trial Judgement in BCS, he/she might instead be given the opportunity to amend the notice of appeal or the appellant's brief following such receipt.²⁴⁸ This practice is generally considered to be more conducive to efficient pre-appeal management.
32. With respect to routine motions, involving extensions of time or word limits, the relevant ICTY practice direction has been amended to allow the Pre-appeal Judge to deal with those motions without hearing the other party unless the judge considers that there is a risk that the other party may be prejudiced. It is recommended that the Chamber contact the non-moving party's counsel to check whether he/she intends to respond and/or opposes the motion, thus avoiding a situation where the other party would spend resources in preparing a response and find out that the Pre-appeal Judge has already disposed of the motion.

C.3 Additional evidence on appeal

33. The admission of additional evidence on appeal is regulated by the Rules.²⁴⁹ To be successful, an applicant must demonstrate that the additional evidence was not available to him at trial in any form, or discoverable through the exercise of due diligence. When determining the availability at trial, the Appeals Chamber considers whether the party tendering the evidence has shown that it sought to make appropriate use of all mechanisms of protection and compulsion, available under the Statute and the Rules, to bring evidence before the Trial Chamber. The applicant must also show that the proffered evidence is both relevant to a material issue and credible, and that it could have been a decisive factor in the trial court's decision. Furthermore, the ICTY's jurisprudence has established that, when the evidence is relevant and credible, but was available at trial, or could have been discovered through the exercise of due diligence, the Appeals Chamber may still allow it to be admitted on appeal provided the moving party establishes that its exclusion *would* amount to a miscarriage of justice. That is, it must be demonstrated that if the additional evidence were considered at trial, it *would* have had an impact on the verdict.²⁵⁰

245 See Rules 108, 111, 112 and 113 ICTY RPE. Word limits are also provided under the Practice Direction on the Length of Briefs and Motions (IT:184/Rev.2).

246 See Rule 127 ICTY RPE on Variation of Time-limits and Rule 116 ICTR RPE.

247 See, e.g., *Mrkšić et al.*, D. Milošević.

248 Such practice is of course not available in the case of a self-represented accused.

249 See Rule 115 ICTY RPE.

250 *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, 3 March 2006, para.11; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos. IT-03-69-AR65.1 and IT-03-69-AR65.2, Decision on Prosecution's Application under Rule 115 to Present Additional Evidence in Its Appeal Against Provisional Release, 11 November 2004, paras.4-7; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Evidence, 31 October 2003, p. 3; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-

34. Initially, ICTY practice required that motions for admission of additional evidence be made as soon as the evidence was discovered. This practice resulted in numerous motions being filed in some cases, and also provided an excuse for requesting extensions of time for the briefing of the appeal.
35. Following a recommendation of the Working Group on Speeding up Appeals, the Rule was changed to delay the time for filing such motions to "no later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons, are shown for a delay". This change has had the expected positive effect of limiting the number of motions to admit additional evidence presented to the Appeals Chamber and allowing it to dispose of those motions with the benefit of having already analysed the Trial Judgement, the grounds of appeal and supporting arguments raised by the parties in preparation for the appeals hearing. Any party affected by those motions may present rebuttal material, and parties are permitted to file supplementary briefs on the impact of the additional evidence.
36. Difficulties in accessing evidence at the investigative, pre-trial and trial stages also occur during the appeals phase. Furthermore, positive solutions to those difficulties, such as the opening of a national archive post trial, may have a serious impact on appeals proceedings (see text box *Blaškić case: The impact on appeals proceedings of the opening of a national archive*). Due to archives in the region of the Balkans having become accessible only after a number of trials had concluded, the Appeals Chamber was seized of motions aimed at tendering large amounts of additional evidence on appeal. This is a situation that may be expected in countries where conflict is on-going or has recently ended.

Blaškić case: The impact on appeals proceedings of the opening of a national archive

The facts involved in the Blaškić case took place during the conflict between the Croatian Defence Council (HVO) and the Bosnian Muslim Army in the Lašva Valley region of Central Bosnia in the period from May 1992 until January 1994. The Appellant, Tihomir Blaškić, was the Commander of the HVO Armed Forces in Central Bosnia when the crimes were committed. On 3 March 2000, the Trial Chamber convicted him and imposed a sentence of 45 years' imprisonment, on the basis of nineteen counts, in relation to crimes occurring in that Region, including grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war and crimes against humanity, both for ordering the crimes and also as a superior under Article 7(3) of the Statute. Blaškić filed his notice of appeal on 17 March 2000. This long appeal was, characterized by the filing of an enormous amount of additional evidence. Among other reasons, this delay was due to the Republic of Croatia's lack of cooperation during the trial, and to the delay in the opening of its archives, which only occurred following the death of former president Franjo Tuđman on 10 December 1999, thus preventing the parties from utilizing those archival materials at trial.

*During the appeal proceedings, the Appellant filed four motions, seeking to admit over 8,000 pages of material as additional evidence on appeal. The first of these additional evidence motions was filed on 19 January 2001, and the last, on 12 May 2003. On 31 October 2002, the Appeals Chamber issued an order on the first three motions and deemed admissible part of the additional evidence in question. Having heard parties' oral arguments as to whether that evidence justified a new trial by a Trial Chamber, on some or all of the counts, the Appeals Chamber allowed the Prosecution to file its rebuttal material.**** Following the filing of the fourth and final motion by the Appellant, and rebuttal material by the Prosecution, the Appeals Chamber rendered its decisions on additional evidence on 31 October 2003. It found that, in the circumstances of this case, a re-trial was not warranted. A total of 108 pieces of evidence were ultimately admitted as additional evidence and several witnesses were heard in the evidentiary part of the hearing on appeal, which took place from 8 until 11 December 2003, and was followed by parties' final arguments.**

* Blaškić Appeal Judgement, paras. 2-6.

A, Decision on Applications for Admission of Additional Evidence on Appeal, 5 August 2003, p. 4.

D. Preparation for the appeals hearing

37. The task of the Appeals Chamber is particularly complex due to many factors, including the magnitude of appellate cases, the complexity of the legal issues raised, the tendency of parties to allege errors with respect to most factual findings in the Trial Judgement without necessarily meeting the standard on appeal. Significantly, the task is made more complex by the failure of some trial judgements to set out specific factual findings with respect to each element of the crimes charged, each element of the form of liability retained, or to organize factual findings according to specific incidents charged under each count.
38. Given these complexities, the ICTY decided that it would be advantageous to carry out a systematic analysis of all aspects of the appeal *prior* to the appeals hearing. This process included the preparation of a memorandum for each appeal that summarized the arguments of the parties. Upon reflection, this process was abandoned because it produced no real benefit. The Tribunal then adopted the practice of producing a "preparatory document" for the appeals hearing which analyses the appeals briefs. The preparatory document was designed to alert the judges to arguments that could be summarily dismissed, and it summarized other arguments and recommended ways to dispose of them. The document provided the necessary research supporting the drafter's recommendations, *i.e.*, legal research related to alleged errors of law and relevant excerpts from transcripts, exhibits, etc., related to alleged errors of fact. In this way, the Judges were given relevant material for deliberating the appeal issues. Finally, the preparatory document identified areas of the parties' briefs that required clarification and questions that the Judges may want to ask at the hearing, as well as aspects of the appeal that the judges may want the parties to particularly focus on during their oral submissions.
39. The preparatory document is drafted using the ICTY judgement template and following the appeals judgement style guide, in order to save time when issuing the first draft judgement. In practice, the document is circulated to the rest of the bench by the presiding judge approximately 4 weeks prior to the appeal hearing. This enables the Judges to indicate whether they wish to put specific questions to the parties prior to the hearing, usually as part of or an addendum to the scheduling order for the hearing. The preparatory document is aimed at fully informing the judges about the appeal and assisting them both at the hearing and during the deliberations. This is not to suggest that any hasty decisions are or should be made by Judges in advance of hearing an appeal. Rather, the preparatory document places the bench in the best situation possible to take full advantage of the parties' arguments during the hearing, as well as to subsequently optimize the use of its resources, focus on the critical areas of the appeal and prepare a reasoned, clear and concise appeal judgement within a time frame that is acceptable to the Tribunal. This approach not only optimises the period of time between the moment the briefing is complete and the time by which, all pre-appeal issues having been adjudicated, the Appeals Chamber is in a position to hear the appeal, but it also reduces the time for the delivery of the appeal judgement.
40. The type of questions that might arise from review of the parties' briefs range from asking them to point to specific evidence in the trial record, to clarify their position as to a particular legal requirement, or to state their views as to the appropriate procedure for the Appeals Chamber to follow should it come to certain conclusions on appeal. A sample of these types of questions can be found in the scheduling order issued in preparation for the appeals hearing in the *Orić* appeal case.²⁵¹

²⁵¹ *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, *Addendum to Order Scheduling Appeal Hearing*, 10 March 2008 ("*Orić* Scheduling Order"), these questions invited the parties *inter alia* to: 1) identify evidence in the trial record, if any, that supports or rebuts the allegation that one of the Appellant's subordinates incurred criminal responsibility; and 2) take a position as to what would be an appropriate course of action if the

E. Appeals hearing

41. The appeals hearings usually last one to two days depending upon the number of appellants. It is sometimes preceded by an evidentiary hearing, depending on the outcome of the motions filed by the parties for admission of additional evidence. Parties are reminded of the standard on appeal and are invited to be concise and to avoid simply repeating what is set out in their briefs (this reminder is increasingly communicated to the parties in advance as part of the scheduling order or an addendum to the order). Judges may ask the parties questions and it is now the Appeals Chamber's practice to grant time for convicted appellants who wish to make a brief address to the Chamber at the end of the hearing.

F. Deliberations and drafting of appeals judgement

42. Deliberations are usually held soon after the hearing. Following the deliberations, the presiding Judge oversees the preparation of a draft Judgement, amending the preparatory document as necessary to incorporate new information from the appeal hearing as well as implementing decisions made by the Judges at deliberations on the various issues raised by the appeal(s). The draft judgment is circulated to the bench for comments as soon as possible. It may arise that further deliberations are required once a first draft Judgement is circulated and/or further research has been conducted. A strict application of the standard of review on appeal is recommended. In order to limit the size of the appeals judgement, the practice is to dismiss on a summary basis arguments or even grounds which do not meet the standard. In doing so, the Appeals Chamber uses various approaches. One approach identifies the reason why a particular category of arguments does not meet the standard and merely lists the parties' arguments falling within that category without further discussion.
43. Examples have already been given of the Appeals Chamber's tendency to summarily dismiss arguments or ground which to not meet the standard of review on appeal, a variant of which can be found in the *Galić* Appeals Judgement (see text box *Galić case: Allegations of factual errors*).

Appeals Chamber were to uphold the Defence's allegation that the Trial Chamber failed to make the proper factual findings on legal elements required for his conviction under Article 7(3) of the Statute; see also *Prosecutor v. Blagoje Simić*, Case No. IT-95-09-A, Order Re-Scheduling Appeal Hearing, 05 May 2006, inviting both parties to 1) explain when in the trial proceedings a defective indictment could be cured in time to place the accused on timely notice of the concrete charges against him and the facts underpinning them so as to allow him time to prepare his defence; and 2) to allow the accused to take a position, if the Appeals Chamber were to find that the Appellant was not put on notice that he was charged with participating in a JCE, as to how his responsibility might be characterized by a different mode of liability pleaded in the indictment, and in that case, whether the elements of that mode of liability would be fulfilled based on the Trial Judgement findings.

44. Upon receipt of the judges' comments, a second draft incorporating those comments is then similarly circulated. This new draft highlights changes between the first and second drafts, and also indicates areas where further deliberations are required or where there is no clear majority. Following reception of the judges' second round of comments, a third and typically final draft is then circulated before signature. The final stage of the drafting process may also include circulation of draft declarations, as well as separate and/or dissenting opinions, which may in turn necessitate a final adjustment of the draft Judgement. Once the date on which the Judgement will be issued is fixed, a scheduling order informing the parties is issued and filed publicly. A summary version of the judgement is prepared to be read at a public hearing by the presiding judge in the presence of the bench and the parties. Bound copies of the Appeal Judgement are made available in one of the working languages of the Tribunal for distribution to the parties at the hearing. Shortly after the Judgement, it is desirable for the Tribunal to issue a press release in all of its official languages. This press release should be easily understandable to non-jurists and should focus on the main aspects of the Judgement. These post-Judgement press releases are usually prepared in cooperation between the Chambers and the Press Office.

Galić case: Allegations of factual errors

In Galić, the Appeals Chamber discussed in some detail a particular allegation that the Trial Chamber committed a factual error by failing to consider the evidence before it. The Appeals Chamber considered that the appellant's allegation of factual error was erroneous and based on a miscomprehension of the standard of proof beyond reasonable doubt. The Appeals Chamber then merely listed the allegations falling under that same category.

Para. 260. Similarly, Galić states on various occasions that the Trial Chamber either did not take into account the fact that there was frequent fighting or ignored the activities of the ABiH. This is incorrect - the Trial Chamber frequently mentioned and considered the position of ABiH forces.

Para. 261. The following allegations are also included in the category of evidence considered by the Trial Chamber:

(a) The allegation that the Trial Chamber did not consider the evidence of Defence witnesses Dunjić and Kunjadić in relation to Scheduled Sniping Incidents 10 and 6. It did consider the evidence.

(b) The allegation that the Trial Chamber did not consider evidence regarding military targets in Alipašino Polje. The Trial Chamber did consider this evidence.

(c) The allegation that the Trial Chamber did not consider the layout of ABiH forces with regard to the Dobrinja area. It did.

(d) The allegation that the Trial Chamber should have considered the fact that the grenade in Scheduled Shelling Incident 2 hit somebody. The Trial Chamber considered exactly that.

G. Management of interlocutory and other appeals

45. Interlocutory appeals are appeals brought during the pre-trial or trial phase against the trial chambers' decisions, as opposed to appeals from trial judgements. Depending on their nature, interlocutory appeals may be time consuming and can impact the overall length of pre-trial and trial processes. Depending on the quantity of interlocutory appeals, these appeals can limit the Appeals Chamber's capacity to deal with appeals from judgements in a reasonable time. It is therefore important to avoid unnecessary interlocutory appeals and to adopt an approach to dealing with those appeals that guarantees their speedy and fair disposal.
46. In an early attempt to expedite proceedings by weeding out unmeritorious appeals, the Rules provided that a party seeking to appeal must file an application for leave to appeal from a three-judge bench of the Appeals Chamber. The Rules that were applicable to interlocutory appeals at the time limited them to the following two situations: (1) if the appealed decision would cause such prejudice to the case of the party seeking leave

as could not be cured by the final disposal of the trial including post-judgement appeal and; (2) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or to international law generally. That practice proved to be counter-productive because it used judicial resources of the Appeals Chamber for the purpose of determining whether leave should be granted when these resources could have been immediately and more efficiently directed to disposing of the merits of the appeal. Furthermore, in many instances, it was ultimately found more appropriate for the Chamber having rendered the impugned decision, rather than the Appeals Chamber, to act as a filter and determine which decisions should be subject to interlocutory appeal. The early practice was therefore eliminated from the Rules upon the recommendation of the Working Group on Speeding up Appeals. It was replaced by a system in which there are certain appeals as-of-right and other appeals that require certification by a Trial Chamber. Interlocutory appeals as-of-right include appeals from:

- ◆ decisions on motions challenging jurisdiction,²⁵²
 - ◆ decisions related to provisional release,²⁵³
 - ◆ decisions from the Referral Bench,²⁵⁴ and
 - ◆ decisions on contempt proceedings.²⁵⁵
47. Appeals from all other decisions require certification by a Trial Chamber. Included are appeals of decisions on preliminary motions other than those challenging jurisdiction (*i.e.* alleging defects in the form of the indictment, seeking severance of counts joined in one indictment or seeking separate trials; or raising objections based on the refusal of a request for assignment of counsel),²⁵⁶ and appeals of decisions on motions other than a (pre trial) preliminary motion. In the latter case, a Trial Chamber may grant certification if the decision involves an issue that would "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."²⁵⁷
48. The Appeals Chamber has abandoned its early practice of preparing a preliminary memorandum setting out the issues raised by interlocutory appeals and proposing ways to dispose of them. In most instances, there is no need to prepare such a memorandum. A draft decision should be self-explanatory and, if necessary, can incorporate options or notes from the judge circulating the draft. A more effective approach is favoured and successfully implemented by the ICTY and ICTR Appeals Chambers. As soon as the briefing is completed, the presiding judge prepares and circulates a draft decision to the other members of the bench. The draft decision includes options or notes where necessary and forms the basis on which comments are made. These comments are in turn incorporated and a new draft circulated in the same fashion as is done for appeals from Judgements.
49. Interlocutory appeals are often brought against decisions taken by the Trial Chambers in areas where they exercise discretion. In such appeals, the issue is not "whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision".²⁵⁸ Thus, when challenging a discretionary decision, the moving party

252 Rule 72(B)(i) ICTY RPE.

253 Rule 65(D) ICTY RPE.

254 Rule 11bis(I) ICTY RPE. Pursuant to Article 11bis of the Rules, the Referral Bench is competent to decide, after an indictment has been confirmed and prior to the commencement of trial, on the Chamber's own initiative or at the request of the Prosecutor, whether a case should be referred to the authorities of a State for trial within that State.

255 Rule 77(J)-(K) ICTY RPE.

256 Rule 72(B)(ii) ICTY RPE.

257 Rule 73(B) ICTY RPE.

258 *Milošević* Decision on Joinder, para.4.

X. Appeals

must establish that the Trial Chamber committed a "discernible" error resulting in prejudice to that party.²⁵⁹ The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."²⁶⁰

H. Expedited appeals procedure

50. A practice, aimed at expediting the proceedings related to interlocutory appeals, appeals from contempt decisions and appeals from Referral Bench decisions, is now reflected in the Tribunals' Rules as recommended in 2005 by the Working Group on Speeding Up Appeals. For such appeals, this new practice applies an expedited appeals procedure that includes a reduced briefing schedule, and the possibility of determining appeals entirely on the basis of written briefs.²⁶¹ A reduced briefing schedule also applies to sentencing appeals which are notably less complex and voluminous than other appeal judgements. According to this reduced briefing schedule, the Appellant's Brief is to be filed within thirty days of filing the notice of appeal, the Respondent's Brief is due within thirty days of the filing of the Appellant's Brief, and the Brief in Reply is to be filed within ten days of the filing of the Respondent's Brief.²⁶²

259 Appeals Chamber's Decision of 8 December 2006, para.16; see also *Prlić* Decision on Cross-Examination, p. 3 citing *Milošević* Decision on Joinder, para.4. See also *ibid.*, paras. 5-6; see also *Milošević* Decision on the Assignment of Defence Counsel, para.10; Decision on Radivoje Miletić's Interlocutory Appeal, para.6 citing *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release, 17 October 2005 ("*Stanišić* Provisional Release Decision"), para.6.

260 Decision on Radivoje Miletić's Interlocutory Appeal, para.6 & n. 17 citing *Stanišić* Provisional Release Decision, para.6 & n. 10. The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations..." *Milošević* Decision on Joinder, para.5.

261 Rule 116bis ICTY RPE.

262 As opposed to respectively seventy-five days, forty days and fifteen days, in other appeals from judgments (Rules 111-113 ICTY RPE).

XI. Review

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1. To avoid miscarriages of justice, provision should be made to hear genuinely new facts, which come to light after all trial and appeal proceedings have been completed. Despite a tribunal's efforts to examine all aspects of a case during the trial and the appeal, important new information that might affect the final verdict can emerge after the close of the case, may arise from evidence admitted in a later one. In addition, through no fault of the parties, important new witnesses may be found or come forward and important new documents may become available from a previously inaccessible archives or States. As in most domestic jurisdictions, the ICTY Statute and Rules provide for a review procedure distinct from the ordinary appellate process. {This section briefly sets out the legal contours of that procedure and describes how the Tribunal practically administers requests for review}.
2. The Tribunal has not yet granted a request for review. As such, there is no practice that supports such review. The standard for granting review strikes a balance between two competing interests. On the one hand, it ensures the finality of the Tribunal's judgements. Experience shows that applicants will not hesitate to file motions seeking to re-litigate issues finally decided on appeal, but masquerading as requests for "review".²⁶³ To prevent a deluge of applications requesting nothing more than a second appeal, the test for review is strict, and it has been rigidly applied by the Tribunal (see text box *Žigić case: discouraging frivolous motions for review*).
3. On the other hand, proceedings before the Tribunal present distinct difficulties in obtaining all of the evidence relevant to a case in due time. As mentioned above, the Tribunal's cases are very complex and demand evidence relating to a wealth of alleged facts. Moreover, they often involve former high-ranking persons within the military and/or political structure. The proceedings, which are primarily adversarial, require the parties to gather a vast amount of evidence which is often in the sole possession of States. Given the Tribunal's limited enforcement mechanisms and search and seizure powers, the parties largely rely on State cooperation for discovering material to support their cases. Yet, the political climate in a State may not allow for disclosure of the sought-after material until after the case has been heard. Review ensures that such material, all criteria being met, will not be excluded from the fact-finding process and prevents potential miscarriages of justice (see text box *Blaškić case - Unavailability of large amounts of evidence due to a lack of State cooperation*) (see *Žigić* Decision on Reconsideration, which illustrates the balancing of these two interests. In that decision, the Appeals Chamber departed from its earlier holding in *Čelebići* that there is, in addition to review, a possibility to "reconsider" judgements²⁶⁴).

263 See *Prosecutor v. Zoran Žigić a/k/a "Žiga"*, Case No. IT-98-30/1-R.2, Decision on Zoran Žigić's Request for Review Under Rule 119, 25 August 2006 ("Žigić 25 August 2006 Decision"), para.10.

264 *Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo*, Case No. IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, paras.49-53.

A. Legal contours of review

4. Under Article 26 of the Statute and Rules 119 and 120, review is available where:

- ◆ there is a new fact;
- ◆ the new fact was not known to the moving party at the time of the original proceedings;
- ◆ the failure to discover the new fact was not due to a lack of due diligence on the part of the moving party; and
- ◆ the new fact could have been a decisive factor in the original decision.²⁶⁵

5. The term "new fact" refers to evidentiary information supporting a fact that was not in issue during the trial or appeal proceedings,²⁶⁶ as opposed to new information of a merely factual nature. For example, in the *Delić* Review Decision the Appeals Chamber did not allow a review based upon the statement of a new witness that, before being assaulted, a detention camp victim had been pulled from a line of detainees by a person other than accused. Since two witnesses at the trial had identified the accused as the person who pulled the victim from the line, and since the accused contested their testimony at the time, the statement of the new witness was merely additional evidence and did not constitute a new fact. Because the information must be "evidentiary" in nature, legal developments do not qualify as "new facts".²⁶⁷ The requirement that the fact "was not in issue" during the proceedings means that it must not have been among the factors the deciding body could have taken into account in reaching its verdict.²⁶⁸ Essentially, the moving party must show that the Chamber did not know about the fact in reaching its decision.²⁶⁹

6. The four criteria for granting review are cumulative, meaning that all must be satisfied or review will not be granted. However, in wholly exceptional circumstances, review may be granted even if the new fact was known to the moving party at the time of the original proceedings or not discovered because of a lack of due

Žigić case: Discouraging frivolous motions for review

In Žigić, the Appeals Chamber discouraged the repeated filing of frivolous motions for review, finding it an abuse of the Appeals Chamber's proceedings, and warned of possible sanctions:

This is the third motion that Žigić has filed before the Appeals Chamber making baseless and frivolous claims with respect to the integrity of the Appeals Chamber Judgement against him. The first, a request for reconsideration of the Appeals Chamber's judgement, was found frivolous, and the second, an application for a finding that he was denied a fair trial due to mistakes made by his assigned Counsel, was dismissed as being without merit.

*Likewise, this Request for review of the Appeals Chamber Judgement is completely without merit. Further, the blatantly untruthful allegations made by Žigić regarding his ignorance of the Prosecution Summary, and attempts by the Prosecution to conceal it from him, go beyond being frivolous but constitute an abuse of the Appeals Chamber's proceedings. Žigić should take this as a stern warning from the Appeals Chamber that any further attempts to seize the Appeals Chamber with similarly unfounded motions will result in the Appeals Chamber imposing strict sanctions.**

* *Žigić* 25 August 2006 Decision, para.10.

²⁶⁵ This test has been uniformly and consistently applied in all major review decisions. See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecutor's Request for Review or Reconsideration, 23 November 2006 ("*Blaškić* Review Decision"), para.7; *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Defence Request for Review, 31 October 2006 (Public Redacted Version) ("*Radić* Review Decision"), para.10; *Žigić* 25 August 2006 Decision, para.8; *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R.3, Decision on Motion for Review, 2 April 2004, p. 3; *Prosecutor v. Drago Josipović*, Case No. IT-95-16-R2, Decision on Motion for Review, 7 March 2003 ("*Josipović* Review Decision"), para.12; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-R, Decision on Motion for Review, 30 July 2002, filed 8 August 2002 ("*Tadić* Review Decision"), para.20; *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-R, Decision on Motion for Review, 2 May 2002 ("*Jelisić* Review Decision"), pp. 2-3; *Prosecutor v. Hazim Delić*, Case No. IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 ("*Delić* Review Decision"), para.8.

²⁶⁶ See, e.g., *Blaškić* Review Decision, paras.14-15; *Tadić* Review Decision, para.25. The "new fact" need not be proven for review to be granted. See *Blaškić* Review Decision, para.30.

²⁶⁷ *Tadić* Review Decision, para.41; *Jelisić* Review Decision, pp. 2-3.

²⁶⁸ See, e.g., *Blaškić* Review Decision, paras.14-15; *Tadić* Review Decision, para.25.

²⁶⁹ See, e.g., *Blaškić* Review Decision, para.14.

diligence (second and third criteria above). In those cases, the party seeking review must show that ignoring the new fact would result in a miscarriage of justice.²⁷⁰

7. Only decisions that terminate the proceedings in a case can be subject to review.²⁷¹ While this generally means appeal judgements, in those cases where an appeal is not filed the Trial Judgement will be the final decision that terminates the proceedings. Provided the deadlines for the filing of an appeal have passed, review is the only available means to revisit those decisions.²⁷² It should be noted, however, that review is an exceptional procedure. Where a Judgement has been appealed, it does not represent a second appeal.²⁷³ Consequently, the material that may be considered during a review proceeding (which goes to prove facts not in issue at trial) differs from material that may be considered as additional evidence in appeal proceedings (which goes to prove facts in issue at trial).²⁷⁴
8. The Tribunal's review proceedings are open to both the Defence and the Prosecution. However, the Prosecution can only seek review within one year of the final judgement.²⁷⁵ As far as representation is concerned, an indigent applicant is only entitled to assigned counsel at the Tribunal's expense if review is authorized. Even then, the Tribunal must decide that counsel is necessary to ensure the fairness of the proceedings. Counsel may be assigned also at the preliminary examination stage though normally for a very limited duration.

