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PETER ROBINSON'S

SUMMARY OF DECISIONS OF THE

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

ICTY STATUTE, RULES OF PROCEDURE AND EVIDENCE,
DIRECTIVE ON ASSIGNMENT OF DEFENCE COUNSEL, AND
CODE OF CONDUCT FOR DEFENCE COUNSEL
ANNOTATED

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PREFACE

When I first started working as a criminal defence counsel at the Tribunals in 2000, it was difficult to find their prior decisions. Since knowledge and use of the Tribunals' own jurisprudence was essential to defending my clients, I began locating and reading all the prior decisions and making summaries of them. I continued that practice even when the Tribunals' jurisprudence became more widely available, mostly as a discipline for myself to keep up with the decisions and as a way to quickly locate decisions that I had read.

The summaries in this document are not verbatim quotations from the decisions and are intended only to assist in locating the relevant precedent. They are guides to, but not substitutes for, reading the decisions themselves.

I hope others will find these summaries useful.

Peter Robinson

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Statute of the Tribunal

Article 1—competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

abuse of process

The Tribunal has an inherent power to stay proceedings which are an abuse of process.[1]

The abuse of process doctrine may be relied upon where, in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[2]

To use the abuse of process doctrine, it needs to be clear that the rights of the accused have been egregiously violated.[3]

Search of home of accused's relatives did not warrant dismissal for abuse of process where prosecution did not participate in search and where purpose of search was to look for fugitives, not to gather evidence against accused.[4]

Even if search was designed to intimidate accused's witnesses, the remedy would be exclusion of the evidence taken during the search, not dismissal of the indictment.[5]

Promise by third party unconnected to the Tribunal that the accused would not be prosecuted if he resigned from public office was not sufficient to justify a stay of proceedings for abuse of process.[6]

It could only be in exceptional circumstances that actions of a third party that is completely unconnected to the Tribunal or the proceedings could ever lead to those proceedings being stayed.[7]

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[1] *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 15

[2] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009) at para. 4

[3] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009) at para. 4

[4] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Motion to Dismiss for Abuse of Process,* (12 May 2009) at para. 13

[5] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Motion to Dismiss for Abuse of Process,* (12 May 2009) at para. 15

[6] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 53; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 84

There is no dual standard for the abuse of doctrine, depending on whether the entity carrying out the abuse was connected to the Tribunal or not.[8]

conflict of interest

Fact that some members of Security Council which voted to establish Tribunal were NATO members who were combatants against Serbia did not justify any relief for alleged conflict of interest.[9]

illegal arrest

The Tribunal would not elect to decline to exercise jurisdiction over the accused who claimed to have been arrested in Serbia and transported to Bosnia for transfer to the ICTY. Given the serious crimes involved, the violation of state sovereignty and human rights was not sufficient to justify setting aside the jurisdiction of the Tribunal.[10]

immunity

According to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals.[11]

It is well established that any immunity agreement in respect of an accused indicted for genocide, crimes against humanity, and war crimes before an international tribunal would be invalid under international law.[12]

Neither the mandate of the judges nor that of the prosecutor is affected by an alleged undertaking by United States Ambassador Richard Holbrooke.[13]

Even if the doctrine of apparent authority applies in international criminal law, the accused did not establish that Richard Holbrooke was acting with the apparent authority of the UN Security Council.[14]

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[7] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 85

[8] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 47

[9] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Nebojsa Pavkovic's Motion for Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the former Yugoslavia* (21 February 2008) at paras. 26-28

[10] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules of Procedure and Evidence* (14 December 2007) at paras. 19, 25

[11] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 17

[12] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 25

[13] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 25

Whether or not an immunity agreement made by a third person is binding upon the Tribunal depends ultimately on the question of whether it was made on behalf of the prosecution or the United Nations Security Council.[15]

The Security Council could, through amendments to the Statute, limit the Tribunal's jurisdiction over a person, if it deemed it appropriate.[16]

Under no circumstances can an agreement not to prosecute an individual limit the jurisdiction of the Tribunal in the absence of a UN Security Council resolution.[17]

Neither the doctrine of actual authority nor apparent authority can operate to deprive the Tribunal of its jurisdiction to prosecute an individual. Only a UN Security Council resolution can do that.[18]

The fact that the FYROM granted amnesty to others involved in the FYROM-NLA conflict is irrelevant to the present case, as the Tribunal is not bound by any act of the FYROM granting amnesty to those involved in the FYROM-NLA conflict under Article 24 of the Statute or Rule 101 of the Rules.[19]

jurisdiction

The United Nations Security Council had the power, pursuant to Chapter VII of the United Nations Charter to create the International Tribunal.[20] The Appeals Chamber has jurisdiction to decide the legality of the powers conferred upon it.[21]

ICTY Chamber lacks competence to determine if continuing exercise of Chapter VII powers with respect to Tribunal is valid, as Tribunal cannot review acts of other United Nations' organs for validity, including the Security Council.[22]

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[14] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 79
[15] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 50
[16] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 57
[17] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 37
[18] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 38
[19] *Prosecutor v. Boškoski & Tarculovski,,* No. IT-04-82-A, *Judgement* (19 May 2010) at para 220.
[20] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 36; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal* (7 December 2009) at paras. 11,13
[21] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at paras. 22, 25
[22] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disqualification of Judges Kwon, Morrison, Baird and Lattanzi* (31 July 2014) at para. 11, fn.24

ICTY Chamber lacks jurisdiction to determine the legality of the Security Council's establishment of the Residual Mechanism as it is competent only to pronounce on issues of the ICTY's own competency.[23]

The jurisdiction of the Tribunal extends to all former territories of the former Yugoslavia, including Macedonia.[24]

Even if the FYROM conducted an "anti-terrorist" operation in Ljuboten on its own territory, it cannot, based on sovereignty, claim that the Tribunal does not have jurisdiction over any serious violations of international humanitarian law committed during this operation, provided it was in the context of an armed conflict.[25]

The jurisdiction of the Tribunal includes Kosovo, irrespective of whether the Federal Republic of Yugoslavia was a member of the United Nations at the time of the creation of the Tribunal.[26]

The Tribunal only has jurisdiction over crimes which were recognized as such under customary international law at the time it was allegedly committed. The Tribunal's power to convict an accused of any crime listed in the statute depends on its existence qua custom at the time the crime was allegedly committed.[27]

The jurisdiction of the Tribunal with respect to punishment of grave breaches of the Geneva Conventions is not dependent on proof that the State in whose territory the breach was committed was a party to the Conventions at the time of commission. It is now considered that, as a matter of international law, there is automatic State succession to multilateral humanitarian treaties in the broad sense. The provisions contained in such treaties are therefore binding on a State from creation. This position reflects both the object and purpose of such treaties, and their recognised status as customary law.[28]

The adoption of an international treaty, by itself, does not necessarily prove that states consider the content of that treaty to express customary international law.[29]

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[23] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Dismiss the Indictment* (28 August 2013) at para. 12

[24] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR72.1, *Decision on Interlocutory Appeal on Jurisdiction* (22 July 2005) at para. 10

[25] *Prosecutor v. Boškoski & Tarculovski,* No. IT-04-82-A, *Judgement* (19 May 2010) at para 33.

[26] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72.2, *Reasons for Decision Dismissing Interlocutory Appeal Concerning Jurisdiction over the Territory of Kosovo* (8 June 2004); *Prosecutor v Djordjevic*, No. IT-05-87/1-PT, *Decision on Vlastimir Djordjevic's Preliminary Motion on Jurisdiction* (6 December 2007) at para. 11

[27] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 9; *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration* (22 March 2006) at para. 15

[28] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at paras 111 – 113.

[29] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1648

While the ICC statute may be in many areas regarded as indicative of customary rules, in some areas it creates new law or modifies existing law.[30]

An ICTY case of contempt for which the accused had not been apprehended prior to the close of the ICTY could be transferred to the Mechanism pursuant to the Transitional Arrangements.[31]

nullem crimen sine lege

The principle of *nullem crimen sine lege* holds that a criminal conviction can only be based upon a norm which existed at the time the acts or omission with which the accused is charged were committed.[32] The crime or form of liability must have also been sufficiently foreseeable and accessible at the relevant time.[33]

The *nullem crimen sine lege* principle does not require that an accused knew the specific legal definition of each element of the crime he committed. Therefore, it is irrelevant which test for international armed conflict existed at the time of the offense.[34]

selective prosecution

The fact that the Security Council created an *ad hoc* Tribunal to deal with one armed conflict, but not all armed conflicts which may have been occurring at the same time does not invalidate the lawfulness of the Tribunal or substantiate a selective prosecution allegation.[35]

The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of the accused before the Tribunal is subject to the principle of equality before the law and to the requirement of non-discrimination.[36]

The accused must demonstrate that the prosecutor abused her discretionary power specifically as regards (1) the fact that the decision to prosecute him was based on impermissible motives; and (2) that the prosecution did not prosecute similarly situated persons.[37]

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[30] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1648
[31] *Prosecutor v Jojic & Radeta*, No. IT-03-67-R77.5, *Order for Transfer to the International Residual Mechanism for Criminal Tribunals* (29 November 2017) at pp. 3-4
[32] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 37
[33] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 38
[34] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 311
[35] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Nebojsa Pavkovic's Motion for Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the former Yugoslavia* (21 February 2008) at para. 23
[36] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Motion by the Accused to Dismiss all Charges Against him (Submission 387) and its Addendum (Submission 391)*(18 September 2008) at para. 18
[37] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Motion by the Accused to Dismiss all Charges Against him (Submission 387) and its Addendum (Submission 391)*(18 September 2008) at para. 21

It is preposterous to suggest that unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial.[38]

stay of proceedings

There may be situations where a fair trial is not possible because witnesses central to the case do not appear due to the obstructionist efforts of a State. In such circumstances, the relevant Party, after exhausting all measures available in the Statute of the Tribunal, has the option of submitting a motion for a stay of proceedings.[39]

The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber, so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*.[40]

It is undoubtedly the case that a Chamber has the power to stay the proceedings in a case where the circumstances are such that a fair trial for the accused is impossible.[41]

There must be a serious violation of human rights justifying such an extreme measure as an indefinite stay of proceedings.[42]

Article 2—grave breaches of the Geneva Convention

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular

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[38] *Prosecutor v Delalic et al*, No. IT-96-21-A, *Judgement* (20 February 2001) at para. 610; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Nebojsa Pavkovic's Motion for Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the former Yugoslavia* (21 February 2008) at para. 25
[39] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 55.
[40] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 55.
[41] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Stay of Proceedings* (8 April 2010) at para. 4
[42] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Stay of Proceedings* (8 April 2010) at para.4

trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

armed conflict

existence

An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[43] The requirement of protracted fighting is significant in excluding mere cases of civil unrest or single acts of terrorism.[44]

The fact that none of the warring parties recognizes the state of war does not affect the status of the conflict. The Geneva Conventions have been drawn up first and foremost to protect individuals, not to serve State interests.[45]

international character

Article 2 only applies to armed conflicts of an international character.[46]

In determining the circumstances under which armed forces may be regarded as acting under the control of a foreign state, thereby rendering the armed conflict international, the foreign state's overall control of those forces must include more than mere provision of financial assistance or military equipment or training. The state must have a role in organising, coordinating, or planning the military actions of the military group in addition to financing, training, and equipping, and providing operational support to that group.[47]

For acts of a military group to be attributed to a State, the "Overall Control" test requires proof that the State wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity.[48]

"Overall control", as required by international law, may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating, or planning the military actions* of the military group, in addition to financing, training, and equipping or providing operational support to that

[43] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 336
[44] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 341
[45] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 373
[46] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 84
[47] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 131; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras. 306-07; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 14.
[48] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 282

group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[49]

Factors considered relevant to determining whether a foreign State has effective overall control over an armed force or militia involved in a *prima facie* internal armed conflict include: (1) extensive financial, logistical and other assistance and support, including the payment of salaries by the foreign State;[50] (2) identical rank structures and hierarchies;[51] (3) direction and supervision of the activities and operations by the armed force of the foreign State;[52] and (4) shared military objectives.[53]

Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish that those armed forces are the *de facto* organs of the controlling state.[54]

The "overall control" test could thus be fulfilled even if the armed forces acting on behalf of the "controlling State" had autonomous choices of means and tactics although participating in a common strategy along with the "controlling State".[55]

The "Overall Control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control.[56]

To determine whether the conflict is international in character, the conflict must be examined in its entirety. For instance, it is not necessary to prove that troops from another State were present in each of the places where the crimes were committed.[57]

Possible underlying motives of the participants in the conflict or the lawfulness of their participation have no relevance. From the moment Croatia intervened directly in the conflict against the ABiH on the side of the HVO, or exercised overall control over the HVO, the conflict became international.[58]

The Croatian Army's presence on Bosnian territory, in conjunction with its direct

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[49] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 137; *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 15.
[50] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 151.
[51] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 151.
[52] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 151.
[53] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at paras 151, 153.
[54] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 149; *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 47.
[55] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 47.
[56] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 282
[57] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 85
[58] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 525

intervention in the conflict, rendered the conflict international [59]

It was reasonable for the Trial Chamber to conclude that the Croatian government's overall control over the Bosnian Croat forces in Bosnia was established by considering that high-ranking officers were sent by Croatia to join the ranks of the Bosnian Croat Army; that the two armies jointly directed military operations; that the Bosnian Croat army dispatched reports concerning its activities to Croatian authorities; that Croatia provided logistical support to the Bosnian Croat army; and Croatia exercised political influence over the Bosnian Croat Army and civilian authorities.[60]

territory included

Once an armed conflict has become international, the Geneva Conventions apply throughout the respective territories of the warring parties.[61]

confinement

civilians

A member of the military police is not a civilian.[62]

A solider on leave is not a civilian.[63]

Testimony stating that detainees were civilians in the mind of the witness, without any further details as to why the witness believes that they were civilians, does not support a finding beyond a reasonable doubt that the detainees were in fact civilians.[64]

Testimony that detainees were "young", or "elderly" is insufficient for a reasonable trier of fact to find that the detainees were civilians.[65]

conditions

The detention or confinement of civilians is unlawful (1) when civilians are detained without reasonable grounds to believe that the security of the detaining power makes it absolutely necessary; or (2) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.[66]

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[59] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para.. 275
[60] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para.. 285
[61] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 321; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 232
[62] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 596
[63] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 630
[64] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 603
[65] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 617
[66] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 322; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.73

The conditions of confinement must be assessed considering the circumstances at the time, considering the state of communications that might affect the supply of food, water, and medication as well as the livelihood of the civilian population, particularly if there are shortages. The Accused bears the burden of proving that the conditions of confinement resulted from specific circumstances.[67]

The internment or placement in assigned residence of a protected person is permitted if the security of the detaining power makes it absolutely necessary, or in the case of an occupation, for imperative reasons of security.[68]

The parties to a conflict possess broad discretion to determine which activities are harmful to the external or internal security of a State and may resort to internment or placement in assigned residence if they have serious and legitimate reasons to think that the person concerned, by his activities, knowledge, or qualifications, represents a real threat to its present or future security.[69]

justifications

The defence of necessity, if such a defence exists under international law, cannot be used to justify participation in the mistreatment of detainees punishable under either Article 2(c) or Article 3(1)(a). The legal standards regulating the treatment of detainees are absolute, not relative. They delineate a minimum standard of treatment, from which no derogation can be permitted.[70]

Subversive activity carried on inside the territory of a party to the conflict or acts that directly assist an enemy power may constitute threats to national security.[71]

The detaining power has a reasonable time to determine whether a particular person is a civilian and further to determine whether there are reasonable grounds to believe that the security of the detaining power is threatened.[72] However, detaining all citizens, including women and children, is unreasonable.[73]

The mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him. There must be an individual

[67] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 118
[68] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 134
[69] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 134
[70] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 525.
[71] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 134
[72] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 609
[73] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.620; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 134

assessment that each civilian taken into detention poses a *particular risk* to the security of the State.[74]

The fact that a man is of military age should not necessarily be considered as justifying the application of measures of confinement.[75]

mens rea

The requisite mens rea for unlawful confinement of a civilian would include knowledge both of the requirement of review of the detainees' detention, and that it had not been conducted.[76]

participation

To establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. *Primary criminal responsibility* is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place or maintain an accused in detention without reasonable grounds to believe that he constitutes a security risk.[77]

The following situations were not held to indicate a level of participation sufficient to found *primary criminal responsibility* for unlawful confinement: (1) mere knowledge that at least some of the detainees were being unlawfully detained and participation in the detention as a guard;[78] and (2) mere signing orders for the classification and release of civilians on behalf of another individual, in the absence of any independent authority.[79]

To establish that an accused aided and abetted the unlawful confinement of a citizen, in the terms of Article 7(1) of the Statute, it is necessary to establish a degree of participation that would be sufficient to constitute a substantial effect on the continuing detention. The circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained will not suffice to render that guard responsible for the crime of unlawful confinement of civilians.[80]

cruel and inhuman treatment

[74] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 327 and 329; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 135
[75] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 134
[76] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 381.
[77] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 342.
[78] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 342.
[79] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 357 – 358.
[80] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 364.

Cruel treatment under Article 2, inhuman treatment under Article 2, and inhumane acts under Article 5 share the same elements.[81]

Inhuman treatment is an intentional act or omission committed against a protected person, causing serious mental harm, physical suffering, injury, or constitutes a serious attack on human dignity.[82]

Under Article 2(b) of the Statute, the following have been characterised as inhuman treatment: repeated beatings and outrages inflicted on protected persons, certain conditions of confinement, the use of detainees as human shields, sexual assault, and being compelled to perform forced labour along the front lines under dangerous conditions.[83]

Any sexual violence inflicted on the physical and moral integrity of a person by means of threat, intimidation, or force, in such as a way as to degrade or humiliate the victim, may constitute inhuman treatment under Article 2(b) of the Statute. Rape is thereby prohibited, as well as all forms of sexual violence not including penetration.[84]

The severity of an act must be assessed considering the circumstances of the case, specifically considering "the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental, and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex, and health.[85]

In respect of the mental element for inhuman treatment, at the moment of the act or omission, the direct perpetrator must have "had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission.[86]

deportation and forcible transfer

The constituent elements for deportation and forcible transfer are identical whether it involves a war crime or a crime against humanity, with one exception: to be characterised as a grave breach of the Geneva Conventions, the offences of forcible transfer and deportation must be committed against a person protected under the Geneva Conventions.[87]

destruction not based on military necessity

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[81] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 350
[82] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 39
[83] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 115
[84] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 116
[85] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 119
[86] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 120
[87] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 132

Two types of property are protected under article 2(d): (i) real or personal property in occupied territory, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organization (except where such destruction is rendered absolutely necessary by military operations);[88] (ii) property that carries general protection under the Geneva Conventions of 1949 regardless of its location.[89]

The destruction and appropriation must be extensive. However, a single incident, such as the destruction of a civilian hospital, may exceptionally suffice to constitute a crime. [90]

The prohibition of destruction of property situated in occupied territory does not apply in cases "where such destruction is rendered absolutely necessary by military operations".[91]

Where a bridge was a military target at the time of the attack, and, thus, its destruction offered a definite military advantage, it cannot be considered, in and of itself, as wanton destruction not justified by military necessity. Thus, the Trial Chamber erred in finding that the destruction of the Old Bridge of Mostar constituted the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war.[92]

Knowing whether a definite military advantage may be achieved must be decided from the perspective of the person contemplating the attack, considering the information available to the latter at the moment of the attack.[93]

The deliberate nature of the offence of the destruction of property is established when the perpetrator acts knowingly with the intent to destroy the property in question or when the property has been destroyed in reckless disregard of the likelihood of its destruction.[94]

killing

[88] *Prosecutor v Brdjanin,* No. IT-99-36-T *Judgement* (1 September 2004) at para 586
[89] *Prosecutor v. Naletilić & Martinović*, No. IT-98-34-T, *Judgement* (31 March 2003) at para 575; *Prosecutor v Brdjanin,* No. IT-99-36-T, *Judgement* (1 September 2004) at para 586
[90] *Prosecutor v. Naletilić & Martinović* , No. IT-98-34-T, *Judgement*, (31 March 2003) at para 575; *Prosecutor v Brdjanin,* No. IT-99-36-T, *Judgement*, (1 September 2004) at para 587; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 126
[91] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para 157; *Prosecutor v. Naletilić & Martinović*, No. IT-98-34-T, *Judgement*, (31 March 2003) at paras 575, 577; *Prosecutor v Brdjanin,* No. IT-99-36-T, *Judgement*, (1 September 2004) at para 588.
[92] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 411
[93] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 123
[94] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 124

The elements of the underlying crime of wilful killing under Article 2 of the Statute are, *mutatis mutandis*, identical to those required for murder under Article 3 and Article 5 of the Statute.[95]

The elements of wilful killing are (1) the death of the victim; (2) as a result of the action of the accused; (3) who intended to cause death or serious bodily injury likely to lead to death, and (4) which he committed against a protected person.[96]

The mens rea for wilful killing does not require premeditation; a *dolus eventualis*[97] will suffice.[98] Thus the threshold mental element is set at recklessness; accordingly, negligence falls below the threshold. [99]

The mens rea may also be inferred either directly or circumstantially from the evidence in the case.[100]

The *actus reus* consists in the act or omission of the accused resulting in the death of the victim.[101] The prosecution need only prove beyond reasonable doubt that the accused's conduct contributed substantially to the death of the victim.[102]

Proof of the victim's death can be established by inference from circumstantial evidence provided that the only inference reasonably available is that the victim is dead as a result of the acts or omissions of the accused.[103] Proof of death, i.e., the production of a corpse, is not strictly required.[104]

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[95] *Prosecutor v Brdjanin*, No. 99-36-T *Judgement* (1 September 2004); *Prosecutor v Delalic et al* No. IT-96-21-A, *Judgement on Appeal* (20 February 2001) at paras 422-423; which make this finding with respect to willful killing under Article 2 of the Statute and murder under Article 3 of the Statute. See *Prosecutor v Krstic*, No. IT-98-33-T *Judgement* (2 August 2001) at para. 485; *Prosecutor v. Krnojelac*, No. IT-97-25-T, *Judgement*, 15 March 2002 para. 323; *Prosecutor v. Vasiljević*, No. IT 98-32-T, *Judgement*, (29 November 2002) at para. 205; *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para. 631, which make this finding with respect to murder under Article 3 and 5 of the Statute. *Prosecutor v. Kordić & Cerkez*, No. IT-95-14/2-T, *Judgement*, (26 February 2001) at para. 236; *Prosecutor v. Naletilić & Martinović*, No. IT-98-34-T, *Judgement*, (31 March 2003) at para. 248, which make this finding with respect to willful killing under Article 2 and murder under both Article 3 and 5 of the Statute.

[96] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 36

[97] *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at paras 587, 747

[98] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 386.

[99] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 386.

[100] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 387; *Prosecutor v Delalic et al*, No. IT-96-21-T, *Judgement* (16 November 1998) at para. 437; *Prosecutor v. Krnojelac*, No. IT-97-25-T, *Judgement*, (15 March 2002) at para. 326

[101] *Prosecutor v Delalic et al*, No. IT-96-21-T, *Judgement* (16 November 1998) at para. 424; *Prosecutor v. Kordić & Cerkez*, No. IT-95-14/2-T, *Judgement*, (26 February 2001) at para. 229; *Prosecutor v. Kupreskić et al*, No. IT-95-16-T, *Judgement*, (14 January 2000) at para. 560

[102] *Prosecutor v Delalic et al*, No. IT-96-21-T, *Judgement* (16 November 1998) at para. 424.

[103] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 385; *Prosecutor v. Krnojelac*, No. IT-97-25-T, *Judgement*, (15 March 2002) at para 326.

[104] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement*, (1 September 2004) at para 384-385; *Prosecutor v Tadic*, No. 94-1-T, *Judgement* (7 May 1997) at para 240

mens rea

Under Article 2, the prosecution must prove that the accused knew of the factual circumstances that made the armed conflict an international one.[105] The existence of an international armed conflict is an element of the offence, and it would violate the presumption of innocence to convict him of a crime without proving that he knew the facts that were necessary to make his conduct a crime.[106]

occupied territory

aiding and abetting

Trial Chamber rejects Prosecution's argument whereby a commander in an occupied territory may, solely due to his failure to discharge his duty to protect the civilian population and civilian property in this territory, be held responsible for aiding and abetting by omission the crimes that were committed against this population or this property. The Prosecution must also prove that the commanding officer had the capacity to act, that he knew that his omission would contribute to the crime being carried out by the direct perpetrator, that he was aware of the core elements of the crime ultimately committed, and that his failure to act had significant bearing on the commission of the crime.[107]

area

It was necessary to determine whether a state of occupation existed in places from which civilians were expelled to determine whether their expulsion from the occupied zone crossed a de facto border and thus constituted deportation.[108]

It was necessary to determine whether a state of occupation existed in places where property was destroyed and appropriated because such property was only covered by Article 2(d) if it was in an occupied area.[109]

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.[110]

Where it was not proven that these places were occupied when the crimes were committed, the convictions under Article 2 were vacated as to those places.[111]

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[105] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para.121; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Assigned Pro Bono Counsel Motion Challenging Jurisdiction* (8 September 2006) at para. 18
[106] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 114
[107] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 573
[108] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 301
[109] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 303
[110] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 317
[111] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 343

authority

The occupying power need only be in a position to exercise its authority.[112]

Factors to be considered when determining whether the authority of the occupying power has been proven in fact include: (1) the occupying power must be in a position to substitute its own authority for that of the occupied power, rendered incapable of functioning publicly from that time forward; (2) the enemy's forces have surrendered, been defeated, or have withdrawn. In this respect, battle zones may not be considered as occupied territory. Despite this, the status of occupied territory remains unchallenged by sporadic local resistance, however successful; (3) the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; (4) a temporary administration has been established over the territory; and (5) the occupying power has issued and enforced directions to the civilian population.[113]

To make a finding as to whether a state of occupation exists in any given place, a trier of fact must look at the situation in its entirety.[114]

The test for occupation is actual authority over the territory and population and not the motivation behind such an occupation. Therefore, occupation by an army of the same ethnic group as the civilians being occupied is possible.[115]

The occupying authorities' authority may be exercised by proxy through *de facto* organised and hierarchically structured groups.[116]

state of occupation

To prove the responsibility of an accused for his functions as a commanding officer in a zone of occupation, the Prosecution must first prove that such an occupation exists.[117]

Nothing in case-law or customary law excludes the possibility that fighting with the character of an international armed conflict might take place in the occupied territory without that territory losing its status as an occupied territory, provided that the occupying power maintains its control over the territory at issue.[118]

Occupation is not limited to one State invading another State and establishing military control over part or all its territory. A non-invading State which remains after

[112] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 322
[113] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 320
[114] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 321
[115] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 341
[116] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 322
[117] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 91
[118] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 94

consent is withdrawn can constitute an occupation.[119]

The mere fact of being in the territory of a party to the conflict or in occupied territory implies that one is in the hands of the Occupying Power.[120]

If the occupying power continues to maintain control of the territory despite resistance and sporadic fighting, the territory is still considered occupied.[121]

Battle zones may not be considered as occupied territory, but the status of occupied territory remains unchallenged by sporadic local resistance, however successful.[122]

A state of occupation and that of an international armed conflict are not necessarily mutually exclusive.[123]

Occupation can be established, once combat ceases, if the occupying power has the required control.[124]

A finding of active hostilities in certain municipalities does not necessarily preclude the Trial Chamber from finding that a state of occupation existed on the ground in those municipalities. The issue is one of authority, i.e., whether the occupying power can maintain its authority over the territory despite some ongoing active combat.[125]

plunder and appropriation of property

The prohibition on the unlawful and wanton seizure of property is broad in scope and is directed toward private as well as government property.[126]

This section covers both organised and systematic confiscations and acts of appropriation committed by soldiers acting in self-interest.[127]

This prohibition applies equally, moreover, to the territory of the Parties to the conflict and to occupied territories.[128]

To constitute a violation of the prohibition in Article 2(d) of the Statute, to the extent that the appropriation of property is a grave breach of the Geneva Conventions under Article 147 of the Fourth Geneva Convention, such appropriation must also be

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[119] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 318, 339
[120] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 101
[121] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 319
[122] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 320
[123] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 335
[124] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 339
[125] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 335
[126] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 129
[127] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 129
[128] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 129

committed extensively and carried out unlawfully and wantonly.[129]

The Fourth Geneva Convention authorises the occupying powers, in certain cases, to requisition private property, such as food and medical supplies or articles, in occupied territory to meet the needs of their occupying forces and administration. The requisition of excess food and supplies for the benefit of occupied regions is authorised if it is proportionate to the resources of the country.[130]

The deliberate nature of the offence of appropriation of property in Article 2(d) of the Statute is established when the perpetrator acts knowingly with the intent to appropriate the property in question unlawfully.[131]

protected persons

To constitute grave breaches of the Geneva Conventions, the crimes enumerated under Article 2 must be committed against persons or property protected under the provisions of the relevant Geneva Convention.[132]

allegiance

The detaining authority's view of the victims' allegiance is a relevant factor in determining whether the victim is a protected person under Article 2.[133]

Protected persons may include victims who share a common citizenship with the perpetrator, so long as they owe no allegiance to the party to the conflict in whose hands they find themselves.[134]

Members of the armed forces of a party to the conflict may not be considered prisoners of war under the Third Geneva Convention when they are placed into detention by their own armed forces.[135]

However, they may be considered as persons falling into the hands of the enemy for purposes of the Fourth Geneva Convention, and therefore are protected persons for purposes of ICTY Article 2.[136]

Grave breaches can be committed by soldiers against members of their own military force.[137]

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[129] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 130
[130] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 130
[131] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 131
[132] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 346
[133] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 355
[134] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 330
[135] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 604
[136] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 611
[137] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 358

The Bosnian Croat Army's Muslim members who were detained by the Bosnian Croat Army were protected persons under Geneva Convention IV.[138]

Since the criterion of nationality might exclude certain victims of crimes from the category of protected persons, it is not applied strictly. The Tribunal will rather look to "more realistic bonds demonstrating effective allegiance to a party to a conflict, such as ethnicity" in appropriate cases.[139]

civilians

Protected persons include all civilians who do not enjoy the diplomatic protection of the Party in whose hands they find themselves. This would include: (1) all civilians not having the nationality of the belligerent Party; and (2) all civilians who whilst having that nationality, are refugees and thus no longer enjoy the diplomatic protection of that Party.[140]

Both civilians who were in the territory prior to the outbreak of the conflict or the occupation and those who arrived later are "protected persons."[141]

co-belligerents

Nationals of a co-belligerent State do not enjoy the protection conferred by the Fourth Geneva Convention, "while the State of which they are nationals has normal diplomatic representation in the State whose hands they are in.[142]

nationals

While protected persons may be detained when it is absolutely necessary, such deprivation of liberty is permissible only where there are reasonable grounds to believe that the security of the State is at risk, based on an assessment that each civilian taken into detention poses a particular risk to the security of the State. An individual may not be detained solely because he or she is a national of, or aligned with, an enemy party.[143]

non-civilians

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[138] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 360
[139] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) paras 164-168; *Prosecutor v. Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at paras 172-176; *Prosecutor v Mucic et al*, No. IT-96-21-A, *Judgement on Appeal* (20 February 2001) paras 83, 98; *Prosecutor v. Mladen Naletilic and Vinko Martinović*, No. IT-98-34-T, *Judgement*, (31 March 2003) at para. 207; *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgment* (1 September 2004) at para 125.
[140] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 164; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 56.
[141] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 101
[142] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 102
[143] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 375

While Geneva Convention IV primarily concerns the protection of civilians, it also encompasses all persons who fall into the hands of a party to the conflict, or occupying power of which they are not nationals, and who are not protected under the other Geneva Conventions.[144]

persons subject to conscription

The Trial Chamber reasonably concluded that military-aged Muslim men - as a general category – did not belong to the ABiH simply because of general mobilization orders providing that all citizens of who are fit to work shall be subject to compulsory military service.[145]

Even though the status of combatant cannot be presumed on the ground that men are of military age at the time of their detention, it is the Prosecution that carries the burden of proving civilian status when seeking to have the regime of crimes against humanity or that of the Fourth Geneva Convention applied to the crimes committed against these persons. Where the evidence, after it has been assessed for each crime alleged, does not prove beyond all reasonable doubt that the persons involved are civilians, the Chamber is bound to find *in dubio pro reo* that such persons are combatants.[146]

reservists

A reservist becomes a member of the armed forces within the meaning of international humanitarian law once he has been mobilised and has taken up active duty, that is, once he has been incorporated into an organised structure and placed under a command accountable for the conduct of its subordinates. It is only then that a member of the reserves acquires the status of combatant and becomes a prisoner of war if he falls into the hands of the opposing party during an international armed conflict. Such a person thus retains the status of combatant from the instant he is mobilised and enters active duty until such time as he is permanently demobilised. Outside this temporal framework, a member of the reserves is a civilian and cannot in any event be considered a prisoner of war if put in detention by the opposing party during a conflict.[147]

Article 3—violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

[144] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 353
[145] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 366
[146] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 621
[147] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 619

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

armed conflict

existence

In establishing the existence of an armed conflict of an internal character, the Trial Chamber must assess (1) the intensity of the conflict and (2) the organization of the parties.[148]

An armed conflict is defined to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised groups or between such groups within a State."[149] It is immaterial whether this conflict is internal or international.[150]

Banditry, unorganized and short-lived insurrections, terrorist activities, or civil unrest are not subject to international humanitarian law.[151]

In applying the test of whether an armed conflict existed, what matters is whether the acts are perpetrated in isolation or as part of a protracted campaign that entails the engagement of both parties in hostilities. It is immaterial whether the acts of violence may be characterized as terrorist in nature.[152]

A state of internal armed conflict existed in Macedonia between the government and NRA in August 2001.[153]

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[148] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 84
[149] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 70; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 254
[150] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at paras. 134, 137; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 252; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.536; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para.24-25; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 845; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 56; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 120; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 13; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 140 and 150
[151] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 254
[152] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 185
[153] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 292

A state of armed conflict existed in Kosovo in 1998-99 between the FRY and KLA and the FRY and NATO.[154]

intensity

The criterion of protracted armed violence refers more to the intensity of the conflict rather than its duration.[155]

Factors to be considered in evaluating the intensity of the conflict include (1) the seriousness of the attacks and whether there has been an increase in armed clashes; (2) the spread of clashes over territory and over a period of time; (3) any increase in the number of government forces; (4) mobilization and the distribution of weapons among both parties to the conflict; and (5) whether the United Nations Security Council has passed resolutions concerning the matter.[156]

While isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of armed forces in hostilities, such acts are relevant when assessing the level of intensity of the armed conflict.[157]

Since no peaceful settlement was achieved during the indictment period, there is no reason to evaluate the oscillating intensity of the internal conflict.[158]

international character

The prohibitions in Article 3 apply to international and non-international conflicts.[159]

Armed conflict in Croatia was international in nature.[160] No general, definitive, and effective termination of hostilities such as to have ended the armed conflict had taken place as of the time of the crimes in August 1995.[161]

An internal armed conflict may exist alongside an international armed conflict.[162]

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[154] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at paras. 1579-80
[155] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 49
[156] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 90; *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 49
[157] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 190
[158] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 100
[159] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal on Trial Chamber Decision on Rule 98 bis Motions for Acquittal* (11 March 2005) at para. 30
[160] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1693
[161] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at paras. 1695-97
[162] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 521

The accused must be aware of the factual circumstances that qualify the conflict as international but the mens rea requirement does not necessitate that the accused correctly applies a particular legal label to known facts. All that is required is that the accused be aware of the factual circumstances that lead to the judicial characterisation of the conflict as international.[163]

organisation

An armed conflict can exist only between parties which are sufficiently organized to confront each other with military means.[164]

Lack of organization of the armed group cannot be inferred by the fact that international humanitarian laws were frequently violated by its members. In assessing this factor, it is relevant to determine whether the attacks were primarily the result of a military strategy by those leading the group or whether they were perpetrated by members of the group acting on their own accord.[165]

The degree of organization of the parties need not rise to the level of that required for establishing the responsibility of superiors for the acts of their subordinates. Some degree of organization will suffice to satisfy this requirement for existence of an armed conflict.[166]

Factors to be considered in evaluating the degree of organization include (1) the existence of headquarters; (2) the existence of designated zones of operation; and (3) the ability to procure, transport, and distribute arms.[167]

Factors to be considered in evaluating the degree of organization include (1) the existence of a command structure and disciplinary rules and mechanisms within the group; (2) the existence of a headquarters; (3) the ability of the group to obtain access to weapons, other military equipment, recruits, and military training; (4) the ability to plan, coordinate, and carry out military operations; (5) its ability to define a unified military strategy and use military tactics; and (6) its ability to speak with one voice and negotiate and conclude agreements.[168]

attacks on civilians or on civilian objects

civilians

[163] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2392
[164] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 60
[165] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 205
[166] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 89; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 254
[167] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 90
[168] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 60

The burden of proof as to whether a person, or object, is a civilian rests on the prosecution.[169]

Members of armed forces and members of militias or volunteer corps forming part of such armed forces are not civilians. Members of organized resistance groups, which are commanded by a person responsible for his subordinates, have a fixed, distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war are not civilians.[170]

Civilians are protected from attack, unless and for the time that they take part directly in hostilities.[171]

To take direct part in hostilities means to engage in acts of war which, by their nature or purpose, are likely to cause actual harm to the personnel or matériel of the enemy armed forces. A civilian who takes part in armed combat loses his or her immunity and becomes a legitimate target.[172]

Members of the armed forces resting in their homes around the conflict remain combatants whether they are in combat or armed at the time.[173]

Soldiers who were killed from shelling while playing a football match were not *hors d'combat* and therefore their killing was not a crime against humanity or war crime.[174]

civilian objects

The presence of members of the armed forces in private homes removes those homes from classification as civilian objects.[175]

The presence of combatants within the civilian population does not necessarily deprive the population of its civilian character.[176] However, to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.[177]

Civilian objects are defined by opposition to military objectives, which are limited

[169] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 48, 53
[170] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.50
[171] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.50
[172] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 947
[173] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.51
[174] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3063
[175] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 455, 510, 516
[176] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.50; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 136
[177] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 137

to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[178]

distinction

The three fundamental principles of international humanitarian law are distinction, precaution, and protection. Under Article 48 of Additional Protocol I, the principle of distinction obliges the warring parties to always distinguish between the civilian population and combatants, and between civilian objects and military objectives. Article 57(2)(a)(ii) of Additional Protocol I requires that those planning an attack take all reasonable precautions in the choice of the means and methods of attack to avoid or minimise the incidental loss of civilian life, injury to civilians, and damage to civilian property. Finally, the principle of protection, as referred to in Article 51(1) of Additional Protocol I and Article 13(1) of Additional Protocol II, ensures that the civilian population and individual civilians enjoy general protections against dangers arising from military operations.[179]

The principle of distinction obliges warring parties to always distinguish between the civilian population and combatants, and between civilian objects and military objectives and ensure that operations will only be directed against military objectives.[180]

In accordance with the fundamental principles of distinction and protection of the civilian population, only military objectives may be lawfully attacked.[181]

"Military objectives" are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[182]

Whether a "military advantage" could have been achieved from an attack requires an assessment of whether it was reasonable to believe, in the circumstances of the person(s) contemplating the attack, including the information available to the latter, that the object was being used to make an effective contribution to military action.[183]

The relevant question is whether the attacker(s) could have reasonably believed that the target was a legitimate military objective, and a useful standard by which to assess the reasonableness of such belief is that of a "reasonable commander" in the

[178] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3257
[179] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at fn. 1484
[180] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 53; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 300
[181] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 488
[182] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 488
[183] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 489

position of the attackers.[184]

A direct attack can be inferred from the indiscriminate character of the weapon used.[185]

An object should not be attacked when it would be unreasonable to believe, in the circumstances of the person contemplating the attack, that the object is being used to make an effective contribution to military action.[186]

The legal test used to determine whether an attack was appropriately directed at a military objective does not render the evidence of military observers and victims irrelevant. The Trial Chamber was entitled to rely on such evidence in determining whether the attackers reasonably could have believed that the targets were legitimate military objectives.[187]

An object shall not be attacked when it is not reasonable to believe in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.[188]

According to the principle of distinction, warring parties must always distinguish between the civilian population and combatants, between civilian and military objectives, and accordingly direct attacks only against military objectives. These principles establish an absolute prohibition on the targeting of civilians in customary international law, but do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations. However, those casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack (the principle of proportionality).[189]

Once the military character of a target has been ascertained, commanders must consider whether striking this target is expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[190]

General evidence as to the presence of mobile mortars in Sarajevo was insufficient to show that Trial Chamber's conclusion that attacks were indiscriminate was erroneous.[191]

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[184] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 489
[185] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 132; *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 260
[186] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 587
[187] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 496
[188] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 356
[189] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 190
[190] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 191
[191] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 500

elements

The crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.[192]

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) and attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack under Article 3 of the ICTY Statute. The *mens rea* for the offence is intention or recklessness, not simple negligence. In determining whether or not the *mens rea* requirement has been met, it should be borne in mind that commanders deciding on an attack have duties: (1) to do everything practicable to verify that the objectives to be attacked are military objectives; (2) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing incidental civilian casualties or civilian property damage; and (3) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.[193]

The offence of attack on civilians includes the common elements from Article 3 of the Statute as well as the following elements: (1) Acts of violence directed against the civilian population or civilian persons not directly participating in hostilities, causing death or serious injury to body or health; and (2) the perpetrator of these acts of violence wilfully subjected the civilian population or the civilian persons not directly participating in hostilities to these acts.[194]

An attack is defined as "acts of violence against the adversary, whether in offence or defence." The issue of who first made use of force is irrelevant.[195]

To establish that the crimes of terror and unlawful attacks against civilians had been committed, the Trial Chamber was required to find beyond reasonable doubt that the victims of individual crimes were civilians *and* that they were not participating directly in the hostilities.[196]

An attack on civilians or civilian objects requires proof that the attack resulted in serious injury to body or health.[197]