Blaškić case: Unavailability of large amounts of evidence due to a lack of State cooperation

Blaškić illustrates the problem of States being unwilling to provide material to parties before the Tribunal. In its judgement, the Appeals Chamber noted that:

*[t]his long appeal has, in part, been characterized by the filing of an enormous amount of additional evidence. This was inter alia due to the lack of cooperation of the Republic of Croatia at the trial stage and to the delay in the opening of its archives, which only occurred following the death of former president Franjo Tuđman on 10 December 1999, thus preventing the parties from availing themselves of the materials contained therein at trial. During the appeal proceedings, the Appellant filed four motions pursuant to Rule 115 of the Rules [...]. In these motions, he sought to admit over 8,000 pages of material as additional evidence on appeal.**

*The amount of additional evidence was so vast that the Appeals Chamber even considered whether it justified a new trial by a Trial Chamber.***

* *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 ("Blaškić Appeal Judgement"), para.4 (footnote omitted).

** *Blaškić Appeal Judgement*, paras 5-6; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Scheduling Order, 31 October 2002, p. 3.

270 See, e.g., *Blaškić Review Decision*, para.8; *Tadić Review Decision*, paras.26-27. The evaluation of whether "wholly exceptional circumstances" exist is case-specific. For examples of when such circumstances were not found, see, e.g., *Tadić Review Decision*, paras.27 and 32-33; *Josipović Review Decision*, paras.31-38; *Delić Review Decision*, paras.17-22.

271 Rule 119(A) ICTY RPE; *Blaškić Review Decision*, paras.22-23.

272 *Prosecutor v. Zoran Žigić a/k/a/ "Žiga"*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, paras.8-9 ("*Žigić Decision on Reconsideration*").

273 *Tadić Review Decision*, para.24.

274 See, e.g., *Radić Review Decision*, para.22; *Delić Review Decision*, paras.10-11; see also *Prosecutor v. Duško Tadić*, Case No. IT-94-I-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, paras.28-32.

275 Art. 26, ICTY Statute; Rule 119(A), ICTY RPE.

B. Practical issues pertaining to review

B.1 Competent Chamber

9. The moving party should file its request for review with the judicial body that rendered the final judgement. When the parties have not lodged an appeal, this body is the Trial Chamber. However, when the judgement has been appealed, the request should be filed with the Appeals Chamber which will then determine whether it can address the request itself or whether it is necessary to refer the case to a reconstituted Trial Chamber.²⁷⁶
10. It may be that some or all of the Judges composing the original Chamber are unable to hear the request, for example because they are no longer with the Tribunal²⁷⁷ (see text box *Tadić case: Considerations on absence of original Trial Judges*).
11. Similar to the practice for pre-appeal proceedings, if the President of the Tribunal is on the bench thus constituted, he will preside. Otherwise, the Judges will elect a presiding Judge amongst themselves.

Tadić case: Considerations on absence of original Trial Judges

The Tadić Review Decision illustrates relevant considerations in this respect. In that decision, the Appeals Chamber considered that: 'The absence, in whole or in part, of the Judges composing the Chamber which rendered the final judgement does not eliminate the competence of that body to deal with a request for review. Thus, in the absence of the Judges who composed the Trial Chamber or the Appeals Chamber which originally rendered the final judgement, a request for review shall still be filed with either of these two bodies and not with the President. Once a request for review is filed with the competent body, it will be for the President to appoint Judges to deal with the request for review as he does in the case of interlocutory appeals and appeals on the merits. Due to the need to have Judges who are familiar with the facts of the case, the President will appoint the Judges who originally heard the case. As set out in Rule 119 of the Rules, should these Judges no longer be at the International Tribunal or be prevented from hearing the requests for review for other reasons, the President will assign new Judges to replace the original ones'.

B.2 Pre-review

12. The presiding Judge may designate a pre-review Judge from the bench.²⁷⁸ The pre-review Judge coordinates all work on pre-review motions and ensures, among other things, that the case is completely briefed within a reasonable period of time. Any brief in response to a request for review must be filed within forty days of the filing of the request and a reply must be filed within fifteen days of the filing of the response.²⁷⁹ The pre-review Judge is competent to adjudicate requests for extension of time or motions regarding word limits and other motions that do not go to the substance of the review request. Rule 127 of the Rules, permitting extensions of time-limits for "good cause" shown, applies to briefs on review.²⁸⁰ Unlike the trial and appellate stage,²⁸¹ there is no Practice Direction specifically addressing the length of these briefs, but some guidelines have crystallised in the Tribunal's jurisprudence.

²⁷⁶ Rule 119(A), ICTY RPE; *Tadić* Review Decision, para.22.

²⁷⁷ See *Tadić* Review Decision, para.23.

²⁷⁸ See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Confidential Order of the Presiding Judge Appointing a Pre-Review Judge, 25 October 2005 (ordered public in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Order Withdrawing Confidential Status of Pre-Review Order and Decisions, 5 December 2005 ("*Blaškić* 5 December 2005 Order"). When the request of the review is properly before the ICTY Appeals Chamber, see Rules 65 *ter* and 107 ICTY RPE,.

²⁷⁹ Rule 119 ICTY RPE.

²⁸⁰ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Confidential Decision on Motion for Extension of Time, 9 November 2005, p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Confidential Decision on Request for Extension of Time and Motion to Enlarge Time, 26 October 2005, p. 3 (both ordered public in *Blaškić* 5 December 2005 Order). For the practice on "good cause".

²⁸¹ See Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005.

13. Neither the Statute and the Rules nor the jurisprudence of the Tribunal require requests for review to be heard orally.²⁸² While the Tribunal is not prevented from hearing the parties orally on these requests, this has not yet been deemed necessary in any ICTY review cases. Requests are thus regularly decided solely on the basis of the parties' written submissions.
14. As with interlocutory appeals, a summary of the parties' submissions along with a preliminary analysis is submitted by the presiding Judge to the bench in the form of a draft decision, including options where necessary. The ensuing deliberations are done by way of confidential²⁸³ memoranda between the Judges setting forth their comments on the draft decision. Those changes to the draft that are supported by a majority of the Judges are implemented, and the presiding Judge then circulates a second draft to the bench, highlighting as necessary areas where further deliberations are required or where there is no clear majority.
15. Following reception of the Judges' second round of comments, a third and often final draft is then circulated before signature. The final stage of drafting may also include circulation of draft declarations, as well as separate and/or dissenting opinions, which may in turn necessitate a final adjustment of the draft decision. Once the decision on the request for review has been signed, it is filed with the Registrar and distributed to the parties. The decision is also made available to the public, *inter alia* by posting it (or if it contains confidential information, a public version thereof) on the Tribunal's website.
16. It should be noted that, because the four criteria for granting review are cumulative and thus mutually exclusive, if the applicant has failed to demonstrate one of them, the Judges could decide not to address the applicant's submissions on the other criteria in their decision. Such an approach was taken in the *Radić* Review Decision:
17. 23. Having found that the Request for Review presents no "new fact" within the meaning of Article 26 of the Statute and Rules 119 and 120 of the Rules, the Appeals Chamber declines to consider whether the second, third and fourth requirements for review have been met.
18. However, the circumstances of the case may also warrant consideration of some of the criteria even if the Chamber finds that another criterion is not met. The *Tadić* Review Decision provides an example. In that case, the applicant put forth as a "new fact" a finding reached by the Appeals Chamber in a contempt judgement rendered after the appeal judgement in the *Tadić* case.²⁸⁴ The Appeals Chamber found that the finding in the contempt case constituted a new fact within the meaning of Rule 119 of the Rules; however, the Appeals Chamber concluded that the finding was not "a 'new fact not known to the moving party' or that could have not been discovered through the use of the ordinary diligence under Rule 119 of the Rules."²⁸⁵ Nevertheless,

282 An oral hearing is only required if the request is granted. See Rule 120 ICTY RPE. The Tribunal's practice of deciding requests for review without an oral hearing can be illustrated analogously by reference to the similar practice on pre-trial motions and interlocutory appeals. See *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, paras.65-67; see also *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para.72 (holding that "a general assertion that the issues are complex and important" did not constitute "good reason" to hold oral hearing on pre-trial motion in that case); but see *Prosecutor v. Milan Kovačević et al.*, Case No. IT-97-24-PT, 95-4-PT, 95-8-PT, Scheduling Order, 7 May 1998 (considering that an oral hearing on a motion for joinder "may facilitate" resolution of the motion in that case); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Order Regarding Esad Landžo's Request for Oral Argument, 26 March 1999, p. 2; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.1, Decision on Miroslav Separović's Interlocutory Appeal Against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 4 May 2007, para.14 (rejecting request for oral hearing of interlocutory appeal, *inter alia*, in view of extensive submissions made and filed by parties before both the Trial Chamber and Appeals Chambers). *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.2, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para.12.

283 Cf. Rule 29 ICTY RPE.

284 *Blaškić* Review Decision, paras.29-30.

285 *Ibid.*, at para.32.

the Appeals Chamber proceeded to consider "whether the new fact would have been a decisive factor in reaching the verdict,"²⁸⁶ considering the principle that the fact would be decisive:

27. [...] whenever it is presented with a new fact that is of such strength that it would affect the verdict, may, in order to prevent a miscarriage of justice, step in and examine whether or not the new fact is a decisive factor, even though the second and third criteria under Rule 119 of the Rules may not be formally met.

19. Nevertheless, the Judges always examine all four criteria in their deliberations in order to appreciate all aspects of the case and reach a fully informed decision. In practice, the Judges thereby ensure that the evidence submitted in support of the alleged "new facts" does not demonstrate a possible miscarriage of justice.

B.3 Practices and trends

20. Recent years have seen an increase in requests for review before the Tribunal, and this is partly due to the increased number of terminated cases as the Tribunal completes its mandate. Given the absence of any statute of limitations for review requests by the Defence, requests may continue to be filed after the close of the Tribunal. The Tribunal is currently considering an appropriate residual mechanism to deal with, *inter alia*, such requests.

²⁸⁶ *Ibid.*, at para.33.

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1. The role of the ICTY in a criminal proceeding is not over with the pronouncement of the judgement. However, the Tribunal's own Detention Unit was intended only to house accused on remand before and during their trials and appeals. Convicted prisoners serving lengthy sentences must do so in national prison systems outside the territory of the former Yugoslavia. If a conviction is entered, and a sentence of imprisonment is imposed, enforcement of that sentence constitutes a new stage of the Tribunal's work. The enforcement of a sentence is a stage that often lasts longer than the trial process, and requires the support of the international community, a great deal of preparation and the ability to react promptly to unexpected difficulties.
2. ICTY's experience in the enforcement of sentences constitutes an important part of its legacy. In identifying the best strategies to deal with the enforcement of sentences, the Tribunal (as was true of many other aspects of its work) had very little precedent before it. Unlike a State, the ICTY has no police force, no prisons, no prison system or coercive powers to enforce its sentences. As in many other aspects of its work, the ICTY must rely on the cooperation of States to enforce its sentences.
3. The enforcement system envisaged by the drafters of the ICTY Statute is illustrated in the Secretary General's Report which suggested that the Security Council would make appropriate arrangements to obtain from States an indication of their willingness to accept convicted persons, and would then communicate this information to the Registrar who would prepare a list of States in which the enforcement of sentences would be carried out.²⁸⁷ The Secretary General also observed "States should be encouraged to declare their readiness to carry out the enforcement of prison sentences in accordance with their domestic laws and procedures, under the supervision of the International Tribunal".²⁸⁸
4. Accordingly, Article 27 of the Statute provides that "imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to

287 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para.122.
288 *Ibid.*, at para.121.

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accept convicted persons". In identifying the sources governing the conditions of detention, Article 27 further states that "imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal".

5. Thus, unlike other forms of assistance, such as surrender, transfer, deferral and provision of evidence, participation in enforcement of prison sentences is not obligatory for States. It is also significant that, unlike all other phases of its work, at the enforcement stage, the Tribunal defers to national legislations as sources of applicable law.

A. The Registry's preliminary work

A.1 Negotiation of enforcement agreements with States

6. The Registrar is given responsibility for identifying suitable States and approaching their administrations for the negotiation and conclusion of framework or *ad hoc* agreements for the enforcement of sentences. Between 1997 and 2008, the Tribunal concluded framework agreements with seventeen States. Several States have indicated that they could not enter into a general agreement, but would consider enforcement of the Tribunal's sentences on a case-by-case basis. Accordingly, specific *ad hoc* agreements have also been concluded by the Tribunal with one particular State.
7. For humanitarian reasons, agreements are negotiated mainly with European States. In identifying potential enforcement States, the Tribunal is particularly attentive to the geographical distance between the enforcement States and the former Yugoslavia. Geographical inaccessibility can hinder family and friends from visiting prisoners.
8. Several other points are relevant for the conclusion of enforcement agreements. In terms of legal requirements for the conclusion of agreements, there is a prerequisite for the enforcement State to adopt appropriate legislation implementing the Statute of the Tribunal, specifically addressing the methods of enforcing the Tribunal's sentences under domestic law. Enforcement also requires that conditions of imprisonment be compatible with international human rights standards.²⁸⁹
9. In addition to the above geographical and legal requirements, the negotiation of enforcement agreements is also subject to a number of constraints on the part of the States, such as the high costs of enforcement for developing or less developed countries, prevailing political/popular hostility toward foreigners, the corresponding unwillingness of Governments to take actions that may risk political/popular opposition, the reluctance of Governments to accept inspections of their prisons by external monitoring bodies, and a State's lack of an appropriate socio-cultural environment in its prisons for persons from the former Yugoslavia (including the absence of other prisoners with similar socio-linguistic-cultural backgrounds).
10. In light of those constraints, a persistent and creative approach to the negotiation of enforcement agreements is a key element of the Tribunal's approach to overcome States' potential reluctance and ultimately enhance its enforcement capacity. In order to ensure the support from an additional number of States, the Tribunal

²⁸⁹ Standard Minimum Rules for the Treatment of Prisoners approved by ECOSOC resolution 663 C (XXIV) of 31 July 1957 and 2067 (LXII) of 13 May 1977, the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment adopted by the General Assembly resolution 43/173 of 9 December 1988 and the Basic Principles for the Treatment of Prisoners adopted by General Assembly resolution 45/111 of 14 December 1990.

maintains permanent pressure, through regular discussions with UN Member States, to increase the awareness of its enforcement needs. The Tribunal's direct approaches to embassies in the Netherlands, with a dense meeting schedule, as well as discussions with Permanent Missions to UN Headquarters in New York, have proved to be very fruitful. The European Union Presidency's organization of seminars in The Hague regarding enforcement of sentences, as well as the mention of enforcement needs during the Tribunal's bi-annual Diplomatic Seminars, have also been very useful.

11. In negotiating enforcement agreements, it is essential to ensure that potential conflicts between national laws on pardon and commutation of sentences and the primacy of the Tribunal are appropriately addressed, and that the authority of the President over sentences pronounced by the Tribunal is preserved. Under a number of State constitutions, pardon decisions are vested in the head of State. Those laws can conflict with the ICTY's primacy and the authority of the ICTY President to determine whether a pardon or commutation would be appropriate for an accused convicted by the Tribunal. To address potential conflicts, the enforcement agreements provisions usually specify that where national law allows pardons or commutations, but the ICTY President does not find those measures to be appropriate, the convicted person will be transferred to the Tribunal or to another State designated by the Tribunal for further enforcement of the sentence. That practice appears to be the best solution to potential conflicts between domestic legislation and the Tribunal Statute without States having to engage in lengthy parliamentary or internal discussions reviewing their domestic legislation.
12. In light of the relevant provisions of their respective Criminal Procedure Codes, a number of enforcement States have limited the duration of sentences that can be enforced in their prisons. For example, some States are not legally allowed to enforce sentences above 15, 20 or 30 years. In order to address these potential conflicts between domestic legislation and the primacy of the Tribunal's sentences, the Tribunal has suggested inclusion of a specific provision in the enforcement agreements whereby the State authorities are allowed to enforce only part of the sentences pronounced by the Tribunal. Article 3 of the Model Agreement for enforcement of sentences has thus been modified in a number of instances to provide that if the sentence pronounced by the Tribunal exceeds the maximum sentence permitted by the national law, only a portion of the Tribunal sentence amounting to the maximum sentence permitted under domestic legislation shall be enforced in that State. The convicted person would then be transferred back to the Tribunal's custody or directly to any other State designated by the President for enforcement of the remaining part of the sentence.

A.2 Preliminary inquiry with States

13. The Registrar is responsible for ensuring the swift transfer of convicted persons to the enforcement States. The Tribunal has recognized that it is a fundamental right of an accused person who is detained while awaiting trial to be separated from convicted persons who are serving a sentence of imprisonment.²⁹⁰ As the Tribunal has a detention facility as opposed to a prison facility, it is imperative that convicted accused are transferred out of the detention unit as soon as possible following conviction. However, the process is a diplomatic one and in most instances will take at least some months to complete. It could take more than a year before a final response is provided to the Tribunal when an *exequatur* procedure is required by the enforcement State's legislation prior to enforcement of the sentence, in which case translation of the Tribunal's judgement into the language of the requested State is necessary.²⁹¹ In some instances, accused with sentences of a few years

²⁹⁰ See Order to the Registrar to Separate Convicted and Non-Convicted Detainees Held in the Detention Unit, IT-06-89-Misc.1, 15 June 2006.

²⁹¹ Generally the approach taken for enforcement of the Tribunal's judgments is distinct from the one taken by most countries when enforcing foreign sentences and judgments of the Tribunal, and do not require any transformation or conversion to be enforced by States. A number of

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only have been released from the detention unit, their sentence of imprisonment having been completed upon issuance of the appeals judgement or shortly thereafter. To address delays in transferring convicted persons from the UNDU, the UNDU has had to implement, to the extent possible in such a small remand centre, a residential separation regime. In doing so, it is crucial to bear in mind the potential adverse effect of total separation of convicted persons within the UNDU. Considering the low number of detained convicted persons being held by the ICTY, a total separation regime could lead to situations of forced isolation, likely to have adverse effect on the individual's mental situation.

14. Costs related to translation of a Tribunal's judgement into a State's language for the purpose of starting the *exequatur* procedure are in principle borne by the State in question. Such cost can, depending upon the size of the judgement, be prohibitive. The Tribunal recently accepted a State's request to cover the costs of translating supporting documents required for an *exequatur* procedure. The Tribunal's commitment to cover those costs is, however, subject to the State's willingness to provide an estimate of costs and to the State's willingness to have the work done by a certified translator. This solution appears to be in the best interest of the Tribunal as the conclusion of the enforcement agreement was being prevented because of the translation requirements. This practice is expected to considerably reduce delayed responses to the Tribunal's enforcement requests where recognition of the Tribunal's judgements and their translation into the language of the enforcement State for that purpose are required.
15. With respect to each convicted accused, the Registrar must first identify an appropriate enforcing State. Once the Registrar has done so, he will send a preliminary request to that State. Although enforcement agreements foresee that a request will be made for the enforcement of a final sentence, the practice has been for the Registrar to make a preliminary request prior to the final conviction of a particular accused, or conviction by a Trial Chamber. This preliminary approach has been prompted by the extended delays in State responses, and an effort to reduce as much as possible the time spent by a convicted person in the United Nations Detention Unit (UNDU). While that approach has reduced detainees' time spent in the UNDU awaiting transfer, and therefore appears to be the best practice, its efficacy can be questioned under specific certain circumstances. In situations when recognition of the Tribunal's judgement is required prior to enforcement of the sentence in the enforcement State, approaching States prior to the final conviction does not allow sufficient time.
16. As outlined above, the requested State may be either one of the States that have declared their willingness to accept convicted persons pursuant to Article 27 of the Statute, and signed an agreement with the Tribunal to that effect, or the Registrar may approach States on an *ad hoc* basis for the enforcement of specific sentences. To identify potential enforcement States for the enforcement of a particular sentence, the Registrar remains fully informed of the domestic legal requirements and policy limitations expressed by enforcement States with regard to:
 - ◆ the maximum duration of the sentence that can be enforced;
 - ◆ the maximum number of sentences that can be enforced;
 - ◆ the minimum duration that can be enforced;
 - ◆ the importance of a compatible socio-cultural environment for the convicts and of geographical accessibility for their families.
17. The Registrar also strives to ensure proper burden-sharing between States enforcing sentences in terms of both the number of convicted persons transferred and the length of the sentences imposed.

States with which the ICTY signed enforcement agreements do require though that an *exequatur* procedure or judicial procedure be undertaken by a domestic Court whereby it formally recognizes that a judgement issued by the Tribunal should be executed in that State.

18. To ensure that convicted persons are transferred without delay upon final conviction, the Registrar will ask the States concerned to give a preliminary indication of their preparedness to carry out the convicted person's sentence. Together with the results of this, the Registrar will provide potential enforcement States with a certified copy of the judgement, a statement indicating how much of the sentence has already been served, including information on pre-trial detention and any other relevant documents that may be requested by the State (e.g., social assessment, information about behaviour in detention, threat and risk assessment and information on medical/psychological status).
19. While the Rules allow the Registrar to approach more than one State to seeking enforcement of a sentence, in practice, the Registrar generally identifies one State at a time. It follows this practice in an effort to avoid the potential embarrassment from having more than one State agree to enforce a sentence and the Tribunal having to decline more than one offer.

A.3 Collection of information for the designation of States

20. After receiving a positive response from the potential enforcement State, the Registrar prepares a confidential memorandum to the President identifying the State that is ready to enforce the sentence. The memorandum will include a summary of the case history, conviction(s) and sentence, an updated list of all States that have enforced or are enforcing sentences of the Tribunal, and background information regarding the convict's family, health and behaviour while in the UNDU. The Registrar also submits an enquiry to the Office of the Prosecutor as to whether the convict is expected to testify as a witness in any future cases before the Tribunal.

B. Designation of the State

21. The framework provided in Article 27 of the Statute is complemented by Rule 103, which confers on the President the authority to designate an enforcement State from the list of States that have indicated a willingness to accept convicted persons. The President's decision to designate a State is guided by the Practice Direction on the Procedure for the International Tribunal's Designation of the State in which a Convicted Person is to Serve His/Her Sentence of Imprisonment ("Practice Direction on Designation"), which the President adopted on 9 July 1998 in order to establish an internal procedure for the designation phase.²⁹² The Practice Direction on Designation provides that the President shall designate a State after receiving advice from the Registrar as to which States have indicated a willingness to enforce a sentence of an individual accused.²⁹³ The Direction also mandates that, in exercising his discretion, the President must consider the proximity of the convicted person's relatives, and allows him to request from the convicted person or the Prosecution if he wishes.²⁹⁴

B.1 The relevance of preferences expressed by convicted persons

22. The Tribunal's jurisprudence has clarified that, according to the Statute, the Rules and the Practice Direction on Designation, the convicted person has no right to be heard with respect to the State in which he will serve his sentence. Some convicts' applications seeking to be transferred to States other than the designated ones

292 Practice Direction on the Procedure for the International Tribunal's Designation of the State in Which a Convicted Person is to Serve His/Her Sentence of Imprisonment, IT/137, 9 July 1998 ("Practice Direction on Designation").

293 Practice Direction on Designation, para.3.

294 *Ibid.* para.4.

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were therefore dismissed on the basis that a convict has no right to directly petition the President on this issue.²⁹⁵ However, the President can choose to solicit the views of the convicted accused on a discretionary basis.²⁹⁶

B.1.1 The geographic limits to enforcement of ICTY sentences

23. The report of the Secretary General concludes that enforcement of ICTY sentences should take place outside the territory of the former Yugoslavia.²⁹⁷ However, it is arguable that this Report must be interpreted in light of the political situation in the former Yugoslavia at the time it was drafted in 1993. At that time, armed conflict in the region was ongoing. Enforcing sentences in the former Yugoslavia during an armed conflict and political instability would have impermissibly risked the lives of convicted persons. Moreover, there were serious doubts about whether the regular prison regime was functional, and it was unclear that the ICTY could provide judicial supervision of detention conditions, heightening the risk of interference with the enforcement of sentences.
24. As time passed, however, one could argue that the changed situation in the territory of the former Yugoslavia should allow for enforcement of sentences in the States of that region, particularly in light of the introduction of Rule 11*bis* in 2002. Pursuant to the Rule, it is possible to refer a case to the State in whose territory the crime was committed "so that those authorities should forthwith refer the case to the appropriate court for trial within that State." Once a case is referred, it will be heard under the laws of the respective State and the sentence imposed by a court of that State is enforced on its territory. This mechanism is implicitly supported by the Security Council in its Resolution 1534 (2004).²⁹⁸ A Judge's dissenting opinion attached to the *Strugar* Decision considered that "if it is legally possible to refer an entire case to the territory of the former Yugoslavia, including the enforcement of the sentence in the event of a conviction, it can be concluded, *a maiore ad minus*, that the States on the territory of the former Yugoslavia can now be entrusted with the enforcement of sentences".²⁹⁹
25. On the other hand, Rule 11*bis* provides that only cases involving intermediate and lower rank accused may be transferred to competent national jurisdictions, and enforcement of ICTY sentences against the most senior leaders should continue to be enforced in States other than the States of the former Yugoslavia. This is equally implied in the Security Council Resolution 1534 (2004) which encourages the ICTY "to continue and intensify their efforts to conclude further agreements for the enforcement of sentences or to obtain the cooperation of other States in this regard".
26. Additionally, the Tribunal's practice has accorded considerable weight to the Secretary General's Report. Although affirming that the Report does not have the same binding authority as if it were part of the Statute itself, the Tribunal's jurisprudence has suggested that:

By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the

²⁹⁵ *Prosecutor v. Žigić*, Case No. IT-98-30/1-ES, Decision on Request of Zoran Žigić, 31 May 2006.

²⁹⁶ Practice Direction on Designation, para.4.

²⁹⁷ Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, para.121.

²⁹⁸ Security Council in its Resolution 1534 (2004) reads, in its relevant part, that the Security Council: "welcomes in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region".

²⁹⁹ *Strugar* Decision, Dissenting Opinion of Judge Shomburg, para.27.

*Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.*³⁰⁰

27. Accordingly, the Tribunal has accepted the views expressed in the Secretary-General's report that the Tribunal's sentences can only be enforced outside the territory of the former Yugoslavia. In the *Strugar* case, the Appeals Chamber found that there was no legal possibility that Tribunal sentences could be enforced in the former Yugoslavia.³⁰¹

B.1.2 Whether designation of the State is a negotiable issue

28. The experience in the *Strugar* case highlights the problematic nature of concluding an agreement with the convicted accused designating the State where the sentence will be enforced. Two kinds of difficulties prevent the Tribunal from adopting the practice of negotiating designated enforcement States with the accused.
29. First, the Tribunal actors who might agree with the convicted accused regarding a designation have different interests than the ICTY President who holds the discretionary power to designate the State where the sentence should be served. The Prosecutor might wish, for example, to encourage the accused to accept a plea agreement by offering him the prospect of serving the sentence in a certain State. Similarly, the Pre-appeal Judge might be inclined to suggest the possibility of accommodating the accused's preferences as to the enforcing State in order to acquire the accused's consent to conclude the proceedings. However, the President has the final word on the designation, and his or her discretion will inevitably be guided by factors other than the preference expressed by the convicted accused. In identifying the enforcement State, the President may give particular consideration to the proximity of the convicted person's relatives. However, other factors that can be considered include whether the convicted person is expected to serve as a witness in further proceedings at the Tribunal, whether the person will be relocated as a witness following the sentence, and any medical or psychological reports, linguistic skills, general conditions of imprisonment and rules governing security and liberty in the State concerned. Thus, those who are in a position to undertake an agreement with the accused do not have the power to guarantee the enforcement of that agreement.

300 *Prosecutor v. Tadić*, Case No. 11-94-1-A, Appeal Judgement, 15 July 1999, para.295.

301 See for this position, *Strugar* Decision, Judge Shahabuddeen's Separate Opinion, para.11.

30. Second, the time-sequence for designating the State is so short as to be incompatible with the possibility that an agreement with the accused can be reached on this issue. As noted above, the Tribunal must notify a State of a final (*i.e.*, irrevocable) sentence before the State can declare its final availability to enforce the sentence. However, any conceivable agreement with the accused must take place while the proceedings are still open. Thus, any promises to the accused about the designation of the enforcing State could not be reliable because the final steps of the designating procedure would not have been taken (see text box *Strugar case: limits to expressed preferences*)

B.2 Transfer of the convicted person to the designated State

31. The final part of Rule 103 provides that the transfer of the convicted person to the State where the sentence will be served shall be effectuated as soon as possible after the time-limit for appeal has elapsed, and that the convicted person shall remain in the custody of the Tribunal pending the finalisation of arrangements for transfer to the State. After the President issues an Order providing that a convicted person's sentence is to be enforced by a particular State, the

Strugar case - Limits to expressed preferences

On 31 January 2005, Trial Chamber II imposed a sentence of eight years imprisonment on Pavle Strugar, who had been found guilty of violations of the Laws or Customs of War under Article 3 of the Statute. Both parties initially appealed. After protracted negotiations, however, the parties withdrew their appeals and the Appeals Chamber accepted these withdrawals. The central issue in the negotiations preceding the withdrawals was the possibility that the accused would serve his sentence in the Republic of Montenegro, from where he comes. In the words of the Appeals Chamber,

*The possibility of him serving his sentence in Montenegro had first been raised by the Pre-appeal Judge; he had received assurances from the Pre-appeal Judge over a period of many months that this could be done (albeit assurances of varying degrees of certainty); and at his final status conference he heard the personal opinion of the Pre-appeal Judge (an opinion given with the caveat that it held no guarantees) that legally there was no general obstacle to the service of his sentence in Montenegro.**

*In the course of the pre-appeal proceedings, the Republic of Montenegro expressed its willingness to work with the Tribunal to enable Strugar to serve his sentence in Montenegro. The Registry, for its part, clarified to the parties that "the enforcement of a sentence in Montenegro would currently be subject to a number of important legal and other obstacles, which would need to be removed".***

*A few months later, however, the Registry notified Strugar that the Tribunal was not at that time in a position to conclude an agreement for enforcement of sentences within Montenegro. The Registry notably stated that it had "verified with the Office of Legal Affairs at UN Headquarters that resolution 827 of the Security Council, accepting the Secretary General's report, S/25704, in which it is stated that 'the enforcement of sentences should take place outside the territory of the former Yugoslavia', places a geographic restriction"****

*In Strugar's view, the explanation provided by the Registry showed that there was in fact a clear legal impediment to him serving his sentence in Montenegro – namely, Security Council Resolution 827 (as interpreted by the Office of Legal Affairs at UN Headquarters). Because he had not known of this legal impediment at the time he withdrew his appeal, he believed that his withdrawal had not been an informed one.*****

*The Appeals Chamber found that Strugar's consent to the withdrawal of his appeal was not informed, reconsidered the Decision Accepting Withdrawals on this ground, and reversed it, thus allowing Strugar to re-open the appeals proceedings "in order to avoid a miscarriage of justice".***** The Appeals Chamber conceded that Strugar knew of the possibility that he might not serve his sentence in Montenegro and of the fact that withdrawal made his appeal final. However, it also pointed out that Strugar did not know that there was "no legal possibility" that he could serve his sentence in Montenegro.*

* Prosecutor v. Pavle Strugar, Case No. IT-01-42-Misc.1, Decision on Strugar Request to Reopen Appeal Proceedings, 7 June 2007 ("Strugar Decision"), para.28.

** Strugar Decision, paras 9-10.

*** Strugar Decision, para.15.

**** Strugar Decision, para.16.

***** Strugar Decision, para.29.

Registrar will take care of all practical arrangements (e.g., transfer of detention and medical records, provision of threat and risk assessment), including liaising with national authorities of the enforcing State and Dutch authorities.

32. To ensure the security of the convicted person and accompanying security officers during the transfer, and to prevent any interference with the security and operations of the transfer to the Enforcement State, no public mention of the transfer can be made until it is successfully completed. This is the Tribunal's practice. Also, although at that point the enforcement State's location becomes a matter of public record, the Tribunal does not disclose the precise location of imprisonment in the enforcement State.

B.2.1 Request for review and transfer of the convict to the enforcing State

33. The President has confirmed on several occasions that a Request for review of a case that is pending before the Tribunal does not suspend or postpone the transfer of the convicted person to the State designated to enforce the sentence.³⁰² Some Defence Counsel have claimed that, pending a request for review, the presence of the convicted person in the territory of the Netherlands is necessary to facilitate communication between Defence Counsel and the convicted person. However, the President has clarified that Rule 118(A) prescribes that a sentence pronounced by the Appeals Chamber shall be enforced *immediately* and a request for review does not impact on that mandatory provision.³⁰³ Moreover, if the enforcement is suspended when a request for review was pending, motions for review could be easily misused to postpone the convict's transfer to the designated State. The Tribunal does not have sufficient facilities to imprison convicted accused separately from its detention facilities even those it must separate to avoid violating the right of those non-convicted accused to be housed separately from those already convicted.

C. The supervision on enforcement of sentences

C.1 Inspection procedure

34. Once an ICTY convict has been transferred, the national penitentiary law applies as provided in the enforcement agreements, but execution of the sentence is subject to the Tribunal President's supervision. Rule 104 provides that "all sentences of imprisonment shall be supervised by the Tribunal or a body designated by it".
35. In most enforcement States, the International Committee of the Red Cross (ICRC) conducts inspection of the conditions of imprisonment. For Portugal, Ukraine and the UK, inspections are carried out by the European Committee for the Prevention of Torture (CPT). For Spain and Germany, a joint Parity Commission composed of ICTY and State officials inspects the conditions of imprisonment. Because a few States objected to ICRC inspections, and indicated that they would prefer an alternative arrangement for inspections, the Tribunal negotiated an agreement with CPT to increase its flexibility in negotiating enforcement agreements with European States. This alternative arrangement has helped the Tribunal conclude at least three enforcement agreements.

302 See, e.g., *Prosecutor v. Josipović*, Case No. IT-095-16-ES, Decision on the Request of the Counsel of Drago Josipović that the Convicted be Halted Considering the Start of his Imprisonment Term, 10 April 2002 ("*Josipović* Decision"), p. 2.

303 *Josipović* Decision, p. 2.

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36. The ICRC submits its findings directly to the President who normally requests that the Registrar follow-up with national authorities on any recommendations or concerns arising from the ICRC submissions, and then report back. The Registrar is also required to deal with *ad hoc* letters and requests from convicted persons, their families, or relevant national authorities on a case-by-case basis. Those letters and requests may concern issues such as conditions of detention, requests for information, and requests for legal assistance.
37. While the Tribunal has established Parity Commissions to monitor the conditions in two enforcement States, the arrangements for independent monitoring of such commissions is far from ideal. There have been instances when a convicted accused has directly petitioned the President of the Tribunal complaining about the conditions of detention and about the Tribunal's officers. In those circumstances, the persons being accused by the convicted person of disregarding his rights are the very people charged with the responsibility of ensuring those rights are protected. When this has happened, the President has requested that the convicted accused be allowed to meet with an independent monitoring body such as the ICRC to investigate the alleged violations. Establishment of procedures for independent monitoring of prison conditions by an external entity is an important means of maintaining institutional credibility and public confidence.

C.2 Convicted persons' contact with the media

38. Although the conditions of detention are governed by the applicable law of the enforcement State, and in principle enforcement States possess discretion to regulate a convicted persons' right to communicate with the outside world, enforcement States have asked the Tribunal to state its position regarding detainee contacts with the media. Given the historical and political interest in the Tribunal's work, the Tribunal has sought to ensure open and transparent procedures and proceedings. However, at all stages, this transparency must be balanced against the need to protect the rights of parties, including victims, witnesses and the accused. The ICTY's experience has shown that, in advising States on how to respond to media's requests for access to a convicted person, a number of factors needed to be considered, *i.e.*, the rights of the convicted individual, the rights of the victims and witnesses affected by the convicted individual's actions, and the adverse impact the media communication may have on ongoing trials and judicial process as a whole. Considering the gravity of the crimes considered by the Tribunal, the best practice may be to recommend careful consideration regarding the decision to grant media requests.

D. Pardon and commutation of sentence

39. Article 28 of the Statute deals with the issues of pardon and commutation of sentences,³⁰⁴ which is supported by Rules 123-125 and by the Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal ("Practice Direction on Early Release"), which outline the modalities of such applications.

D.1 Notification by States

40. The Rules reiterate that, if a convicted person is eligible for pardon or commutation of sentence according to the law of the State of imprisonment, the State shall notify the Tribunal of the person's eligibility.³⁰⁵ Upon

304 Art. 28, ICTY Statute reads: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law."

305 Rule 123 ICTY RPE.

notification from a State that a convicted person is eligible for pardon, early release or commutation under national law, the Registrar must notify the President and must obtain from the OTP and the national authorities the information outlined in paragraph 2 of the Practice Direction on Early Release. This process involves writing to the national authorities to request all available medical and behavioural reports on the convicted person. The Registrar must then translate all relevant information into the language of the convicted person, forward it to that person, and explain the procedure that will be used by the Tribunal in making a pardon or commutation decision. The Registrar must then compile and forward all documents to the President, including any comments from the convicted person. The Registrar also ensures that a person applying for pardon, early release or commutation of sentence before is assisted by counsel either retained by him or her or assigned by the Registrar on request.

D.2 Derogation from the procedure

41. In several instances, the notification prescribed by Rule 123 was made by the convict personally rather than by the enforcing State. Such notifications have been made when the convict believes that his or her situation is comparable to that of other persons sentenced by the ICTY and subsequently granted provisional release.
42. While the Rules do not specifically recognize the right of a convicted person to apply for provisional release, the ICTY's practice has been to address the merit of such applications in accordance with its jurisprudence.
43. Upon receipt of a convict's application, the President requests the Registry to provide it with the relevant materials in accordance with Article 2 of the Practice Direction. Subsequently, the Registry asks the enforcement State to express its position as to the eligibility of the convicted person for pardon or early release.

D.3 Determination by the President

44. Pursuant to Rule 124, after receiving the notification, the President shall determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, whether pardon or commutation is appropriate.
45. The Tribunal's jurisprudence clarifies that the President has discretion to grant or deny pardon or commutation of sentences. While the President is advised by the other judges, he or she is not bound by their views.³⁰⁶ In making commutation decisions, the President normally states briefly whether his or her decision is unanimously supported by the Judges or whether some or all of them expressed contrary opinions.
46. By concentrating the discretionary powers concerning pardon and commutation of sentences in the President's hands, the ICTY helps ensure a smooth decision making process and consistency in the evaluation of all relevant factors. The end result is convicts are assured that they will receive equal treatment and equal opportunities to obtain early release.

D.4 Relevant factors for pardon, commutation of sentence or early release

47. Rule 125 provides that the President, in deciding whether a pardon or commutation of sentence is appropriate, shall take into account a variety of factors: the gravity of the crime or crimes for which the prisoner was convicted, the handling of similarly-situated prisoners, whether the prisoner has been rehabilitated, and whether the prisoner has given substantial cooperation to the Prosecutor.

³⁰⁶ *Prosecutor v. Vuković*, Case No. IT-96-23/1-ES, Decision of the President on Commutation of Sentence, 12 March 2008 ("*Vuković* Decision"), paras.12-13.

D.4.1 The gravity of crimes

48. The criteria enumerated in Rule 125 are to be assessed by the President in exercising his discretion. Thus, for example, in cases where commutation of sentence was granted, the President has never grounded his decision on the relatively low gravity of crimes committed by the convict. Rather, the President has decided to commute a sentence "despite" the gravity of the crimes committed in light of other factors.³⁰⁷

D.4.2 The convict's demonstration of rehabilitation

49. In assessing the factor of rehabilitation, the President relies on reports from state authorities where the convict is serving his sentence. Among factors demonstrating rehabilitation, the Tribunal's jurisprudence has given weight to the convicted accused's compliance with prison regulations, and good relations with prison officers and other inmates. In this last respect, special importance has been given to the fact that the convict has maintained good relations with individuals belonging to the same nationality, ethnicity or religion as the accused's victims.³⁰⁸ In addition, the President has also considered factors demonstrating rehabilitation such as the fact that the accused had shown remorse for his crimes,³⁰⁹ that he took an active part in the prison activities, and that he did not allow the considerable difficulties associated with enforcement of his sentence in a foreign country to adversely affect his behaviour.³¹⁰

D.4.3 Substantial cooperation with the prosecution

50. The accused's cooperation with the Prosecution prior to conviction is not considered in deciding whether to commute a sentence under Rule 125 and Article 2 of the Practice Direction. In determining the convict's sentence, the Trial Chamber already considered this factor.³¹¹
51. The President has held that the mere *availability* of the convicted person to testify in other cases before the Tribunal, or before a regional Court, is not to be considered as a form of cooperation with the Prosecution. Likewise, when the Prosecution does not seek the convicted person's cooperation, the convict's willingness to cooperate is treated as a neutral factor.³¹² When the convicted person has *actually* testified in other cases, this act is regarded as a positive factor in the decision whether to commute the sentence.³¹³

D.4.4 The treatment of similarly situated prisoners

52. Although not a rule, early release has been granted to a number of accused after they have served two-thirds of their sentences. This practice mostly depends upon consistency with legislation of the enforcing States, but such legislation frequently provides that a convicted person is eligible for early release after having served two-thirds of his or her prison sentence. However, this trend toward consistency does not create uniformity between the laws of the enforcing States. When there are significant discrepancies between the laws of the

307 *Vuković* Decision, para.9; *Prosecutor v. Tadić*, Case No. IT-94-1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008, Public Redacted, ("*Tadić* Decision"), para.17.

308 *Prosecutor v. Todorović*, Case No. IT-95-9/1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Stevan Todorović, 22 June 2005 ("*Todorović* Decision"), para.9; *Prosecutor v. Jokić*, Case No. IT-01-42/1-ES, Decision of the President on Request for Early Release, 1 September 2008 ("*Jokić* Decision"), paras.8, 14.

309 *Todorović* Decision, para.9; *Tadić* Decision, para.16.

310 *Vuković* Decision, para.6; *Jokić* Decision, para.14; *Tadić* Decision, para.16.

311 *Prosecutor v. Radić*, Case No. IT-98-30/1-ES, Decision of the President on Commutation of Sentence, 22 June 2007, para.15; *Tadić* Decision, paras.10 and 18.

312 *Prosecutor v. Banović*, Case No. IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 10 March 2006, paras.5 and 14; *Vuković* Decision, para.10; *Tadić* Decision, para.18.

313 *Todorović* Decision, paras.8, 10; *Jokić* Decision paras.9, 15. In cases where convicts cooperated actively with the Prosecution, the convicted person's availability to testify for the Prosecution in further cases has been considered an additional factor in favour of the early release.

majority of enforcing States, the issue of equal treatment between convicted persons comes into question. In this regard, the Tribunal's practice concerning sentences enforced in Spain and France deserves particular attention.

D.4.5 The domestic eligibility thresholds

53. Under the law of a specific enforcement State, convicted persons may become eligible for pardon and commutation of sentence only after serving three-quarters of their sentences. However, in exceptional circumstances, the State penal code may permit parole when a convict has served less than two-thirds of a sentence. Exceptional circumstances may be found to exist if a convicted person has "progressed through three grades of prisoner status", and displayed good behaviour and a high likelihood of successful reintegration into society.
54. In two cases, convicted persons submitted requests for commutation after two-thirds of their sentences had been served, independent from any notification to the Tribunal by Enforcement State authorities. In both cases, after the Tribunal requested a report on whether the convicts had satisfied the conditions for early release, the Enforcement State authorities elevated the status of the convicted persons to grade three under the national detention system, thus making them eligible for parole in that country and facilitating their application before the Tribunal.³¹⁴
55. The President emphasized on both occasions that early release of convicted persons would not have been possible if the accused were ineligible for commutation under domestic law.

D.4.6 The automatic reduction of sentence system

56. In another Enforcement State, relevant articles of the Code of Criminal procedure on the remission on penalties applicable to prisoners provide that convicted prisoners could benefit from a remission of sentence, which is calculated based on the duration of the sentence imposed and not on the sentence effectively served. Namely, a reduction of sentence is granted automatically to convicted persons from the time they serve their sentence calculated at three months for the first year, two months for the following years, and for the last part of the sentence of less than a full year, seven days per month. This reduction may be withdrawn, however, by a penalty enforcement Judge if there is detainee misconduct. The Code of Criminal Procedure provides that an additional remission may be granted to inmates who demonstrate serious signs of social readjustment. If the convicted person is not a recidivist, the additional remission granted amounts to a maximum of three months per year of incarceration. The remission is granted in instalments if the incarceration is for more than one year.
57. In one Decision,³¹⁵ the President expressed concern about systematic incompatibility between State legislation on commutation of sentences and the system applied by the Tribunal, which could result in unequal treatment of convicts serving their sentences in that State as compared to convicts serving their sentence in other countries. This incompatibility arises from State laws awarding periods of remission of sentence to convicted detainees at the commencement of their sentence. The Tribunal's system permits application of such rewards only after a significant part of the sentence has been served.

314 *Prosecutor v. Josipović*, Case No. IT-95-16-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Drago Josipović, 30 January 2006, paras.6-8.

315 *Prosecutor v. Banović*, Case No. IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 4 September 2007 ("*Banović* Decision"). para.13; see also *Prosecutor v. Banović*, Case No. IT-02-65/1-ES, Decision of the President on Commutation of Sentence, 3 September 2008, para.10.

58. In one case, in particular, State authorities notified the Tribunal of a convict person's eligibility for early release, pursuant to its Code of Criminal Procedure at the commencement of the sentence period (in other words, much earlier than permitted under the two-thirds threshold). The early release was denied by the Tribunal on the ground, *inter alia*, that a significant part of the sentence had not been served yet.³¹⁶ After serving two-third of his sentence, the convict renewed his request to the President for early release. The Enforcement State authorities, when requested to provide their position on the convict person's eligibility for early release, stated that the convict was not eligible for remission of sentence under the Code of Criminal Procedure. The reason submitted was that remission is only applicable at the commencement of a convicted person's sentence and its application at that time was refused by the President. However, the Enforcement State authorities suggested that the convict could benefit from an "additional remission of sentence" pursuant to another provision of the Code of Criminal Procedure. However, as illustrated above, pursuant to this provision the possibility of early release is subject to different and much stricter conditions.
59. Regarding this latter provision, the President stated that "it would be extremely beneficial if the [State] authorities could accommodate in their system of sentence remission the practice of the Tribunal of granting commutations of sentence only following a significant serving of that sentence, that is, allowing for the application of such remissions to be claimed upon the serving of a significant portion of the sentence imposed". Following further discussions with the State in question, it was further clarified that automatic reduction of sentences, if approved by the President, could always be withdrawn if found inappropriate by the President in light of the convicted person's conduct. In that specific case, the best way forward, appeared to be the provisional approval of the automatic reduction by the President and further reconsideration when the convicted person becomes eligible for early release.

D.5 Release and transfer

60. If the President grants early release, pardon or commutation of sentence, the Registrar will liaise with national authorities for all practical arrangements regarding the release of the convicted person in accordance with the relevant enforcement agreements. The Practice Directions on Early Release provide that, where appropriate, and at the direction of the President, the Registry shall inform persons who testified before the Tribunal during the trial of the convicted person regarding his or her release, where he or she will travel to upon release, and any other information that the President considers relevant.
61. The Registrar may also be required to arrange for the transfer of convicted persons when a sentence is terminated or deemed to be impossible of enforcement. In those cases, arrangements must be made for the transport of the convicted person from the enforcement State to another enforcement State. In some cases, arrangements may also be required for temporary imprisonment until convicted persons can be transferred to another enforcement State to serve the remainder of their sentences. Temporary imprisonment is likely to be necessary whenever an ICTY sentence is longer than the maximum sentence enforceable in the enforcement State or in cases where the national law allows early release, pardon and commutation of sentence, but the President denies the request (see text box *Jelisić case-Maximum term of imprisonment in enforcement State*).

316 *Banović Decision*, para.13.

D.6 Issues arising upon transfer/deportation

62. Upon release or completion of their sentences, ICTY convicts normally return to their country of nationality. All enforcement agreements concluded by the Tribunal provide that the Tribunal will bear the expenses related to the transfer of the convicted person to and from the requested State unless agreed otherwise by the Parties. Only in very exceptional occasions, such as when convicted persons are under threat for providing evidence to the Parties or Chambers, convicted persons may be relocated to a third State for their security. The released convicts are sent to states with whom the Tribunal has a relocation agreement.
63. While the enforcement agreements concluded with enforcing States does not address the status of convicted persons under European Union immigration regulations following completion of their sentences, time spent in the enforcement State for the purpose of serving a sentence imposed by the Tribunal should not have long-term adverse effects for convicted persons regarding application of European Union immigration regulations. Experience has shown, however, that the impact of national deportation decisions on the released persons' right to subsequently enter the EU must be fully considered to prevent any potential adverse effect on the convicted person's immigration status.

Jelisić case - Maximum term of imprisonment in enforcement State

*Goran Jelisić, was sentenced to 40 years' imprisonment on 5 July 2001. He is presently serving his sentence in Italy, pursuant to the Agreement on the Enforcement of Sentences of 6 February 1997, ratified by law in Italy on 7 June 1999. Despite the fact that the Agreement explicitly states that in "enforcing the sentence pronounced by the International Tribunal, the competent national authorities of the requested State shall be bound by the duration of the sentence" (Article 3), on 5 December 2002, the Italian Supreme Court ruled that the term of imprisonment in Italy may not exceed 30 years, the maximum allowed by Article 735 of the Italian Code of Criminal Procedure.**

* Cass. Pen. 5 December 2002, No. 3785.

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1. The ICTY was granted primary jurisdiction over crimes in its Statute and therefore was not given exclusive jurisdiction over all prosecutions. While in principle the UN Security Council endowed the ICTY with primacy over domestic courts for all crimes within its jurisdiction, and the Prosecution obtained information about many hundreds of potential suspects, both the ICTY and the UN Security Council realised that international institutions might realistically deal only with a limited number of cases. The ICTY therefore sought to bring to the international forum only those cases which could not adequately be tried in national courts. Initially there was little or no capacity or willingness to prosecute any war crimes cases at the local level. The ICTY therefore focused on accused at the highest level of leadership and responsibility, although its prosecutions necessarily started with a number of mid-level cases. As time passed, ICTY trials began to focus on those who bore the greatest responsibility for crimes in the former Yugoslavia.
2. As investigations developed and the available evidence and the overall level of trials increased, the Prosecutor reviewed the outstanding indictments and withdrew a number of the older lower-level cases. As a result, the Prosecutor focused only on the higher-level individuals. When the ICTY began to develop its completion strategy several years later, by which time the capacity of national courts had increased, it conducted a further review of the remaining cases. At the present time, the focus is on identifying cases which, although permissibly included in the ICTY trial programme, might also be considered as candidates for referral to national courts. In that way, the ICTY was able to complete the most serious cases within the new dates set for completion of its mandate. Although the idea of referring cases to national courts was introduced as a new measure, such referrals were always within the original spirit of the Tribunal as a body with primacy over national courts enjoying concurrent jurisdiction.
3. The Tribunal introduced Rule 11*bis* into its Rules of Procedure and Evidence to allow a Chamber, after the confirmation of the indictment and either *proprio motu*³¹⁷ or upon request of the Prosecution, to refer a case to a State. Under the rule, a referral can be made to a state:
 - ♦ in whose territory the crime was committed; or

³¹⁷ Since it removes a case from the international forum, the use of this power begins to encroach on the independence of the Prosecutor. However the Referral Bench has noted that it would only be appropriate for it to act *proprio motu* "in an obvious case". See *Prosecutor v. Mile Mrksić et al.*, Case No. IT-95-13-1-PT, 20 June 2005, para.14.

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- ◆ in which the accused was arrested; or
 - ◆ having jurisdiction and being willing and adequately prepared to accept such a case.
 - ◆ referral of a case to national courts implies that the proceedings against an accused become the primary responsibility of the authorities of the State concerned.³¹⁸
4. In order to ensure consistent application of the standard for referring cases, the ICTY has adopted the practice of appointing one "Referral Bench" composed of three permanent judges that deals with all referral decisions in the first instance. When such decisions are appealed, the President appoints benches to hear appeal on an *ad hoc* basis.

A. Criteria for referral

A.1 Choice of the State

5. There is no apparent hierarchy among the three criteria for selecting a State to hear the case, *i.e.* the State of commission, the State of arrest, or a State having jurisdiction and being willing and adequately prepared to accept the case. The Referral bench has however generally preferred the State where the alleged crimes occurred, and whose residents were victims, over the State where the accused surrendered.³¹⁹ In choosing the most appropriate jurisdiction, the Referral bench also considers other factors such as the projected ability of a State's tribunals to adjudicate independently and fairly, as well as on circumstances such as potential threats to witnesses.³²⁰

A.2 Level of the accused and gravity of crimes

6. In determining whether to refer a case, the Referral Bench must consider the gravity of the crimes charged and the level of responsibility of the accused. This requirement is dictated by Security Council Resolution 1504 (2003), which contains the exhortation that the ICTY should concentrate on "the most senior leaders suspected of being most responsible for crimes" within its jurisdiction³²¹,
7. In relation to issues relating to the seniority of the accused, the ICTY evaluates the accused's level of responsibility and the gravity of the crimes charged, considering only the facts alleged in the indictment.³²² In defining who are the "most senior leaders", the Referral bench focuses on those who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the "most senior" rather than as "intermediate"³²³ (see text box *Dragomir Milošević case - Denial of a referral request*).

318 *Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-PT, Decision on Referral of Case Pursuant to Rule 11bis, Referral, 17 May 2005 (Partly Confidential and *Ex Parte*) ("*Stanković Referral Decision*"), para.93.

319 *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.I, Decision on Joint Defence Appeal against Decision on Referral under Rule 11bis, 7 April 2006 ("*Mejakić Referral Decision*"), para.38. The only explicit exception was *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11bis, 17 November 2006, where the accused was transferred to the State of his nationality due to humanitarian concerns related to his health.

320 In relation to the issue of witnesses, see also para.9.

321 UN Security Council Resolution 1534 (2004) reiterated that the transfer to competent national jurisdictions should involve "intermediate and lower rank accused".

322 *Prosecutor v. Savo Todović*, Case No. IT-97-25/1-AR11bis.1, Decision on Rule 11bis Referral, 23 February 2006, para.14.

323 *Prosecutor v. Dragomir Milošević*, IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11bis, 8 July 2005 ("*Milošević Referral Decision*"), para.22.