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[192] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 283; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 450
[193] *Report by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* at para. 28.
[194] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 193
[195] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.47
[196] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 57
[197] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.67

factors

To constitute a violation of the prohibition of attacks against civilians, the attack must be directed at individual civilians or the civilian population. Whether an attack is so directed can be inferred from many factors, including the means and method used during the attack, the status and number of the victims, the nature of the crimes committed, the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war and the indiscriminate nature of the weapon used.[198]

hospitals

A hospital becomes a legitimate target when used for hostile or harmful acts unrelated to its humanitarian function, but the opposing party must give warning before it attacks.[199]

mens rea

Statement of accused that "if there is an order to strike at Knin, we will destroy it in its entirety in a few hours" could be interpreted as a statement of Army's capabilities, rather than its aims, and therefore did not provide evidence of an intention to engage in indiscriminate shelling.[200]

No reasonable trier of fact could have concluded that the forces possessed the requisite mens rea for murder and wilful killing by shelling a house, given the ongoing combat activity in the vicinity of the house and the position of the defenders of the village relative to the house.[201]

To establish the *mens rea* for the offence, it must be shown that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In cases of doubt, the Prosecution must show that, in the given circumstances, a reasonable person could not have believed that the individual he or she attacked was a combatant.[202]

For the *mens rea* of an attack on civilians, the perpetrator must undertake the attack "wilfully", which it defines as wrongful intent, or recklessness, and explicitly not "mere negligence".[203]

military objects

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[198] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 948
[199] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 346
[200] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 81
[201] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 441
[202] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 952
[203] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 140; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 456

A general assertion that the attacks were legitimate because they allegedly targeted "military zones" throughout the city is bound to fail.[204]

It is accepted that attacks aimed at military objectives may cause collateral damage. Collateral damage is not unlawful *per se*.[205]

Military activity does not permanently turn a protected facility into a legitimate military target. It remains a legitimate military target only if it is reasonably necessary for the opposing side to respond to the military activity.[206]

An attack must be aimed at the military objects in or around the facility, so only weaponry reasonably necessary for that purpose can be used.[207]

precautions

The parties to a conflict are under an obligation to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas.[208]

proportionality

When assessing whether the destruction of an object was justified by military necessity, the principle of proportionality must also be considered. Damage to property must not be disproportionate to the concrete and direct military advantage anticipated before the attack. In determining whether an attack on military objectives was proportionate, it is necessary to adopt the perspective of a person in the circumstances of the actual perpetrator contemplating the attack and making reasonable use of the information available to him.[209]

Although the principles of distinction and the protection of a civilian population do not exclude the possibility of legitimate civilian casualties incidental to the conduct of military operations, those expected casualties must not be disproportionate to the concrete and direct military advantage anticipated before the attack.[210]

The Trial Chamber failed to provide a reasoned opinion when it found that the damage was excessive in relation to the concrete and direct military advantage anticipated without determining this military advantage.[211]

Trial Chamber's finding that attacks on legitimate military target were

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[204] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 54
[205] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.52
[206] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 346
[207] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 346
[208] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 949
[209] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 357
[210] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 561
[211] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 561

disproportionate was not based upon a concrete assessment of comparative military advantage and did not make any findings on resulting damage or casualties. Therefore, it could not support a conviction for unlawful attacks.[212]

Unnecessary or wanton application of force is prohibited. A belligerent may apply only that amount and kind of force necessary to defeat the enemy.[213]

scale

No specific amount of civilian destruction need be shown so long as the evidence proves beyond a reasonable doubt that civilian objects were deliberately attacked. The scale of the destruction may be relevant to determine whether an attack was aimed at civilian objects.[214]

shelling

Trial Chamber was not unreasonable in finding that the angle of descent of mortar shell could be reliably estimated despite the interference with the crater at the scene of the incident.[215]

Trial Chamber's finding that any shell landing more than 200 meters from a military object was indiscriminate was error when not based upon any evidence in the case and not accounting for factors such as wind, temperature, and distance.[216]

Trial Chamber erred in finding that no shells were aimed at mobile military objects moving around the town, as such "targets of opportunity" were legitimate military targets.[217]

Although there was evidence that many shells fell further than 200 meters from military objects and that they were spread across the whole town of Knin, this was not conclusive evidence of indiscriminate attacks.[218]

The possibility of shelling mobile targets, combined with the lack of any dependable range of error estimation, raises reasonable doubt about whether even artillery impact sites particularly distant from fixed artillery targets considered legitimate by the Trial Chamber demonstrate that unlawful shelling took place.[219]

The Trial Chamber's finding that firing "shells", without further specification, was inherently indiscriminate was unreasonable.[220]

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[212] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 82
[213] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 686
[214] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 453
[215] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 518
[216] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 61
[217] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 63
[218] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 65
[219] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 66

Text of order which provided detailed instructions for shelling military objects in four towns and "put the towns under artillery fire" was sufficiently ambiguous to not support the inference that the towns were to be shelled indiscriminately.[221]

Observations of witnesses with no artillery experience and whose vantage points made it difficult to determine where the shells were directed at or actually landed were not sufficient to base a finding that the shelling was indiscriminate.[222]

targeting civilians

There is an absolute prohibition against the targeting of civilians in customary international law encompassing indiscriminate attacks.[223]

There is an absolute prohibition on the targeting of civilians in customary international law. The prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.[224]

The prohibition against attacking civilians and civilian objects is not a crime when justified by military necessity.[225]

If the civilian population as such, or individual civilians, were unlawfully targeted in each incident, it was by definition impossible that the target could have been a legitimate military objective.[226]

cruel treatment

contribution

The involvement of VRS members in the guarding of the prisoners in the schools as well as their participation in loading the prisoners onto trucks to be taken for execution substantially contributed to the infliction and perpetuation of the appalling conditions of detention that amounted to cruel and inhumane treatment.[227]

defences

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[220] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 434
[221] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 77
[222] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 79
[223] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 53; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 49
[224] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 130
[225] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 54; *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 486
[226] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 56
[227] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1908

While the burden is on the prosecution to prove that the conditions of detention were sufficiently bad to constitute cruel treatment, it is up to the defence to lead evidence that the conditions of the prisoners were like those of the local population with respect to food and water shortages. Where minimum standards of treatment cannot be maintained, the detaining authority may possibly incur criminal responsibility if it continues to detain the prisoners.[228]

elements

The crime of cruel treatment as a violation of the laws or customs of war pursuant to Article 3 of the Statute, is an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. Indirect intent, *i.e.*, knowledge that cruel treatment was a probable consequence of the perpetrator's act or omission, may fulfil the intent requirement for this crime.[229]

The elements of cruel treatment are: (1) an act, or omission notwithstanding a duty to act, of the accused; or of a person for whose acts or omissions the accused has criminal responsibility, causing serious mental or physical suffering, serious injury, or constituting a serious attack on human dignity; and (2) an intent to inflict serious mental or physical suffering, serious injury, or a serious attack on human dignity.[230]

mens rea

The mens rea of cruel treatment may be satisfied by knowledge that it is more likely than not that such result could occur and acceptance of that risk.[231]

The mental element for this offence requires the perpetrator of the crime to have acted with direct or indirect intent to engage in cruel treatment. A perpetrator has acted with indirect intent to commit cruel treatment when he knew that cruel treatment was a probable consequence of his act or omission and accepted that fact.[232]

Those present at the schools knew all the prisoners were Bosnian Muslims and of the cruel and inhumane treatment to which they were subjected. The infliction of such treatment was thus carried out with the intention to discriminate against the Bosnian Muslims on political, racial, or religious grounds, or with an awareness of the discriminatory context in which the crime was to be committed.[233]

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[228] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at paras. 36-37
[229] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 261; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 231; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 79
[230] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 351
[231] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 353; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 423
[232] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 147
[233] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1909

suffering

The degree of physical or mental suffering required to prove cruel treatment is lower than the one required for torture, though it must be at the same level as wilfully causing great suffering or serious injury to body or health.[234]

The fact of imprisonment, in and of itself, does not amount to an act inflicting severe pain or suffering or constituting a serious attack on human dignity, within the meaning of torture or cruel treatment under Article 3 of this Statute.[235]

The failure to provide adequate medicine or medical treatment would constitute the offence of "cruel treatment" if, in the specific circumstances, it causes serious mental or physical or injury, or constitutes a serious attack on human dignity and if it is carried out with the requisite *mens rea.*[236]

Acts of medical deprivation of medical care of those who had previously been injured, in and of themselves, were not of the nature to cause severe or serious pain or suffering to amount to torture or cruel treatment.[237]

Beating or detaining persons in difficult conditions may constitute cruel treatment if they cause great suffering or physical or mental harm or are a serious attack on human dignity.[238]

The physical conditions of detention may be enough to constitute the offence of cruel treatment when they cause detainees great physical and/or mental suffering, constituting a serious attack on their human dignity, and are imposed deliberately.[239]

Unlawful seizure, unlawful detention for prolonged periods, and interrogation, in and of themselves, do not amount to a serious attack on human dignity and therefore do not constitute cruel treatment.[240]

The assessment of the seriousness of an act or omission is, by its very nature, relative. All the factual circumstances must be considered, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental, and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex, and health. The suffering inflicted by the act upon the victim does not need to be lasting so long as it is real and serious.[241]

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[234] *Prosecutor v Kvocka et al*, No. IT-98-30/1-T, *Judgement* (2 November 2001) at para. 161
[235] *Prosecutor v. Mrksic et al*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 524
[236] *Prosecutor v. Mrksic et al*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 517
[237] *Prosecutor v. Mrksic et al*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 529
[238] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 35
[239] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 148
[240] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 232
[241] *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 131

Beatings are not per se cruel treatment or inhumane acts but can be with further showings.[242]

Taking a man out of his home and detaining him in a well, while putting his wife in the hands of armed soldiers known for violence constituted serious mental suffering sufficient to constitute cruel treatment.[243]

victims

Cruel treatment under Article 3 applies to members of the civilian population, regardless of whether they were in the hands of their perpetrators at the time.[244]

destruction not based on military necessity

collateral damage

Military necessity includes those lawful measures which are indispensable for securing the ends of the war.[245]

Collateral damage to civilian property may be justified by military necessity. The protection of civilians and civilian property provided by modern international law may cease entirely, or be reduced or suspended, when the target of a military attack is comprised of military objectives and belligerents cannot avoid causing damage to civilians.[246]

Only the targeting of objects which qualify as military objectives may be justified by military necessity. Damage to civilian property or civilian casualties may be legitimate only if they are incidental to the conduct of military operations which are directed against military objectives.[247]

elements

The crime of wanton destruction not justified by military necessity, under Article 3(b) of the Statute was part of international customary law.[248]

The elements of this offence are: (1) the destruction of property occurred on a large scale; (2) the destruction was not justified by military necessity; and (3) the perpetrator acted with intent to destroy the property in question.[249]

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[242] *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 176
[243] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 95
[244] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Several Motions Challenging Jurisdiction* (19 March 2007) at para. 82
[245] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 686
[246] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 45
[247] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 353
[248] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.76

The crime of wanton destruction of cities, towns, or villages not justified by military necessity has the following elements: (1) the destruction of property occurs on a large scale; (2) the destruction is not justified by military necessity; and (3) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.[250]

The crime of wanton destruction of cities, towns or villages requires proof of the same elements as devastation not justified by military necessity.[251]

mens rea

The mens rea for offences under article 3(b) is satisfied where the destruction or devastation is either perpetrated intentionally, with the knowledge and will of the proscribed result, or in reckless disregard of the likelihood of the destruction or devastation.[252]

The mens rea of wanton destruction requires proof of direct intent to destroy the property in question or the indirect intent of knowing that destruction was the probable consequence of one's acts.[253]

military objects

As a rule, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity.[254]

Where prosecution failed to prove that attacks were not justified by military necessity, the accused should be acquitted.[255]

The use of a firehouse as a headquarters and the use of private houses in combat operations allowed for the conclusion that there was a justified military objective in the attacks.[256]

The fact that arms were found in a house did not justify destruction of the house.[257]

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[249] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 581; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 39
[250] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 351
[251] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3256
[252] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 593; *Prosecutor v Blaskic*, No. IT-95-14-T, *Judgement* (3 March 2000) at para 183; *Prosecutor v. Kordić & Cerkez*, No. IT-95-14/2-T, *Judgement*, (26 February 2001) at para 346.
[253] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 358
[254] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3257
[255] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras. 429,503; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 586
[256] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.445
[257] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 575

The destruction of civil settlements is presumed to be unlawful but may be justified on a case-by-case basis, such as when the settlement might be used to resume the attack.[258]

partial destruction

Although it is required that a considerable number of objects were damaged or destroyed, it is not required that a city, town, or village be destroyed in its entirety.[259]

Partial destruction of property may be sufficient, if acts of partial destruction are committed on a large scale.[260]

Destruction of almost everything from one apartment, absent any evidence establishing what these items are, does not constitute destruction on a large scale.[261]

The destruction must be both serious in relation to the individual object and cover a substantial range in a particular city, town, or village. The sporadic or isolated destruction of a few houses of a settlement is insufficient., but total destruction of a city, town, or village is not required.[262]

Commission of destruction on a large scale is both an element of the offence of wanton destruction of towns and villages and a jurisdictional prerequisite to the application of Article 3.[263]

Destruction on a large scale occurs when either a large quantity of property has been destroyed or when the value of a single destroyed property is sufficiently great.[264]

Partial destruction of property falls within the ambit of this section of the Statute.[265]

scope of protection

The protection extends to property in the territory of the conflict, including property in enemy territory or territory not held by either party.[266]

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[258] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 588
[259] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 352
[260] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 352
[261] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3407
[262] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 583, 85
[263] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 47; *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1766
[264] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 43; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3257
[265] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 44
[266] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 582

The protection extends to both moveable and unmovable property.[267]

devastation not justified by military necessity

The elements of the crime of "devastation not justified by military necessity", at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.[268]

Military necessity is defined as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Whether a military advantage can be achieved must be decided from the perspective of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.[269]

The Prosecution must establish that the destruction was not justified by military necessity, [270]

This crime is applicable to armed conflicts of either international or non-international character.[271]

destruction of cultural property

The prohibition on destruction of cultural property contained in Article 3(b) of the Statute covers also non-international armed conflicts.[272]

An act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of

[267] *Prosecutor v Hadzihasanovic & Kubura,* No. IT-01-47-T, *Judgement* (15 March 2006) at para. 42
[268] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 297; *Prosecutor v Martic,* No. IT-95-11-T, *Judgement* (12 June 2007) at para. 90
[269] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 295
[270] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 170
[271] *Prosecutor v Hadzihasanovic & Kubura,* No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal on Trial Chamber Decision on Rule 98 bis Motions for Acquittal* (11 March 2005) at para. 30
[272] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 228; *Prosecutor v Hadzihasanovic & Kubura,* No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal on Trial Chamber Decision on Rule 98 bis Motions for Acquittal* (11 March 2005) at para. 47

hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.[273]

The protection accorded to cultural property is lost where such property is used for military purposes. It is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. The special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were "directed against" that cultural property, rather than the military installation or use in its immediate vicinity.[274]

To prove the destruction or wilful damage done to institutions dedicated to religion and other cultural buildings as persecution, as a crime against humanity, the prosecution must prove the general requirements of crimes against humanity, the specific requirements of persecution, and the following elements of the underlying offence: (1) the destruction or damage of the religious or cultural property occurs on a large scale; (2) the destruction or damage of the religious or cultural property is not justified by military necessity; and (3) the perpetrator acted with the intent to destroy or damage the religious or cultural property or in reckless disregard of the likelihood of its destruction or damage.[275]

Educational institutions are not automatically cultural property.[276]

It is not necessary to establish that the building represent the cultural heritage of a people.[277]

destruction of religious institutions

The elements of the offence of destruction or wilful damage to institutions dedicated to religion are (1) a religious institution is destroyed or damaged; (2) the damaged or destroyed property was not used for military purposes; and (3) the act was carried out with the intent to damage or destroy the property in question.[278]

The crime of destruction or wilful damage done to institutions dedicated to religion or education comprises the following elements: (1) an intentional act or omission; (2) causing destruction or damage to a cultural or religious object of property; (3) the property did not constitute a military objective within the meaning of Article 52 of Additional Protocol I and (4) the act or omission is perpetrated with intent to destroy the

[273] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 312
[274] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 310
[275] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 88
[276] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.92
[277] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 60
[278] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 58; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 96

cultural or religious property.[279]

Reckless disregard of the substantial likelihood of destruction or damage to religious institutions will also satisfy the mens rea of the offence in art 3(d).[280]

Article 3(d) of the Statute criminalises only those prohibited acts which result in the destruction or damage of the object protected.[281]

The destruction or damage to a religious institution must be sufficiently serious to constitute desecration.[282] The seriousness should be measured more by the spiritual value of the property than the material extent of the damage or destruction.[283]

For Article 3(d) of the Statute to apply, the perpetrator of the crime must act with intent to destroy the protected property.[284]

forced labour

See Article 5—crimes against humanity

hostage taking

Hostage taking applies not only to civilians, but to all persons not taking an active part in the hostilities.[285]

The *actus reus* of hostage taking is the detention of persons and the use of a threat concerning the detained persons, including a threat to kill, injure or continue to detain, to obtain a concession or gain an advantage.[286]

Unlawful detention is an element of hostage taking.[287]

Unlawful detention is an element of hostage taking, but the lawfulness of the confinement or deprivation of liberty does not depend on the circumstances in which any individual comes into the hands of the enemy but rather depends upon the whole circumstances relating to the way and the reasons they are held. Thus, the unlawfulness of the detention relates to the idea that civilians or those taking no active part in hostilities are taken or held hostage not to ensure their safety or to protect them, but rather to gain

[279] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 178
[280] *Prosecutor v Brdjanin* No, IT-99-36-T, *Judgement* (1 September 2004) at para 598.
[281] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 175
[282] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 63
[283] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 63
[284] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 176
[285] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 60
[286] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 468
[287] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 65

an advantage or obtain a concession. The existence of threats or use of violence against the individuals taken hostage are other factors to consider to assess the lawfulness of their detention.[288]

Unlawful detention is not an element of the crime of hostage taking.[289]

The lawfulness of the detention does not depend on the circumstances in which any individual comes into the hands of the enemy, but rather depends on the whole circumstances relating to the way, and reasons why, they are held.[290]

Since Common Article 3 provides a minimum protection for all conflicts, international or internal, its prohibition on hostage taking cannot be read to be limited to civilians, as it is in Article 2. Hostage taking applies to all persons not taking a direct part in the hostilities.[291]

No cogent reasons to depart from ICTY Appeals Chamber decisions that there was jurisdiction over the crime of hostage-taking.[292]

Even if the UN personnel were combatants immediately before their detention, they were rendered "hors de combat" by virtue of their detention and thus were entitled to the minimum protections guaranteed by Common Article 3.[293]

Because the essential feature of the offence of hostage-taking is the use of a threat to detainees to obtain a concession or gain an advantage, which may happen at any time during the detention, the requisite intent may be formed at the time of the detention or it may be formed at some later time, after the person has been detained.[294]

Hostage taking prohibition applies to all persons who are detained regardless of whether they were combatants or civilians.[295]

mens rea

The *mens rea* required for hostage-taking is the intention to compel a third party to act or refrain from acting as a condition for the release of the detained persons.[296]

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[288] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3216
[289] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 659
[290] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 65
[291] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment* (9 July 2009) at para. 22
[292] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 493
[293] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Motion for Judgement of Acquittal* (28 June 2012) at p. 28735
[294] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 468
[295] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.9, *Decision on Appeal of Denial of Motion for Judgement of Acquittal for Hostage Taking* (11 December 2012) at para. 21
[296] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 468

The prosecution accepted that they were required to prove that the accused knew or had reason to know of the factual circumstances of the conflict and did prove that knowledge.[297]

It must be proven that the perpetrator was aware or should have been aware that the victim was a person not taking an active part in the hostilities. The prosecution must show that no reasonable person could have believed the victim was a combatant.[298]

Once he knew that they were detained – irrespective of their involvement in hostilities prior to their capture or surrender – a reasonable trier of fact could have concluded that the accused knew that they were not taking an active part in the hostilities.[299]

The erroneous belief that detained combatants are not entitled to Common Article 3 protections is not a defence should the elements of hostage-taking be met.[300]

murder

See Article 5--murder

nexus

The crime need not be committed in the same place as the armed conflict so long as the crimes were closely related to hostilities occurring in parts of the territories controlled by the parties to the conflict. Such a relation exists if the crime is "shaped by or dependent upon the environment – the armed conflict – in which it is committed. [301]

For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities. The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the way it was committed or the purpose for which it was committed.[302]

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[297] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 295
[298] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 36; *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 78; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 143
[299] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 800
[300] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 468
[301] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 536; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para.26
[302] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 215; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 29; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 253, 256; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 846; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 55

When determining the nexus between the armed conflict and the offence, factors to be considered include: (1) whether the perpetrator is a combatant; (2) whether the victim is a non-combatant; (3) whether the victim is a member of the opposing party; (4) whether the act may be said to serve the ultimate goal of a military campaign, and (5) whether the crime is committed in the context of or as part of the perpetrator's official duties.[303]

For Article 3 to apply, the crime charged must be committed in a time of armed conflict and an accused's acts must be closely related to that conflict. The nexus need not be a causal link, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the way it was committed or the purpose for which it was committed. If it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. To find a nexus, it is sufficient that the alleged crimes be closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. Article 3 crimes need not be committed in the area of armed conflict but must at least be "substantially related" to this area, which at least includes the entire territory under control of the warring parties. It is essential, however, that a Trial Chamber establish the existence of a geographical and temporal linkage between the crimes ascribed to the accused and the armed conflict.[304]