A.3 Fair trial and not imposition of death penalty

8. Rule 11bis authorises the transfer of a case only when the Referral Bench is "satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out." While the latter requirement does not contain much ambiguity,³²⁴ it is not easy to assert with certainty that an individual will receive a fair trial.
9. The factors related to fair trial considered by the Referral Bench are:
 - ♦ the equality of all persons before the court;
 - ♦ a fair and public hearing by a competent, independent, and impartial tribunal established by law;
 - ♦ the presumption of innocence is applied until guilt is proven according to the law;
 - ♦ the accused has a right to be informed promptly and in detail in a language which he understands of the nature and basis of the charge against him;
 - ♦ the right of an accused to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - ♦ the right of an accused to be tried without undue delay;
 - ♦ the right of an accused to be tried in his presence and to defend himself in person or through legal assistance of his own choosing;
 - ♦ the right of an accused to be informed of the right to legal assistance, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him if he does not have sufficient means to pay for it;
 - ♦ the right of an accused to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - ♦ the right of an accused to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings;
 - ♦ the right of an accused not to be compelled to testify against himself or to confess guilt.³²⁵
10. Domestic legislation in the region of the former Yugoslavia (i.e., the countries to which the ICTY has considered referring cases) generally provide for the respect of due process rights.³²⁶ However, the Tribunal has essentially interpreted this standard as requiring that the relevant legal instruments be in place, and is satisfied that a fair trial would be secured given the specific circumstances of the case.³²⁷ The Referral Bench

Dragomir Milošević case - Denial of a referral request

The Referral Bench has denied a referral requested by the Prosecution in the case of Dragomir Milošević, alleged to have been for fifteen months commander of a Corps with around 18,000 soldiers in charge of the siege of Sarajevo. Its conclusions were that:

*"The campaign alleged in the Indictment and the crimes with which Dragomir Milošević has been charged stand out when compared with other cases before the Tribunal, especially in terms of alleged duration, number of civilians affected, extent of property damage, and number of military personnel involved. It is also evident that the Prosecution's case imputes significant authority to Dragomir Milošević. The Referral Bench therefore concludes that the gravity of the crimes charged and the level of responsibility of the accused, particularly when they are considered in combination, requires that the present case be tried at the Tribunal."**

* *Milošević Referral Decision*, in particular para.24; see also *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Motion for Referral of Case Pursuant to Rule 11bis, 9 July 2007.

324 No State in the former Yugoslavia provides for the imposition of the death penalty. See *Stanković Referral Decision*, paras.49-50.

325 *Stanković Referral Decision*, para.55.

326 All of these countries are also member States of the Council of Europe, and subject to the jurisdiction of the European Court of Human Rights, which provide an additional layer of protection for, amongst others, fair trial rights.

327 See, e.g. *Stanković Appeal Referral Decision*, para.28.

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has, for example, considered the issue of availability of witnesses in light of the domestic provisions for their protection and applicable international agreements for obtaining witnesses from abroad.³²⁸

11. The ICTY also recognizes that human rights law does not allow a person to be detained in circumstances in which he or she would face torture or inhumane treatment. The ICTY has therefore considered whether referral to certain countries would put the safety of the accused in jeopardy, and has made reference to applicable international standards governing prison conditions in the countries considered, and to the declared willingness of governments to abide by them. The ICTY has dismissed what it has defined as "generalized claims" about the inadequacy of standards of detention in countries of the former Yugoslavia.³²⁹

A.4 State willing and adequately prepared

12. Recognising that serious violations of international humanitarian law may be prosecuted and adjudicated based on universal jurisdiction, the ICTY may also refer cases to countries other than the one where the crime was committed or in which the accused was arrested, if the country is "willing and adequately prepared to accept" them. In making such determinations, the ICTY will consider submissions of the State concerned and will examine the domestic legal regime likely to be applied to the case to be referred. Referral will be granted only when the Referral Bench is satisfied that there are appropriate provisions to address each of the criminal acts of the accused alleged in the indictment and that there is an adequate penalty structure.³³⁰ Thus, referral is assumed to be possible only when the State will bring charges for international crimes listed in the Tribunal's Statute. In other words, there must be serious violations of international humanitarian law. Ordinary crimes would not be sufficient since there is insufficient stigma attached to those crimes.

B. Monitoring and other post-referral issues

13. As mentioned above, the ICTY's referral of a case to a domestic jurisdiction implies that the proceedings against an accused become the primary, but not the exclusive, responsibility of the authorities of the State concerned.³³¹ Indeed, the Tribunal maintains the power to monitor cases referred to national authorities in order to ensure that those proceedings are conducted properly.³³² The monitoring, conducted pursuant to Rule 11*bis*, enables the Tribunal to promptly react if a State fails to properly exercise the competence referred to it. Thus, for instance, Rule 11*bis* (F) explicitly grants the Referral Bench the authority to revoke the order of referral at any time after the order has been issued provided that the individual has not been found guilty or acquitted by a national court.
14. Rule 11*bis* vests the Prosecutor with the authority to monitor proceedings in State courts. To this end, the Prosecution has entered into agreements with external organizations to assist in the monitoring of referred cases. In addition, the Referral Bench has ordered the Prosecution to report back to it concerning developments in the case following transfer.³³³ It is indeed essential that reliable and flexible monitoring

328 *Stanković* Referral Decision, paras.81-86.

329 See, e.g., *Stanković* Referral Decision, paras.31-37 and *Mejakić* Referral Decision, paras.56-62. Cf., however, *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 6 June 2008, which denied referral on the basis, *inter alia*, of risk of solitary confinement for the accused, if he were to be convicted to life imprisonment.

330 *Stanković* Appeal Referral Decision, paras.41-42.

331 Referral Decision, para.93.

332 See, e.g., Rule 11*bis* (D)(iv) ICTY RPE.

333 *Stanković* Appeal Referral Decision, para.59.

mechanisms be put in place when a case is referred from one jurisdiction to another in a way similar to that envisaged by Rule 11*bis*.

15. Article 27 of the Statute grants the Tribunal the power to supervise imprisonment in States to which the Tribunal has transferred individuals to serve their sentence.³³⁴ In cases tried before the Tribunal and on the basis of agreements relating to the enforcement of sentences, the enforcement of a sentence may be terminated by the Tribunal with the convicted person being brought back to the Tribunal.³³⁵ Once a case is referred under Rule 11*bis*, though, a sentence imposed by a court of that State is generally enforced on its territory and this may lead to problems. Under Rule 11*bis*, there is no provision explicitly setting forth specific mechanisms for post-verdict situations where, for example, an accused manages to escape from detention or the referred State is not otherwise able to properly enforce a sentence.

C. Referral of cases: managerial aspects

16. Once the Referral Bench grants an application to refer a case to a State as outlined in Rule 11*bis*, the Registry is expected to perform two tasks: physically transfer the accused and provide certified copies of official case-related material to all necessary parties in the national jurisdiction. Given the numerous parties and issues involved in the referral of a case, the Registry has standardized its operating procedure for the transfer of cases so as to ensure the smoothest transfer possible and prevent overlooking any of the required tasks. The physical transfer of an accused thus far has been mandated only pursuant to Rule 11*bis*. The Referral Bench, when ordering the transfer, must provide the Registry with 30 days after the final decision to transfer the accused to the designated Referral State. In addition to the physical transfer of the accused, the Registry assists the OTP in facilitating access to certified copies of official case-related material either in hardcopy or electronic format. In order to ensure a smooth and timely transfer of the defence case file to the national jurisdiction, the Registry also plays a liaison role between the national defence unit and the counsel representing the accused before the Tribunal.

C.1 Physical transfer of the accused

17. In the absence of an agreement binding the organisation and the referral state, it is recommended that a Memorandum of Understanding (MoU) be drafted and signed prior to the implementation of a transfer. Considering that an MoU cannot always be concluded, due to various time, political or legal constraints, it is essential to prepare a standardised transfer plan to be used by all relevant sections within the Tribunal and the Referral State. In addition, experience has shown that an individual, preferably a legal officer, should serve as a focal point within the Registry to monitor the transfer process until completion. The focal point also performs a liaison and coordination role that helps ensure that the transfer is completed in the most efficient manner possible. It is essential that a focal point also be designated in the referral state. The focal point is responsible for coordinating the following between the Tribunal and the Referral State prior to the transfer, though this list is not exhaustive: negotiating an agreement for the date of transfer; planning the route and mode of transfer; securing travel and identity documents for the accused; assisting in the organisation and transfer of the detention file, including medical records; and arranging for transfer of the accused's personal belongings. In addition, representatives from all relevant offices must be designated, and a coordination

³³⁴ See Chapter XII - Section C: The supervision on enforcement of sentences.

³³⁵ See, e.g., Articles 9 (2) of the Enforcement Agreements with France (25 February 2000), United Kingdom (11 March 2004), Estonia (11 February 2008), available in their English version on the Tribunal's website: <http://www.un.org/icty/legaldoc-e/index.htm>.

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meeting (via teleconference or video conference link) must be held as soon as possible, involving all stakeholders.

C.1.1 Route and mode of transfer

18. Since the Tribunal does not have any territorial jurisdiction or law enforcement capacity, it must rely on the cooperation of States for the transfer of an accused. The route and mode of transportation must therefore be agreed on by all parties. When an accused must be transferred via a neighbouring European country, the relevant Embassy in The Hague must be contacted immediately to ensure that the transit country's national laws are not violated. Experience has shown that at least two weeks notice must be given to the Embassy in order to ensure a smooth transition. Aside from land transport (which has never been utilised by the Tribunal, except to reach the nearest military NATO base where the accused and his accompanying escorts boarded a military flight) there are two options with respect to modes of transport: military or commercial flights, both of which may require the involvement of authorities of the Transit State. Securing the use of a military aircraft may necessitate the involvement of a third party country in preparation for the transfer, and authorities from the Transit State may need to obtain a court order permitting the transfer of a detained accused through its soil. It is necessary to be aware of relevant national laws impacting the cross-border transfer of detained persons prior to making any final decision(s) on the mode and place of transfer.
19. The use of a commercial aircraft, in particular a national aircraft, may require the involvement of the Transit State's diplomatic representative in The Hague in addition to a senior official from the airline company. For example, prior to the commencement of a transfer with a commercial airline from The Hague via a Transit State to the former Yugoslavia, an official notification is sent to the Embassy of the Transit State in The Hague and the contact point with the airline company seeking their assistance and cooperation. Although the notification is intended to facilitate the transfer, it does not guarantee that the transfer will proceed smoothly through the Transit State. Based on past experience, such as the instance when an ICTY accused was denied the boarding a plane in a Transit State, it is recommended that a legal officer accompany the escort team to the final destination. In addition, if a detained person is transported on a commercial airline, it is necessary to designate one to two security officer(s) per accused to accompany him/her during the entire transfer. This requirement will vary depending on the airline's regulations, thus making it vital for the focal point to secure a clear understanding of those requirements at least two weeks in advance of the transfer date.

C.1.2 Travel and identifying documents of the accused

20. The Registry must provide the Requesting State with an official notification setting out the intended date of transfer, the full name of the accused (along with any known aliases), country of nationality, passport number, and date and place of birth. In most cases, the accused is in possession of his passport; however, in some instances, his/her consular representative in The Hague will be in possession. Some accused, when arrested, do not have a passport or travel document in their possession. In such circumstances, the Registry must prepare an official document that includes a photograph of the accused, his full name, date of birth, place of birth, and father's name, with a certified signature of the Registrar. This document, in conjunction with the travel document used by the accompanying Tribunal representative(s), secures transit through international borders. When traveling on official business, Tribunal staff use the UN *laissez passer*. In order to avoid problems *en route*, the fact that the accused is not in possession of a valid travel document must be reported in advance to the local officials of the Referral State and any transit country.

C.1.3 Detention file

21. A detention file must be prepared with copies of the detainee's personal and medical information. With respect to the medical files, the consent of the accused may be required prior to disclosure. All confidential documents must be placed in a sealed envelope. In addition, a security threat assessment memorandum must be prepared by the commanding officer of the UN detention facility, a copy of which should be provided to the accompanying legal officer, chief of security, and representative of the Referral State. A receipt of transfer must be attached to each file to be handed over to local authorities. Because the detention file constitutes confidential Registry material, it is necessary to transfer them directly to a Registry representative in the national jurisdiction and to the Referral State's prosecution office. The accused must be informed that his detention file will be transferred to the new jurisdiction. Considering that the accused will be notified of the exact date of transfer only a few days in advance due to security concerns, the Tribunal's detention facility has responsibility for psychologically preparing the accused for the transfer and the major change he will experience.

C.1.4 Personal belongings

22. The accused's personal belongings must be transferred either during or after the physical transfer. When possible, it is recommended that the personal belongings accompany the accused. It is important to receive guidance from the Referral State as to what the accused may or may not be permitted to bring with him/her, especially with respect to monetary funds. The detention facility should be responsible for creating an inventory of the accused's personal belongings, and the accused must sign the inventory prior to his transfer. To prevent any potential litigation, three copies of the signed inventory must be created. One copy should be provided to the accused, one copy should be kept by the detention facility, and a third copy should be attached to the personal belongings for confirmation at the final destination. If an accused intends to transport electrical equipment (for example, a personal laptop) advance warning must be given to the authorities in the Requesting State. In most prisons or detention facilities, prisoners are not permitted to use such equipment without prior permission from the Pre-trial Judge.

C.1.5 Custody of the accused

23. The Registry is charged with reviewing the question of who has effective custody of the accused during each phase of the transfer. It is important that a Registry legal officer, along with the necessary security officers, accompany the accused during the transfer. A standardised transfer order with the necessary certified copies must be drafted by the relevant Registry office. In the case of the Tribunal, the Office for Legal Aid and Detention Matters initiates the transfer order. The transfer order originates from the detention facility that relinquishes custody of the accused to the local authority (*i.e.* Dutch Transport Police) that is responsible for transporting the accused to the military base or airport as indicated by the legal officer prior to the transfer. At each point in the transfer of custody, a Tribunal representative must sign all certified copies of the transfer order. A copy of that document must also be provided to the representative of the Referral State who in turn provides the legal officer with that state's necessary transfer documents. The transfer order along with the Referral State's signed transfer documents are then filed in the official record as proof that the referral decision has been properly implemented.

C.2 Access to certified copies of court material

C.2.1 Certification

24. The ICTY Registry does not have a separate section or unit that processes referral cases. Instead, it divides the assignments among sections, with the majority of tasks being delegated to the Court Management and Services Section (CMSS) because it is the custodian of the Tribunal's official record. The Registry becomes involved only when there is a request for assistance: e.g., for certified copies of documents that have been officially recorded in the case file; for transcripts, case filings, and audio-visual materials. When a case is referred pursuant to Rule 11*bis*, the Registry assists the Prosecutor in transferring the file by ensuring that the official record of the case is certified by the Registry. The OTP certifies that the material in its possession has not been filed or admitted in the official record of the Tribunal. The certification process was deemed cumbersome due to a lack of prior agreement between the Referral State and the Tribunal, and the Tribunal was required to modify its procedure to accommodate the Referral State's national procedure. In future referrals, it is recommended that all official records of the Tribunal should be certified and authenticated under the Tribunal's procedure. Furthermore, it is recommended that there be only one certification authenticating all the material constituting the case file.

C.2.2 Translations

25. When the official language of the Referral State does not correspond to the Tribunal's working languages, matters related to the translation of material should be negotiated in advance. The Tribunal faces a dilemma related to the fact that its official transcripts are transcribed only in the English and French languages, thus making it difficult for lawyers from the former Yugoslavia to research the transcript archive if they are not trained in one of the official UN languages. Instead, local lawyers are requesting access to the audio/visual material in the BCS language. This process is both cumbersome and costly to the referral state because they must then listen to the audio/visual record, and then transcribe the testimony in their own language.

C.2.3 Judicial Database

26. The Tribunal's records are available electronically through the internal Judicial Database (JDB) which is used as both a disclosure and a legal research tool. In the last two years, through Memoranda of Understanding, the Tribunal has expanded the list of those who can access the judicial database by permitting external courts to receive remote access keys. These keys allow designated users to log on to the system remotely and search the Tribunal's entire official public database. For material that is not in the Tribunal's official record, the OTP has also granted national authorities access to the Electronic Disclosure System (EDS) which houses the bulk of the prosecution evidence collection.

C.3 Legal aid and transfer of case material to the Defence

C.3.1 Legal representation before the national court

27. Legal representation before the national court is an important matter that should be negotiated prior to the transfer of the case and/or the accused. In some jurisdictions, only nationals of that jurisdiction are permitted to represent the accused or to have a right of audience. Under such rules, the counsel representing the accused before the Tribunal may not be able to continue representing him/her. When a case is submitted for transfer, in order to ensure consistency in the defence and a smooth transition, the Registry should envisage the possibility of assigning counsel who will have the right of audience before the national

jurisdiction. The goal of this assignment should be to that counsel will be able to begin preparing the defence before they have to appear in the national court. Absent such an agreement, the time and resources spent by Tribunal lawyers in preparing cases will be lost in proceedings before the national court.

C.3.2 Transfer of the Defence files

28. Coordination is needed to ensure the smooth transfer of files from defence counsel at the Tribunal to any new lawyer that handles the case before the national court. Problems can arise if the Trial Chamber's order referring the case does not contain any provision permitting the transfer of defence files to the accused's new lawyers. Since the Tribunal may not have jurisdiction after the order is issued, it is necessary to ensure that the order deals with this issue. This matter can be solved by ensuring that the rules pertaining to the assignment of defence counsel, and the relevant code of conduct, include a specific provision addressing the obligation that counsel practising before the Tribunal has towards the new jurisdiction. In its order referring the case to the national court, the Trial Chamber may emphasize counsel's to transfer the defence files. In any event, it is necessary for the Tribunal to research and understand the obligations set out in the national codes prior to the transfer of a case. For example, a provision in the BiH Criminal Procedure Code states that parties have a seven day deadline for filing preliminary motions after an indictment has been confirmed by the State Court. Unless the accused already has a lawyer before the State Court prior to his transfer, it will be difficult or impossible for a new lawyer to meet that deadline, especially if the new lawyer is not familiar with the case and/or does not possess the defence files. In addition, since some of the preliminary issues of the indictment may have been argued before the Tribunal, it would make sense to have a lawyer who is knowledgeable regarding the preliminary issues to determine whether those same issues should be raised before the national jurisdiction. If a lawyer is allowed to join the defence team in The Hague before or during the transfer period, both the Tribunal and the national court can conserve time and resources.

C.3.3 Legal aid during the transition period

29. A number of issues must be considered relating to the legal aid scheme, depending on whether the Tribunal expects defence counsel to remain on the case following referral. In particular, if a financial commitment is going to be made by the Tribunal, it should determine a minimum and maximum transitional period needed to ensure an efficient transition. There is no assurance that national courts will agree with the Tribunal's assessments regarding the indigence of the accused. In addition, the focal point should clarify the citizenship requirements for lawyers who seek a right of audience before the national court. If such requirements are in force, the focal point should clarify whether or not those requirements can be waived for cases being transferred from the Tribunal.

C.4 Requests for assistance and variation of protected material

30. The ICTY has made maximum use under Rule 11bis of the possibility of referring cases involving ICTY indictments to national jurisdictions. Not all requests to transfer such cases have been granted, and the, the opportunities for referral in this first category of cases were therefore exhausted. Nevertheless, the Tribunal continued to be involved in providing assistance to national jurisdictions in two additional categories of cases: cases that have been investigated at different levels by the Tribunal's Prosecution office, but which did not result in the issuance of an indictment by the Tribunal, also referred to as "category 2" cases; and cases investigated and triggered by the national courts, also referred as "category 3".
31. When the national courts seek access to public ICTY material, the request is submitted to the Registry in the form of a Request for Assistance. To coordinate responses to such requests from law enforcement/judicial

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institutions, a Registry focal point is designated. The Registry does not have a specially designated Requests for Assistance office; however, in light of the increasing number of such requests, it is considering establishing one to more efficiently accommodate national courts. The processing of such requests has triggered the realization that national courts may require further access to material that is subject to protective measures that prohibit disclosure. As a result, in February 2007, Rule 75(H) was amended to allow for such an application to be submitted directly by national authorities. This novel modification of the Rules is a fundamental step towards allowing third parties to access protected material for use in national jurisdictions, and helps foster a partnership between international and national jurisdictions.

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1. The judicial activities of any international tribunal cannot function effectively without the support of, and close collaboration with, the tribunal's administrative sections. Experience has shown that it is of critical importance to ensure constant consultation amongst different tribunal sections and to co-ordinate efforts to implement court orders and decisions effectively and efficiently. Any administrative issues that may arise regarding the ICTY's judicial activities are handled by the Registry which is statutorily charged with providing operational support to the Chambers and the OTP.³³⁶
2. This chapter is intended to highlight the different services provided by the Registry which are indispensable to the ICTY's judicial activities, and to outline the lessons learned from the Registry's experiences.

336 Art.17, ICTY Statute stipulates that "(t)he Registry shall be responsible for the administration and servicing of the International Tribunal."

A. The United Nations Detention Unit

3. The United Nations Detention Unit (UNDU) is a remand centre under the supervision of the ICTY's Registry and is located within a Dutch prison a few kilometres away from the seat of the Tribunal. Detainees include accused held pending and during trial and appeal, convicted persons awaiting transfer to the State of enforcement, and detained witnesses and persons charged with contempt. The mission statement of the UNDU is:

*To monitor and maintain the physical and emotional welfare of all those detained, awaiting or undergoing trial before the ICTY, bearing in mind the presumption of innocence, defending their dignity as human beings, protecting their rights as individuals in order that they can understand and participate in the proceedings before them at the Tribunal.*³³⁷

4. The UNDU's regulatory regime includes rules and regulations such as the Rules of Detention, Regulations for the Establishment of a Complaints Procedure for Detainees (the "Complaints Procedure"), Regulations for the Establishment of a Disciplinary Procedure for Detainees, Regulations to Govern the Supervision of Visits to and Communications with Detainees and House Rules for Detainees. Post Orders and Procedures (POPs) are used to determine how to apply the Rules of Detention and other UNDU regulations. Post Orders and Procedures provide a basic framework and an explanation and breakdown of procedures, for the staff to abide by in carrying out their duties at the UNDU.
5. The regulatory regime and POPs have developed over a period of time, taking into account the needs and requirements of the judicial process, the peculiarities of the detainee population, and the unique characteristics of the UNDU itself as the remand centre for an international criminal court. The regime and the POPs provide a tried and tested framework that is constantly being adjusted to ensure protection of the rights and dignity of those detained and protection of detention staff in the course of their duties. The following highlights how the UNDU has adjusted to the challenges of its mission.

A.1 Detention Unit staff awareness of the detainee population

6. The UNDU operations are governed by the presumption of innocence, and the principle of respect between staff and detainees. The monitoring of detainees is a critical aspect of the UNDU's task. Experience has shown that all UNDU staff must be aware of the individual aspects of each detainee. The detainee population housed in the UNDU has a unique profile which informs and determines the UNDU's operation and focus:
- ◆ the detainees are not habitual criminals;
 - ◆ most detainees are being deprived of their freedom for the first time;
 - ◆ the detainees are held on remand for long periods;
 - ◆ the detainees are older than the average prisoner in a detention facility, have fewer coping mechanisms for dealing with the prison environment, and are of increased age and medical complications;
 - ◆ most detainees have (or had) important or high status in their countries or regions;
 - ◆ many of the detainees have a higher than average intellect when compared to a national detention setting;
 - ◆ there is high media interest in the ICTY and individual cases;
 - ◆ the distance from the detainees' homes, families, familial social support network, cultural environment and the lack of familiarity with the surroundings are considerable;
 - ◆ the psychological status of each detainee must be taken into consideration.

337 The Mission Statement has been established in an internal UNDU policy document.

7. In accordance with the above profile and the presumption of innocence, it is the policy of the UNDU to facilitate normalisation of the detainees' daily lives to the extent possible and to avoid restrictive measures where they are not necessary.

A.1.1 Health of detainees

8. The health of detainees is a crucial consideration for any international court or tribunal, and an important factor for efficient trial proceedings. The UNDU management has struggled to meet the increasing healthcare requirements of detainees. Even though the UNDU is a remand institution, the average period of detention is significantly longer than that of most national remand institutions, and possibly closer in length to that of ordinary penitentiaries. This situation has a detrimental effect upon the mental state of the detainees as they work their way through trials and appeals over an extended period of time. The conditions can cause long term stress and can induce or exacerbate health conditions. Also, the average age of a detainee at the UNDU is currently 57 years,³³⁸ which is significantly higher than in national detention facilities. Most detainees arrive at the UNDU with various pre-existing health problems due to their age.
9. The detainees often suffer health ailments due to lifestyle issues earlier in life and advanced age.³³⁹ Post-Traumatic Stress Disorder (PTSD) and other psychiatric disorders are very common. Due to the nature of PTSD and psychiatric disorders, the fostering of personal relationships with the detainees while providing medical care becomes crucial.
10. As a result of this medical profile, the UNDU is equipped to handle a range of medical situations involving the detainees. The UNDU Medical Service has a small but well equipped medical clinic that undertakes diagnostics and treatment of detainee illnesses and injuries. At admission, all detainees receive an extensive medical examination tailored to produce a comprehensive medical profile that includes a full set of blood analyses. Medical care provided by the UNDU Medical Service includes first line healthcare including mental healthcare.³⁴⁰

A.1.2 Medical patient and staff trust issues

11. It is vital to the UNDU's functioning for detainees to have confidence and trust in the staff. However, this trust relationship can be undercut by the natural distrust, even paranoia, of detainees arrested and brought into a foreign country and culture, often against their will. Keeping the Medical Officer³⁴¹ free from the judicial process as much as possible, and maintaining the confidentiality of all medical records, help strengthen the trust relationship.

A.2 Absence from Court for medical reasons

12. A detainee is sometimes too ill to attend court proceedings, and therefore an ICTY policy allows a detainee to be absent. Since ICTY accused have the right to be present at court proceedings, a waiver of that right must

338 As of 16 May 2008, the average age of the 41 detainees in custody at the DU was 56.5 years.

339 After age 40 to 45, poor lifestyle choices earlier in life begin to affect health. Cultural lifestyle issues and the stressful environment during the conflicts in the Balkans (e.g., traditional diet, smoking, drinking, stress, lack of exercise, senior responsible positions, war) all have an effect in this regard.

340 This mental health care is augmented by the services of a Consultant Psychiatrist who is a native speaker of the common language of those detained, which mitigates complications of translation.

341 The definition section of the Rules of Detention provides that "the Medical Officer for the time being appointed by agreement between the Registrar and the General Director of the Host Prison." ICTY Rules of Evidence and Procedure, Rule 34 B further provides that "(t)he medical officer shall have the care of the physical and mental health of detainees and shall see on a regular basis or as is necessary, all sick detainees, all who complain of illness and any detainee to whom his attention is specially directed."

be voluntary and informed. A formal process takes place when a waiver is desired. The detainee must state that he is unable to attend court proceedings due to illness following which counsel must notify of the consequences of being absent from court proceedings. Thereafter a formal waiver is signed by the detainee and witnessed by a principal officer. A UNDU medical service staff member must sign the document certifying that an examination of the detainee has taken place.³⁴² The medical staff must act cautiously when supplying this information so as to maintain continuity of treatment and to avoid contact with the judicial process which may impact the crucial trust and confidence relationship between medical practitioner and patient.

13. The aim of this procedure is to ensure that the interests of justice are served when detainees are unable to attend court proceedings due to illness, protect the right of an accused to attend court proceedings and protect the efficiency and integrity of the process, particularly the right to trial without undue delay for any co-accused.