The offence need not be carried out in the context of military action. It is sufficient if the offence is closely linked to the hostilities.[305]

outrages upon personal dignity

The determination of what constitutes a war crime is dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. The laws of war are not static, but by continual adaptation follow the needs of a changing world. There is no question that acts such as rape, torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to these Indictments.[306]

The crime of outrages upon personal dignity requires; (1) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious

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[303] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 91; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 59

[304] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 342; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 58; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 16; *Prosecutor v. Mrkšić et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 423

[305] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 62

[306] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 67.

attack on human dignity; (2) that he knew that the act or omission could have that effect.[307]

Outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity."[308]

Murder in and of itself cannot be characterised as an outrage upon personal dignity. Murder causes death, which is different from concepts of serious humiliation, degradation, or attacks on human dignity. The focus of violations of dignity is primarily on acts, omissions, or words that do not necessarily involve long-term physical harm, but which nevertheless are serious offences deserving of punishment.[309]

Regarding the *mens rea*, the crime of outrages upon personal dignity requires only the knowledge of the "possible" consequences of the charged act or omission.[310]

plunder

Plunder is all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as "pillage".[311]

There is some doubt as to whether acts of plunder, in and of themselves, rise to the level of gravity required for crimes against humanity.[312]

Plunder is a crime which protects important values and whether the breach of these values involves grave consequences for the victims must be determined on a case-by-case basis.[313]

Plunder is committed when private or public property is appropriated intentionally and unlawfully.[314]

Plunder of private or public property is prohibited in both international and internal armed conflicts and is not limited to occupied territories.[315]

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[307] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 161
[308] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 163
[309] *Prosecutor v Kvocka et al,* No. IT-98-30/1-T, *Judgement* (2 November 2001) at para. 172
[310] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 165
[311] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.79
[312] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 148
[313] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 46
[314] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.84; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 49
[315] *Prosecutor v Hadzihasanovic & Kubura,* No. IT-01-47-AR73.3, *Decision on Joint Defence Interlocutory Appeal on Trial Chamber Decision on Rule 98 bis Motions for Acquittal* (11 March 2005) at para. 37; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.78; *Prosecutor v Martic,* No. IT-95-11-T, *Judgement* (12 June 2007) at para. 101

Plunder requires grave consequences to the victim, which may be measured by the monetary value of the property. However, plunder can be committed where appropriations take place vis a vis many people, even though the consequence to each individual is not grave.[316]

The *mens rea* for plunder is established when the perpetrator acts with the knowledge and intent to acquire property unlawfully, or when the consequences of his action are foreseeable.[317]

In certain circumstances, appropriation of property may not be regarded as unlawful where it can be justified under international humanitarian law. Under international humanitarian law, there is a general exception to the prohibition of appropriation of property when the appropriation is justified by military necessity. In the context of an international armed conflict, treaty law and international customary law justify battlefield seizures of military equipment of the adverse party as war booty.[318]

The principle of "war booty" is an exception to the appropriation of property. In an internal conflict, one must look to the law in the national jurisdiction to determine the application of this exception.[319]

In the context of an actual or looming famine, a state of necessity may be an exception to the appropriation of property. Food and livestock may be appropriated if it is shown that (1) there was a real and imminent threat of severe and irreparable threat to life existence; (2) the acts of plunder may have been the only means to avoid the harm; (3) the acts of plunder were not disproportionate; and (4) the situation was not voluntarily brought about by the perpetrator himself.[320]

The "grave consequences" requirement was satisfied by the overall effect of the various incidents of plunder on the civilian population and the multitude of offenses committed.[321]

protected persons

Under Article 3, it must be established that the victim was a person taking no active part in the hostilities.[322] It is the specific situation the moment the crime was

[316] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.82-83; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 55; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 103
[317] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 50
[318] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1779
[319] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at paras. 51-52; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 102
[320] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 53
[321] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1787
[322] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 176; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 3; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 258; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para.47

committed which controls.[323] Factors to be considered include (1) whether the victim was carrying weapons; (2) clothing; (3) age; and (4) gender.[324]

The principle contained in Article 50(1) of Additional Protocol I that in cases of doubt a person shall be considered a civilian is limited to the expected conduct of a member of the military. In contrast, when the criminal responsibility of an accused is at issue, the prosecution bears the burden of proof concerning the civilian status of victims.[325]

There is an unconditional and absolute prohibition on the targeting of civilians in customary international law. Any attack directed at the civilian population is prohibited, regardless of the military motive.[326]

The victim must not have been participating in acts of war which by their nature and purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces to be considered a person not directly taking part in hostilities.[327]

Since members of the armed forces of a party to a conflict are legitimate military objectives, they may be targeted even when not actively participating in hostilities.[328]

However, if the victim was a combatant, or even with respect to a victim not directly taking part in hostilities, the killing of such person would not be a war crime if the person was killed as the incidental result of an attack which was proportionate to the anticipated and concrete military advantage.[329]

Driver for President of Municipal Crisis staff, who was also military reservist, was not a person directly taking part in hostilities at the time of the offence.[330]

In determining that the victim was not taking an active part in the hostilities, the Trial Chamber correctly relied on evidentiary findings that the victim was in civilian clothes at the time of his death; that he was not a militia member; and that his father's house (the house he was killed in) was not used as a militia checkpoint.[331]

In determining that the victim was not taking an active part in the hostilities, the Trial Chamber correctly relied on evidentiary findings that the victim was detained and severely mistreated before he was shot dead; that he was unarmed and among a very

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[323] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 47; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 34
[324] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 34
[325] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 522
[326] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 906
[327] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 178; *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 93
[328] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at para. 2054
[329] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 179
[330] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 185
[331] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Judgement* (19 May 2010) at para 81.

large group of well-armed police; and even though the detaining forces may have thought he was attempting to escape, the hopelessness of his position was obvious and his conduct did not present a real threat of escape.[332]

Common Article 3 protects all persons taking no active part in hostilities, including those placed *hors de combat* through detention. Thus, even if some of these victims had been participating actively in hostilities prior to their detention, as soon as they were detained by the BSF, they would have ceased to be taking an active part in hostilities and thus would have come under the protection of Common Article 3.[333]

Even if the evidence demonstrated that the Srebrenica enclave was never fully demilitarised, that there had been combat activity shortly before the executions began, and that ABiH members were hiding amongst the civilians in the enclave, a reasonable trier of fact could still have reached, as the only reasonable inference, the Trial Chamber's conclusion that all the persons killed were detained in the hands of the BSF at the moment of their deaths and hence were victims of murder under Article 3.[334]

In determining that the victim was not taking an active part in the hostilities, the Trial Chamber correctly relied on evidentiary findings that the victim was in the custody of police members; wore civilians' clothes; and the only weapon found in his house was a light shotgun for hunting birds which had not been used or moved.[335]

Since the Bosnian Muslim men from the column or who had been separated from their families at Potocari had been killed after their surrender or capture and during the period of their detention, they were not taking an active part in hostilities at the time the crimes were committed.[336]

reprisals

Reprisals may only be used as a last resort and when all other means have been proven to be ineffective.[337]

Reprisals must be affected only after a warning has been given and not heeded.[338]

The decision to take reprisals must be made at the highest political or military level.[339]

Reprisals must be proportionate to the initial violation.[340]

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[332] *Prosecutor v Boskoski & Tarculovski,* No. IT-04-82-A, *Judgement* (19 May 2010) at para 96.
[333] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 794
[334] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 796
[335] *Prosecutor v Boskoski & Tarculovski,* No. IT-04-82-A, *Judgement* (19 May 2010) at para 102.
[336] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 794
[337] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 466
[338] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 466
[339] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 466
[340] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 467

Reprisals must cease as soon as they have put an end to the violations which provoked them.[341]

Reprisals must be exercised, to the extent possible, in keeping with the protection of the civilian population and the general prohibition against targeting civilians.[342]

Existence of peace negotiations at time of shelling of Zagreb demonstrates that not all possibilities had been exhausted as required for a justified reprisal.[343]

scope

Article 3 covers violations which are based on treaties as well as violations which are based upon customary international law. When a treaty provision is violated, it makes no difference whether the violation was prohibited by customary international law.[344]

Article 3 of the Statute is not limited to the protection of property.[345]

Article 3 is a residual clause which gives the Tribunal jurisdiction over any serious violation of international humanitarian law not covered by Articles 2, 4, or 5 of the statute. To fall within this residual jurisdiction, the offence must meet the following criteria: (1) it must constitute and infringement of a rule of international humanitarian law; (2) the rule infringed on must be customary in nature or covered by a treaty binding on the parties at the time that conforms with international law; (3) the violation must be serious—breach of a rule having important values and having grave consequences for the victims; and (4) the violation of the rule must entail individual criminal responsibility under customary or conventional law. These conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not.[346]

Acts such as rape, torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war.[347]

A violation of the rule prohibiting attacks on civilian objects meets all the criteria for prosecution under Article 3.[348]

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[341] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 467
[342] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 467
[343] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 468
[344] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.41
[345] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 118
[346] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 218; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 30; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 257; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 842; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 66
[347] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 67
[348] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 226

Crimes committed anywhere in the territory under the control of a party to the conflict, until a peaceful settlement of the conflict is achieved, fall within the jurisdiction of the Tribunal.[349]

The fact that a State is acting in lawful self-defence (just ad bellum) is irrelevant for a determination as to whether a representative of this State has committed a serious violation of international humanitarian law during the exercise of the State's right to self-defence which constituted part of an armed conflict (jus in bello).[350]

The legitimate character of an operation does not exclude an accused's criminal responsibility for planning, instigating, and ordering crimes committed during this operation. [351]

terror

customary law

The prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II, is a part of customary international law,[352] and customary international law imposed individual criminal liability for violations.[353]

No cogent reasons exist to depart from the controlling jurisprudence that the ICTY had jurisdiction over the crime of terror.[354]

elements

The elements of "terror" are: (1) Acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population; (2) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; (3) The above offence was committed with the primary purpose of spreading terror among the civilian population.[355]

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[349] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 70; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 84; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 255; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 57; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 15

[350] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Judgement* (19 May 2010) at para 51.

[351] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Judgement* (19 May 2010) at para 172.

[352] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 90

[353] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 98

[354] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 287

[355] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 875

actus reus

The definition of the *actus reus* of the crime of terror suggested by the Prosecution, notably "acts capable of spreading terror", does not necessarily imply grave consequences for the civilian population and thus does not *per se* render the violation of the said prohibition serious enough for it to become a war crime within the Tribunal's jurisdiction.[356]

Terror could be defined as "extreme fear".[357]

Psychological impact on the population of Sarajevo also satisfies the required gravity threshold.[358]

The actual infliction of terror is not an element of the crime of terror against the civilian population. The Trial Chamber did not err in so defining the elements of the offence, despite the allegation in the indictment of the infliction of terror.[359]

The actual terrorisation of the civilian population is not an element of the crime of unlawful infliction of terror. However, evidence of actual terrorisation may contribute to establishing other elements of the crime of terror.[360]

Acts of terror do not include legitimate attacks against combatants.[361]

Acts of sniping and shelling undoubtedly fall within the scope of "acts of violence" contemplated under the definition of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population.[362]

The actus reus of the crime of unlawful infliction of terror consists of acts or threats of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.[363]

Causing death or serious injury to body or health represents only one of the possible modes of commission of the crime of terror, and thus is not an element of the offence *per se*. What is required is that the victims suffered grave consequences resulting from the acts or threats of violence; such grave consequences include but are not limited to death or serious injury to body or health.[364]

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[356] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 34
[357] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 315
[358] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 35
[359] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 73
[360] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 563-64
[361] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 464
[362] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 106
[363] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at fn. 5882
[364] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 33

The crime of terror is not limited to direct attacks against civilians but may also include indiscriminate or disproportionate attacks to threats thereof. Similarly, acts and threats of violence do not include legitimate attacks against combatants but only unlawful attacks against civilians. While the nature of the acts or threats of violence may vary, the important element is that the acts or threats of violence are committed with the specific intent to spread terror among the civilian population.[365]

According to customary international law applicable both in international and non-international armed conflicts, the parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. The applicable international humanitarian law did not oblige the VRS to allow passage of consignments of humanitarian aid for the benefit of the ABiH, or of military equipment under the guise of humanitarian aid. Such consignments were deprived of their impartial character.[366]

mens rea

The crime of terror is a "specific intent crime". The mens rea of the crime of terror consists of a general intent and a specific intent. The general intent is that the offender must have wilfully made the civilian population or an individual civilian the object of acts or threats of violence. The specific intent is "spreading terror among the civilian population." [367]

The *mens rea* of the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population. The purpose of the unlawful acts or threats to commit such unlawful acts need not be the only purpose of the acts or threats of violence. The fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims. Such intent can be inferred from the circumstances of the acts or threats, that is from their nature, manner, timing, and duration.[368]

While the actual infliction of death or serious harm to body or health is a required element of the crime of terror […the] actual infliction of 'terror' on the civilian population is not an element of the crime. The fact that the civilian population suffered and experienced terror during an armed conflict may, however, serve as corroboration of the intent to terrorize.[369]

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[365] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 877; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1774
[366] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 615
[367] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12December 2007) at para. 878
[368] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 104; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 313
[369] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 880

The mens rea of the war crime of unlawful infliction of terror on civilians as a violation of the laws or customs of war includes the specific intent to spread terror among the civilian population.[370]

The *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population. While spreading terror must be the *primary* purpose of the acts or threats of violence, it need not be the only one. Both the actual infliction of terror and the indiscriminate nature of the attack were reasonable factors for the Trial Chamber to consider in determining the specific intent of the accused.[371]

Other purposes of the unlawful acts or threats may have coexisted simultaneously with the purpose of spreading terror among the civilian population, provided that the intent to spread terror among the civilian population was principal among the aims.[372]

The specific intent for this offence is the intent to spread terror among the civilian population.[373]

Such intent can be inferred from the nature, manner, timing and duration of the acts or threats.[374]

The specific intent of the crime of terror can be inferred from the circumstances of the acts or threats of violence, that is, from their nature, manner, timing, and duration. Attacks during cease-fires and truces or long-term and persistent attacks against civilians, as well as indiscriminate attacks, may be taken as indicia of the intent to spread terror. The specific intent may also be inferred from the site of the attack[375].

The crime of terror requires the same legal elements as the crime of unlawful attacks against civilians. However, it is different from the crime of unlawful attacks against civilians in that it requires the additional mental element of the "primary purpose of spreading terror." The crime of terror, therefore, constitutes an "aggravated", more serious form of, unlawful attack on civilians.[376]

It must be established that the terror goes beyond the fear that is only the accompanying effect of the activities of armed forces in armed conflict. The prohibition of spreading terror among a civilian population must therefore always be distinguished from the effects that acts of legitimate warfare can have on a civilian population. Therefore, the circumstances of a particular armed conflict must be considered in

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[370] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 424
[371] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 37; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 313
[372] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 424
[373] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 460
[374] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 424, 1774
[375] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 881
[376] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 882

determining whether the crime of terror has been committed, or whether the perpetrators intended to "spread terror among a civilian population." [377]

The crime of terror shares the same elements with the crime of unlawful attacks against civilians, except for the additional requirement that to constitute terror it must be established that the acts were committed with the primary purpose of spreading terror among the civilian population. It follows, therefore, that the acts which the Trial Chamber found to have constituted terror must a fortiori also constitute unlawful attacks against civilians and civilian population.[378]

Considering the Trial Chamber's findings that the Bosnian Croat Army had a military interest in the destruction of the Old Bridge and that it was a military target, no reasonable trier of fact could have found, beyond reasonable doubt, that the Bosnian Croat Army had the specific intent to commit terror.[379]

Trial Chamber's finding that the Bosnian Croat Army had the specific intention to spread terror among the civilian population of and committed acts of violence, the main aim of which was to inflict terror on the population was insufficient where no similar findings were made in the individual criminal responsibility section to clarify whether the accused shared this specific intent.[380]

Despite not explicitly finding that the accused had the specific intent to spread terror, the Trial Chamber considered that he had extensive knowledge of, and accepted nearly all, the underlying acts that the Trial Chamber earlier considered demonstrated the Bosnian Croat Army's specific intent to spread terror. Therefore, a reasonable trier of fact could be satisfied beyond reasonable doubt - and as the only reasonable inference available - that the accused intended that the acts of violence be committed with the primary purpose of spreading terror among the civilian population.[381]

timing

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached, or in the case of internal conflicts, a peaceful settlement is achieved.[382]

torture

elements

[377] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12December 2007) at para. 878
[378] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 953
[379] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 425
[380] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1778
[381] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1788
[382] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 255; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 14

The elements of torture are: (1) an act or omission inflicting severe pain or suffering whether physical or mental; (2) the act or omission must be intentional; and (3) the act or omission must have been carried out with a specific purpose such as to obtain information or a confession, to punish, intimidate, or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[383]

The Trial Chamber correctly identified the following elements of the crime of torture in a situation of armed conflict:(i) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) this act or omission must be intentional; (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (iv) it must be linked to an armed conflict; and (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity.[384]

actus reus

An act or omission may constitute the *actus reus* of torture if it has caused severe pain or suffering. It is not required that the injury be permanent, or even physical.[385]

To constitute torture, the accused's act or omission must give rise to "severe pain or suffering, whether physical or mental."[386]

The intimidating and humiliating aspects of a scene (The rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina) and their devastating impact on the physical and mental state of a witness can be serious enough to amount to torture.[387]

Factors determining the seriousness of the act include: (1) the nature and context of the infliction of pain; (2) the premeditation and institutionalization of the ill-treatment; (3) the physical condition of the victim; (3) the manner and the method used; (4) the position of inferiority of the victim; (5) the physical and mental effect of the treatment on the victim; (6) the victim's age, sex, and state of health; and (7) the specific social, cultural, and religious background of the victims.[388]

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[383] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 235
[384] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 111
[385] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 236; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para.417
[386] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 111
[387] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 113-114
[388] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 237-38; *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 514; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 417

mens rea

The *mens rea* of torture requires that the perpetrator intended to act in a way, which, in the normal course of events, would cause severe pain and suffering, whether mental or physical.[389]

The act must have been carried out with the specific purpose of obtaining information or a confession, or to punish, intimidate, or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.[390]

Torture is distinguished from other offences in that it aims, through the infliction of severe mental or physical pain, to attain a certain result or purpose. This includes, albeit not exhaustively, the purpose to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person. In the absence of these purposes or goals, even very severe infliction of pain would not be classified as torture.[391]

There is no requirement that the severe pain or suffering be inflicted exclusively for one or more of the purposes mentioned, but only that such a purpose or purposes be part of the motivation for the conduct.[392]

Factors relevant to determining whether the perpetrator had the *mens rea* requisite for the offence of torture include (1)the nature and duration of the beatings; (2) the implements used by the perpetrators to inflict suffering; (3) the number of persons attacking individual victims, the verbal threats and abuse occurring simultaneously with the beatings; and (4) the threatening atmosphere in which the victims were detained as they were beaten.[393]

The evidence did not allow the Trial Chamber to distinguish between beatings that were inflicted with a specific purpose – which is required to establish the crime of torture - and beatings that may have been inflicted for reasons of pure cruelty, but not with a specific purpose. Consequently, the Trial Chamber found *in dubio pro reo* that the specific purpose necessary for torture had not been established beyond reasonable doubt[394].