A.3 Staffing and financing of the UNDU

14. While physically situated within the Host Prison, the UNDU has an autonomous command structure comprised of ICTY employed staff and detention officers loaned to the ICTY by three national governments. The ICTY has negotiated with the government of the Netherlands to create an agreement for the Host Prison, and to provide all of the services and facilities necessary to run the programme of remand required to service the ICTY's requirements. A price per cell per day has been established which takes into account the ratio of services and facilities required by the UNDU, *i.e.* staffing, accommodation, equipment, maintenance, detainee services - meals, fresh air, sports, education.
15. The services and facilities required by the UNDU include the provision of detention officers who are selected by the UNDU management from applicants, and are answerable to the management of the UNDU for operational issues, but remain within the Dutch Prison Service for administrative purposes. This arrangement has been highly beneficial due to the proximity of a large pool of highly qualified, specialist detention officers in a state which promotes good prison management.
16. As a consequence, the vast majority of detention officers are drawn from the Dutch service. However it has been highly beneficial to draw additional detention officers from other nations in order to ensure a competitive environment and to maintain the international character. Having a multinational work force means that the best qualities of each staff member can be cultivated and their work complements each other, providing a more efficient network of detention officers. This contributes to establishing a self-regulating process and ensuring high standards of services within the UNDU.

A.4 UNDU relationship to the judicial process

17. The UNDU does not play an active role in the judicial process. Its role is solely supportive. The detainee profile coupled with the close proximity of the three organs of the ICTY, namely the Chambers, the Office of the Prosecutor and the Registry, and the defence, causes many detention issues to be raised in the judicial arena. Health, cultural and status issues often impact upon the judicial process. For this reason, detention issues are routinely raised in the judicial arena and the UNDU management can and must react quickly to judicial issues that arise. POP has proven to be a highly effective way of documenting procedural issues and the reasons thereof.

³⁴² See Absence from Court due to Illness. The waiver document allows the staff member of the medical service to highlight the severity of the illness and hence the expected duration of absence, allowing Chambers to make informed decisions regarding the proceedings.

A.4.1 Medical issues

18. The UNDU has experienced difficulty in establishing a satisfactory mechanism related to the handling of medical issues in the judicial arena. The ICTY has dealt with various situations when the health of the detainee has been called into question. These situations include applications for provisional release for purposes of medical treatment, and prolonged absence from court due to illness, hunger strikes etc. Invariably, the Chambers or parties require further information about the health of a detainee in order to deal with a legal issue involving health and the detainee's ability to follow the trial or need for provisional release to obtain treatment outside the Netherlands. Generally, under the Rules of Detention, medical information should be kept confidential by the Registrar unless disclosure is made with the consent of the detainee. However, a Judge or a Chamber may order disclosure in the interest of justice, or good administration of a trial, after consultation with the UNDU's medical officer. As with any relationship between medical practitioner and patient, there must be a high level of trust. This is especially important to the relationship to the UNDU medical officers and medical specialists and the detainees/patients who they treat. If detainees/patients perceive that disclosure can be made without their consent, even though compelled by court order, the trust relationship can be undermined. This risk is mitigated if independent medical experts (not in the treating pathway) are appointed to examine the detainee and submit a report to the Chambers and/or parties. This procedure is available pursuant to Rule 74bis of Rules of Procedure and Evidence.

A.4.2 Facilities for detainees in the UNDU

19. Another example of the UNDU's relationship with the judicial process is when the Judges order the UNDU to provide exceptional facilities to detainees, for instance "privileged" facilities for self-represented accused, such as computers, additional cell space, facilities not available to other detainees. Such arrangements may have an impact on the UNDU's safety, security or internal organisation. Therefore, prior consultation with the UNDU is advisable so that all safety and security issues can be identified, and their together feasibility can be examined, prior to issuance of the order. Such consultation enables the UNDU and the court to address safety or security issues that may arise from the court order.

A.4.3 Segregation and isolation of detainees

20. Orders for segregation and isolation,³⁴³ which are regulated under the Rules of Detention, may benefit from prior consultation with the UNDU on their impact on the safety, as well as the security and the internal organisation in the UNDU.

A.4.4 Scheduling for provisional releases from and returns to UNDU

21. The ICTY's experience shows that the scheduling of provisional release, and the return of detainees to the UNDU, require significant logistical arrangements by UNDU management. Departure and return dates are sensitive security information, and any public mention of time schedules before the actual transfer has taken place, could compromise the UNDU's movement of detained persons. End-of-week movements as well as evening returns create additional logistical/staffing problems for the UNDU, and prior consultation before the order is issued may help avoid these complications. A return at least one week before the start of the trial is generally advised to allow sufficient time for UNDU Management to deal with logistical and medical issues that arise relating to a detainee's return to the UNDU. However, as the return can be affected by the circumstances and medical status of the detained person, prior consultation with the UNDU is advised. Also returns should preferably occur at the beginning of a week as UNDU will need to conduct medical examinations upon the

343 Rules 40 to 49 ICTY Rules of Detention.

return of a detainee. For these reasons, it is advisable to consult with the UNDU prior to the issuance of an order.

A.5 IT resources and security

22. The UNDU must maintain security when considering whether to allow detainees to information technology. At the same time, the principle of "equality of arms" requires that detainees be able to access materials to conduct their defence, including the ability to review vast quantities of disclosure materials released by the Prosecution in searchable digital format.
23. The "Internal policy regarding the use of computers in the UNDU and the transfer of information subject to counsel-client privilege" sets out procedures governing the use of computers by both detainees and counsel, and for the transfer of information stored in paper and digital media. The Rules provide that materials used in support of the indictment and prosecution witness statements must be provided to the defence in a language the accused understands.³⁴⁴ The Registry has determined that the most efficient, transparent and comprehensive way to provide such access is to make computers directly available to detainees.³⁴⁵ Individual computers are issued to each detainee and are located in their individual cells. Critically, these computers are controlled by the UNDU and are locked to prevent any unauthorised use such as internet access.
24. The transfer of information is highly regulated with counsel only being permitted to transfer non-paper media to their client if it contains material relevant to their client's defence before the ICTY. The use of computers and transfer of information is subject to the "Agreement Concerning the Procedures and Conditions of Use for Computers and Digital Media Information at the United Nations Detention Unit" (Agreement). The Agreement explains the obligations of detainees and defence counsel, and the undertaking by the UNDU management, and must be signed by all three parties.
25. Peripheral devices, including printers, cannot be connected to computers issued to detainees and therefore printing stations have been established on each of the UNDU's residential wing to allow detainees the opportunity to produce hard copies of documents. Basic training and technical support in the use of information technology is available to detainees.

A.6 Policies aimed at normalisation of the detainees' lives

A.6.1 Daily regime

26. The UNDU's daily regime is based on a policy of openness. If a detainee is not in court, he can move around freely in his section of the UNDU for the most part of the day. Detainees can socialise and for instance cook food together. Educational classes in subjects such as languages, computing basics and creativity are also provided.

A.6.2 Communication and visits

27. UNDU management are able to communicate directly with detainees through staff interpreters who speak the detainees' native languages. The ability of detainees to communicate in their native language helps to mitigate the cultural differences. When detainees that arrive at the UNDU often have feelings of paranoia and nervousness, and are fearful of abuse as a result of media influence in the region. The ability of detainees to

³⁴⁴ Rule 66(A) ICTY RPE.

³⁴⁵ Agreement Concerning the Procedures and Conditions of Use for Computers and Digital Media Information at the United Nations Detention Unit §1.2.

communicate in their own language helps establish respectful and trustful relationships with UNDU management.

28. Detainees' communications with those outside the UNDU, through visits, telephone and mail, are encouraged in an effort to normalise the detainees relationship with family and support structures. The UNDU bears the presumption of innocence in mind, and is conscious of the pressures placed on families during periods of detention, particularly in relation to the distance from their home countries. Visits allow detainees to normalise their family support systems and are therefore encouraged. Detainees are permitted up to seven consecutive full days of visits in any thirty day period, including conjugal visits. The daily visits can be as long as eight hours.

A.6.3 Physical exercise and access to fresh air

29. Due to the poor physical and mental status of many detainees, as well as their advanced age, it is important to provide them with opportunities for physical exercise, education and spiritual practice as part of a system of maintaining healthy detainees. Detainees are encouraged to exercise and maintain good health through the availability of several exercise facilities within the UNDU. Detainees have access to a gym, weight room and cardio room. Detainees also have access to a secure outside yard where they have the ability to exercise, garden and socialise. A more secure "air cage" is also made available in the UNDU to give detainees access to additional fresh air when security requirements prevent their use of the outside yard.

A.6.4 Cultural comforts

30. The UNDU has learned and recognizes that allowing detainees a degree of cultural comforts helps in building trust and morale with the detainees. The provision of cultural comforts is also consistent with the presumption of innocence and helps to ensure normalisation of detainees' daily lives. Satellite television channels from the region of the former Yugoslavia add to the normalisation process and give detainees a sense of being closer to their home environments thus reducing feelings of alienation and depression.

A.7 Detainee distribution

31. An important factor in maintaining stability and order in the UNDU is the ability to mix detainees into viable compatible groups that function in a respectful environment while at the same time maintaining the ability to segregate certain detainees for security or judicial reasons. The UNDU is divided into a number of residential wings that allow UNDU management to establish residential groupings of detainees each of which functions as an entity. Detainee groupings are not based on ethnic differences, but are instead designed to create a respectful and varied group of individuals by taking into account the individual characteristics each detainee brings to the group. This approach allows each individual detainee to live in a respectful environment, and reduces the potential for conflict between staff and detainees.

B. Translation and interpretation services

B.1 Managing translation and interpretation in international criminal trials

32. International criminal trials involve numerous witnesses and large amounts of documentation that require interpretation and translation. Time and volume considerations are further affected by the need to maintain

quality despite the fact that several languages are involved, including rare ones, and judicial documents and other evidence that can run into hundreds and thousands of pages.

33. All witnesses and almost all documents used in international criminal trials require interpretation and translation. Since the ICTY can hold up to eight simultaneous trials with interpretation into three, four or five languages, the ICTY has effectively been in conference mode every working day for more than a decade. The flow of evidentiary material and substantive legal documents requiring translation has been huge and constant.
34. Given the serious nature of the crimes involved, the complexity of proceedings and the need to maintain clarity of language and consistency in terminology throughout long and closely interconnected trials, these services have to be of the highest standard.
35. The Conference and Language Services Section (CLSS) falls under the Registry and provides services to all organs of the Tribunal as requested. While the OTP has its own language-support staff, and Defence teams receive legal aid allotments from the Registry's Office for Legal Aid and Detention Matters, responsibility for translating all substantive documents and the bulk of evidence must remain with CLSS.

B.1.1 Interpretation challenges

36. The task of providing interpretation for up to eight simultaneous trials, in addition to servicing various other interpretation requests (judges' plenary sessions and deliberations, diplomatic seminars, high-level official visits etc.), poses a major challenge. Multi-lingual criminal trials constitute a somewhat unusual setting for the practice of simultaneous interpretation which is more suitable for international conferences where speakers present their views in a more orderly fashion and seldom challenge each other's words. Also, in ICTY proceedings, the expected level of accuracy and completeness of the message conveyed is much higher than in other types of institutions. The challenges include the need to recruit a sufficient number of qualified conference interpreters for "rare" languages, such as BCS, Albanian and Macedonian, and to keep both in-house and freelance staff well acquainted with ICTY case law and relevant terminological issues. In terms of logistics and the optimum use of resources, the ICTY's nature plays a significant role because of the high level of unpredictability associated with the trial calendar and frequent changes in the court schedule that make it difficult to schedule and utilize interpreters. The increasing use of documents in court poses a further problem for simultaneous interpretation which is meant essentially for oral communication. Furthermore, what is commonly regarded as legitimate interpretation techniques, such as paraphrasing, editing or strategic omissions, can present serious language issues in court and can be considered by the parties as mistakes in interpretation.
37. Measures that CLSS recommends to meet such challenges include:
 - ◆ setting up an appropriate recruitment procedure for both permanent and freelance staff and the implementation of a system of quality control through continuous learning and active mentoring; emphasis should be placed on terminology workshops and lectures on relevant legal concepts.
 - ◆ Setting up a system for requesting interpretation services, identifying those making the requests establishing deadlines, and organizing a system for providing interpreters with documents that they need for preparation or for quoting.
 - ◆ Establishing system-based access to the information needed to organize the provision of quality interpretation services, including liaison with other departments with a view to obtaining reliable information on types of hearings (legal arguments versus witness or expert witness testimony), subject matter to be discussed and extraordinary language arrangements.

- ◆ Setting up a procedure for correcting mistakes in interpretation. This procedure should be discussed with appropriate Registry and Chamber staff and should address the following issues:
 - ◇ Identifying requesting persons and the appropriate channel for submitting verification requests (preferably through the Court Officer dedicated to the case in question).
 - ◇ Detailing the verification procedure itself (the need to provide exact references, the use of audio files for verification purposes, the need to have an official request form, etc).
 - ◇ Issuance of formal corrigenda and setting forth the appropriate action to be taken subsequently (correction of transcript, filing, etc.).
 - ◇ Sensitising users of interpretation services to the nature of the exercise; awareness raising by including interpretation issues in orientation procedures for new participants in the proceedings.

B.1.2 Translation challenges

38. The Tribunal's experience shows that, to effectively manage limited translation capacity, two sets of measures need to be implemented, one at the phase of setting up an institution, and the other once it is operative.
39. Initial measures include:
 - ◆ setting the highest criteria for the recruitment of translators, including rigorous testing procedures, and ensuring sufficient time for continuous in-house training;
 - ◆ establishing clear policies governing requests for, and provision of, translation services;
 - ◆ properly arranging the electronic flow of documentation from and to requesters and creating a mechanism for filtering requests to eliminate duplicate translations;
 - ◆ establishing in-house terminology for each language direction and conventions for dealing with all commonly encountered translation problems;
 - ◆ developing style guides, glossaries and terminology databases and ensuring that adopted terminology and usage are used throughout the institution.
40. In the operative phase, and particularly once trials start, it is imperative that the translation service cooperates closely with Chambers and requesters ensure that the translation needs of all parties are met in the most effective, efficient, equitable and economical way.
41. CLSS should work closely with requesters to develop clear guidelines for the submission of evidentiary material, detailing the kinds and volumes of documents which can and should be submitted, criteria and methods for identifying and selecting documents or passages from long documents, the most acceptable format for submission of documents, timing of requests, setting of deadlines and other ways to ensure that their translation needs are met as effectively as possible.
42. A number of policies have been adopted at the Tribunal with this end in view:
 - ◆ the Registry Policy Governing Translation Services provides guidelines on the types of document that can be submitted for translation and procedures for submitting requests;
 - ◆ the Practice Direction on the Length of Briefs and Motions limits the length of such documents, partly in order to reduce the burden on translation services and resulting delays in proceedings;
 - ◆ since defence counsel are required to speak at least one of the Tribunal's official languages, in most cases only certain documents (indictments, orders, decisions and judgements) need to be translated into the accused's language.
43. Judges and Chambers staff must be kept well informed about the CLSS' operating constraints and be supportive of efforts to implement policies relating to the prioritisation of translation requests. It is beneficial to have CLSS representatives meet with the Trial bench (or at least its presiding judge) before any status

conference, or court session at which the issue of translation is to be addressed, to ensure that the judges are fully briefed regarding any translation limitations and are fully informed regarding the status of translations in their cases.

44. Parties should be reminded: (1) that it is their responsibility to limit requests for translation of exhibits to documents that they will ultimately tender into evidence and to prioritize such translation requests; and (2) that the parties be given specific resources enabling them to produce draft translations or summaries in order to determine which documents will be submitted in court and thus need to be translated.
45. Parties that submit unmanageable quantities of documents should be required to accept longer deadlines or to indicate which documents should receive priority. If necessary, CLSS should contact the Trial Chamber to enlist its support in reaching a solution that meets the party's needs without unduly straining CLSS resources or adversely affecting the rights of other parties. In some cases, it has been necessary to impose monthly quotas on teams that make particularly heavy demands on CLSS resources. For many practical and legal reasons, however, such limitations should be the exception rather than the rule.
46. Trials of self-represented accused and Trials of Multiple Accused (TMAs) generate larger volumes of translation requests. Unlike counsel appearing before the Tribunal, self-represented accused are under no obligation to be proficient in one of the official languages and are thus entitled to receive all substantive documents in a language they understand. In trials of multiple accused, the volume of evidence submitted for translation and the number of motions, orders and decisions multiplies with the number of defence teams. Liaison between CLSS and the Chamber needs to be particularly close in such cases.

B.2 Referencing and terminology

47. CLSS established the Referencing, Terminology and Document Processing Unit in 2001 to support its translation units in a number of important ways:
 - ◆ providing pre-treatment of legal materials, especially judgements and expert reports, by finding the original documents referred to in the text, and including passages that can be inserted directly into the translation;
 - ◆ setting up the terminological data base and providing other reference tools (access to various databases, on-line dictionaries, search machines, template libraries etc.);
 - ◆ developing the application of Computer-Assisted Translation tools and training translators in their use;
 - ◆ providing other technical and reference assistance.

B.3 Office of Document Management

48. In 2004, the Registry created the Office of Document Management (ODM) to streamline the handling of translation requests within the ICTY. The need for better coordination and screening of translation requests was prompted by the realisation that many documents were being submitted more than once for translation by different parties or by the same party at different times. The ODM serves as an intermediary between requestors such as Defence, the Office of the Prosecutor, Chambers and the Registry, and the CLSS which is responsible for the actual translations.
49. The ODM created a new workflow for translation requests that included the Translation Tracking System (TTS). This computerized system is designed to serve as the only route for submitting translation requests to the CLSS and for returning completed translations. The TTS allows ODM and the requesting party to track the status of each request, and also provides information on the number of duplicate translations avoided. The system is used to streamline the translation request and tracking process. Specific functionalities include an

electronic translation request and tracking form, the creation of a unique translation tracking number that will remain linked to the translation and original during its lifetime as an ICTY document, and support for confidentiality, prioritization, forecasting, and statistical reporting. Requestors may set priorities for translation requests that are evaluated by the office in light of established Registry translation prioritization guidelines. A critical part of the process is ODM's ability to access ICTY databases using search tools that can locate previous translations on both the Prosecution and Registry networks. Searches are based on both keywords (metadata) and evidence reference numbers, and are more fruitful than those performed only on one network. The ODM adds further value to the process by checking translation requests for document legibility and clarity.

B.4 Court reporting

50. The ability of the ICTY to obtain accurate transcripts of proceedings is critical. The ICTY provides transcripts in its two official languages, English and French. However, court reporting should not be placed under Language Services, but should more appropriately be placed under Court Management. Transcripts involve verbatim reporting of what was said in the courtroom and do not require translation or interpretation skills. At the Tribunal, Court Management sets the requirements for court reporting, and receives and controls the transcript. CLSS's role as court reporting project manager is therefore limited to the contractual and financial aspects only. The overall task is not within the domain of a language service.

C. Cooperation with the Host State

C.1 Hosting of international criminal tribunals

51. The location of an international criminal tribunal, or mixed United Nations-domestic court, in the territory of a State, commonly referred to as the Host State, requires that numerous arrangements be put in place to facilitate the tribunal's operation. Such requirements can be tribunal specific, but can also involve the standard arrangements required for hosting of an international organisation with staff members covered by the Convention on the Privileges and Immunities of the United Nations. Such standard Host State agreement provisions deal with the inviolability of premises and diplomatic pouch, exemption from taxes and duties, flag rights, access to the Host State for staff and visitors, privileges and immunities of officials, etc. Consequently, while a typical international organisation will obtain most of its Host State cooperation through the Ministry of Foreign Affairs of the Host State, an international criminal tribunal also requires a close relationship with other relevant bodies of the country (e.g. Ministry of Justice) for day-to-day operational matters.

C.2 Tailor-made Host State agreement provisions - jurisdiction and entry into the Host State

52. Any international tribunal requires a Host State agreement tailored to the needs of operating a judicial body prosecuting and trying (war) criminals, with specific provisions dealing with witnesses, defence counsel and suspects and accused travelling to the Host State and present on its territory. The jurisdiction of the Host State over such individuals must be specified, as should issues relating to whether such persons enjoy any level of (functional) immunity while present in the territory of the Host State. For example, the ICTY's Host State Agreement provides that "the witnesses and experts appearing from outside the host country on a summons or a request of the Tribunal or the Prosecutor shall not be prosecuted or detained or subjected to

any other restriction of their liberty by the authorities of the host country in respect of acts or convictions prior to their entry into the territory of the host country."

53. The travel of witnesses, defence counsel, suspects and accused may require visas to enter the territory of the Host State. The visa issuance process is a key responsibility of the Host State and can be complex. It is necessary to determine the circumstances in which a visa may be issued or refused, or subject to limitation, and if there is an expectation or obligation to disclose underlying reasons for any such decision. Similarly, it is important to know whether persons under the tribunal's jurisdiction for whom an arrest warrant is not considered appropriate or necessary, for example, persons accused of contempt of court, can enter the territory of the Host State if such person need not normally bear a visa to enter the country. While such provision may not be detailed in the actual Host State agreement, a degree of "meeting of the minds" between the Host State and the management of the international tribunal is necessary in order for day-to-day practice to be a smooth one. In the case of the ICTY, a standing procedure is in place for visa issuance by the Host State. Good relations with the Host State allow for non-standard situations to be dealt with in a satisfactory manner on a case-by-case basis.

C.3 Detention facility

54. In most cases, an international tribunal will operate a detention facility on the territory of the Host State. The Host State agreement needs to make provisions for this facility, and must delineate responsibilities for the housing and welfare of detainees. For example, which body is authorised to make treatment decisions in case of a hunger strike? Special regard must be given to providing immunity medical officer(s) charged with providing medical care and treatment to detainees. A variety of questions arise. Do the Host State's requirements on medical ethics and board certification apply in whole or in part? Which body bears the authority for prosecuting medical officer malpractice and who sets limits on doctor-patient confidentiality? Which body governs (non-)disclosure of information regarding the medical status of a detainee, in particular in circumstances where such disclosure is mandated by the international tribunal? Ideally, such questions should be addressed during the inception phase of any international tribunal. In the case of the ICTY, the immunity of the Medical Officer is included in the "Services & Facilities Agreement," entered into with the Host State for the lease of the detention facility from the Host State.

C.4 Premises

55. Even though the Host State agreement may provide that the tribunal's premises, including its detention facility, are "inviolable," what does this mean in practice? Where structural improvements or on-site construction is required, for example, for the construction or renovation of court rooms and detainee holding cells, are the building code or fire regulations of the Host State applicable in any way? While there is considerable State practice on the matter of inviolability of international organisation premises, the specific nature of a judicial institution where persons are detained, and subject to physical restraint, requires careful consideration.

C.5 Enforcement of sentences and release of acquitted persons

56. Prior to its establishment, an international tribunal must clarify intentions regarding the enforcement of sentences of convicted persons. Is the Host State to offer prison capacity for the enforcement of sentences, or should the Host State Agreement specify that enforcement of sentences will take place elsewhere? Is there sufficient political will on the part of UN Member States to help enforce the sentences of convicted persons?

In the case of the ICTY, its founding documents explicitly provide for enforcement of sentences in UN Member States other than the Host State or the States of the former Yugoslavia. Conversely, in the case of acquittals, the international tribunal and Host State need to have an understanding as to the procedures for releasing acquitted persons. Furthermore, questions relating to enforcement of sentences and release of acquitted persons may relate to various legal and delicate political considerations, not all of which can be fully articulated in any kind of formal arrangement or otherwise made public.

C.6 Relocation of witnesses

57. Similarly, a clear understanding is required as to the handling of witnesses granted protective measures by the International Tribunal. It may arise that the conditions in a witness' the place of habitual residence require that an immediate safe-haven be found. Mechanisms must be developed to allow for the relocation of such vulnerable witnesses to UN Member States. Such mechanisms can include asylum and regular immigration procedures or State-run witness protection programmes. In the ICTY's case, relocation of witness agreements have been entered into between the UN and its Member States. Nevertheless, the international tribunal must have at least one State at its disposal, possibly the Host State, where such vulnerable witnesses can be given immediate temporary residence in anticipation of relocation to a UN Member State. Any State offering such temporary residence must exercise this task with great discretion. As the process of relocating witnesses can be extraordinarily complicated, it is important for the ICTY to have excellent working relationships with the authorities of such States.

C.7 Safety and security

58. Safety and security are of paramount consideration for the proper functioning of any international criminal tribunal, which will encounter elements keen to derail its proceedings or frustrate its progress. Experience shows that the tribunal's affiliation with the UN may bring additional security concerns. Any standard Host State agreement will ensure that the Host State bears the primary responsibility for providing external security for the institution, its Judges and officials. Hence, the tribunal will require intensive working level contacts with security officials in the Host State, allowing it to rely on threat assessments made by the Host State.
59. Regarding internal security, the presence of detainees in an international tribunal calls for an armed security service on the premises. Internal security can be provided by the Host State or the institution may choose to run its own armed security service. The latter is a serious undertaking, requiring periodic firearms training and certification of officers and firearms, and requires adequate access by the tribunal's security officers to a local shooting range and use of a firearms certification bureau. Of course, the Host State must provide authorisation for the tribunal's security officers to carry firearms.

C.8 Managing the Host State relationship

60. In order for an international tribunal to function effectively, it must have a close relationship with the Host State, as well as with other UN Member States who assist in the enforcement of sentences and witness relocation. In many instances, relations between the tribunal and other states involve routine matters and are uncomplicated. However, novel issues in the Host State relationship inevitably arise from time to time relating to detainees, defence counsel, witnesses or material evidence.
61. Given the multitude of ways in which the international tribunal may interact with the Host State, a specific section should be placed in charge of overseeing and coordinating the Host State relationship. Ideally, this

section reports to senior management within the tribunal's Registry and is staffed by persons with legal knowledge and understanding of the diplomatic process. Likewise, the Host State should designate clear points of contacts within its ministries of foreign affairs and justice. In addition, the Host State should designate points of contacts in government agencies dealing with taxation, social affairs/health care and immigration as issues relating to these topics frequently arise in relation to the Judges and staff. This is especially so if the international tribunal employs such persons over extended periods of time who envisage long-term futures in the Host State.

D. Communication

D.1 Introductory considerations

62. Criminal courts in a national setting are rarely expected to explain their history, activities, operating practices and proceedings to society. It is common for such courts to provide a rather basic service to journalists and other interested external agencies. International criminal courts, however, have developed a quite different approach to media and outreach issues. As a result, international courts actively seek to make the organisation accessible and its work intelligible and relevant to different audiences around the globe, especially those most affected by the crimes adjudicated in the courts.
63. Shortly after its inception, the ICTY recognised the importance of judicial transparency, as well as the need to communicate justice to international audiences, especially those in the region of the former Yugoslavia. While widely praised for its pioneering work in the field of international justice, limited attention has been paid to its public relations and communications work where a proper balance must be maintained between openness and the need to protect the integrity of legal proceedings.
64. The ICTY's judges, at an early stage in the organisation's evolution, made it clear that international courts that deal with war crimes had an obligation to take active steps to make its work accessible and meaningful. Without such steps, much of the judicial work performed by the institution ran the risk of passing largely unnoticed or misrepresented, undermining the positive effects of justice. With this in mind, it is of utmost importance for similar institutions to calculate the importance of communicating justice in the early days of establishment.
65. A well-developed communication policy and structure will take into account the different needs of the respective independent organs of the institution, as well as provide the impetus to identify and pursue common goals of the organisation as a whole. In addition, it must recognise early on the wide ranging audiences interested in its work and establish a means for catering to each of these groups.
66. The ICTY combined the use of traditional communication methods with modern technology in an effort to communicate with different audiences around the world. The ICTY's experience paved the way for similar undertakings by other international and domestic war crimes courts.
67. Preserving judicial integrity and independence is vital. This basic principle should be reflected in the organisational set up of the Communication Service. Each of the two main organs of the institution, Chambers, headed by the President of the ICTY, on the one hand, and the Prosecutor's office on the other, require its own Communications Office, including its own spokesperson. ICTY staff including individual prosecutors should not

address the media regarding their cases and should be protected by a spokesperson from daily media inquiries.

D.2 Mass media and grassroots communication

68. Encouraging the media, both electronic and print, to fully appreciate the court's mandate and its mission is important. Given the importance of the media in the functioning of any society, especially those that are involved in conflict, media support may not be forthcoming in the early stages. Elsewhere, scepticism or lukewarm support may prevail. In such a climate, the institution's role must be explained. Experienced communicators need to be engaged in the organization's effort to meet these communications challenges.
69. Media interest changes rapidly and those media outlets that can afford to follow a story for long periods of time may be rare. Interest can be kept alive by innovative communication methods and efforts to provide the media with materials that set the story rather than follow it. It is important that the organisation not react only following negative coverage, but that it proactively pursue positive coverage using all opportunities to emphasize its achievements. The ICTY's Media Office has produced a standard text of the ICTY's achievements which can be used by ICTY representatives during presentations and speeches.
70. The proactive approach also includes the need, however, to deal with negative coverage. The ICTY has often been subjected to negative media campaigns. A timely reaction is perhaps the only way to put the institution's position on the record and avert more negative coverage.
71. Successful communication is about much more than knowing the media outlets and speaking to journalists. Today, no institution can consider itself serious without a well presented, user friendly and easily navigated website³⁴⁶. The Internet is the most influential communication tool of the modern age. Legal institutions need to embrace this power and present their work in a manner that benefits researchers, scholars, but also the media, and the "person-next-door" wherever they may be in the world. Furthermore, for institutions that are not permanent, the website can serve as legacy tool for generations to come. International courts, unlike most national jurisdictions, cannot rely on domestic communication systems and thus have an obligation towards the public to have an active communication policy which explains the institution's activities and operational practices. It is important that this obligation be recognised early on in the judicial institution's life and that the institution develops a media policy.
72. The establishment of the ICTY in the Netherlands, a country with a small contingent of international press representatives, impacted negatively on the world's ability to see the ICTY at work. The ICTY therefore set about using a number of innovative approaches in making its work transparent and available to all. To this end the ICTY's website is used to broadcast courtroom proceedings in near real-time from all three courtrooms. While this opens the courtrooms to the public, the 30 minute broadcast delay allows sufficient time to protect any unwitting or deliberate disclosure of protected material. For those who do not need real-time access, transcripts of each public session are provided within a few days.
73. The ICTY has made considerable efforts to provide court documents and document indexes to journalists on a timely basis. By making motions, orders and certain correspondence easily available to the public, the ICTY avoids accusations that it uses non-transparent procedures. At the same time, such steps ensure that the court's material will be available to the current public as well as to future generations. What may be only a footnote in a judgement can be the missing chapter of history for societies struggling to establish the truth. Such materials can be distributed via mailing lists, websites or press briefings.

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D.3 Communication staff

74. Communications professionals may find their approach at odds with many of the police investigators or lawyers within the organisation. The judiciary may also be reserved towards the media and public relations officials. It is therefore important that effective internal communications be used to create trust between the judicial and non-judicial elements.
75. It is important that those charged with handling communications be fully integrated into the institution and be involved in relevant decision making processes. This approach facilitates the ability of communications staff to brief decision makers on how their decision may impact or resonate with the public (be it ordinary citizens or politicians) and to better prepare for responding to inquiries from outside agencies once a decision has been made public.
76. One advantage of having experienced journalists or media specialists involved in the organization's communications team is that they are better able to communicate complex legal intricacies in a digestible manner. Plain language will receive more attention than legal jargon, and will also diminish misunderstandings and deliberate misrepresentation. At the same time, it is important to endeavour to communicate in the language of the relevant target group.
77. Different audiences may require different approaches with the message adjusted accordingly. Important target groups include legal and civil society representatives, NGOs, diplomatic community, victims' associations and scholars. It may be possible to identify common aims and causes with outside agencies and to forge working partnerships that further the reach of the ICTY's message.

D.4 Channels of communication

78. The media office provides core communication services such as the issuance of press releases and advisories, as well as responding to media inquiries. While these tools remain key channels of communications, there are other equally important, and sometimes more effective, ways of promoting the work of a court.
79. It is important to identify the best time to issue press releases and advisories, as well as to determine the form that they should take. Certain court activities routinely require the issuance of a press release or advisory information, including the issuance of judgements, the confirmation or unsealing of indictments, the commencement of trial, key developments outside of the courtroom, key speeches and addresses of the ICTY's principals. It is important for an institution to take advantage of opportunities to publish press releases which provide an opportunity to attract media attention and further disseminate the court's work to the wider public, as well as to promote greater understanding of its mandate and mission.
80. Press releases need to be written in a style that is appropriate to the relevant audience. Initially, ICTY press releases were little more than shortened and slightly paraphrased versions of the documents they explained. Legal language and phrases dominated, diminishing the number of people able to understand the releases or their significance. Once the ICTY adjusted the style of its press releases to appeal to a lay readership, the impact was immediate with a number of newspapers carrying the press releases almost in their entirety without undue comment.
81. Apart from press releases and advisory information, a number of other tools are available to an institution that wishes to communicate with the public regarding its activities. Press briefings, for example, may be held on a weekly basis to bring attention to coming developments and send key messages from the institution's

principals. The ICTY's Principals and other senior officials may address the public directly when significant messages need to be conveyed.

82. In order to assist groups that are interested in following ICTY cases, the Communications Service developed a number of approaches, including the publication of a comprehensive series of Case Information Sheets. These materials are updated daily and provide key information on all of the ICTY cases, provide a concise summary, and are written in plain English to reach out to a broad audience that is not necessarily familiar with legal procedure. Similarly, an at-a-glance key data and figures document provides vital information on a wide range of important data from the number of indictees to how many cases are in progress. In the later stages of the ICTY's development, a bi-weekly newsletter, entitled "ICTY News", was established, with the aim of providing the diplomatic world with a regular overview of the highlights of the ICTY's activities.
83. The ICTY has also addressed specific key areas of public interest by providing both materials and access. One example is the extensive range of information made available regarding the ICTY's Detention facility. The Communications Service has prepared videos and a wide catalogue of photographs depicting the interior of the facility both of which are available on the website. These materials, accompanied by easy-to-read texts about life in the facility, have been appreciated and widely rebroadcast on the BBC, CNN and regional networks. In another attempt to maintain transparency, the ICTY decided to permit the commander of the detention facility to have extensive contacts with the media. The materials and the open approach countered misinformation generated by some media outlets portrayed the ICTY as biased and its detention facilities as unsatisfactory.
84. The ICTY has taken an active approach to communications with its staff addressing numerous public meetings. These meetings provide an important forum for countering misrepresented or misunderstood functions and decisions. Important issues that have been addressed by the ICTY in public fora include the key role of the defence in trials, and the institution's practice on plea agreements and command responsibility.
85. Finally, the plethora of documents that have been produced during the ICTY's mandate constitute a valuable communications tool. The Judicial Database system, with its searchable database of all public documents filed during the ICTY's mandate, will be made available on its website as a key legacy tool ensuring the institution's work is remembered and utilised by generations to come.

D.5 Outreach

86. Mass media and the internet are undoubtedly effective ways to reach out to large numbers of people, but sometimes nothing can substitute for face-to-face interaction. Over the years, the ICTY's Outreach Programme has invested significant effort into communicating at the grass-roots level, learning along the way that listening is just as important as speaking.
87. The Outreach Programme was created in 1999 in response to the systematic attempts by some governments in the region to misrepresent the work of the ICTY. Many regional media often deliberately advanced hostile misinformation about the court.
88. In association with partner organisations, Outreach has organised numerous conferences, seminars and other events and visits for audiences from the former Yugoslavia. Through this program, thousands of people - victims and members of their families, legal professionals, government representatives, students, journalists and others - have had an opportunity to communicate directly with ICTY representatives. Access to accurate information has served to dispel myths and prejudices about the court.

XIV. Judicial Support Services

89. Recognising that justice must resonate with local communities, Outreach has conducted a wide range of regional programmes. One example was the 2004 series of programs that took place in the areas where some of the most notorious crimes under the ICTY's jurisdiction were committed. Using layman's terms, ICTY investigators, prosecutors and chambers staff provided insight into the meticulous and painstaking investigations conducted by the ICTY and explained how the crimes and the responsibility of the perpetrators were proven beyond reasonable doubt. Entitled "Bridging the Gap between the ICTY and Communities in Bosnia and Herzegovina", a total of five conferences were held in Brčko, Foča, Konjic, Prijedor and Srebrenica. The public comprised members of victim associations, municipal authorities, judicial institutions and law enforcement agencies, as well as local politicians and civil society representatives. The audiences had the opportunity to ask questions from senior ICTY staff who presented the findings with an openness that was a hallmark of this particular conference series. Multimedia CDs containing court footage, photographs, documents and fact sheets were provided. An independent television production company made a series of documentaries on each event that were broadcast of numerous outlets to audiences in their millions.
90. The Outreach Programme aims to empower local communities to make the best possible use of the ICTY's judgements and evidence to help document the events of the past and to counter possible denials of the crimes. A standard part of presentations given by ICTY staff is to assist the audience in navigating through lengthy ICTY judgements and understanding the references to exhibits and testimonies. For instance in 2006, the ICTY's Registrar travelled to the small village of Grabovica in Bosnia and Herzegovina to discuss a judgement which had recently been issued concerning the murder of civilians in the village.
91. The Outreach Programme has played an important role in the transfer of ICTY know-how to the former Yugoslavia and has provided the ICTY's Registry and Chambers with assessments of legal and political developments in the region, such as the reform of national justice systems. Numerous visits have been organised by Outreach Programme that have enabled local judges and prosecutors to familiarise themselves with the ICTY's work and its relationship to their daily work.

D.5.1 Challenges posed by an Outreach Programme

92. Media representatives and spokespersons face the challenge of trying to provide as much information to the public as possible without prejudicing proceedings. As the public face of the organisation, it is important that the representations and spokespersons enjoy ample support from within the organization, including budgetary support.
93. The ICTY's media and outreach activities have been hampered by limited funding and resources. Since its inception, the ICTY's Outreach Programme has been funded on the basis of voluntary contributions. It is imperative that the communications service be regarded as an integral department of the institution if it is to succeed in accomplishing its mandate and mission.
94. There is only so much a public information office can achieve, and unrealistic expectations for the office can lead to disappointment. International community members, for example, have at times expected that efforts to communicate regarding the court's work will automatically translate into a change of perceptions, leading to stronger support and a better understanding of its mandate among the local population.
95. It would be a mistake to presume that the dissemination of correct information about ICTY judgements and proceedings will always produce a positive and desired effect. For instance, even if ICTY officials explain how the lack of credible evidence led to an acquittal, that explanation may be of limited comfort to victim groups.

Yet it is extremely important to make sure that those who are interested have the opportunity and means to access information about the cases in order to achieve a deep and balanced picture.

E. Victims and Witnesses Section

96. The Victims and Witnesses Section (hereinafter "VWS") is an independent and neutral body within the Registry of the ICTY, and its mandate is to facilitate the appearance of all witnesses testifying before the ICTY, including those called by the Chambers, Prosecution or Defence.
97. The VWS has developed its principles, policies and procedures to ensure that all witnesses can testify in a safe and secure environment, and that the experience of testifying does not result in further harm, suffering or trauma to the witness. The VWS' goal is to foster an environment in which a testifying witness can regard the experience as a positive, strengthening and enriching event. The VWS operates with the highest levels of integrity, impartiality and confidentiality, and ensures that all witnesses are informed about their rights and entitlements and have equal access to its services. It is imperative that the VWS remain impartial within the international court or tribunal.
98. The VWS is composed of three main units: the Protection Unit which co-ordinates responses to the security requirements of the witnesses; the Support Unit which provides social and psychological counselling and assistance to witnesses; and the Operations Unit which deals with the logistical arrangements. The VWS is assisted by a field office based in Sarajevo which was created in 2002 order to provide victims and witnesses from the former Yugoslavia with easy and expanded access to the VWS operational, support and protection services both before and after they testify at the ICTY. Since its creation, the VWS has provided effective follow-up to witnesses upon their return home.
99. The mandate of the VWS is divided into three main actions, which are discussed below.

E.1 Operations unit

100. The VWS' mandate requires it to bring to The Hague all witnesses called to testify before the ICTY from whichever country they reside. Since the VWS organises the travel of around 500 individuals per year, the VWS has developed a comprehensive system to overcome the practical barriers that result from the obstacles facing witnesses (e.g. lost wages while absent from home) and to enable witnesses to make voyage to, and return from, the Netherlands. Thus, the VWS assists witnesses with such things as visas, travel arrangements and financial allowances.

E.1.1 Visas to travel to The Netherlands

101. Since seventy-five percent of the witnesses reside in one of the countries of the former Yugoslavia, and most of them still require visas to enter The Netherlands, the VWS had to conclude a special arrangement with the Host State authorities in order to be able to obtain 14-day Schengen visas in a flexible and swift manner. With regards to the remaining witnesses, who travel from other parts of the world, some of them are refugees who require special travel documents so that they can re-enter their new country upon return from The Hague. For refugee cases, the VWS has identified relevant contacts with Ministries in concerned States.

E.1.2 Assistance to the witnesses in the field

102. The VWS provides each witness with detailed information on the scheduled trip in their own language. In addition, the VWS seeks to identify any particular needs they may have such as security issues, health and psychosocial issues, as well as whether the witness is able to travel alone or whether an escort is needed.
103. Prior to the establishment of the Sarajevo Field Office, the majority of VWS interactions with victims and witnesses in the region took place via telephone. Only in exceptional cases, involving assistance for especially vulnerable individuals, where in-depth threat or psychosocial assessments were required, did Support or Protection Officers in The Hague travel to the region. The process was costly and time-consuming, and the lack of a VWS presence in the region inhibited its ability to respond quickly and efficiently. Experience has shown that the telephone, in addition to being an insecure method of communicating sensitive material, can cause more anxiety than face-to-face interactions. In addition, it was difficult for the VWS staff in The Hague to keep informed and up to date regarding the types of support services available for referrals, and the security situation in the region.
104. Experience has shown that in-person contact provided the most accurate, secure and reliable information from witnesses. At the same time, it offered an opportunity to build rapport with the witness, and assist the witness in feeling comfortable and confident about travelling and testifying. By travelling to the region in advance, VWS staff members could answer questions directly and provide support prior to witness travel to The Hague, helping to ensure minimum stress while facilitating the best possible testimony.
105. To better serve the large number of witnesses coming from and returning to the region, the VWS opened a satellite Field Office in Sarajevo, Bosnia and Herzegovina in January of 2002. This office included one Support Officer, one Protection Officer and one Language Assistant.
106. The field office is pivotal to the ICTY's work by providing victims and witnesses with easier and expanded access to the VWS' protection and support services both before and after they testify. In addition, the Field Office enables the VWS to better co-ordinate with local and international agencies in the former Yugoslavia, to identify additional sources of security, social and psychological services and other assistance for victims and witnesses, as well as to arrange for witnesses' travel to The Hague.
107. Witnesses receive the assistance of VWS field assistants in their country of residence who collect visas from one of the Host State Embassies and may also assist in obtaining passports from local authorities. Rotating between The Hague and the region, usually via the Sarajevo Field Office on a bi-monthly basis, the field assistants play a vital role as they provide the key link for ensuring that the physical and psychological needs of witnesses are taken into account. There is constant contact and relaying of information between the field assistants travelling in the region and the VWS staff in The Hague. If required, a VWS staff member may travel with a witness from their home (prepaid flights arranged by VWS) to The Netherlands or a VWS staff member may provide assistance during a change of flights at a transit airport. To further facilitate the transfer of witnesses, VWS has adopted a so called 'meet and greet assistance' program by reaching an arrangement with an airline company, which enables the Section to effectively assist witnesses during transfer while reducing the travel of VWS staff members and related expenses when no specialised support or protection is required for a witness.

E.1.3 Accommodation in The Hague

108. Upon arrival at the airport in Amsterdam, a VWS driver will wait for the witness at the gate and assist him or her through immigration control and in collecting his or her luggage. The witness will then be brought from

the airport to one of the designated accommodation where a VWS staff will be present for the arrival briefing.

109. Experience has shown that witnesses involved in different cases, and representing different Prosecution or Defence teams, must be separated from each other during the time they spend in The Hague. Different ethnic and religious affiliations should also be taken into account. Attention should always be given to these factors when transporting witnesses from one point to another, in allocating accommodation, and in placement of witnesses in different waiting rooms so that witnesses do not meet each other and do not discuss the content of their testimony with each other.

E.1.4 Duration of stay of witnesses in The Hague

110. VWS adopted a "7 day rule" for the duration of proofing and testimony (including travel) as a best practice to minimise the potential adverse impact of testimony on the witnesses. VWS indeed observed that many witnesses begin to show signs of stress after they have been absent from home for more than seven days. To address situations involving prolonged stays in The Hague prior to testimony, which was the case in the trial of Milošević, VWS developed a policy for the return of witnesses to their homes in case of prolonged court delays. Under the policy, VWS took into account such factors as the length and difficulty of the journey, the estimated time period of the delay, and the age and health of the witness in determining whether to require a witness to return home during a prolonged delay. In circumstances when Support or Protection Officers decided that a witness should remain in The Hague, because return travel would jeopardise the support or security needs of a witness, the justification for remaining in The Hague was submitted to the Chief of Section in writing for approval.

E.1.5 Allowances

111. While in The Netherlands, it is crucial to ensure that witnesses do not suffer any adverse financial consequences stemming from the fact that they have been called to testify before the ICTY and are absent from home. To respond to this problem, the VWS has developed a number of policies setting forth basic and exceptional allowances to be provided to witnesses. For instance, witnesses will receive an *attendance allowance* which is based on the UN rate for the country where they reside, and a *witness allowance* which includes incidental expenses and a *meals allowance*. In addition to these basic allowances, the witnesses may receive on an exceptional basis, *allowances for extraordinary losses* if the witness has suffered or will suffer extraordinary monetary loss as a result of testifying (see text box *Extraordinary loss allowance policy*), or a *childcare or dependent persons allowance* for a witness who requires paid care for dependent children or other persons in order to testify

Extraordinary loss allowance policy

A witness may obtain an exceptional loss allowance which is designed to cover extraordinary monetary loss if he or she has suffered or will suffer undue hardship as a result of testifying before the ICTY.

The witness has to provide documentation proving the extraordinary monetary loss, the undue hardship and the link between the loss and the testimony before the ICTY. Examples of witnesses who received this extraordinary loss allowance:

- During a witness' testimony in The Hague, her two cows felt ill and due to the witness' absence from home for several days, proper care could not be provided to the cows. As a result, the two cows had to be sold at a very low price to a butcher upon the witness' return and the witness suffered from not being able to sell the milk anymore. The VWS provided her with an allowance enabling her to purchase another milk cow.

- Due to multiple delays in their testimony in The Hague, several witnesses were not able to be at home on time for the harvest and had to hire workers to perform the harvesting on their behalf. The VWS provided them with an allowance enabling them to avoid an undue hardship by hiring workers to replace them on the field.

E.2 Support Unit

E.2.1 Professional psychosocial assistance and assessments of witnesses' needs

112. Based on its experience, the VWS deems it important to be involved with witnesses scheduled to travel for court proceedings as early as possible so that an independent assessment of their needs can be made. For example, vulnerable witnesses may be allowed to bring a support person with them to The Netherlands (see text box *Accompanying Support Person Policy*).
113. In an international criminal tribunal or legal institution dealing with war crimes and violations of human rights such as physical and sexual violence, it is imperative that witnesses be provided with professional psychosocial support. The VWS support staff's direct contact with witnesses demonstrates client orientation, sensitivity and appropriate communication skills targeted to vulnerable and victim witnesses. In particular, by having the staff working closely with victims and witnesses, the staff should be aware of the following:
- ◆ Victims and witnesses will often be traumatized because of their experiences during the war.
 - ◆ Coming to The Hague will frequently re-awaken this trauma, and can sometimes affect the way they appear, or the way they behave.
 - ◆ How and whether they have had any contact with *any* justice system in former Yugoslavia or elsewhere will also impact on their fears, expectations and perceptions of their visit to the ICTY.
 - ◆ The importance of keeping the power of decision-making in the hands of victim/witnesses
 - ◆ Be conscious when referring to a witness as a "victim" or as a "survivor". Many people who have suffered in the war do not see themselves as "victims" and are offended by use of the word. The term victim often implies a passivity that people do not feel characterizes their behaviour in "fighting" the war. These "survivors" feel resentful when they are described as or treated as "victims". For others, the term "victim" is a welcome term because it can mean that they are not responsible for what happened to them. Moreover, the term victim has the potential to lay the blame upon the accused for the violence that was perpetrated against them.
114. Staff that deals with victims and witnesses should keep the following general principles of effective support in mind:
- ◆ be encouraging;
 - ◆ accept differences of opinion while being supportive;
 - ◆ give accurate information;
 - ◆ show acceptance;
 - ◆ use language which is non-judgmental;
 - ◆ ensure that witnesses have an opportunity to discuss anything that concerns them in preparing for their testimony.

Accompanying support person policy

A witness may bring a support person to accompany him or her during the testimony in The Hague. As this policy only applies to the most vulnerable witnesses, the following criteria will be used to assess whether the witness requires a support person:

- *No surviving close family members;*
- *Witness with a disability;*
- *Older or very young witnesses;*
- *Presence of severe symptoms of a Post-Traumatic Stress Disorder;*
- *Subjective fear or anxiety to such an extent that it would prevent the person from travelling or testifying;*
- *Relationship of support person to the witness;*
- *A support person has been approved for previous testimony/visit to the ICTY.*

E.2.2 Adjustment of the witness to a new environment and first meetings between the witness and their lawyers

115. The witness will receive an arrival briefing at the accommodation and be provided with information pertaining to his or her upcoming testimony. This information will include a brochure in his or her own language detailing all practical aspects of the judicial process, such as the ways of testifying before the court, the testimony in Court, the assistance and support provided to witnesses by the VWS and the special measures for confidentiality, security and protection. The VWS has drafted and published such brochures in Bosnian-Croatian-Serbian and Albanian languages as well as in English language.
116. When the witness arrives in The Hague, it is desirable that the witness be allowed sufficient time to recover from the flight and acclimatize to The Hague accommodation. A witness should be encouraged to spend the remainder of the first day adjusting to the new environment.³⁴⁷
117. It is not advisable for a witness to meet with OTP or defence lawyers to prepare the testimony (the so-called "proofing") on the first day. However, if proofing is absolutely necessary on the first day, then it should occur no sooner than 4 hours after the witness has arrived at the accommodation and after the consumption of one meal.

E.2.3 Constant monitoring of the well-being of the witness

118. For the witnesses' well-being, it is important that the support staff provide a visible and independent supportive presence in the accommodations and in the witness waiting rooms during the Court proceedings. Support staff is available to speak to the witnesses from 07h00 till 21h30 and at night, there is an "on call" staff member that witnesses may contact by phone at any time. In this way, the VWS maintains the well-being of witnesses through the provision of a high standard of professional support.
119. In addition to providing direct psychosocial care to witnesses, VWS support staff are required to advocate for the needs of witnesses within the legal institution by putting the rights of witnesses on the Court agenda. For example, VWS staff monitor the psychological and health state of a witness during the court appearance and alert relevant staff within the ICTY such as Judges, Prosecution or Defence teams to any factor that would prevent the testimony from continuing or that would require immediate action. It is the responsibility of support staff to notify these parties or judges about issues that might affect the performance of witnesses in Court or that might affect their ability to testify.

E.2.4 Symptoms of post trauma

120. VWS staff will monitor closely whether witnesses show any post-traumatic symptoms. The types of symptoms experienced by witnesses either during or immediately after proofing and testimony include the following physical and psychological symptoms in varying intensity:

Physical symptoms

- ◆ Headaches (most common and frequent),
- ◆ pains and aches throughout their body (less often, but usually when people have experienced physical assault then specific pain can re-occur involuntarily),
- ◆ loss of appetite (change of environment contributes to this reaction however inability to eat is also symptomatic of the body being in a state of stress and being in a physical state of "fight or flight"),

³⁴⁷ See Annex 7: VWS recommendations on proofing of witnesses.

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- ◆ insomnia (re-emergence of earlier symptoms),
- ◆ nightmares (re-emergence of earlier symptoms),
- ◆ involuntary visual, auditory or olfactory images of trauma related events.

Psychological symptoms

- ◆ Withdrawal from others (detaching themselves from the group present in the accommodation and experiencing communication difficulties),
 - ◆ anxiety (afraid of having unexplainable symptoms, perhaps symptoms that they experienced previously and are now afraid that they have returned again perhaps permanently),
 - ◆ fear (by being reminded of traumatic events and of experiencing unexplainable physical symptoms),
 - ◆ fatigue (compounded by inability to sleep and eat and having such detailed reminders of traumatic material).
121. These types of reactions fit into the normal categories of post trauma reaction. When a person has experienced a traumatic event, such post trauma reactions are usually considered normal responses to abnormal events. Very importantly, such symptoms will occur when triggered independently of how long ago the event occurred. These symptoms or reactions are known to dissipate with the removal of key triggers or in the presence of information and professional support.

E.2.5 Follow-up with witnesses after testimony

122. It is important that VWS follow-up with the witnesses by contacting them two to three weeks after they return home to identify issues related to their reintegration into their local community. In this regard, VWS has developed a number of tools to alleviate problems linked with a witness' appearance in court. For example, the VWS Sarajevo Field Office has developed a network of international and national agencies, including Non-Governmental Organisations in the region of the former Yugoslavia and in third countries, to which witnesses can be referred to for legal or social assistance. The identification and cultivation of new contacts within the mission area is an important factor that assists the VWS in improving the efficiency and quality of its work. In addition to the VWS field office, the VWS has a hotline number that witnesses can call when a problem arises.
123. Furthermore, thanks to a recent donation from a State, the VWS is now in a position to provide limited funding for witnesses who suffer from long-lasting adverse economic or psychological consequences linked to their testimony.