Whether the perpetrator had a different motivation is irrelevant if he acted with the requisite intent. Further, the act or omission must have been carried out with a specific purpose. This includes, albeit not exhaustively, the purpose to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to

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[389] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 238; *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 515

[390] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 239; *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 679

[391] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 418

[392] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 418

[393] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 531

[394] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 21

discriminate, on any ground, against the victim or a third person. The prohibited purpose need not be the sole or the main purpose of the act or omission in question.[395]

public official

It is not required that the crime of torture be committed by a public official or, in the case of a plurality of perpetrators, that at least one of the persons involved in the torture process be a public official.[396]

Article 4—genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

actus reus

destruction

The Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. An enterprise attacking only the cultural or sociological characteristics of a human group to annihilate these

[395] *Prosecutor v. Mrksic et al.,* No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 515
[396] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 284; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 240; *Prosecutor v. Mrksic et al.,* No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 515

elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide." [397]

The term "destroy" in the genocide definition can encompass the forcible transfer of a population.[398] The physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members.[399]

While forcible transfer does not in and of itself constitute a genocidal act, it is a relevant consideration as part of the overall factual assessment and could be an additional means by which to ensure the physical destruction of the protected group.[400]

In the absence of findings of any long-term consequences of the forcible transfer operation on the Zepa population and the Bosnian Muslim population of Eastern BiH in general and of a link between the circumstances of the transfer operation in Zepa and the physical destruction of the protected group as a whole, no reasonable trial chamber could have found that the Bosnian Muslims forcibly transferred from Zepa suffered serious mental harm within the meaning of Article 4(2)(b) of the Statute.[401]

Failure to provide adequate accommodation, shelter, food, water, medical care, or hygienic sanitation facilities will not ordinarily constitute the *actus reus* of genocide if the deprivation is not so severe as to contribute to the destruction of the group.[402]

When more than one group is targeted, the elements of the crime of genocide must be considered in relation to each group separately.[403]

killing

The actus reus and mens rea required for 'killing' in subparagraph 4(2)(a) of the Statute are identical to those controlling 'wilful killing' under article 2 and murder under articles 3 and 5.[404]

The required elements are satisfied where (i) the victim is dead; (ii) the death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (iii) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention to kill; or to inflict grievous bodily

[397] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 25
[398] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 665
[399] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 666
[400] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 209
[401] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 217
[402] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 863
[403] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 541
[404] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at paras 381, 689.

harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[405]

serious physical harm

The *actus reus* of serious bodily harm was satisfied by evidence of severe non-fatal physical violence, including rape, which left the victims with serious injuries.[406]

The trauma and wounds suffered by those individuals who managed to survive the mass executions constitutes serious bodily and mental harm.[407]

Causing serious bodily harm' is understood to mean, inter alia, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnic, racial, or religious group.[408]

Serious bodily or mental harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go beyond temporary unhappiness, embarrassment or humiliation and inflict grave and long-term disadvantage to a person's ability to lead a normal and constructive life.[409]

There is no additional requirement that the serious bodily or mental harm to members of the group be of such serious nature as to threaten the destruction of the group in whole or in part. The degree of threat to the group's destruction may, however, be considered as a measure of the seriousness of the bodily or mental harm.[410]

Acts of beating and interrogating detainees over four days, escorting them at gunpoint, and providing them limited food, while infliction of serious bodily harm, was not of such a serious nature as to contribute, or tend to contribute, to the destruction of the protected groups to constitute the actus reus of genocide.[411]

The harm need not be permanent or irremediable but needs to be serious.[412]

The harm must be inflicted intentionally.[413]

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[405] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at paras 381, 689
[406] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 37
[407] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 647
[408] *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 690.
[409] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 201; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 543
[410] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 544
[411] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3450
[412] *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para 516; *Prosecutor v Brdjanin* No. IT-99-36-T, *Judgement* (1 September 2004) para 690
[413] *Prosecutor v Krstic* No. IT-98-33-T, *Judgement*, (2 August 2001) at para 513 .

While forcible transfer does not of itself constitute an act of genocide, depending on the circumstances of a given case, it may cause such serious bodily or mental harm as to constitute an act of genocide under Article 4(2)(b).[414]

Article 4(2)(b) refers to an intentional act or omission which causes serious bodily or mental harm to members of the protected group and requires proof of a result.[415]

serious mental harm

Threats of death and knowledge of impending death have been accepted as amounting to serious mental harm under Article 4 of the Statute.[416]

Serious mental harm must be lasting but need not be permanent and irremediable.[417]

The suffering of men separated at Potocari or detained after their surrender or capture from the column of men leaving Srebrenica, knowing they were likely to be killed, constituted serious bodily and mental harm as an *actus reus* of genocide. It was of such a nature as to contribute or tend to contribute to the destruction of the group in that their suffering prevented these members from leading a normal and constructive life.[418]

The suffering endured by the Bosnian Muslim men prior to being killed constituted serious mental harm as a separate genocidal act from killing.[419]

Mental harm suffered by the survivors of the killings qualified as an act of genocide.[420]

The mental harm suffered by the men who survived arose not only from their being subjected to the killing operation itself, but also from having subsequently experienced the horrific circumstances of their escapes.[421]

The suffering of women separated from their husbands or sons at Potocari also constituted serious mental harm as an *actus reus* of genocide.[422]

The Appeals Chamber is also not persuaded that the United States of America's "understanding" of serious mental harm as "the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques", expressed in its instrument of accession to the Genocide Convention, is correct under

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[414] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 545
[415] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 543
[416] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 206
[417] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 203
[418] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Judgement* (12 December 2012) at paras. 754-55
[419] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 206
[420] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 207
[421] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at fn. 595
[422] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 756

customary intonational law.[423]

Nothing in the Tribunal's jurisprudence or in the Genocide Convention provides that a forcible transfer operation may only support a finding of genocide if the displaced population is transferred to concentration camps or places of execution. A forcible transfer operation may still ensure the physical destruction of the protected group by causing serious mental harm or leading to conditions of life calculated to bring about the group's physical destruction, even if the group members are not transferred to places of execution.[424]

The painful separation process from their male family members, the fear and uncertainty as to their fate and that of their detained male relatives, the appalling conditions of the journey, the continuation of their profound trauma, as well as the financial and emotional difficulties they faced in their drastically changed lives following the forced transfer were proper considerations which supported the conclusion that the women, children, and elderly who were forcibly transferred from Srebrenica suffered serious mental harm.[425]

The Trial Chamber was entitled to consider the inability and fears of the group to return to their former homes, and the post transfer quality of their life in making an assessment that those who had been forcibly transferred suffered serious mental harm.[426]

Serious mental harm need not result from acts causing permanent or irremediable mental impairment. It suffices that the harmful conduct caused grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life so as to threaten the physical destruction of the group in whole or in part.[427]

unbearable conditions of life

The acts punishable under Article 4(2)(c) are construed as "the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction".[428]

The destruction of the social structure of the community and the inability of those who were forcibly transferred to reconstruct their lives did not constitute the conditions of life deliberately imposed to bring about the physical destruction of the group as required by Article 4, when considered apart from the killings. [429]

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[423] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 204
[424] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 209
[425] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 210
[426] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 211
[427] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 212
[428] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 546
[429] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 854

The actus reus of creating conditions of life designed to bring about the physical destruction of the group was satisfied by conditions of detention including severe overcrowding, deprivation of nourishment, and lack of access to medical care.[430]

The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services.[431]

The underlying acts covered by Article 4(2)(c) are methods of destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts punishable under Article 4(2)(c) include, inter alia, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[432]

Unlike Articles 4(2)(a) and (b), Article 4(2)(c) does not require proof of a result such as the ultimate physical destruction of the group in whole or in part. However, Article 4(2)(c) applies only to acts calculated to cause a group's physical or biological destruction deliberately and, as such, these acts must be clearly distinguished from those acts designed to bring about the mere dissolution of the group. Such acts, which have been referred to as "cultural genocide", were excluded from the Genocide Convention. For example, the forcible transfer of a group or part of a group does not, by itself, constitute a genocidal act, although it can be an additional means by which to ensure the physical destruction of a group.[433]

Contrary to the acts prohibited by Articles 4(2)(a) and 4(2)(b), Article 4(2)(c) does not require proof of that a result was attained; as such, it does not require proof that the conditions actually led to death or serious bodily or mental harm of members of the protected group. When such “a result is achieved, the proper charge will be paragraphs (a) or (b)” of Article 4.[434]

Conviction under sub-paragraph 4(2)(c) does not require proof of the physical destruction in whole or in part of the targeted group.[435]

Killings may not be considered, under Article 4(2)(c) of the Statute, as acts resulting in the deliberate infliction of conditions of life calculated to bring about the protected group's physical destruction.[436]

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[430] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 49
[431] *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para 517; *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement*(1 September 2004) at para 691.
[432] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 225-26
[433] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 225-26
[434] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 546
[435] *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para 517
[436] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 227

When the same prohibited acts are charged under both Article 4(2)(b) and Article 4(2)(c), a chamber will consider whether these alleged acts amount to conditions calculated to bring about physical destruction only when it does not find them to amount to 'causing serious bodily or mental harm'.[437]

Examples of acts under Article 4(2)(c) include, but are not limited to, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion.[438]

The different categories of genocidal acts proscribed in Article 4(2) of the Statute correspond to and aim to capture different methods of physical destruction of a protected group: subparagraphs (a) and (b) of Article 4(2) of the Statute proscribe acts causing a specific result, which must be established by the evidence, i.e., killings and serious bodily or mental harm respectively; on the other hand, subparagraph (c) of the same Article purports to capture those methods of destruction that do not immediately kill the members of the group, but which, ultimately, seek their physical destruction.[439]

Trial Chamber erred in combining consideration of killings with other methods of physical destruction when considering whether the actus reus of genocide under Article 4(2)(c) was satisfied.[440]

The destruction of historical, cultural, and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. The Trial Chamber committed a legal error in considering the destruction of mosques in Srebrenica and Zepa under Article 4(2)(c).[441]

The forcible transfer operations in Srebrenica and Zepa, viewed separately from the killings of Srebrenica's male population, were not conducted under circumstances calculated to result in the total or partial physical destruction of the protected group.[442]

There is no doubt that the Bosnian Muslims who were forced to abandon their houses and belongings in Srebrenica and Zepa and then endured a painful process of separation from their ancestral land and transferred to other parts of BiH were traumatised because of the transfer and have since faced harsh realities in their new lives, both financially and psychologically. The record, however, is devoid of any evidence that the forcible transfers, if they are analysed - as they must - separately from the killing operation and the destruction of mosques in Srebrenica and Zepa, were

[437] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3453
[438] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 547
[439] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 228
[440] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 229
[441] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 230
[442] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 233

"carried out with a view to the destruction of the group, as distinct from its removal from the region" at issue (i.e., the enclaves of Srebrenica and Zepa).[443]

The Trial Chamber's statement that the forcible transfer and killing operations met the threshold of Article 4(2)(c) of the Statute because they resulted in conditions of life aimed at destroying this Bosnian Muslim community and preventing the reconstitution of the group *in this area*" reflects an erroneous understanding of the term "physical destruction" as used in Article 4(2)(c).[444]

The actus reus of Article 4(2)(c) covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group. There is no evidence on the record that the forcible transfer operations were carried out in such a way to lead to the ultimate death of the displaced Bosnian Muslims.[445]

The destruction of the social structure of the community and the inability of those who were forcibly transferred to reconstruct their lives are not the kinds of conditions intended to be prohibited by Article 4(2)(c).[446]

Article 4(2)(c) applies only to acts that are deliberately calculated to cause a group's physical destruction and, as such, these acts must be clearly distinguished from those acts designed to bring about the dissolution of the group.[447]

The forcible transfer operations did not deliberately subject the protected group to conditions of life calculated to destroy it physically.[448]

In the absence of direct evidence of whether the conditions of life imposed on the group were deliberately calculated to bring about its physical destruction, a chamber can be guided by the objective probability of these conditions leading to the physical destruction of the group in part. The actual nature of the conditions of life, the length of time that members of the group were subjected to them, and the characteristics of the group such as its vulnerability are illustrative factors to be considered in evaluating the criterion of probability.[449]

The persecutory and severe mistreatment demonstrated by the evidence and reflected in the Trial Chamber's findings did not compel it to find, as the only reasonable inference, the existence of the deliberate infliction of conditions of life calculated to bring about the physical destruction of the Bosnian Muslim and Bosnian Croat groups as such.[450]

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[443] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 233
[444] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at fn. 670
[445] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 233
[446] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 233
[447] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 547
[448] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 234
[449] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 548
[450] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 709

preventing births

The consequence of the forcible transfer operation cannot be said to have prevented births among the group such as to constitute the *actus reus* of genocide.[451]

complicity

Complicity in genocide requires that genocide was committed.[452]

Complicity requires a showing of genocidal intent.[453]

As to the distinction between genocide under article 4(3)(a) and 4(3)(e), generally the former is concerned with principal offenders, including but not limited to the physical perpetrators and to those liable pursuant to the theory of JCE, whereas the latter concerns accomplices to genocide – i.e., those who associate themselves in the crime of genocide committed by another.[454]

The relationship between article 4(3) and article 7(1) is such that certain heads of criminal responsibility in article 4(3) overlap with those in article 7(1): by incorporating article 4(3) in the Statute, the drafters ensured that the Tribunal had jurisdiction over all forms of participation in genocide prohibited under customary international law, though this had the effect of duplicating heads of responsibility otherwise provided for in article 7(1).[455]

Lack of accused's awareness of mass murders meant that no reasonable trier of fact could find that he knew of the genocidal intent of the perpetrators, despite knowledge of forcible transfers and opportunistic killings in Srebrenica.[456]

Complicity by command responsibility would be more appropriately pleaded under genocide, rather than complicity. However, the accused was informed since the beginning of the case of the Prosecution's intention to plead superior responsibility context of the crime of genocide. The Trial Chamber therefore deems it acceptable to consider the charge.[457]

Complicity in genocide under article 4(3)(e) can consist of aiding and abetting genocide, thought there may be other acts which are not strictly aiding and abetting but

[451] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 767
[452] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 638
[453] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 142; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 865
[454] *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 727.
[455] *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 726; *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement on Appeal* (19 April 2004) at para 138.
[456] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 123
[457] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 685

which could amount to complicity: the terms 'complicity' and 'accomplice' may encompass conduct broader that aiding and abetting.[458]

Complicity in genocide, where it consists of aiding and abetting genocide, does not require proof that the accomplice had the specific intent to destroy, in whole or in part, a protected group.[459] (Note that the *Brdjanin* Trial Chamber, following the *Krstic* Appeals Chamber upon which it relied, took no position on the mens rea requirement for the offence of complicity where the offence strikes broader than aiding and abetting).[460]

Where the offence consists in aiding and abetting the principal perpetrator, the prosecution must prove 'that an accused knew that his own acts assisted in the commission of genocide by the principal offender and was aware of the principal offender's state of mind; it need not show that an accused shared the specific intent of the principal offender'.[461]

conspiracy

agreement

Conspiracy to commit genocide is defined as an agreement between two or more persons to commit the crime of genocide.[462]

The *actus reus* of the criminal act of conspiracy to commit genocide is the act of entering into an agreement to commit genocide.[463]

Genocide and conspiracy to commit genocide are distinct crimes. While the *mens rea* for the two crimes is identical - i.e., "the intent to destroy in whole or in part a national, ethnical, racial or religious group as such, the *actus reus* is different. The crime of genocide requires the commission of one of the enumerated acts in Article 4(2) of the Statute, while the crime of conspiracy to commit genocide requires the act of entering into an agreement to commit genocide.[464]

The evidence must establish beyond a reasonable doubt a concerted agreement to act and not merely similar conduct or the mere showing of a negotiation in progress.[465]

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[458] *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 729; *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para 139, *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 220

[459] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para 142; *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 730.

[460] See *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at fn. 1777.

[461] *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 730

[462] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1184

[463] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1184

[464] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 582

[465] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 786

inference

While the actus reus of conspiracy to commit genocide can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence. A concerted agreement to commit genocide may be inferred from the conduct of the conspirators.[466]

Conspiracy to commit genocide can be inferred from coordinated actions by individuals who have a common purpose and are acting within a unified framework.[467]

An agreement may be inferred from the conduct of the conspirators, if it is the only reasonable conclusion to be drawn from the evidence.[468]

mens rea

To be found guilty, one must possess the same specific intent required for the commission of genocide, namely, the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.[469]

continuing offence

Conspiracy is a continuing crime, and an individual can join a conspiracy after the initial agreement is concluded .[470]

An individual can join a conspiracy at any time before the crime is completed.[471]

inchoate offence

Conspiracy is an inchoate crime, and it is not required that a genocide actually was committed.[472]

withdrawal

Withdrawal from a conspiracy does not exonerate a conspirator unless he produces affirmative and contemporaneous evidence of his withdrawal.[473]

mens rea

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[466] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 553; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 587
[467] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1184
[468] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 786
[469] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1184; *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 787
[470] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para 876
[471] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 785
[472] *Prosecutor v Tolimir,* No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 582
[473] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 785

as such

The words "as such" underscore that something more than discriminatory intent is required for genocide, that the intent "must be to destroy the group as a separate and distinct entity" and that the ultimate victim of the crime of genocide is the group.[474]

factors

Absent direct evidence of genocidal intent, the scale of the atrocities committed is one of several factors relevant to determining genocidal intent.[475]

The intent to destroy a group as such is circumscribed by the area of the perpetrators' activity and control and the extent of the perpetrators' reach.[476]

Evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent.[477]

The use of derogatory language such as the term "balija" is in no way determinative of a specific intent to commit genocide, though it is relevant to it.[478]

The Trial Chamber acted within the bounds of the law and its discretion when contrasting the number of Bosnian Muslims and Bosnian Croats displaced versus those who were victims of conduct falling within Article 4(2) in assessing whether genocidal intent had been established.[479]

Indications of genocidal intent are "rarely overt", and thus intent must often be inferred based on the totality of the evidence, considering such factors as the scale of atrocities as well as the systematic targeting of victims on account of their membership in a particular group.[480]

inferences

Where proof of state of mind is based on inference, it must be the only reasonable inference available on the evidence. This test is even more stringently applied when inferring genocidal intent.[481]

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[474] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1177
[475] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 727
[476] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 727
[477] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 52; *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 745
[478] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at paras. 1177, 2086
[479] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 728
[480] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 5825
[481] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 576

Proof of the mental state with respect to the commission of the underlying act can serve as evidence from which the factfinder may draw the further inference that the accused possessed the specific intent to destroy.[482]

Proof of specific intent, may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as (1) the general context, (2) the perpetration of other culpable acts systematically directed against the same group, (3) the scale of atrocities committed, (4) the systematic targeting of victims on account of their membership of a particular group, or (5) the repetition of destructive and discriminatory acts,[483] or evidence of a plan or policy.[484]

Intent to destroy by the physical perpetrators was inferred from the intensity of the prohibited acts, their widespread and discriminatory nature, and the fact that many were perpetrated by the same individuals or units.[485]

The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified.[486]

The implication of multiple levels of military command in a genocidal operation can evidence the systematic nature of the culpable acts and an organised plan of destruction, which may be relied upon to infer genocidal intent.[487]

insufficient evidence

The fact that more members of a targeted group could have been killed, but were not, may indicate a lack of the dolus specialis required to prove such intent.[488]

There was insufficient evidence indicating why the Bosnian Muslims in each of the municipalities or the municipalities themselves had a special significance or were emblematic in relation to the protected group as a whole. As a result, it was not the only reasonable inference that the physical perpetrators possessed the intent to destroy a substantial part of the Bosnian Muslims in those municipalities.[489]

Since the forcible transfer operation of Zepa's Bosnian Muslims had been completed before the three Zepa leaders were detained and killed and in the absence of any findings as to whether or how the loss of these three prominent figures affected the ability of the Bosnian Muslims from Zepa to survive in the post-transfer period, the

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[482] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 20
[483] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 47.
[484] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 80; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 246
[485] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at paras.3514, 3515, 3519, 3524
[486] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 34
[487] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 252
[488] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 727
[489] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3535

inference of genocidal intent was not the only reasonable inference that could be drawn from the record.[490]

Despite inflammatory speeches and the commission of serious crimes, it could not be said that the only reasonable inference that can be drawn from the evidence is that the crime of genocide formed part of the JCE's objectives.[491]

A reasonable inference is that the accused's blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors. In these circumstances the stringent test for specific intent is not met and the Trial Chamber therefore finds that the accused did not participate in the JCE to Murder with genocidal intent.[492]

Where accused removed his men from area of murder operation and wished to open a corridor for Muslim men to pass, this indicated that he did not have genocidal intent.[493]

The Trial Chamber did not err in considering the opening of a corridor to be a unique departure from the genocidal plan promulgated by the VRS commanders rather than a factor showing absence of genocidal intent on behalf of the BSF more generally.[494]

Where accused was aware of murderous intent of VRS soldiers in Srebrenica, there was no evidence that he was aware of their specific intent to destroy the Muslims of Eastern Bosnia as such. Therefore, he could not be found guilty of aiding and abetting genocide.[495]

Trial Chamber unable to determine that vast violations of international humanitarian law in Bosnia were committed by perpetrators possessing the intent to destroy a substantial part of the Bosnian Muslim group.[496]

related crimes

The evidence could reasonably be seen as consistent with the conclusion that the accused merely intended to displace, but not to destroy, the Bosnian Muslim group. To be sure, he was willing to employ means to this end that ensured that some members of the group would be killed, and others brutalised, and this was surely criminal – but not

[490] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 269
[491] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 4237
[492] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1414
[493] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1588
[494] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 459; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 251
[495] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2088
[496] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 869

necessarily genocidal, absent evidence proving beyond a reasonable doubt that he sought the destruction of the group as such.[497]

The fact that the forcible transfer operation does not constitute, in and of itself, a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of those individuals involved.[498]

A trial chamber may rely on the act of forcible transfer as evidence of genocidal intent, regardless of the destination of the transfer.[499]

saving victims

Evidence of limited and selective assistance to a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide.[500]

specific intent

As a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part.[501]

The specific intent requires that the perpetrator seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial, or religious group, as such. However, the existence of a plan or policy is not a legal requirement of the crime. It is not sufficient that the perpetrator simply knew that the underlying crime would inevitably or likely result in the destruction of the group. The destruction, in whole or in part, must be the aim of the underlying crimes.[502]

There is a difference between motive and intent. An accused may have had a goal of destroying a protected group, but it must be proven that he intended to achieve his goal through particular actions, including killing and imposing of inhumane conditions of life, which amounted to genocide.[503] The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.[504]

A finding that the accused participated in the killing operation with the specific intent to discriminate is not on its own sufficient to establish the specific intent for genocide.[505]

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[497] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 56
[498] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 254
[499] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 254
[500] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 629
[501] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 20
[502] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 656
[503] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 45
[504] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 49.
[505] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1177

in whole or in part

The intent requirement of genocide is satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the protected group.[506]

The intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it.[507]

The intent requirement in article 4 is satisfied where evidence shows that the alleged perpetrator intended to destroy at least a substantial part of the selected group. The determination of whether the targeted group is substantial enough to meet this requirement may involve several considerations, including: the numeric size of the targeted part of the group (both absolute and relative); the prominence within the group of the targeted part of the group, and the area of the perpetrators' activity and control as well as the possible extent of their reach.[508]

Although the substantiality requirement is textually indicated in the provision describing the specific intent required for genocide, i.e. the requirement that there must exist an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is the objective, contextual characteristics of the targeted part of the group, including, inter alia, its numeric size relative to the total size of the group, that form the basis for determining whether the targeted part of the group is substantial.[509]

Even though the Bosnian Muslims of Srebrenica constituted only 2 % of the Bosnian Muslim population, considering the significant strategic importance of Srebrenica due to its close geographical proximity to Serbia and its status as a refuge to Bosnian Muslims, the Bosnian Muslims in Srebrenica constituted a substantial part of the Bosnian Muslim population of Bosnia-Herzegovina.[510]

Considering that the affected communities effectively comprised between approximately 0.6 and 2.6 per cent of the overall Bosnian Muslim group in Bosnia and Herzegovina, the Trial Chamber did not err in concluding that the communities each formed a relatively small part of the group.[511]

Because the intent to destroy formed by perpetrators of genocide will always be limited by the opportunity presented to them, the perpetrators' areas of activity and

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[506] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 12; *Prosecutor v Mladic,* No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 576

[507] *Prosecutor v Krstic*, No. IT-98-33-T *Judgement* (2 August 2001) at para 590, *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para 524; *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 700.