E.3 Protection Unit

E.3.1 Protection of witnesses in court

124. The VWS is one of the entities mandated as per Rule 75(A)³⁴⁸ to request protective measures for a witness for whom it identifies a privacy or protection risk should he or she testify in open session. In practice, the VWS has filed submissions under Rule 33(B) of the Rules of Procedure and Evidence in order to raise this issue with Chambers. This Rule allows the Registry to "make oral and written representation to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions". In most cases, a request for protective measures is made by the Prosecution or the Defence team since they are aware of security concerns at an earlier stage, and the VWS intervenes only when such request has not been made or lacks crucial facts.
125. According to Rule 75(B), protective measures may include:
- ◆ measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
 - ◇ expunging names and identifying information from the Tribunal's public records;
 - ◇ non-disclosure to the public of any records identifying the victim or witness;
 - ◇ giving of testimony through image- or voice-altering devices or closed circuit television; and
 - ◇ assignment of a pseudonym;
 - ◆ closed sessions, in accordance with Rule 79;
 - ◆ appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
126. Witnesses must be informed in a clear language they understand about the content of court documents pertaining to their situation, and in particular about the application, decision and variation of their protective measures.
127. The VWS has observed over the years that there is a real risk of intimidation of witnesses that are left in the courtroom in the presence of accused persons or the parties in the absence of the Judges. Witnesses can indeed be subject to intimidation if they overhear and/or view the defence or the Prosecution teams or the accused, when left in the courtroom without Judges. Additionally, in trials of multiple accused, the witnesses may feel intimidated simply by the number of persons present in the courtroom. To address the issue of potential intimidation of witnesses, and interference by the parties or an accused, and to reduce the stress associated with appearing before the Court, the VWS recommended the adoption of practical yet effective measures related to the movement of witnesses into and out of the courtroom. The goal is to ensure that the witnesses, to the extent possible, are not left alone in the presence of accused or parties (see text box *Milutinović case - Witness protection in the courtroom*).

Milutinović case - Witness protection in the courtroom

In the Milutinović Case, the Trial Chamber, based on VWS recommendations, requested the Registry that the Court Ushers bring in the witness immediately after the Judges have entered the Courtroom (and for the first session, after the Court Usher has introduced the hearing) and bring out the witnesses immediately before the Judges leave the courtroom.

³⁴⁸ ICTY's Rules of Procedure and Evidence, Rule 75(A): A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

E.3.2 Protection of witnesses outside of the courtroom

128. In some cases, in spite of the judicial protective measures granted, or due to the fact that protective measures were not granted, the witness may nonetheless face security issues. To deal with this problem, the VWS Protection Unit has developed a policy detailing available actions to address these concerns. One element of this policy is the Witness Relocation Programme into which a witness and his or her family can be included if, after an assessment conducted by VWS' Protection Unit (see text box *Specificities of Threat and Risk Assessment in an International Context*), it is determined that circumstances prevent the witness from remaining at his or her place of residence (see text box *Criteria for inclusion into the witness relocation program*).
129. Unlike domestic criminal law systems which can rely on the police or ministries for the protection of witnesses, the ICTY, as an international organisation, is entirely reliant on the cooperation of States, including the Host State authorities, to perform some of its services, *i.e.* relocation, temporary relocation to respond to a temporary threat or to monitor threat. Due to the ICTY's lack of coercive means and lack of territory of its own, it is not in a position to independently offer the services of domestic witness protection programmes which include notably the possibility to change an identity, accommodate in safe houses, and internally relocate endangered persons.
130. The ICTY has therefore entered into bilateral framework relocation arrangements with States to facilitate the relocation of those witnesses and their families who could not return to the region.
131. Experience has shown that the best interest of witnesses and families requires that the temporary relocation of witnesses prior to a final relocation should be as short as possible. An extended stay under the ICTY's care prior to final relocation significantly increases the witness' anxiety about his/her future, thereby making adaptation to the new country even more traumatic (see text box *Difficulties*

Criteria for inclusion into the witness relocation program

The inclusion of a witness and his/her family into the ICTY relocation programme is subject to the following conditions:

The witness must testify in relation to a crime involving a breach of Articles two ("Grave breaches of the Geneva Conventions of 1949"), three ("Violations of the laws or customs of war"), four ("Genocide") or five ("Crimes against humanity") of the Statute of the ICTY;

The person must be an essential witness and evidence cannot be secured by any other means;

The threat must be assessed as real and life threatening, The subject must be willing and suitable for inclusion on a witness protection programme.

Specificities of Threat and Risk Assessment in an International Context

Difficulties and challenges have arisen in the practical application of protection services by the Registry and assessment of the level of threat for relocation purposes. Considering the difference and complications of a war zone as a crime scene to a domestic crime scene, in the case of the ICTY it is not possible to identify threat as clearly as in domestic crimes. In the context of international crimes, the threat could come from any member of a political party, a social group, an ethnic group, so it is hard to establish a clear "threat assessment". This means the ICTY has to err on the side of safety for any witness when considering witness protection measures and relocation.

The difficulty of the assessment is increased by the fact that there are no effective, efficient, trustworthy police forces in the areas concerned. In a domestic context, witness relocation is a really final last service to protect a witness, there are lots of trustworthy police forces to maintain law and order and only when a witness is especially targeted by resourceful enemies does a witness need to go into a relocation program because the police forces can't realistically protect them. In war zones the local police forces are shattered, and their ability to protect a witness is much lower. This can mean the ICTY has to take witnesses into its relocation program who, with a similar threat level, might not have been taken in a domestic program.

related to adapting to a new country of relocation).

132. It is important not to underestimate the impact of practical stresses in selecting a new home. The well-being of a relocated witness can be adversely affected by such factors as changes in weather and food, doctors to whom they cannot speak directly or confidentially, and difficulties in doing everyday things such as not reading street signs or determining the opening hours of local supermarkets. Witnesses may be confronted by a daily life in which they understand very little of what is happening around them. This makes witnesses almost completely dependent on the Protection staff, not just for safety and security, but for "cultural translation" to help them make some sense of how to manage daily life. The staff's protection efforts require a great deal of staff time.
133. Because of the difficulties with witness relocation, VWS has found that regional safe houses provide good options for relocation. A safe house ensures that a protected witness is comfortable within his/her own cultural environment, and may reduce considerably the costs associated with the relocation process.
134. The VWS requests that a Memorandum of Understanding be signed between the witness and the VWS Protection Unit setting out the mutual rights and obligations of the VWS and the witness (see text box *Obligations of a witness under the Memorandum of Understanding*). For example, the witness and his/her family will receive allowances, based upon the host countries social welfare allowances scheme, housing costs, utility costs and medical insurance until final relocation takes place. The witness and family will receive psychosocial support from VWS staff in their native language. A psychological assessment will be conducted by an independent qualified clinical psychologist when deemed necessary by the Protection Unit. Consideration will always be given to the education and language needs of the witness and family while they are awaiting relocation under the care of VWS.
135. The Protection Unit will submit a written request to those countries that the VWS has agreements with, asking for the witness and

Obligations of a witness under the Memorandum of Understanding

The witness will:

- *provide the information and give the evidence as required by the Prosecution or the Defence,*
- *not commit any crimes,*
- *refrain from activities that might compromise his or her security,*
- *accept and gives effect to the requests and directions made by the ICTY in relation to the protection provided,*
- *cooperate with the ICTY by avoiding wilful or negligent acts that might disclose to anyone his or her whereabouts.*

Difficulties Related to Adapting to a New Country of Relocation

Over the years, VWS experienced that a final relocation to a State was less successful if the witness and his/her family had waited for a long period of time under the care of the ICTY. This is due to the fact that the witnesses became very dependent on VWS' services and their level of adaptability to a new environment consequently decreased.

Witnesses experience not one but two culture shocks during their relocation. The first occurs when they are brought to a place of safety under the care of the VWS directly from their homes and the place of the threat. The period of time spent waiting in the place of safety while the ICTY locates the country of final relocation can be extremely long. On arrival to the place of safety, they are immediately confronted with a new culture and commence the process of adapting to it. Then of course, they go through this adaptation a second time when they move to their final country of relocation. This process of adaptation is extremely challenging and stressful, at a time when the witnesses' ability to handle stress well is at its weakest. In war zones the police forces are shattered, so the threshold where the local police forces can't protect a witness is much lower and this can mean the ICTY has to take witnesses into its relocation program who, with a similar threat level, may not be taken in a domestic program.

family to be considered for relocation. A request for international relocation should be thoroughly prepared, and requires consideration of cultural and environmental factors when deciding which country to approach with an application for relocation. Once a target country has been identified, the application for relocation to that country should be initiated as soon as possible. Any delays in this process should be followed up at the highest level within the ICTY.

136. Upon acceptance by a country, all travel arrangements and movements should be completed as covertly as possible. Following relocation, the Protection Unit will continue to comply with the terms of the agreement between the country of relocation and VWS.

E.4 Final considerations

137. Throughout the years, the VWS has developed a number of practices and policies designed to ensure that witnesses can testify in a safe and secure environment, a matter of great significance for the management of the trials. Indeed, providing that the witnesses are brought to The Hague in an effective and non-stressful way, ensuring that witnesses receive appropriate psycho-social assistance, and addressing any security issues stemming from their appearance in court are the basic and necessary principles to be implemented within an international tribunal, so that evidence on the violations of international humanitarian law can be adequately presented.

XV. Legal Aid and Defence Counsel Issues

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1. The Tribunal's legal aid system, as it presently exists in the Registry, is the product of 14 years of experience of how to facilitate and provide legal aid in an efficient and equal manner to all indigent accused before the Tribunal. Especially in recent years, the Registry's Office for Legal Aid and Detention Matters (OLAD) has contributed to the codification and systematization of various sections of the legal aid system. These contributions have largely been made in response to procedural developments (multi-accused cases, self-represented accused) and the Tribunal's growing case-load, which reached an all-time high in the years 2007 and 2008 with an unprecedented number of accused persons on trial.
2. Policy development has been one of the highlights of OLAD's work in the past three years with the Association of Defence Counsel (ADC) being consulted to ensure that they are aware of any upcoming changes, or to seek their input prior to promulgation. All Rules and Regulations applied by the Registry and the policies underpinning them should be made available to the defence to ensure transparency and consistency of administrative decisions so that defence counsel are familiar with policies applicable to their payments, travel and other issues. An internal policy document establishing internal procedures is an absolute necessity to ensure consistency within the office, particularly where there is a turnover of staff, in order to avoid different interpretations of the policies by staff members.
3. The Tribunal's legal aid system can be subdivided into three main components: first, the standards and mechanisms for counsel to qualify to practice law before the Tribunal; second, the payment policies for counsel, as they have been established and improved by way of amendments throughout the years; and lastly, the professional conduct of counsel and the Tribunal's disciplinary regime

A. Qualification requirements for counsel

4. Article 21 of the ICTY Statute guarantees an accused the right to have legal assistance if he lacks the means to pay for it.³⁴⁹ Rule 45 of the Rules of Procedure and Evidence provides that "whenever the interests of justice so

349 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, as amended 28 February 2006, at Article 21(4) (d).

demand, counsel shall be assigned to suspects or accused who lack the means to remunerate counsel",³⁵⁰ and details the qualifications counsel must possess in addition to the basic requirements for all Defence counsel established by Rule 44. These requirements must be satisfied before counsel can be assigned to represent accused persons whose indigence has been established, and in order for counsel to be remunerated through the legal aid system. Approximately 90% of the accused that come before the Tribunal lack the means to fully remunerate counsel. Consequently, they must have counsel assigned to them from a list of qualified lawyers maintained by the Registrar, known as the "Rule 45 List"³⁵¹ or propose the assignment of other counsel whose qualifications are then vetted by the Registrar and appointed if their credentials satisfy the requirements set out in Rule 45.

5. Ensuring that assigned Defence counsel meet a minimum standard of qualifications and experiences is essential for conducting fair and expeditious trials, for maintaining the proper functioning of the Tribunal, and ensuring the integrity of the ICTY's jurisprudence. The Registrar meets his obligations through the OLAD. In assessing the qualification of counsel, OLAD is guided not only by Rules 44 and 45, but also by the Directive on the Assignment of Defence Counsel (Directive).³⁵²
6. Given the Tribunal involves a dynamic confluence of common law and civil law systems, as well as of legal professionals from all over the world - who bring with them different educations, experiences and legal traditions - in the ICTY's early practice many thought that strict and exact criteria for the admittance of Defence counsel was ill-advised. However, the absence of stringent qualification criteria led to instances when admitted counsel suffered from questionable competence or ethics, and left the Tribunal's legal aid system vulnerable to abuse. Consequently, a working group composed of Tribunal judges was convened in May 2003 and charged with the task of strengthening the qualification criteria for counsel appearing before the Tribunal. In particular, the working group was concerned with developing a more rigorous standard of competence for inclusion on the Rule 45 List, as well as a more vigorous process for vetting counsel's qualifications. In conjunction with the Registry, a series of amendments was proposed to Rules 44 and 45 of the Rules, and Articles 14 and 15 of the Directive came into force on 28 July 2004.

A.1 Rule 44: General qualification requirements for all Defence counsel

7. Rule 44(A) establishes the basic qualifications that counsel must possess in order to represent a suspect or accused before the Tribunal, including the following criteria:
 - ◆ counsel must be admitted to the practice of law in a State or be a university professor of law;³⁵³
 - ◆ counsel must be a member in good standing of an association of counsel practicing at the Tribunal and recognized by the Registrar³⁵⁴;
 - ◆ counsel must not have been found guilty or otherwise disciplined in relevant criminal³⁵⁵ or disciplinary proceedings³⁵⁶;

350 Rule 45(A) ICTY RPE (Rules of Procedure and Evidence, IT/32/Rev.4i, as amended on 28 February 2008).

351 It identifies counsel that meet the requirements of Rule 45, of the ICTY RPE, and have expressed their willingness and availability to be assigned to any suspect or accused.

352 Directive on the Assignment of Defence Counsel, IT/73/REV.11, as amended 29 June 2006 ("Directive").

353 Rule 44(A)(i), ICTY RPE.

354 Rule 44(A)(iii), ICTY RPE.

355 Rule 44(A)(v), ICTY RPE.

356 Rule 44(A)(iv), ICTY RPE.

- ◆ counsel must not have engaged in dishonest or otherwise discreditable conduct, or conduct that is prejudicial to the administration of justice or likely to diminish public confidence in the Tribunal or the administration of justice;³⁵⁷
 - ◆ counsel must not have provided false or misleading information in relation to his qualifications or failed to provide relevant information;³⁵⁸ and
 - ◆ counsel must have written or oral proficiency in one of the two working languages of the Tribunal (English or French).³⁵⁹
8. Rule 44(B) provides an exception to this requirement which provides that "the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused" when such an assignment is requested by lead counsel and "where the interest of justice so demand."³⁶⁰ A counsel privately retained by a non-indigent accused must meet all the requirements of Rule 44 and must submit a power of attorney to the Registrar. Such counsel is admitted to represent the accused by way of an appointment decision upon verification of his qualifications.

A.2 Rule 45: Qualification requirements for assigned Defence counsel

9. While an accused has the right to be represented by counsel of his or her own choosing,³⁶¹ the choice is not unlimited, especially given that counsel will be appointed by the Registrar and remunerated from public funds.³⁶²
10. Rule 45 imposes additional requirements counsel must satisfy in order to be appointed to a case financed by the Tribunal's legal aid system. The Rule 44(B) exception to the Tribunal's language requirement, available to counsel representing non-indigent accused, does not extend to lead-counsel assigned to represent an indigent accused: Rule 45(B)(i) provides that this requirement may only be waived by the Registrar for assigned counsel in accordance with the Directive which in turn limits the exception to co-counsel.³⁶³
11. The Working Group also amended Rule 45(B)(ii) of the Rules, and Article 14(A)(iii) of the Directive, to require that assigned counsel "possess *established competence* in criminal law and/or international criminal law/ international humanitarian law/ international human rights law" as opposed to the "*reasonable experience*" that counsel was previously required to possess in one of those fields³⁶⁴. Furthermore, the Working Group introduced a minimum standard of experience in applicable disciplines which requires that counsel possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings.³⁶⁵ The Registry has consistently interpreted this rule as requiring relevant courtroom experience. Finally, Rule 45 requires that counsel seeking admission to the Rule 45 List must provide a

357 Rule 44(A) (vi), ICTY RPE.

358 Rule 44(A) (vii), ICTY RPE.

359 Rule 44(A) (ii) ICTY RPE.

360 Rule 44(B) ICTY RPE.

361 Article 21(4)(d), ICTY Statute.

362 See e.g. *Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003, as confirmed by subsequent jurisprudence.

363 Article 14(C), ICTY Directive: "A person who does not have written and oral proficiency in either of the two working languages of the Tribunal but who speaks a language spoken in the territory over which the Tribunal has jurisdiction, and who fulfils all other requirements set out in Article 14(A), may be admitted to the list envisaged in Rule 45(B) of the Rules, if the Registrar deems it justified. Such person can be assigned only as co-counsel in accordance with Article 16(D)."

364 ICTY Directive on the Assignment of Defence Counsel, IT/73/Rev.9, as amended on 12 July 2002, Article 14A(iv).

365 Rule 45(B)(iii), ICTY RPE.

declaration indicating their availability and willingness to be assigned to any person detained under the authority of the Tribunal and lacking the means to remunerate counsel.³⁶⁶

A.3 Duty Counsel List

12. In accordance with Rule 45(C), the Registrar also maintains a separate list of counsel who, in addition to fulfilling the qualification requirements of the Rule 45 List, can be assigned as "duty counsel" to an accused for the purposes of the initial appearance.³⁶⁷ This list allows counsel to be appointed on short notice for the initial appearance before the Tribunal, and it allows the accused and the Registrar the opportunity to carefully select counsel for further representation. The duty counsel provisions were introduced in the Rules and the Directive in July 2004 in an effort to prevent delays in the assignment/appointment of counsel to represent the accused at initial appearances. Delays had occurred in the past, and were associated with the unavailability of an accused's selected counsel, or the impossibility of assessing the requested counsel's credentials in time for the initial appearance.

A.4 Admission to the Rule 45 List

13. The Registry is ultimately responsible for verifying the qualifications of counsel under both Rules 44 and 45, and since 2002 has worked with the Association of Defence Counsel (ADC)³⁶⁸ to ensure the competence and qualifications of counsel appearing before the Tribunal. In order to be included on the Rule 45 List, applicant counsel must submit extensive documentation³⁶⁹ to the Registry demonstrating that they possess the requisite qualifications which are then rigorously assessed by OLAD. If the Registrar is satisfied that the required criteria are met, the applicant receives written confirmation of his/her admission to the list. In some circumstances, pursuant to Article 15(B) of the Directive, the Registrar may refer an applicant to a panel of senior legal officers in Chambers and/or experienced, qualified counsel "to interview the applicant and to make a recommendation to the Registrar on his application."³⁷⁰ Similarly, a candidate for admission to the Rule 45 List can be (and several have been) required to demonstrate his proficiency in one of the working languages of the Tribunal by means of a language proficiency test. A denied applicant, or counsel who has been removed from the Rule 45 List, has fifteen days from the date upon which he is notified of the Registrar's decision to seek review by the President of the decision to deny admission or to remove counsel from the Rule 45 List.³⁷¹
14. Some individuals who have requested assignment to defence teams may have been under investigation, or may have been involved in some way in the atrocities that were committed in the conflict that are at issue before the Tribunal. It is advisable to undertake thorough background checks of all applicants before making assignments.

A.5 Assignment to represent an accused and withdrawal of counsel³⁷²

15. Once admitted to the Rule 45 List, counsel can be assigned to represent any suspect or accused before the Tribunal, provided that there is no impediment to the assignment.³⁷³ A conflict of interest or a scheduling

366 Rule 45(B)(iv), ICTY RPE.

367 Rule 45(C), ICTY RPE for the initial appearance of the accused pursuant to Rule 62.

368 See Chapter XV - Section C: Professional Conduct of Counsel.

369 Article 15(A), ICTY Directive.

370 Article 15(B), ICTY Directive.

371 Article 15(C), ICTY Directive.

372 This procedure applies *mutatis mutandis* to the assignment of counsel to suspects.

373 Article 11(D)(i), ICTY Directive.

conflict may constitute an impediment to assignment. Therefore, upon receipt of the accused's request for the assignment of a specific counsel from the list, OLAD must verify that the selected counsel has no conflict of interest. Both the accused and counsel are given an opportunity to be heard before a final decision is made. If the accused's selected counsel cannot be assigned, the accused must choose another lawyer from the list.

16. Instances may occur when an accused or counsel request withdrawal of assigned counsel. A request for withdrawal must be supported by compelling reasons that must be weighed against the rights of the accused, the interests of justice and the efficient and orderly administration of justice. Conflicts between lead and co-counsel or a client's unjustified refusal to communicate with his counsel are not ordinarily sufficient cause to withdraw or dismiss counsel. Similarly, counsel requesting withdrawal for personal reasons are required to provide justification in support of the request. OLAD must assess the legitimacy of the asserted justifications for withdrawal on a case-by-case basis. However, when an accused requests the withdrawal of counsel in order to represent himself, the Chamber must decide whether to recognize the accused's election to represent himself.
17. Potentially justifiable reasons for withdrawing assigned counsel include proof of a potential or actual conflict of interest or evidence that counsel no longer fulfils the requirements of Rule 45. Additional justifications include proof of conviction following criminal or disciplinary proceedings, proof of serious misconduct or demonstrated incompetence affecting fair trial rights of the accused, or serious illness.
18. In fulfilling its mandate, it is crucial that the OLAD observe very strict neutrality in its dealings with other organs of the Tribunal. Shortly after transfer to the Tribunal, the accused needs reassurance of this neutrality, especially since many accused wrongly believe that the entire Tribunal represents the interests of the Office of the Prosecutor. OLAD's experience suggests that the professionalism with which staff have handled issues affecting the accused and the defence have gone a long way towards alleviating this concern, and to helping ensure that defence counsel and accused view the Registry as a neutral organ.
19. Some lawyers may be subjected to disciplinary proceedings and found guilty of offences while already assigned to defence teams. It is advisable to send periodic reminders to defence counsel that they must provide the Registry with information on any issues that may change their status before the Tribunal. Some counsel may neglect or fail to inform the Registry of their ineligibility to continue representing an accused person.
20. When sufficient justification has been provided, and counsel is to be withdrawn from a case that is on trial, there is a great need for a transition plan that retains the counsel to be withdrawn for at least one month while the replacement counsel serves in the capacity of legal consultant. This transitional period helps ensure that replacement counsel has time to become sufficiently familiar with the case and is only assigned after confirmation to this effect is provided to the Registry by the lead counsel.

A.6 The Accused's application for assigned counsel

21. When an accused claims indigence and requests the assignment of Tribunal-paid counsel, he is required to make full disclosure of his/her means and assets, as well as those of members of his household, on a *Declaration of Means* form provided by the Registry. The accused has the burden of proving that he lacks the means to remunerate counsel.³⁷⁴ To satisfy this burden, the accused must produce evidence to substantiate his indigence claim and must cooperate with the Registry's inquiry into his means. In the course of that inquiry,

374 Article 8, ICTY Directive.

XV. Legal Aid and Defence Counsel Issues

the Registry can gather information, hear the suspect or accused, or request the production of any documents deemed relevant.

22. The Registrar determines the extent to which an accused is able to remunerate counsel by taking into account means to which the accused has direct or indirect enjoyment or free disposition. The inquiry includes on, but is not limited to, direct income, bank accounts, real or personal property, pensions and stocks, and bonds or other assets held, but excludes any family or social benefits to which he may be entitled. In assessing such means, the Registrar must take into account the means of the spouse as well as of those persons with whom he habitually resides. From the established pool of income and assets, the accused's disposable means is calculated, but deduction is made for the estimated living expenses of the accused's family and dependents for the estimated period in which the accused will require representation before the Tribunal.
23. When an accused has transferred an interest in an asset under circumstances demonstrating that the purpose of the transfer was to conceal the asset, the Tribunal has consistently ruled that such assets are to be taken into account in assessing the accused's means. This approach is consistent with the ICTY Directive that allows the Registrar to lift the veil of registered ownership to determine the real financial status of an accused. This process helps ensure that accused requesting legal aid are not allowed to use the veil of legal title to hide their real financial status.³⁷⁵
24. In order to make a reliable determination of an accused's indigence, it is necessary to recruit a highly qualified financial investigator with excellent knowledge of and connections with the region concerned, as well as experience in investigating money-laundering or other practices of concealment of assets. When the information provided by an accused on his financial status is incomplete or appears inaccurate, a thorough investigation must be undertaken regarding the actual financial status of the accused. If such measures are not put in place, an accused who has sufficient means to pay for his defence, or to make a contribution to the cost of his defence, may unduly benefit from public funding for his defence.
25. When an accused has requested the assignment of counsel and has submitted a *Declaration of Means*, the Registrar must assign counsel for a period not exceeding 120 days in order to protect the accused's right to counsel while his financial status is being assessed. If, as a result of the financial inquiry, the accused is found fully or partially indigent, counsel is assigned permanently and the accused's Defence costs are borne by the Tribunal in full or in part, respectively. In the latter case, the accused is required to make a financial contribution to the cost of his Defence, as determined by the Registry.³⁷⁶ If the accused is found to be fully non-indigent, his request for assignment of counsel is denied.³⁷⁷
26. On matters related to findings of (full or partial) indigence, the suspect or accused may appeal the Registrar's decision to the President or to a Chamber, depending on the case.³⁷⁸ Judicial intervention is warranted because of the importance of representation to the right to a fair trial.
27. The assessment of an accused's indigence may take several months, especially when the investigation requires cooperation from states regarding foreign bank accounts or assets held in various countries. Therefore, counsel should be assigned to an accused requesting legal aid on a temporary basis pending the indigence determination in order to protect the accused's right to counsel, and also to ensure smooth preparation for trial with no undue delay to the proceedings.

375 See Articles 9 and 10, ICTY Directive, and the Registry Policy for Determining the Extent to which an accused is Able to Remunerate Counsel (Indigence Policy).

376 Articles 11(A) (i) and (ii), ICTY Directive.

377 Article 11(A) (iii), ICTY Directive.

378 Article 13, ICTY Directive.

28. A system needs to be put in place to ensure that the accused pay their assessed contribution for counsel, should they refuse to do so. The Tribunal must assume responsibility for enforcement of contribution decisions, preferably through legal means allowing for example for the sale of an accused's assets. The absence of a framework in the Tribunal's Rules for enforcement of such decisions presents difficulties in obtaining contribution. Further difficulties arise in securing such funds where the funds are held in foreign bank accounts, or assets are disposed due to complex legal procedures that require considerable time periods.

A.7 Assignment of other Defence team members

29. When counsel is assigned to an indigent accused, counsel may request that the Registry assign a second counsel (co-counsel) and support staff to assist in the preparation of cases of considerable scope and magnitude. Co-counsel are usually selected from the Rule 45 List unless an exception is granted under Article 16(D) of the Directive for the assignment of a co-counsel who does not speak a working language of the Tribunal. As far as support staff are concerned, the Registry, through OLAD, verifies the qualifications of proposed support staff by vetting their *curriculum vitae* and other documentation, and will perform a conflict of interest check to ensure the assignment of a particular support staff does not conflict with current or previous assignments, and that they are not themselves the subject of investigation by the Tribunal. In order to minimize the potential for abuse of the Tribunal's legal aid system, assignment of family members or close friends of counsel or the accused is not permitted.