[508] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at paras 12-14*; Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at paras 701-2.

[509] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 422

[510] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3554

[511] *Prosecutor v Mladic,* No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 577

control, as well as the possible extent of their reach, should be considered when determining whether the part of the protected group they intended to destroy was substantial. [512]

It is not just any impact on a protected group that supports a finding of genocidal intent; rather, it is the impact that the destruction of the targeted part will have on the overall survival of that group which indicates whether there is intent to destroy a substantial part thereof. [513]

Where the affected communities collectively comprised approximately 6.7 per cent of the Bosnian Muslim group, a reasonable trier of fact could reasonably have concluded that the communities, individually as well as cumulatively formed "a relatively small part" thereof. A reasonable trier of fact could also have found that the destruction of the communities, individually as well as cumulatively, was not sufficiently substantial to have an impact on the group's overall survival at the relevant time. [514]

Genocidal intent may consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such. [515]

If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4. [516]

The selective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent. [517]

Recognising that genocide may be committed through the killings of only certain prominent members of the group selected for the impact that their disappearance would have on the survival of the group as such aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders. [518]

No conviction for genocide has ever been entered by the Tribunal, or other international criminal tribunals, based on the selective targeting of a protected group's leadership. [519]

For a finding of genocide, it suffices that the leaders were selected for the impact that their disappearance would have on the survival of the group as such. Genocide may be committed even if not all leaders of a group are killed - even though targeting the

[512] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 578
[513] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 580
[514] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 589
[515] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 261
[516] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 261
[517] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 263
[518] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 263
[519] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at fn. 781

totality of the leadership per se may be a strong indication of genocide regardless of the actual numbers killed.[520]

A finding that Zepa's Bosnian Muslims lost three of their leaders does not suffice to infer that those civilians were affected by the loss of their leaders in a way that would threaten or tend to contribute to their physical destruction as a group.[521]

plan or policy

A plan or policy is not a legal ingredient of the crime of genocide.[522]

The existence of a plan or policy is not a legal ingredient of the crime of genocide. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[523]

protected group

The protected group cannot be defined negatively, such as "all non-Serbs", but the elements of genocide must be separately considered in relation to each targeted group, such as Bosnian Muslims and Bosnian Croats.[524]

There is nothing in the definition of genocide prohibiting, a conviction where the perpetrator killed detained military personnel belonging to a protected group because of their membership in that group.[525]

A national, ethnical, racial, or religious group is identified by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, based on its perceived national, ethnical, racial, or religious characteristics.[526]

The correct determination of the relevant protected group must be made on a case-by-case basis, consulting both objective and subjective criteria. This is so because subjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, since the acts identified in subparagraphs (a) to (e) of Article 2(4) must in fact be directed against "members of the group". [527]

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[520] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 264
[521] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 267
[522] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 431; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 830
[523] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 48; *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 225
[524] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 28
[525] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 226
[526] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 667
[527] *Prosecutor v Brdjanin* No. IT-99-36-T *Judgement* (1 September 2004) at para 684

Because evidence of intent to destroy may be inferred from an accused's actions or utterances *vis-à-vis* the targeted group, it is impossible to establish with certainty whether the accused possessed the necessary intent to destroy if the target group itself has not been defined.[528]

Article 5—crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

armed conflict

The crimes must be committed in armed conflict, whether international or internal in character.[529]

It is not necessary that a state of armed conflict exist in the State of the former Yugoslavia in which the crime was committed. The prosecution can succeed in prosecuting a crime against humanity committed in Vojvodina by proving that the crime occurred while an armed conflict in Croatia and/or Bosnia was in progress.[530]

A crime is part of the armed conflict even if no actual combat is taking place there, so long as there is combat on the territory of the States involved in the conflict.[531]

[528] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 18
[529] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para 142; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.542; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 704; *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Several Motions Challenging Jurisdiction* (19 March 2007) at para. 45; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 915
[530] *Prosecutor v Seselj*, No. IT-03-67-AR72.1, *Decision on the Interlocutory Appeal Concerning Jurisdiction* (31 August 2004); *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para.
[531] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 704

The "armed conflict" requirement is a purely jurisdictional prerequisite which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.[532]

No nexus must be shown under Article 5 between the armed conflict and the acts of the accused.[533]

An armed conflict and/or an occupation took place between October 1992 and April 1994 in the municipalities relevant to the Indictment. The widespread and systematic attack itself commenced in May 1992, that is, several months prior to the outbreak of the armed conflict, and continued until April 1994. However, since acts committed between May and September 1992 did not occur during an armed conflict, the prerequisite for the exercise of the Tribunal's jurisdiction to adjudicate crimes against humanity committed during that time has not been satisfied.[534]

attack

elements

To amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack directed against any civilian population. This phrase encompasses the following elements: (i) there must be an attack; (ii) the attack must be widespread or systematic; (iii) the attack must be directed against any civilian population; (iv) the acts of the perpetrator must be part of the attack; and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[535]

existence

The "attack" is a course of conduct involving the commission of acts of violence. It is not limited to the use of armed force; it encompasses any mistreatment of the civilian population and can precede, outlast, or run parallel to the armed conflict.[536]

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[532] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 83; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 915; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 75

[533] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Several Motions Challenging Jurisdiction* (19 March 2007) at para. 31

[534] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 paras. 652-53

[535] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.541; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 181; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 85

[536] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.543; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 666; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 182; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 706; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 86; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 69

The acts of the perpetrator must be part of the attack on the civilian population.[537]

When assessing whether an attack against a particular civilian population occurred, it is not relevant whether the other side also committed atrocities against its opponent's civilian population. Evidence of this nature is not relevant unless it tends to prove or disprove any of the allegations made in the Indictment, particularly to refute the allegation that there was a widespread or systematic attack against a civilian population. Such an allegation cannot be disproved by a submission that the other side is responsible for starting the hostilities.[538]

nexus

Once the requirement of a widespread or systematic attack against a civilian population is fulfilled, there must be a nexus between the acts of the accused and the attack itself.[539]

Such a nexus consists of two elements: (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof. Thus, to convict an accused of crimes against humanity, it must be proven that his acts were related to a widespread or systematic attack against a civilian population and that he knew that his acts were so related. Such an assessment will be made on a case-by-case basis.[540]

The act or acts must not be isolated or random; they may not be so far removed from the attack that, having considered the context and circumstances in which it occurred, the act or acts cannot reasonably be said to have been part of the attack. The nexus between the crime and the attack must demonstrate that objectively, it was part of the attack; and that the accused knew that there is an attack on the civilian population and that his act is part thereof.[541]

The required nexus between the acts of the perpetrator and the attack consists of two elements: (i) the commission of an act which, by its nature and consequences, is objectively part of the attack; together with (ii) knowledge on the part of the perpetrator that there is an attack on the civilian population and that his act is part thereof.[542]

The nexus between the acts of extermination and the widespread and systematic attack on a civilian population is fulfilled by an act which, by its nature or consequences, is objectively part of the attack, coupled with knowledge on the part of the accused that

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[537] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 478
[538] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 917
[539] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 41
[540] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 41
[541] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.547; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 190; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 100
[542] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 918-919

there is an attack on the civilian population and that his act is part thereof.[543]

The acts of the accused do not necessarily have to be contemporaneous with the attack on the civilian population to meet the nexus requirement.[544]

Where the perpetrators of the crimes knowingly directed their actions against members of the Croatian forces (e.g., non-civilians), the Appeals Chamber found no nexus between these acts and the widespread and systematic attacks committed against the civilian population two days earlier within the same geographical area, by the same perpetrators and under like sentiments of animosity towards the perceived enemy.[545]

While the acts of the perpetrator must be "part of" the attack against the civilian population, they need not be committed during that attack. A crime "which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack.[546]

The crime must not, however, be an isolated act. A crime would be regarded as an 'isolated act' when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack." [547]

If the other elements are established, the fact that the accused acted against the victim for personal reasons does not exonerate him.[548]

widespread or systematic

"Widespread" refers to the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.[549] "Widespread" refers to the large-scale nature of the attack and the number of targeted persons.[550]

"Systematic" refers to organised acts of violence and is often expressed through patterns of crimes.[551] "Systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.[552]

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[543] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 570
[544] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 41
[545] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 42, 43
[546] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 918-919
[547] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 918-919
[548] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 260.
[549] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.544
[550] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 183; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 57
[551] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.544
[552] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 183; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 57

Only the attack, not the individual acts of the accused, need be widespread or systematic.[553] A single or limited number of acts may constitute a crime against humanity, unless those acts are said to be isolated or random.[554]

A Trial Chamber must first identify the population which is the object of the attack and, considering the means, methods, resources, and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic.[555]

An attack against a civilian population may be classified as systematic even where some members of that civilian population are not targeted.[556]

Factors to be considered to determine if an attack is "widespread or systematic" are the consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes. Neither the attack nor the acts of the accused need to be supported by a policy or plan.[557]

Proof of a policy or plan is relevant to whether there was a widespread or systematic attack but is not a requirement.[558]

Trial Chamber could not include crimes for which the KLA was not identified as the perpetrators, or crimes committed for reasons pertaining to the victims personally, rather than against them as members of the civilian population when determining whether an attack was widespread or systematic.[559]

Trial Chamber could not draw any conclusion on whether there was an attack on the civilian population from the mere fact that many Serbian civilians left their home during this period.[560]

Animosity among factions in Kosovo may have caused individuals belonging to one faction to commit crimes against the other faction out of personal anger rather than in a structured or organized manner.[561]

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[553] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 189
[554] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 94
[555] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 95
[556] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 247
[557] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.546; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 184; *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 225; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 95
[558] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 706; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para 117
[559] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 114
[560] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 120
[561] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 121

Crimes against Serbs and other minorities in Kosovo were not on such a scale or frequency to conclude that there was an attack on the civilian population. Therefore, accused could not be convicted of crime against humanity.[562]

Crimes against Albanians in Kosovo were widespread and systematic.[563]

The acts constituted a widespread attack since they were committed extensively – the acts were committed on the territory of eight BiH municipalities over a period of two years, from May 1992 until April 1994 – and resulted in thousands of victims. Moreover, these acts of violence were similar in every one of the municipalities concerned and were carried on in an organised fashion by the military and political forces of the HVO. For this reason, the attack was also systematic in nature [564]

chapeau elements—*mens rea*

context

The relationship between the accused and the crimes/underlying offence must be sufficiently direct or proximate such that the individual *intended* that the offence be committed, inherent in four forms of responsibility provided in the Statute: commission, planning, ordering, and instigating. Thus, the forms of responsibility without intent (i.e., aid and abetting) are not CAH. Thus, to convict for CAH, someone must have knowledge of the context in which the crime/underlying offence occurred.[565]

As the civilian status of the victims is only a jurisdictional requirement and not an element of the crime, the Chamber believes that it is sufficient for the perpetrator to have been aware of the factual circumstances that established the status of the victim.[566]

details

Knowledge of certain events, not necessarily every individual attack, is sufficient to warrant the conclusion that the perpetrator had notice of the wider context and nature of the crimes. [567]

discriminatory intent

Crimes against humanity do not require proof of a discriminatory intent. Such an intent must be proved only for those crimes for which it is an express requirement, that is the various types of persecution falling under Article 5(h) of the Statute.[568]

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[562] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 122
[563] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at para. 1598
[564] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 646
[565] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 158.
[566] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 460
[567] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 929
[568] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 23

elements

The *mens rea* for crimes against humanity requires proof of the accused's: (i) intent to commit the underlying offence or offences with which he is charged; (ii) knowledge that there is an attack against the civilian population; and (iii) knowledge that his acts comprise part of that attack.[569] The *mens rea* requirement, however, does not entail knowledge of the details of the attack. Furthermore, the accused need not share the purpose or the goal behind the attack.[570]

The perpetrator must know that there is a widespread or systematic attack on the civilian population and know that his acts comprise part of that attack.[571]

multiple motivations

The perpetrator may act for purely personal reasons, so long as he knows that there is a widespread or systematic attack against the civilian population and that his act is part of that attack.[572]

Evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.[573]

Comment of the accused that "100 should be killed for every 1" could not be determined to mean a reprisal quota against civilians or killings in combat situations. The principle of *in dubio pro reo* must be applied to favor the interpretation favouring the accused.[574]

recklessness

The *mens rea* for attacks on civilians incorporates the concept of recklessness, but not mere negligence.[575]

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[569] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.548; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 100; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 101

[570] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.548; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 706; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 929

[571] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 389; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 479

[572] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 706; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 103; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 75

[573] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 103

[574] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 691

[575] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 22

The accused must have known of the attack against the civilian population and that his acts comprised part of the attack, or at least must have taken the risk that his acts were part thereof.[576]

It is error to define the *mens rea* of crimes against humanity in terms of an accused knowingly taking the risk that his acts were part of the overall attack. The accused must know that there is an attack on the civilian population and that his acts form part of that attack.[577]

The widespread character and nature of the crimes inevitably created an awareness in the principal perpetrators that an attack as described above existed and that their acts were part of it.[578]

whose intent matters

In a JCE case, it is sufficient that either the principal perpetrators or those on the ground on whose behest they were acting, i.e., who were commanding them during the operations, were aware that their acts comprised part of a larger attack against the civilian population in the region.[579]

If the physical perpetrator of an underlying offence is not the accused, his mental state is not necessarily determinative and thus, if the non-accused physical perpetrator is not aware of the context of his crimes, but his superior or an intermediary perpetrator is, these crimes could still constitute crimes against humanity.[580]

However, in situations where neither the physical nor the intermediary perpetrator knows of the context of his offences and the person with knowledge of this context is too far removed from the commission of the offence for such knowledge to be relevant -- like an aider and abettor, or the mental state of the person is legally irrelevant to the establishment of the crime, such as a superior who could only be liable under Article 7(3) -- the Chamber considers that in such circumstances an offence should not qualify as a crime against humanity.[581]

civilian population

definition

[576] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 271
[577] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Prosecution's Motion for Leave to File an Amended Indictment* (14 September 2007) at para. 33
[578] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3047
[579] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 275
[580] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 156.
[581] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 157.

A population is considered to be a civilian population under Article 5 of the Statute if it is predominantly civilian in nature.[582]

The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. [583]

A "civilian population" can include members of resistance groups or former combatants who have laid down their arms if it is predominantly civilian in nature.[584]

To determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined.[585]

The prohibition against attacking civilians is absolute . One side in a conflict cannot claim that its obligations are diminished or non-existent just because the other side does not respect all its obligations.[586]

It is not relevant that the other side also committed atrocities against its opponent's civilian population.[587]

Whereas jurisprudence accepts that the attack requirement for crimes against humanity allows for the presence of non-civilians in the population that is the target of the widespread or systematic attack, there is nothing to suggest that a crime, listed under Article 5 of the Statute, would qualify as a crime against humanity if the victims were non-civilians.[588]

For the purposes of Article 5 of the Statute, the victims of the underlying crime must be civilians. If the victims are non-civilians, the more appropriate charge is war crimes. This is a proper and specific requirement for the application of Article 5, which considers the historical origins and development of crimes against humanity as a category distinct from war crimes.[589]

directed against civilian population

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[582] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 474; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 69

[583] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, *Judgement* (12 December 2007) at para. 922; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 69

[584] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.544; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 186; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 144

[585] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 115

[586] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 69

[587] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 87

[588] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 462.

[589] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 462.

The attack need not be directed at the civilian population in the whole area under consideration.[590]

Whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement of Article 5 of the Statute that an attack be directed against a "civilian population" is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be "civilians".[591]

The phrase "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack". In determining this, consideration will be taken of; (1) the means and method used during the attack; (2) the status of the victims; (3) their number; (4) the discriminatory nature of the attack; (5) the nature of the crimes committed in its course; (6) the resistance to the assailants at the time and (7) the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[592]

The civilian status of the victims and the proportion of civilians within a population are factors relevant to satisfy the *chapeau* requirement that an attack was directed against a "civilian population", yet it is not an element of the crimes against humanity that individual victims of the underlying crimes be "civilians".[593]

There is no requirement nor is it an element of a crime against humanity that the victims of the underlying crime be civilians or predominantly civilians, provided the acts form part of a widespread or systematic attack directed against a civilian population.[594]

To satisfy the jurisdictional requirement of Article 5 of the Statute, crimes against humanity must be committed as part of a widespread attack against a civilian population. This does not imply, however, an additional requirement that civilians be the sole target of the crimes.[595]

The targeting of a select group of civilians, such as political opponents, cannot satisfy the requirements of Article 5. It is sufficient, however, to show that enough individuals were targeted during the attack, or that they were targeted in such a way as to

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[590] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 706
[591] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at paras. 31, 32
[592] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 91 *Prosecutor v. Milosevic,* No. IT-98-29/1-T, *Judgement* (12 December 2007) at para. 921; *Prosecutor v Seselj,* No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 69
[593] *Prosecutor v. Milosevic,* No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 58
[594] *Prosecutor v Tolimir,* No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 142; *Prosecutor v Popovic et al,* No. IT-05-88-A, *Judgement* (30 January 2015) at para. 774
[595] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 28

demonstrate that attack was in fact directed against the civilian population as opposed to a limited and randomly selected group of individuals.[596]

It was not established that the attacks of the KLA were directed against a civilian population, although attacks against civilians did occur.[597]

The numerous incidents of murder, torture, and cruel treatment of civilians, including in detention camps, the overall atmosphere of violence, fear, and intimidation created by Serbian forces as well as the methods used in the course and aftermath of attacks on towns and villages inhabited by non-Serbians clearly show the existence of a widespread and systematic attack directed against the non-Serbian civilian population in large areas of Croatia and Bosnia and Herzegovina.[598]

No reasonable trier of fact could have concluded that there was no widespread or systematic attack against the non-Serbian civilian population in Croatia and in Bosnia and Herzegovina.[599]

The fact that the SRK forces may have been weaker than the ABiH is not relevant to the conclusion as to whether the SRK attacks were directed against the civilian population.[600]

The fact that people not belonging to the targeted group were affected by attacks of the Serbian forces against the Kosovo Albanian population does not deprive such conduct of its discriminatory character.[601]

Military objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances, ruling at the time, offers a definite military advantage.[602]

hors d'combat

In wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, if these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population.[603]

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[596] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 187; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1-T, *Judgement* (12 June 2002) at para. 90; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 924
[597] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 228
[598] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 70
[599] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 71
[600] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 74
[601] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 203
[602] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 337
[603] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 923

During the assaults launched on the towns and villages of the municipalities relevant to the Indictment, the HVO set fire to houses belonging to Muslims, took their belongings and destroyed many institutions dedicated to religion. In addition, the arrests by the HVO of both Muslim men of military age – regardless of whether they were members of the armed forces – and women, children, and elderly people. For this reason, the population targeted by the attack was civilian.[604]

The specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status. [605]

The reference to civilians in Article 5 of the Statute is not intended to reflect Common Article 3 of the Geneva Conventions, thus including persons not taking an active or a direct part or who have ceased to take part in hostilities, such as persons placed *hors de combat.* There is insufficient evidence in the proposition that the notion of crimes against humanity has expanded under international law, to include crimes against combatants.[606]

The term "civilian" in Article 5 of the Statute must be interpreted within the meaning of Article 50 of Additional Protocol I, thereby excluding combatants or persons *hors de combat*. Under Article 3 of the Statute, however, the status of the victim at the time of the offense may be relevant to its designation as civilian or not.[607]

Persons *hors de combat* may be victims of crimes of humanity under Article 5 even if they are not considered "civilians" for purposes of the chapeau requirement.[608]

A distinction must be made between persons *hors de combat* and civilians. While both may be victims of the underlying crimes, for purposes of the element of an attack on the civilian population, persons *hors de combat* should not be included.[609]

deportation

defence of necessity

International law recognises certain grounds permitting forced removals, and that if an act of forced removal is carried out on such a basis, that act cannot constitute the *actus reus* of the crime of deportation.[610]

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[604] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 3 para. 648
[605] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 113-14; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 55
[606] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 460.
[607] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 35
[608] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 313
[609] *Prosecutor v Tolimir,* No. IT-05-88/2-A, *Judgement* (8 April 2015) at fn. 416
[610] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 284

Displacement may be allowed under international law if carried out for the security of the people involved or imperative military reasons. In such cases, the displacement must be carried out in such a manner to ensure that displaced persons are able to return to their homes as soon as the situation permits.[611]

Evacuation is an exceptional measure which is permitted when, for example, the area is in danger because of military operations or is liable to be subjected to intense bombing, or when the presence of persons in the area hampers military operations.[612]

Discussions concerning the population leaving towns after an attack could be interpreted as relating to a lawful consensus on helping civilians temporarily depart from an area of conflict for reasons including legitimate military advantage and casualty reduction.[613]

Displacement for humanitarian reasons, such as epidemics or natural disasters, is justifiable, unless the accused's own activity caused the humanitarian crisis.[614]

The fact that the people expelled were nationals of an enemy state was not a valid defence to deportation or forcible transfer where the means of expulsion were by unlawful attack on civilians and civilian objects.[615]

elements

The *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. The *mens rea* of the offence does not require that the perpetrator intend to displace the individual across the border on a permanent basis.[616]

forcible

The definition of deportation requires that the displacement of persons be forced, carried out by expulsion or other forms of coercion such that the displacement is involuntary in nature, and the relevant persons had no genuine choice in their displacement. Factors other than force itself may render an act involuntary, such as taking advantage of coercive circumstances. It is the absence of genuine choice that makes

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[611] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 725; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 901
[612] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 901
[613] *Prosecutor v Gotovina et al*, No, IT-06-90-A, *Judgement* (16 November 2012) at para. 93
[614] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 903; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 287; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 109
[615] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1748
[616] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 278; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 154; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 538

displacement unlawful. Therefore, while persons may consent to (or even request) their removal, that consent must be real in the sense that it is given voluntarily and because of the individual's free will, assessed in the light of the surrounding circumstances.[617]

It is the consent of each individual and not of a collective group or official authorities deciding on behalf of a group, that determines the voluntariness or otherwise of a transfer.[618]

The term "forced", when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.[619]

Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to forcible displacement of people.[620]

The military component of the column which left Srebrenica were not the victims of a forced displacement because they had a genuine choice to remain and fight, or to surrender. However, the civilian component of the column had no genuine choice and therefore were the victims of forced displacement.[621]

Men who were transferred to sites where they were executed were not the victim of forcible transfer, since the intent was to execute them, rather than to transfer them.[622]

The participation of an NGO in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful.[623]

Trial Chamber was unable to conclude that shelling of towns was not aimed at military targets, that the shelling was intended to force the population to flee, and that persons fled because of the shelling, as opposed to other reasons. Therefore, as to some areas, it could not enter a conviction for forcible transfer or deportation due to shelling.[624]

Persons who witnessed crimes by Croatian soldiers and left their homes were victims of forcible displacement, since the crimes created an environment where the

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[617] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 279; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 108
[618] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 921
[619] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 281
[620] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 724
[621] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at paras. 927,929
[622] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 933
[623] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 286
[624] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para.1755

persons had no choice but to leave. Persons who left before the crimes but became aware of them were also victims of forcible displacement as they were unable to return.[625]

Certain persons could not be said to be forcibly displaced where the evidence left open the reasonable conclusion that they may have left because of the fear of violence commonly associated with armed conflict, or general distrust of the forces.[626]

Displacement of people pursuant to an agreement among political or military leaders, or under the auspices of international organizations, does not make it voluntary.[627]

international border

Deportation as a crime against humanity under Article 5(d) of the Statute requires that individuals be transferred across a state border or, in certain circumstances, a *de facto* border.[628] The question whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case-by-case basis considering customary international law.[629]

In the case of deportation, not only must the victims end up across a border, but it must be the act of the accused which determines that destination. It must be because of the force—the act of the accused—that the persons are displaced across a border. For the crime of deportation, it is not sufficient to prove force on the part of the accused and the ultimate location of the victims across a border. The prosecution must also establish the link between the two elements. To do otherwise is to leave a constituent element of the crime related not to the acts of the accused but to chance or, in many cases, to a choice made by a victim. [630]

Customary international law does not support a finding that "constantly changing frontlines " may amount to *de facto* borders sufficient for the purposes of the crime of deportation.[631]

Displacement of persons from Kosovo to Montenegro did not constitute deportation since a *de facto* border does not exist between entities of a sovereign state regardless of the autonomy enjoyed by those entities.[632]

Displacement of civilian populations across constantly changing frontlines does not constitute the crime of deportation under customary international law but may still

[625] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1756
[626] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1762
[627] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 724
[628] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 289; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 723
[629] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 300
[630] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 893
[631] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 302
[632] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 535

amount to forcible transfer. The civilian population of Srebrenica and Zepa did not cross a de facto border when crossing from the territory of Republika Srpska to areas under Bosnian Muslim control.[633]

Where some residents chose to cross the border to Serbia, it is the intention of the perpetrator which determines whether the crime was deportation or forced transfer. Absent an intent to expel someone across a border, the crime would be classified as forcible transfer.[634]

Deportation and forcible transfer may be committed without regard to whether the party is occupying the territory from which the deportations or transfers take place.[635]

lawfully present

The words "lawfully present" should be given their common meaning and should not be equated to the legal concept of lawful residence. Whether an individual has lived in a location for a sufficient period to meet the requirements for residency or whether he or she has been accorded such status under immigration laws is irrelevant.[636]

Soldiers were lawfully present in Zepa even if the enclave was required to be demilitarized and could be the victim of forced transfer or deportation.[637]

mens rea

It is unclear whether the goals and rhetoric of President Tudjman's speeches concerning the driving out of the Serbs from the Krajina could be attributed to the JCE's membership or considered illustrative of its common purpose.[638]

Evidence of policy and legal attempts to prevent the return of Serb civilians who had left the Krajina is also insufficient to justify the Trial Chamber's view that a JCE to permanently remove Serb civilians by force or threat of force existed. The fact that Croatia adopted discriminatory measures after the departures of Serb civilians from the Krajina does not demonstrate that these departures were forced.[639]

In the factual context of this case, departures of civilians concurrent with lawful artillery attacks cannot be qualified as deportation.[640]

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[633] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 173
[634] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at paras. 959-61
[635] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Several Motions Challenging Jurisdiction* (19 March 2007) at para. 56
[636] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 900
[637] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 957
[638] *Prosecutor v Gotovina et al*, No, IT-06-90-A, *Judgement* (16 November 2012) at para. 94
[639] *Prosecutor v Gotovina et al*, No, IT-06-90-A, *Judgement* (16 November 2012) at para. 95
[640] *Prosecutor v Gotovina et al*, No, IT-06-90-A, *Judgement* (16 November 2012) at para. 114

Deportation does not require an intent that the deportees should not return.[641] The correct legal standard is an intent to transfer persons on a non-provisional basis.[642]

The *mens rea* of deportation is to forcibly displace the persons. The intent to permanently displace the persons need not be proven.[643]

. The *mens rea* required for deportation is the intent to forcibly displace the population across a *de jure* or *de facto* border.[644]

The Prosecution must prove that the accused had the intent to displace, permanently or otherwise, the victims across the relevant national border.[645]

enslavement

Whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include; (1) control of someone's movement; (2) control of physical environment; (3) psychological control; (4) measures taken to prevent or deter escape; (5) force; (6) threat of force or coercion; (7) duration; (8) assertion of exclusivity; (9) subjection to cruel treatment and abuse, (10) control of sexuality and (11) forced labour.[646]

Enslavement flows from claimed rights of ownership. Lack of consent does not have to be proved by the Prosecutor as an element of the crime of enslavement. However, it may be of evidential relevance in establishing the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. Circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.[647]

The duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. The duration of the relationship is one of the indicia used to determine whether the quality of the relationship allows for the exercise of any or all the powers attaching to the right of ownership.[648]

The required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership. It is not specifically required to prove that the accused intended to

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[641] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 307
[642] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 319
[643] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 726; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 905
[644] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 493
[645] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 164; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para.904
[646] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para 119
[647] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 120
[648] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 121

detain the victims under constant control for a prolonged period to use them for sexual acts.[649]

extermination

aggregation of victims

Certain Scheduled Incidents did not satisfy the requirement of mass scale given the significantly low numbers of people killed in each incident, the absence of any other circumstances indicating that the killings were on a mass scale and the fact that the incidents were not sufficiently connected to other incidents regarding time, geographical proximity or through affiliation of the perpetrators so as to aggregate them for the purposes of assessing the mass scale requirement.[650]

It is not necessary that many killings occurred during a single incident in a concentrated place over a short period. Extermination may also be found on an accumulation of separate and unrelated incidents, meaning on an aggregated basis.[651]

In assessing whether the extermination element of mass scale was established the Trial Chamber considered the number of deaths in each incident and the circumstances surrounding the deaths, including the selection of the victims, the time and place of the killings, and the way the killings were carried out.[652]

Separate killing incidents may be aggregated for the purpose of meeting the "large scale requirement" if the killings are considered to be part of one and the same operation.[653]

Killings of more than 50 men in and around school over two-day period, by a broad mix of perpetrators killing in a sporadic fashion, were not grouped together either in numerical terms or were patterned killings targeting the wider group held at the school. Therefore, the killings were isolated incidents which, although related in a broad fashion, do not meet the mass scale requirement.[654]

Collective consideration of distinct events committed in different locations, in different circumstances, by different perpetrators, over an extended period cannot satisfy the requirement of killing on a large scale.[655]

aiding and abetting

[649] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 122
[650] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at paras. 3085, 3096, 3106
[651] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 107
[652] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3069
[653] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1022
[654] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3109
[655] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1022

Contribution to murder of 10 persons during Srebrenica events did not rise to the level of making a substantial contribution to extermination and therefore the requirements for aiding and abetting extermination were not met.[656]

elements

The elements of extermination are: a) act or omission that results in the death of persons on a massive scale, and b) the intent to kill persons on a massive scale, or to inflict serious bodily injury or create conditions of life that lead to the death in the reasonable knowledge that such act or omission is likely to cause the death of a large number of persons.[657]

The elements of extermination consume the elements of murder plus the fact that the killings take place on a large scale and the perpetrator intended this result by his acts.[658]

Relevant factors for extermination include but are not limited to: (i) the time and place of the killings; (ii) the selection of the victims and the way they were targeted; (iii) the type of victims; (iv) whether the killings were aimed at the collective group rather than victims in their individual capacity; and (v) the population density of the victims' area of origin.[659]

The *actus reus* of extermination is "the act of killing on a large scale." The *actus reus* also includes "subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death". The *mens rea* required for extermination is that the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths.[660]

mens rea

Although extermination did occur in 8 municipalities Trial Chamber was not satisfied that the possibility that these killings at a mass scale could be committed in execution of the common plan was sufficiently substantial to be foreseeable to Minister of Interior Mico Stanisic. The evidence concerning CSB Chief Stojan Zupljanin was different. Zupljanin had knowledge of the murders committed by some of his subordinate forces against the non-Serb civilian population and nevertheless continued to task these forces for operations involving the non-Serb population. The evidence presented by the

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[656] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2078
[657] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.572
[658] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 716; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 62
[659] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1022
[660] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 259; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 62

Prosecution in relation to Mico Stanisic was not sufficient for the Chamber to come to the same conclusion regarding the crime of extermination.[661]

Proof of intent to commit mass murder against "civilians" is not required for the *mens rea* of extermination. The *mens rea* for extermination is the intent to kill on a massive scale as part of a widespread or systematic attack directed against a civilian population.[662]

The *mens rea* for extermination to "(i) kill on a large scale" can be met by establishing the *mens rea* for murder as a crime against humanity – i.e., the intent to: (i) kill the victim; or (ii) wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death--plus the additional intention to do so on a large scale.[663]

number of victims

There is no minimum number of victims to constitute extermination. The element of massive scale must be assessed on a case -by-case basis.[664] A vast scheme of collective murder or vast murderous enterprise need not be proven.[665]

While there may be a higher threshold for a finding of extermination in a densely populated area, it would not be inappropriate to find extermination in a less densely populated area on the basis of a lower threshold, that is, fewer victims.[666]

Killings in Serb Krajina were not of sufficient number to constitute extermination.[667]

Almost the entire Muslim population of Koritnik perished in the Pionirska Street Incident.1587 In these circumstances, the killing of 59 persons amounted to extermination as a crime against humanity.[668]

The assessment of "large scale" is made on a case-by-case basis, considering the circumstances in which the killings occurred. Relevant factors include, *inter alia*: the time and place of the killings; the selection of the victims and the way they were targeted; and whether the killings were aimed at the collective group rather than victims in their individual capacity.[669]

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[661] *Prosecutor v Stanisic & Zupljanin*, No. 08-91-T, *Judgement* (27 March 2013) at para. 775
[662] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 142
[663] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1036
[664] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 573; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 260
[665] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 576; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 259
[666] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Judgement* (20 July 2009) at para. 938
[667] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at paras. 404-05
[668] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 543
[669] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 538

No reasonable trial chamber could have found that the killings of the three Zepa leaders were part of the same attack against the civilian population or of "a single deliberate, organised, large-scale operation to murder Bosnian Muslim males" thereby fulfilling the requirement of "large scale" and constituting extermination. Those three killings were "isolated acts". Therefore, the extermination conviction must be reversed insofar as it relates to the three Zepa leaders.[670]

forced labour

Forced labour constitutes manifest violations of international humanitarian customary law, causing their perpetrators to incur individual criminal responsibility under Article 3 of the ICTY Statute.[671]

It is not required to establish the existence of a state of occupation since unlawful labour by civilians is prohibited the moment they fall into the hands of an occupying power, regardless of the phase of hostilities.[672]

Article 95 of the Fourth Geneva Convention contemplates a certain type of labour which the detaining authority has the right to impose on internees against their will. These are, broadly speaking, tasks whose completion contributes to the well-being of the interned population. Article 95 specifically mentions the employment of internees with medical skills on behalf of their fellow internees, internees for administrative and maintenance work at the detention facility, etc.[673]

The Detaining Power may compel prisoners of war – excepting officers – to work, under certain conditions described in Section III of the Third Geneva Convention.[674]

The following criteria is used to determine whether the labour was forced: (a) the substantially uncompensated aspect of the labour performed; (b) the vulnerable position in which the detainees found themselves; (c) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; (d) the long term consequences of the labour; (e) the fact and the conditions of detention; and (f) the physical consequences of the work on the health of the internees.[675]

The perpetrator of the crime must have acted with the intent that the victim performs prohibited labour. This *mens rea* can be inferred from the circumstances in which the labour is carried out.[676]

The use of civilian detainees or prisoners of war for work on the defensive

[670] *Prosecutor v Tolimir,* No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 150
[671] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 152
[672] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 153
[673] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 156
[674] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 157
[675] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 162
[676] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 162

structures of the detaining power is clearly included among the categories of military labour prohibited under applicable law.[677]

forcible transfer

deportation distinguished

Forcible transfer is the forcible displacement of persons which may take place within national boundaries. [678]

The distinction between forcible transfer and deportation is that the first one consists of forced displacements of individuals within state borders, while the second one consists of forced displacement beyond internationally recognised state borders [679]

Forcible displacement, as an act of persecution, does not require the victim to be transported across a State border.[680]

elements

Forcible transfer is the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law.[681]

The crime of forcible transfer forms part of the category of Other Inhumane Acts under Article 5(i) of the Statute.[682]

Forcible transfer must satisfy three specific conditions to constitute an inhumane act within the meaning of Article 5(i) of the Statute: (1) the victim must have suffered serious bodily or mental harm; (2) the suffering must be the result of an act or omission, by the accused or a person in relation to whom he bears criminal responsibility, of a severity equal to those acts enumerated in Article 5 of the Statute; and (3) the accused or a person for whom he bears criminal responsibility must, at the time of the commission of the offence, have been motivated by the intent to inflict serious bodily or mental harm upon the victim or knew that his act or omission might result in the infliction of serious bodily or mental harm to the victim.[683]

The jurisprudence of the Tribunal does not require that persons be displaced

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[677] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 164
[678] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 317; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 538
[679] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 595; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356
[680] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para.154; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 541
[681] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 595; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para.356
[682] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 629
[683] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 59

because of criminal acts.[684]

forcible

It is the absence of genuine choice that makes displacement unlawful.[685]

These transfers must be involuntary or with the absence of a "genuine choice" for the victim. This can be inferred from threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects, the burning of civilian property, and the commission of or the threat to commit other crimes "calculated to terrify the population and make them flee the area with no hope of return."[686]

Factors other than force itself may render displacement involuntary and include the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power or by taking advantage of a coercive environment. Creating severe living conditions for a certain population - which in tum makes it impossible for that population to remain in their homes - can amount to forced displacement.[687]

The requirement of "forcible" describes a situation where individuals do not have a free or 'genuine' choice to remain in the territory where they were present. The element of 'forcible' has been interpreted to include threats or the use of force, fear of violence, and illegal detention. It is essential therefore that the displacement takes place under coercion. Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice.[688]

If the displacement is the result of a humanitarian crisis caused by the accused's activities, such displacement is forced.[689]

It is the absence of genuine choice that makes displacement unlawful.[690] However, circumstances which render it impossible to express consent may be sufficient to presume the absence of consent.[691]

The requirement that the displacement be forced is not limited to physical force

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[684] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 918
[685] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 495; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356
[686] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 165.
[687] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 495; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356
[688] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 596
[689] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 163; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 525
[690] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 229
[691] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 233

but can be met through the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, or taking advantage of a coercive environment.[692]

An agreement among military commanders, political leaders, or other representatives of the parties in a conflict cannot make a displacement lawful either; it is the consent of the individual that determines whether a displacement is voluntary.[693]

gravity

Acts of forcible transfer may be sufficiently serious as to amount to other inhumane acts.[694]

mens rea

The *mens rea* does not require the intent to transfer permanently.[695]

As for the *mens rea*, the perpetrator must intent to remove the victims, which implies the intention that they should not return. Therefore, lawful evacuations, under any of the three recognised exceptions, cannot form part of this crime. The fact that no step is taken by the perpetrator to secure the return of those displaced, when the circumstances that necessitated the evacuation have ceased, is among the factors that may prove an intent to permanently displace the victims rather than the intent to secure the population through a lawful – and therefore temporary – evacuation. The Trial Chamber finds that the fact that victims subsequently return to the area by their own volition does not have an impact on the criminal responsibility.[696]

necessity

The Prosecution must prove that (a) the displacement of persons by expulsion or other coercive acts, (b) from an area in which they are lawfully present, (c) without grounds permitted under international law[697], which are recognized as the security of a civilian population or imperative military reasons and are noted by a possible return to their homes after the hostilities have ceased.[698]

Displacement may be permitted by international law in certain limited circumstances, provided it is temporary in nature and conducted humanely.[699]

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[692] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 918
[693] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 490
[694] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 317; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 538
[695] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 317; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 538
[696] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 601
[697] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 164.
[698] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 166.
[699] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356

Displacement is not permissible where the humanitarian crisis that caused the displacement is the result of the accused's own unlawful activity.[700]

The participation of a non-governmental organization in facilitating displacements does not in and of itself render an otherwise unlawful transfer lawful.[701]

The displacement of persons carried out pursuant to an agreement among political or military leaders or under the auspices of an organization does not necessarily make it voluntary.[702]

Additional Protocol I prohibits attacks on civilians and indiscriminate attacks in all circumstances. Thus, even if Srebrenica and Zepa had lost their status as demilitarised zones because of the ABiH's presence and operations within those enclaves, the VRS could not target civilians in the enclaves, either deliberately or as part of an indiscriminate attack against military and civilian objectives alike. And even if the VRS operations against Srebrenica and Zepa had been directed exclusively at legitimate enemy military targets in the enclaves, the VRS, once the enclaves were under its control, could not force, directly or indirectly, the local civilian population out of these areas or commit any other prohibited criminal acts against the civilians.[703]

It is unlawful to use evacuation measures based on imperative military reasons as a pretext to remove the civilian population and seize control over a desired territory.[704]

Evacuation to ensure the security of the population is authorised when the area in which the population is located is in danger because of military operations or intense bombing. In such situations, in the interest of the protection of the civilian population a military commander may, and is in fact duty bound to, evacuate the population. This situation is similar to that when evacuations for imperative military reasons may be carried out, *i.e.*, when the presence of the population hampers military operations. There is an important distinction, however, in that evacuations in this latter situation may only be carried out when necessitated by overriding, *i.e.*, imperative, military reasons. In considering whether these exceptions justify proven acts of forcible population displacements, the trier of fact will consider whether there was in fact a military or other significant threat to the physical security of the population, and whether the military operation in question was 'imperative'. It is unlawful to use evacuation measures as a pretext to remove the population and effectuate control over a desired territory.[705]

The law also provides for an exception to the general prohibition against forcible displacements that would permit evacuations for humanitarian reasons. The Commentary