A.8 Assistance to the Defence

30. The Defence must be placed on an equal procedural footing with the Prosecution for the principle of equality of arms to be respected. The Tribunal has a duty to provide administrative and logistical support to the Defence because the Defence is not an organ of the Tribunal, and the seat of the Tribunal is far away from the crime scene, as well as from counsel's place of residence and support network. In addition to a comprehensive remuneration scheme, the Registry has developed and implemented several systems and policies aimed at assisting Defence teams throughout all phases of the proceedings.
31. Those systems and policies include:
- ◆ providing facilities on the Tribunal premises, such as Defence offices with internet access, printers, and copying machines;
 - ◆ ensuring the availability of Information Technology equipment and services;
 - ◆ providing access to the Tribunal's Judicial Database;
 - ◆ facilitating (*i.e.* booking) and paying for work-related travel;
 - ◆ providing and facilitating all counsel-client communication through privileged channels.
32. A lack of office space within the Tribunal became a limiting factor when the number of accused persons whose cases were on trial increased, and several defence teams had to be physically present in The Hague. The ICTY's decision to introduce a lump sum system, with an office cost component, enabled defence counsel to rent office space outside the Tribunal. While operational requirements demand that some space be provided to the Defence on the Tribunal's premises, such space is used as a staging room and a place where defence team members can hold short meetings prior to or after a court hearing and during court breaks.
33. The defence should be able to directly contact sections of the Tribunal relevant to their work such as CMSS, CLSS, Security, and Chambers. These direct contacts increase efficiency and help integrate the defence who were kept at a distance and isolated during the earlier years. Defence personnel also have the right to use

common facilities within the Tribunal such as the cafeteria. However, for security purposes, access to various parts of the Tribunal must be restricted (as it is for staff members).

B. Payment policies

34. OLAD, in consultation with the Association of Defence Counsel (ADC), has adopted a number of payment policies that govern the payment of Defence teams representing indigent accused during the Pre-Trial, Trial and Appeals stages of proceedings. Additionally, a remuneration scheme for self-represented accused has been established.³⁷⁹
35. The ICTY's legal aid system has undergone a major reform in recent years. The Registry has abandoned the previous hourly payment scheme, which was based on a maximum number of hours per month, because it proved to be overly bureaucratic, burdensome, and expensive, and has replaced it with a lump sum payment scheme.³⁸⁰ The transition from a payment scheme based on a maximum number of working hours remunerated at a certain rate to a lump sum payment policy has been one of the most significant achievements in the management of legal aid funds. The lump sum, as implemented at the ICTY, is designed to provide adequate resources to the defence teams and more flexibility in the disbursement of legal aid funds, while reducing the administrative burden on the Tribunal and defence counsel. Control mechanisms allow the Registry to monitor the expenditure of public funds and to react swiftly should irregularities occur. Of course, the use of a lump sum payment system can only be implemented when the defence counsel funding recipients are under an obligation to ensure the efficient management of funds. In addition, travel expenses incurred by the defence in connection with the preparation of the defence must be borne by the Tribunal.

B.1 Pre-trial legal aid policy

36. The Pre-trial Legal Aid Policy³⁸¹ lump sum payment system is designed to give counsel maximum flexibility in the use of resources and to allow lead counsel to use the lump sum to hire members of the Defence team in a manner that best suits the needs of the team. The Registrar must, however, approve all members of the Defence team to ensure that they are qualified and that there are no conflicts of interest or other ethical concerns. The Pre-Trial Legal Aid Policy follows a scheme that varies payment based on one of three complexity levels in each case: (1) difficult; (2) very difficult; or (3) extremely difficult/leadership. Payment to counsel is made accordingly in lump sum form relative to the level of complexity. The lump sum is distributed in monthly stipends which do not represent a monthly allotment of hours.
37. For payment purposes, the pre-trial stage consists of three phases:
 - ◆ Phase One - the initial appearance phase;
 - ◆ Phase Two - the phase in which preliminary motions and a work plan are submitted; and
 - ◆ Phase Three - the trial preparation *per se*.
38. In Phase One, the initial appearance phase, counsel will be assigned to represent an accused for the initial appearance and any other matters needed until permanent counsel is assigned. This phase begins with the

379 Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused of 28 September 2007.

380 See the Report of the Secretary-General *Comprehensive report on the progress made by the International Criminal Tribunal for the Former Yugoslavia in reforming its legal aid system*, A/58/288 of 12 August 2003, paras.17 *et seq.*

381 Defence Counsel - Pre-Trial Legal Aid Policy of 1 May 2006.

assignment of counsel and ends one day following the accused's entry of a plea. A lump sum payment³⁸² is made at this phase upon submission of a *pro forma* invoice.³⁸³

39. In the event that the counsel who is assigned for the initial appearance continues to represent his/her client beyond the plea, Phase Two will commence the day following the date on which a plea is entered by or on behalf of the accused. When a new counsel is assigned following the plea, Phase Two will begin on the day of the assignment. Phase Two concludes 90 days after commencement or upon submission of the Work Plan, whichever is later. The Registrar calculates the Phase Two lump sum based on a formula that assumes that the defence will include one counsel and one support staff.³⁸⁴ The assignment of a second counsel or additional support staff is not prohibited, but the addition of other staff does not result in an increase of the lump sum received for Phase Two. Phase Two lump sum payments are made in three equal monthly stipends.³⁸⁵ The lump sum payment for both Phase One and Phase Two is adjusted only on a showing of compelling factual or legal circumstances, or other developments that lead to a substantial increase in the amount of work. In addition, the lump sum for both Phase One and Two is not contingent on the complexity of the case.
40. Lead counsel is required to submit a Work Plan by the end of Phase Two which is a judicial management document³⁸⁶ that allows the Registrar to monitor the Defence team's preparation of the case and provides a reference for the allocation of resources to Defence teams. At the same time the Work Plan is submitted, the Defence team must present the Registrar with a reasoned submission relating to the Chamber's determination of the case's complexity level.³⁸⁷
41. Phase Three commences the day after the conclusion of Phase Two and terminates with the commencement of trial. The Registrar calculates the lump sum for Phase Three based on the complexity of the case.³⁸⁸ The lump sum for a Level One (difficult) Phase Three case is based on the work of one counsel and two support staff.³⁸⁹ The lump sum for a Level Two (very difficult) Phase Three case is based on the work of one counsel and three support staff.³⁹⁰ The lump sum for a Level Three (extremely difficult/leadership) Phase Three case is based on the work of one counsel and five support staff.³⁹¹ As with Phase Two, co-counsel and additional support staff can be assigned to any team at any time, but this will not lead to an increase the amount of the lump sum.³⁹²

382 Counsel is assigned a standard lump sum of €1,688.00 for Phase one. Included in the lump sum are all interpretation costs and costs of translation of documents other than those documents to be adduced as evidence which are translated by the ICTY. Not included are those interpretation and translation costs incurred to facilitate client-counsel communication. The Defence team may invoice separately for those costs up to €1,000 per month.

383 The invoice must be signed by counsel and submitted within 60 days following the end of the phase. The invoice advises the Registrar how to distribute the stipend between Defence team members.

384 Total lump sum for the three-month phase is €40,707, including an office cost component.

385 The first two stipends will be paid upon submission by counsel of a *pro forma* invoice at the end of each month. The last stipend will be paid upon submission of a *pro forma* invoice and a Work Plan for Phase Three of the pre-trial stage.

386 A Work Plan is comprised of 15 different sections, all of which must be elaborated.

387 Complexity level is determined by the Registrar after consultation with representatives from the Chamber, the Prosecution and the Defence, which is done by way of a meeting or in writing. The assessment of the complexity of a case at every stage is determined by various factors, not limited to the position of the accused within the political/military hierarchy; the number and nature of counts in the indictment; whether the case raises any novel issues; whether the case involves multiple municipalities (geographical scope of the case); the complexity of legal and factual arguments involved; and the number and type of witnesses and documents involved. See for example the complexity determination in the Pre-Trial Stage in the cases against Johan Tarčulovski - Level 1; Dragomir Milošević - Level 2; Momčilo Perišić - Level 3.

388 The members of each Defence team and their rates of pay are estimated as to what is deemed reasonable for calculating the lump sum, but are not considered prescriptive. The lead counsel has complete flexibility in how to compose and compensate the Defence team.

389 Total lump sum equals €94,415, including an office cost component.

390 Total lump sum equals €192,759, including an office cost component.

391 Total lump sum equals €340,432, including an office cost component.

392 The lump sum is calculated on the basis of the amount of work necessary to prepare the case for trial and not the number of Defence team members sharing the workload.

Upgrades in the level of complexity can occur upon request, but only in cases initially determined to be Level One or Two. Adjustments in the lump sum can occur only if lead counsel demonstrates unforeseeable circumstances that substantially impact upon the preparation time reasonably required by the Defence team.

42. Counsel must also submit monthly *pro forma* invoices for Phase Three. Payment is disbursed upon submission of the invoice in monthly stipends and will commence only after the Registrar accepts the Work Plan. Eighty percent of the Phase Three lump sum will be paid in monthly stipends while the remaining twenty percent will be paid after acceptance of the Defence team's End-of-Stage Report.³⁹³ Lead counsel must keep a record of the hours and work performed by the Defence team even though lead counsel is required to submit progress reports every four months during Phase Three, and a detailed End-of-Stage Report at the end of the Phase.³⁹⁴

B.2 Trial payment scheme

43. Similar to the pre-trial payment policy, the Trial legal aid scheme³⁹⁵ envisages a lump sum allotment to Defence teams for the Trial phases. The lump sum for each case is calculated by multiplying allotments by the estimated number of months of the case's duration.³⁹⁶ The estimated duration of the Prosecution and Defence phases is based on the time allocated by the Trial Chamber for the presentation of their respective cases. Therefore, the total allotment for each month will include the regular monthly allotment and a monthly allotment for client-counsel interpretation and translation costs.³⁹⁷ However, the total lump sum for the Prosecution or Defence phases may be modified where the Trial Chamber has extended the duration of the phase or where the phase has been shorter than initially determined.
44. The Registrar shall determine the amount of the lump sum after consulting with the Trial Chamber and the parties, and after evaluating both: (1) the estimated duration of the stage,³⁹⁸ and (2) the complexity of the stage. The trial stage is divided into the Prosecution phase and the Defence phase.³⁹⁹ The Defence team will receive an up-front payment,⁴⁰⁰ a monthly stipend paid automatically each month,⁴⁰¹ and a final End-of-Phase

393 The stipend for this phase is calculated by dividing eighty percent of the lump sum by the estimated number of months in the phase. Absent a clear estimate of the length of the phase, the Phase Three lump sum is distributed as follows: for Level One cases - over 12 months, for Level Two cases - over 15 months and for Level Three - over 18 months.

394 Progress Reports must summarize the work performed by the Defence team, including the progress made based on the items included in the Work Plan. On his own initiative, or on request of the lead counsel, the Registrar may organize a meeting to discuss a progress report. The End-of-Stage Report must contain a formal accounting of hours covering the pre-trial stage as well as details on the type of work performed by each team member during this period. Defence must also retain all Defence files for a period of, at least, five years after the end of the proceedings so the Registrar may check on the work performed.

395 Defence Counsel - Trial legal Aid Policy of 1 May 2006 ("Trial Legal Aid Policy").

396 The allotments are comprised of three components: (1) gross salary of a P5 Step VII staff member plus a component for office costs totaling €14,093 (for lead counsel); (2) gross salary of a P4 Step VII staff member plus office costs, a total of €11,645 (for co-counsel); and (3) a support staff component totaling €3,000 for difficult cases, €9,000 for very difficult cases and €15,000 for extremely difficult/leadership cases.

397 The monthly allotment in total (i.e. lead counsel, co-counsel and support staff) is thus: (1) for difficult cases €25,738 +€3,000 = €28,738, (2) for very difficult cases €25,738 +€9,000 = €34,738 and (3) for extremely difficult cases €25,738 +€15,000 = €40,738 (this does not include the monthly allowance for client-counsel interpretation and translation costs). A maximum of €1,000 per month for client-counsel interpretation and translation costs is also available to the defence.

398 It has generally been the practice that, throughout the course of proceedings, both in the pre-trial and trial phases, the Office for Legal Aid and Detention Matters seeks the Chamber's view concerning the duration of a case when the length of the case has changed from the time when the initial determination was made regarding the anticipated level of complexity and payment for the Defence.

399 In the event that either of these phases is predicted to last longer than twelve months, a phase may be sub-divided into two separate phases. Separate lump sums will then be calculated and allocated for each phase of the trial at the time that this phase of the trial is set to begin. In the event that the whole trial stage is expected to last less than twelve months, it will constitute one phase.

400 Ten percent of the lump sum is issued at the commencement of the Prosecution phase on the day that the trial proceedings begin.

401 The stipend is calculated by dividing the lump sum by the estimated number of months, and multiplying that amount by seventy percent. Defence counsel is required to submit a monthly statement, a *pro forma* invoice, advising how to distribute the stipend.

distribution.⁴⁰² The up-front payment and monthly stipends are considered advance payments towards the lump sum rather than an allotment of hours.

45. The End-of-Phase payment is normally disbursed within one month following the Registrar's acceptance of an End-of-Phase Report.⁴⁰³ The Report is similar to the Pre-Trial stage End-of-Phase Report.⁴⁰⁴ Based on the Report and any additional information received from lead counsel, the Registrar disburses the remainder of the lump sum, unless he has reason to believe that irregularities in the work or conduct of the Defence team may have taken place.

B.3 Appeals payment scheme

46. The appeals payment scheme is structured differently than the pre-trial and trial stages. The Registry disburses funds pursuant to an hourly system with a hourly maximum allotment for the whole Appeals phase.⁴⁰⁵ The Appeals Payment Scheme is as follows: whenever a Defence team appeals, the case is preliminarily ranked as a Level One (difficult) case. The Level One case is then allotted a maximum of 1,050 hours for counsel and up to 450 hours for support staff work. Upon request, a case can be upgraded in its complexity level according to the standards established for the Pre-Trial and Trial phase, and an upgrade provides for a higher number of overall hours.⁴⁰⁶ In light of the expected high number of appellate proceedings in 2009 and 2010, OLAD in consultation with the ADC, is currently finalizing a lump sum legal aid policy for appeals.⁴⁰⁷ While the policy has not gone through consultation with the ADC and the various Tribunal sections, OLAD envisages a lump sum payment system similar to that used for pre-trial and trial. In particular, it is envisaged that the Defence team will be allocated a total amount of money to be distributed monthly and a portion of the lump sum will be withheld by the Registry and disbursed at the end of the phase. The Registrar's proposal is based on a review of all appeals that have been brought before the Tribunal to date. This review focuses on certain features, notably complexity and workload, common to most appeals. It is therefore envisaged that a standard lump sum will be allocated to all "standard appeals", *i.e.*, appeals which meet certain criteria. Factors which add to the standard complexity and workload indicators may warrant additional funding on a case-by-case basis, in accordance with pre-determined criteria.
47. In a Tribunal where translation of material from the native language to the working languages of the Tribunal is necessary, it is imperative to factor translation costs into the lump sum payment so that counsel can recruit language assistants to translate documents. The payment scheme should also include a separate allowance for strictly client-counsel translation when defence counsel does not speak the language of the accused.
48. The Rules and Regulations governing matters pertaining to defence counsel should include measures designed to protect the integrity of the Tribunal. Specific provisions in the Directive on the assignment of Defence Counsel and Code of Conduct should be included prohibiting financial misconduct such as fee-splitting and unethical practices by defence counsel. Disciplinary proceedings should always be initiated where such violations are found to take place and sanctions implemented to protect the integrity of the Tribunal.

402 The Defence team is entitled to receive the part of the lump sum that was withheld. If the actual duration is the same as the estimated duration, then the End-of-Phase payment will equate to twenty percent of the lump sum. In all other cases the Registrar recalculates the lump sum in accordance with the revised duration and reconciles the figures.

403 Trial Legal Aid Policy, para.10.

404 Files must be retained for a period of at least 5 years as in the Pre-Trial Stage.

405 See Legal Aid Payment Practice Direction of 01 January 2001.

406 If the case is upgraded to a higher level of complexity, a Level Two (very difficult) case will be allotted 1,400 hours for counsel and 600 hours for support staff work, and a Level Three (very difficult/leadership) case will be allotted 2,100 hours for counsel and 900 hours for support staff work.

407 The new policy is expected to be fully operational in 2009.

B.4 Experts allocation

49. The legal aid system also provides for the possibility of an assignment of experts to the Defence. Expert witnesses or medical/psychological experts engaged by the Defence, provide written and/or may testify in court. While the Chamber determines the scope of the expertise required, and its admission into the proceedings, the Registry administers the assignment. The Registry will reimburse a maximum allotment of 150 hours for the pre-trial phase and 150 hours for the Trial phase.⁴⁰⁸ Testimony of expert witnesses in court is compensated separately. The allotment includes all work necessary to carry out the assignment, including research, and drafting of the written expertise. An expert's travel time is not billable as working hours.⁴⁰⁹

B.5 Self-represented accused

50. In September 2007, the Tribunal established the Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused.⁴¹⁰ Guided by the Statute's Article 21 on fair trial rights, and expressly referring to the Directive and other Registry policies, the Registry provides remuneration to a limited number of persons who assist an indigent, self-represented accused.⁴¹¹ The Remuneration Scheme is based on an hourly system that allows a maximum number of hours per month, for all stages of the proceedings, where pre-trial and appeal are totalled with an overall number of hours per phase, and the Trial phase is regulated by a monthly maximum of hours.⁴¹² The qualification requirements for members of the support team resemble those for support staff assigned to assist counsel.⁴¹³ In addition to providing funding for persons assisting indigent self-represented accused, OLAD also ensures that such accused have adequate facilities to prepare their cases, taking into account the specific needs of each accused, the particular stage of the proceedings and the security and good order of the United Nations Detention Unit where the accused are detained.
51. With regard to self-represented accused, lump sum payment system cannot be used. Instead the Registry reviews invoices submitted and makes payments to all support staff in accordance with the maximum hourly rate provided in the remuneration scheme for self-represented accused.
52. Experience has shown that self-represented accused cases are extremely demanding, taking up some 50% of the time of OLAD legal staff, and may affect the quality of service provided to other defence teams. The establishment of a *Pro Se* office to deal exclusively with self-represented accused has helped alleviate the extra administrative burden placed on OLAD, but also ensures that self-represented accused receive an adequate level of service, and that there is consistency in how self-represented accused are treated.

B.6 Other arrangements

53. A payment structure should be put in place for other, smaller, matters such as contempt cases which inevitably arise in Tribunal proceedings. Contempt cases, for example, differ markedly in scope and magnitude and do not lend themselves to the application of the payment policy for other ICTY cases. Other *ad*

408 Experts are paid per hour. Working hours are paid in accordance with the applicable rate as established by the Registry based on the expert's relevant experience.

409 The Tribunal's Victims and Witnesses Section (VWS) arranges travel of expert witnesses for testimony. Otherwise, the Registry does not cover any travel expenses related to the expertise other than for medical and psychological experts, who require periodic visits with the accused.

410 For the legal background, see *Prosecutor v. Momcilo Krajišnik*, (IT-00-39-A), Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007.

411 Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused ("Remuneration Scheme"), para.3.1., providing for a legal associate, a case manager, an investigator and a language assistant.

412 Remuneration Scheme, para.3.3.

413 *Ibid.*, para.5.

hoc situations arise that may require a payment structure, including cases transferred to a national jurisdiction that require defence counsel to perform specific tasks to facilitate the transfer that differ from tasks to prepare a case for trial.

C. Professional Conduct of Counsel

54. Competent, professional and vigorous defence is of paramount importance to criminal proceedings. In the absence of an international bar to regulate the profession and deal with counsel ethics, the Tribunal has a responsibility to bridge the gap by monitoring the performance and conduct of Defence counsel appearing before it, thus ensuring that the Defence maintains a high level of professionalism and integrity.
55. It is advisable to ensure sufficient staffing levels that include lawyers, administrative assistants, financial investigators and finance assistants. It is absolutely necessary that Registry lawyers review reports submitted by defence counsel, review invoices to determine the work was necessary and reasonable, assess conflict of interest and draft submissions on matters related to defence counsel. The largely administrative component of the section's work should not be misunderstood to mean that a non-lawyer would be equally qualified to perform tasks requiring a legal background.

C.1 Code of Conduct

56. OLAD further supports the fairness of ICTY trials by constantly overseeing and safeguarding the quality of counsel's performance and conduct on behalf of an accused. The normative foundations for counsel's obligations and conduct before the Tribunal are prescribed by the Code of Professional Conduct for Defence Counsel Appearing before the ICTY (Code of Conduct)⁴¹⁴ which imposes very high standards of ethical conduct. The Tribunal takes failures to observe Code standards extremely seriously, and may impose grave sanctions for serious professional misconduct, such as striking counsel from the Rule 45 list.
57. When the Registrar first promulgated the Code of Conduct in 1997, it contained only a few standard obligations of counsel, and was rather undeveloped in other areas, such as enforcement of disciplinary measures or conflicts of interest. The Code was amended substantially in July 2002, and now consists of 50 Articles rather than the original 23. The most prominent of the long list of important new provisions⁴¹⁵ involves the establishment of a disciplinary regime.⁴¹⁶ Article 40 of the Code of Conduct establishes a Disciplinary Panel, which consists of members of the ADC, the Advisory Panel and the Registry, which is competent to deal with "all matters relating to counsel ethics".⁴¹⁷ The Registrar plays a role in investigating complaints and allegations of counsel misconduct, as his office provides independent service to the Chambers, and thus has the neutral status and resources necessary to investigate disciplinary matters.

414 Code of Professional Conduct for Counsel Appearing before the International Criminal Tribunal, IT/125 REV.2 of 12 June 1997, as last amended on 29 June 2006.

415 The Code of Conduct refers not only to the duty of counsel to his client, but also to his obligations as an officer of the Court (Articles 3, 10). Some of the major amendments are listed in the following: the Article on conflicts of interests was further elaborated (Article 14); a prohibition of fee-splitting practices was added (Article 18); a provision on proper conduct towards court officials is now contained in the text (Article 27); the soliciting of clients is now expressly prohibited (Article 30). Finally, the responsibility of counsel for the Defence team is established (Article 34).

416 Articles 37 *et seq.* Code of Conduct.

417 Mostly, it receives and decides upon complaints (Articles 40 and 47, ICTY Directive).

58. In the event of inconsistency, the Tribunal's Code of Conduct has supremacy over the Code of Conduct in a Defence counsel's state of nationality or a state in which he or she is licensed to practice law.⁴¹⁸ Given that the standards of professional conduct and ethics vary from bar to bar and from country to country, this provision guarantees that all counsel appearing before the Tribunal abide by the same high standards, and their conduct will be assessed against a single uniform standard.

C.2 Association of Defence Counsel

C.2.1 Role of the ADC

59. The Association of Defence Counsel (ADC) was established as professional association of counsel to ensure that Defence counsel that practice before the Tribunal adhere to the highest standards of professional conduct, and to guarantee that the interests of Defence counsel practising before the Tribunal are collectively represented by a single body. The Tribunal recognizes the ADC and ensures that it is represented when policy issues are discussed within the Tribunal, especially when they affect the defence or accused. While it is not a bar, the ADC performs some functions usually performed by national bar associations. The ADC was formally recognized by the Registrar and endorsed during the Plenary session of the Judges of the Tribunal of July 2002.⁴¹⁹ Under an amendment to Rule 44, the ICTY expects that the ADC will play an active role in ensuring the professional integrity of its membership.
60. The ADC's primary function is thus twofold: to guarantee a high quality of counsel through the adoption and imposition of internal standards, and to allow ADC Defence counsel to speak with one voice on all issues concerning Defence counsel practicing before the Tribunal.⁴²⁰ Although the ADC is not an organ of the Tribunal, continuous joint efforts of the Registry and the ADC on a number of projects have allowed Defence counsel, through the ADC, to participate in consultations on major Tribunal issues and policies affecting them. For example, a joint consultation process was used to develop the Defence Counsel Pre-Trial and Trial Legal Aid Policies, a Travel and Daily Subsistence Allowance Policy, and the amendments to the Directive. The ADC also participates in the work of the Tribunal's Rules Committee on proposals for the amendment of the Tribunal's Rules. The Tribunal should maintain a constructive working relationship with the association and assist it in providing mandatory continuous training for defence counsel. Additionally, Defence counsel, OLAD and the ADC regularly meet to address issues of mutual concern.
61. It is advisable to keep good relations with the defence offices of other International Tribunals to share information on experiences and practices, and for international tribunals to learn from each other. Although problems encountered at the Tribunal tend to depend on the specific environment and circumstances of Tribunal proceedings, those problems are not entirely different from the problems faced by other international tribunals.

418 See Article 4 Code of Conduct.

419 During the Plenary, the Judges adopted an amendment to Rule 44 of the Rules of Procedure and Evidence, which stipulates that: "(c)ounsel engaged by a suspect or an accused [...] shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she [...] is a member in good standing of an association of counsel practicing at the Tribunal recognized by the Registrar." Rule 44(A)(iii) ICTY RPE.

420 The ADC also functions as a general advocate for the interests of Defence counsel assigned by the Registrar. Also internally, the ADC offers services for its members, relevant for the representation of their clients, such as training for Defence counsel in areas of substantive international criminal law, advocacy skills, and information technology systems.

C.2.2 ADC Disciplinary Council

62. The ADC has its own disciplinary regime that provides a complementary safeguard for the fundamental values of the Code of Conduct. The ADC's Disciplinary Council (Council) is the organ responsible for governing the conduct of its members.⁴²¹ It is an independent ADC organ, charged with three primary tasks: (1) monitoring the conduct of ADC members in their representation of accused before the Tribunal; (2) adjudicating complaints for alleged misconduct that have been lodged against ADC members; and (3) providing advisory opinions on matters relating to the Code of Conduct and the Directive on the Assignment of Counsel, as well as the interpretation of the ADC constitution.⁴²²
63. Complaints against an ADC member for alleged misconduct may be brought by a full member of the ADC, by persons accused by the Tribunal, and by staff members of the Tribunal, whose rights or interests are affected by the alleged professional or ethical misconduct.
64. Upon a complaint, the Council may:
- ◆ mediate between the parties to the disagreement;
 - ◆ issue a formal warning to the respondent member for his or her conduct;
 - ◆ refer the complaint to the Disciplinary Panel of the International Tribunal; and/or
 - ◆ terminate a counsel's membership to the ADC.⁴²³

421 The Disciplinary Council consists of five full members elected by General Assembly of the ADC for a term of one year, though members may be re-elected for a second term, see Art. 15(1) ADC-Constitution.

422 See Articles 16, 18 and 19 ADC-Constitution.

423 See Articles 15 to 19 ADC-Constitution, which specify the duties of the Council.

List of Acronyms

ADC	Association of Defence Counsel
BCS	Bosnian/Croatian/Serbian
CLSS	Conference and Languages Services Section
CMSS	Court Management and Services Section
CPT	European Committee for the Prevention of Torture
DU	Demographic Unit
EDS	Electronic Disclosure System
ERN	Evidence Reference Number
EU	Evidence Unit
ICCPR	International Convention on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ITSS/AV	Information Technology Support Services/Audio Visual
JCE	Joint Criminal Enterprise
JDB	Judicial Database
MIF	Mini Index Information
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
ODM	Office of Document Management
OLAD	Office of Legal Aid and Detention Matters
OTP	Office of the Prosecutor
PoP	Post Orders and Procedures
PTSD	Post-Traumatic Stress Disorder
RFA	Request for Assistance
SLO	Senior Legal Officer
SRA	Self-Represented Accused
TMA_s	Trials of Multiple Accused
TMM	Trial Management Meeting
TTS	Translation Tracking System
UNDU	United Nations Detention Unit
UNICRI	United Nations Interregional Crime and Justice Research Institute
VWS	Victims and Witnesses Section
WMS	Witness Management System

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