[700] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356
[701] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 356
[702] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 357
[703] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 346
[704] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 492
[705] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 597-98

to Article 17 of Protocol II indicates that for other reasons – such as the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation – forcible displacement of the civilian population may be lawfully carried out by parties to the conflict. Such displacement must, however, comply with the requirements of evacuation, including among others, that they be of a temporary character.[706]

While an evacuation is not prohibited if the security of the population or imperative military reasons so demand, where the transfer had already taken place at a time when there was no fighting in the area, the Trial Chamber could conclude on this basis alone that the transfer was unlawful.[707]

Transfer of the wounded and sick may be carried out against a person's will and does not constitute the crime of forcible transfer unless done for other than medical reasons. The prosecution failed to prove that the transfer was not for reasons of medical necessity.[708]

nullum crimen sine lege

The notion of forcible transfer does not violate the principle of *nullum crimen sine lege*.[709]

persons excluded

Forcible displacement of enemy soldiers is not prohibited under international humanitarian law.[710]

Transfer of detainees from one camp to another does not constitute forcible transfer.[711]

The terms "lawfully present" should be given their common meaning and should not be equated to the legal concept of lawful residence.[712]

transfer

There is a "removal from an area" within the meaning of Article 5 of the Statute when the location to which the victims are sent is so remote that they are no longer able to effectively enjoy these rights.[713]

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[706] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 600
[707] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 524
[708] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1810
[709] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 317; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 538
[710] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 774
[711] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 723
[712] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 491
[713] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 49

The actus reus of forcible displacement does not require that the population be removed to a location sufficiently remote from its original location.[714]

It is no defence to forcible transfer that the transfer was to a nearby community where those transferred had family. The prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.[715]

imprisonment

continued detention

If there was a legal basis for the detention but it ceased to exist, the continued detention is arbitrary.[716]

defences

When a national law is relied upon to justify imprisonment, the national law must not violate international law.[717]

The mere fact that civilians had some freedom of movement does not necessarily mean that they were not deprived of their liberty and thus imprisoned or unlawfully confined.[718]

The internment or placement in assigned residence may be ordered only if the security of the detaining party makes it absolutely necessary.[719]

elements

[714] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 492
[715] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 491
[716] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 753; *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1816; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 79; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3239
[717] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 753; *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1816; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 79; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3239
[718] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 473
[719] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 513

Imprisonment is constituted by the deprivation of a person's liberty without due process of law. It must be carried out arbitrarily—that is, there is no legal basis for it. The perpetrator must act with the intent to deprive the victim of his liberty arbitrarily.[720]

Imprisonment as a crime against humanity, should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.[721]

The crime of imprisonment consists of the following elements: (1) an individual is deprived of his or her liberty; (2) the deprivation of liberty is carried out arbitrarily, that is, there is no legal basis for it; and (3) the perpetrator acted with the intent to deprive the individual arbitrarily of his or her liberty.[722]

factors

Determining whether a person has been deprived of his or her liberty will depend on the circumstances of each particular case and must consider a range of factors, including the type, duration, effects, and the manner of implementation of the measures allegedly amounting to deprivation of liberty.[723]

home detention

Detention amounting to imprisonment and unlawful confinement of civilians can occur even in situations where the civilians are held in houses without guards and where they have some freedom of movement.[724]

An initially lawful internment or placement in assigned residence clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[725]

murder

body

Proof beyond reasonable doubt that a person was murdered does not necessarily require proof that the dead body of that person has been recovered. All that is required to

[720] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 752; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 116; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at paras. 87-88
[721] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 471
[722] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1815; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 78
[723] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 473
[724] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 479
[725] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 479

be established from that evidence is that the only reasonable inference from the evidence is that the victim is dead because of the accused's actions or omission.[726]

A body need not be recovered to establish that a person has been killed. A victim's death can be inferred circumstantially from all the evidence presented to the trial chamber.[727]

Relevant factors to be considered when assessing whether a victim died include but are not limited to proof of incidents of mistreatment directed against the victim; patterns of mistreatment and disappearances of other victims; the coincident or near-coincident time of death of other victims; the fact that the victims were present in an area where an armed attack was carried out; the time, location, and circumstances in which the victim was last seen; the behaviour of soldiers in the vicinity, as well as towards other civilians, at the relevant time; and the lack of contact by the victim with others whom he/she would have been expected to contact, such as his/her family.[728]

causation

Regarding the requisite causal nexus, the requirement that death must have occurred "as a result of" the perpetrator's act or omission does not require this to be the sole cause for the victim's death; it is sufficient that the "perpetrator's conduct contributed substantially to the death of the person".[729]

The evidence was insufficient to establish that the acts or omission that caused the death of the victim occurred during the time that the accused was employed in the camp. Acquittal ordered on that charge.[730]

When considering suicide, the crucial issues are causation and intent. The relevant act or omission by the Accused or by those for whose acts or omissions the Accused bears criminal responsibility must have caused the suicide of the victim and the Accused, or those for whom he bears criminal responsibility, must have intended by that act or omission to cause the suicide of the victim, or have known that the suicide of the victim was a likely and foreseeable result of the act or omission. The Accused cannot be held criminally liable unless the acts or omissions for which he bears criminal responsibility induced the victim to act which resulted in his death, and that his suicide was either intended, or was an action of a type which a reasonable person could have foreseen

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[726] *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 326; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgment* (16 November 2005 at para 37; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings…*(12 March 2009) at para. 29; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 149

[727] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 126

[728] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at fn. 1476

[729] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 448

[730] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 271; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 347

because of the conduct of the Accused, or of those for whom he bears criminal responsibility.[731]

elements

The elements of the offence of murder as a crime against humanity and as a violation of the laws or customs of war are the same. Murder is the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.[732]

The elements of murder under Articles 2,3,and 5 are the same.[733]

For the crime of murder under Article 3 of the Statute to be established, the Prosecutor bears the onus of proving: 1) the death of a victim taking no active part in the hostilities; 2) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible; 3) the intent of the accused or of the person or persons for whom he is criminally responsible a) to kill the victim; or b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[734]

The basic requirements for the crime of murder are: (1) the victim named in the indictment is dead, (2) the victim's death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility and (3) that act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention (a) to kill, or (b) to inflict grievous bodily harm, or (c) to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[735]

mens rea

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[731] *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 329

[732] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 556; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 37; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 715; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at paras. 57-58

[733] *Prosecutor v Oric*, No. IT-03-68-T, *Judgment* (30 June 2006) at para 345; *Prosecutor v. Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 323

[734] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 261; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 35; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 241

[735] *Prosecutor v Krnojelac*, No. IT-97-25-T, *Judgment* (15 March 2002) at para 324; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 556; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 37; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 715; *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 261; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 35; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 241; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 346

To satisfy the mens rea for murder it is further required that there was an act or omission, with the intention to kill or to inflict grievous bodily harm, in the reasonable knowledge that it might lead to death.[736]

Premeditation is not required as an element of murder under Article 3 or Article 5.[737]

To prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission. In respect of this formulation, it should be stressed that knowledge by the accused that his act or omission might *possibly* cause death is not sufficient to establish the necessary *mens rea*. The necessary mental state exists when the accused knows that it is *probable* that his act or omission will cause death.[738]

The *mens rea* of murder includes both direct intent (*dolus directus)*, which is a state of mind in which the perpetrator desired the death of the individual to be the result of his act or omission, and indirect intent (*dolus eventualis*), which is knowledge on the part of the perpetrator that the death of a victim was a probable consequence of his act or omission.[739]

The *mens rea* for murder as a war crime may be established by wilful behaviour in the form of either a direct intent to kill or recklessness that death may ensue because of the accused's deliberate conduct. Ordinary negligence does not suffice as the *mens rea* for murder.[740] Nor does gross negligence.[741]

Where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death.[742]

other inhumane acts

Other inhumane acts can be committed by omission.[743]

The elements of "other inhumane acts" are: a) an act or omission of similar seriousness to the other acts enumerated in Article 5; b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human

[736] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 931
[737] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 551
[738] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 236
[739] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 446
[740] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 21; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 348
[741] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 348
[742] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 240
[743] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 155

dignity; and c) the act or omission was performed intentionally by the accused, or by a person or person for whose acts and omissions the accused bears criminal responsibility.[744]

The following acts, among others, fall into the category of "inhumane acts": mutilations and other forms of severe bodily harm, beatings and other acts of violence, serious bodily and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution and forced disappearance.[745]

Not every denial of a human right is serious enough to constitute a crime against humanity. Acts or omissions need to be of equal gravity to the crimes listed in Article 5 whether considered in isolation or in conjunction with other acts.[746]

The context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.[747]

To ascertain the degree of severity of an act, all the factual circumstances must be considered, including the nature of the act or omission, the context in which it occurs, its duration and/or repetition, the physical, mental, and moral effects of the act on the victim as well as the personal circumstances of the victim, including age, sex, and health.[748]

Detention under harsh conditions is likely to constitute an inhumane act within the meaning of Article 5(i) of the Statute if it causes great suffering or physical or mental anguish or constitutes a serious attack on human dignity.[749]

The principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in Article 5 of the Statute, forms part of this crime: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not.[750]

It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act.[751]

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[744] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 626; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 117; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 83; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 934

[745] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 79

[746] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 761

[747] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 763

[748] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 78

[749] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 80

[750] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 625

[751] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 628; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12 December 2007) at para. 935

The mens rea for the crime of inhumane acts is satisfied if, at the time of the act or omission, the perpetrator had direct or indirect intent to inflict, by act or omission, serious physical or mental suffering or to commit a serious attack on the victim's human dignity. Indirect intent requires that the perpetrator knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.[752]

No reasonable trier of fact could have found that Sredoje Lukić's slapping of detainee caused serious bodily or mental harm to amount to cruel treatment as a violation of the laws or customs of war, and other inhumane acts as a crime against humanity or that Sredoje Lukic had the intent to inflict serious mental or physical suffering or serious bodily or mental harm.[753]

persecution

in general

Persecution is "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as other acts prohibited in Article 5."[754]

Persecution as a crime against humanity requires evidence that the principal perpetrator had the specific intent to discriminate on the ground of race, religion, or politics.[755]

The elements of persecution consists of an act or omission which: (i) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law; and (ii) is carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics.[756]

A single act may be sufficient, if this act or omission discriminates in fact and is carried out deliberately with the intention to discriminate on one of the listed grounds.[757] The existence of a discriminatory policy is not a necessary requirement for persecutions.[758]

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[752] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 112
[753] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 634
[754] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 2
[755] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 422
[756] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 579; *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 320; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 101, 671; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 159
[757] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 582; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 102
[758] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 582

The acts underlying persecutions as a crime against humanity, whether considered in isolation or in conjunction with other acts, must be of equal gravity to the crimes listed in Article 5 of the Statute.[759]

The Prosecution must also prove that the denial or infringement upon a fundamental right is serious enough (gravity requirement) as to be of equal gravity of those listed in Art 5 or be one of those listed in Art 5.[760] This act or omission may also be singular, but its gravity must be considered in context by looking at its cumulative effect and not at the act or omission in isolation.[761]

Persecution may be committed by persons at any level, it is not limited to persons at the high level of a hierarchy.[762]

The context in which the underlying act of persecution takes place is particularly important for the purpose of assessing its gravity.[763]

act of discrimination

Denial of freedom of movement, denial of employment, invasion of privacy through arbitrary searches of homes, unlawful arrests, denial of the right to judicial process, and denial of equal access to public services, when carried out on discriminatory grounds, and when the general elements of crimes against humanity are fulfilled, constitute the crime of persecution when considered in conjunction with other relevant acts, especially in conjunction with those acts that qualify as an underlying act of persecution. These restrictive and discriminatory measures may also constitute the crime of persecution when considered in isolation.[764]

An act is discriminatory when a victim is targeted because of his or her membership in a group defined by the perpetrator on a political, racial, or religious basis. The act or omission must have discriminatory consequences—discriminatory intent is not enough.[765]

Where a person is targeted for abuse because she or he is suspected of belonging to a particular ethnic group, the discrimination element is met even if the suspicion proves inaccurate and the person is in fact not a member of that ethnic group.[766]

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[759] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 102,671; *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 160; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 221; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para.177; *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 296

[760] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 178.

[761] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 179.

[762] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 580

[763] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 159

[764] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3266

[765] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 583

[766] *Prosecutor v Kvocka et al*, No. IT-98-30/1-T, *Judgement* (2 November 2001) at para. 195

Discrimination in fact exists when the Prosecution proves that the victim was targeted because of his membership within one of the protected groups (racial, religious, political, or ethnic).[767] This discrimination in fact is assessed on a subjective basis.[768]

The existence of a discriminatory policy is not a requirement for proving persecution, although persecutory acts may form a part of a discriminatory policy or practice.[769]

attacks against civilians

Attacks launched deliberately against civilians or civilian objects may constitute persecution without the requirement of a particular result caused by the attack.[770]

cruel and inhumane treatment

Persecution by cruel and inhumane treatment is an intentional act or omission, which causes serious mental harm, physical suffering or injury, or which constitutes a serious attack on human dignity. The harm inflicted does not need to be permanent and irremediable but must have more than a short-term or temporary effect on the victim.[771]

Cruel treatment is an act or omission which causes serious mental or physical suffering or injury, or which constitutes a serious attack on human dignity. The act or omission must be committed with the intent to cause serious mental or physical suffering or injury or a serious attack on human dignity, or with the knowledge that serious mental or physical suffering or injury or the serious attack on human dignity was a probable consequence of the act or omission.[772]

The crime of cruel and inhumane treatment requires that the perpetrator had the intention to inflict serious physical or mental suffering, or to inflict serious injury, or to commit a serious attack on human dignity, or that he or she knew that his act was likely to cause this result and was reckless.[773]

Providing inhumane living conditions for detainees is a form of cruel and inhumane treatment.[774]

The establishment and perpetuation of inhumane living conditions has been considered a sub-category of cruel and/or inhumane treatment, which may constitute

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[767] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 177.
[768] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 177.
[769] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 500
[770] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 105
[771] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 586; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 746
[772] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 504
[773] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 746
[774] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 756

persecution if the acts reach the same level of gravity as the other crimes listed under Article 5 of the Statute and if the general requirements for persecution are also met.[775]

Beatings constitute cruel or inhumane treatment if (i) the beatings caused serious mental or physical suffering or injury or constituted a serious attack on human dignity, and (ii) the beatings were performed deliberately.[776]

The mental element for cruel and inhumane treatment is satisfied by a finding that the act or omission was committed with intent, or alternatively with knowledge that the act or omission was likely to cause serious mental or physical suffering or a serious attack on human dignity and the perpetrator was reckless as to whether such consequences would result from his act or omission.[777]

disappearances

The crime of disappearances includes the following elements: (a) an individual is deprived of his or her liberty; and (b) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby denying the individual recourse to the applicable legal remedies and procedural guarantees.[778]

Enforced disappearances, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.[779]

destruction of cultural property

Destruction of cultural property—the destruction or damage of an institution dedicated to religion, charity, education, or arts and sciences, historic monuments, and works of art or science—may constitute persecution.[780]

Destruction of religious property amounts to "an attack on the very religious identity of a people" and, as such, manifests "a nearly pure expression" of the notion of crimes against humanity and is thus prohibited as an act of persecution and CAH.[781]

The Prosecution must prove (a) the religious or cultural property must be destroyed or damaged extensively; (b) the religious or cultural property must not be used for a military purpose at the time of the act; and (c) the destruction or damage must be the result of an act directed against this property.[782]

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[775] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 514
[776] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 509
[777] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3233
[778] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1837
[779] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1839
[780] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 782
[781] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 205.
[782] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 206.

The equal gravity requirement of the destruction/damage must be proved such that the impact of the deprivation of destroyed/damaged property is serious, such as where the property is indispensable, a vital asset to the owners, or the means of existence of a given population.[783]

The Prosecution must prove that the property was not used for military purposes at the time of the destruction/damage and thus it is not justified by military necessity.[784]

Causation of the act of destruction/damages against the property must be proved by showing the act was specifically directed at the property and thus destruction caused by nearby fighting or military necessity will not constitute a CAH.[785]

The prosecution must demonstrate that the destruction was not justified by military necessity. This cannot be presumed.[786]

Trial Chamber erred in failing to consider whether destruction of church was justified by military necessity.[787]

Recklessness is sufficient to satisfy the *mens rea* for destruction of religious or culturally significant property.[788]

destruction of personal property

The destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecution of equal gravity to other crimes listed in Article 5.[789]

Destruction of personal property can also be a crime against humanity, depending on the nature and extent of the destruction.[790] The crime requires that the destruction is not justified by military necessity.[791]

Destruction of private property as an underlying act of persecution is to be understood as any intentional destruction of private property that has a serious impact on the victim and that was not justified by military necessity.[792]

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[783] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 207.
[784] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 208.
[785] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 209.
[786] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 337
[787] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 98
[788] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 559
[789] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 422
[790] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 593-94; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 108; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 770
[791] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 593-94
[792] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1827; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3259

Burning someone's car may not constitute a crime against humanity unless the car is an indispensable and vital asset to the owner.[793]

Destruction of personal belongings of men separated in Potocari did not have a severe enough impact on the victims to constitute an act of persecution punishable under Article 5.[794]

An act of destruction of property which in itself does not have a severe impact on the victim, may still, when carried out on discriminatory grounds, and when the general elements of crimes against humanity are fulfilled, constitute the crime of persecution, when considered in conjunction with other acts.[795]

forced labour

The following criteria may be examined in determining whether an individual was not in a position to make a real choice to undertake labour: (i) the substantially uncompensated aspect of the labour performed; (ii) the vulnerable position in which the detainees found themselves; (iii) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; (iv) claims of longer term consequences of the labour on the detainees, including on their health; and (v) the fact and the conditions of the detention.[796]

In relation to forced labour, the perpetrator must have intended the victim to perform prohibited work involuntarily. In the absence of direct evidence, intent can be inferred from the circumstances in which the labour was performed. In relation to the use of human shields, the perpetrator must intend to shield a military objective from attack or shield, favour, or impede military operations.[797]

Not all forms of forced labour are prohibited under international law, provided the labour is performed under certain protective conditions. However, digging trenches and graves and other forced labour at the front lines were not among those permitted activities.[798]

Acts at the front lines, by its nature, cannot ever be performed in suitable working conditions. Therefore, such acts cannot fall within any lawful exceptions to the prohibition of forced labour.[799]

Forced labour as an underlying act of persecutions as a crime against humanity requires a perpetrator to have intended for a victim to perform prohibited work.[800]

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[793] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 774
[794] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1001
[795] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3262
[796] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 524
[797] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 526
[798] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 759
[799] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3243

The detainees' personal conviction that they were forced to work must be proven with objective and not just subjective evidence.[801]

forcible transfer

Forcible transfer, taken separately or cumulatively, and when committed on discriminatory grounds may constitute persecution.[802]

Speech inciting to violence against a population based on ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes actual discrimination.[803]

By instigating the forcible expulsion of Croatians from Hrtkovci, the accused incited violence against them, in violation of their right to security. His speech denigrated the Croatians based on their ethnicity, in violation of their right to respect for dignity as human beings. The accused's speech rises to a level of gravity amounting to the actus reus of persecution as a crime against humanity.[804]

harassment, humiliation, and psychological abuse

Subjecting victims to constant humiliation and degradation may amount to psychological abuse as an underlying act of persecution.[805]

Harassment, humiliation, and psychological abuse as established in this case were of sufficient gravity to constitute crimes of persecution under Article 5(h) of the Statute.[806]

human shields

The use of human shields—the placement or detention of persons in areas where they may be exposed to combat operations for the purpose of rendering certain areas or activities immune from military operations or armed attack constitutes an act of persecution.[807]

In relation to the use of human shields, the perpetrator must intend to shield a military objective from attack or shield, favour, or impede military operations.[808]

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[800] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3242
[801] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 195
[802] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 602; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 221
[803] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 159
[804] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 163
[805] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 510
[806] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 325
[807] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 763-64
[808] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 526

imprisonment

The crime of imprisonment consists of the following elements: (i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is carried our arbitrarily, *i.e.*, there is no legal basis for it; and (iii) the accused or perpetrator acted with the intent to deprive the individual arbitrarily of his or her liberty.[809]

Denial of freedom of movement, denial of employment, arbitrary searches of homes, denial of right to judicial process, and denial of equal access to public services constitute acts of persecution.[810]

If there is a legal basis for the deprivation of liberty, it must apply throughout the period of imprisonment, for the deprivation of liberty will become arbitrary as soon as the legal basis ceases to exist.[811]

mens rea

In addition to the chapeau requirements of knowledge of a widespread or systematic attack against a civilian population, the *mens rea* for persecutions consists of the intent to commit the underlying act and the intent to discriminate on political, racial, or religious grounds. The discriminatory intent requirement amounts to a *dolus specialis.*[812]

For persecution, discriminatory intent alone does not suffice. The act or omission must have "discriminatory consequences" in fact, and not merely be committed with discriminatory intent.[813]

Persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial, or religious grounds. It falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent.[814]

While the requisite discriminatory intent may not be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, the discriminatory intent may be inferred from such a context if, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.[815]

Discriminatory intent may be inferred from a context if, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the

[809] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 519
[810] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 741
[811] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 520
[812] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 328
[813] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 73
[814] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 184
[815] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 422

existence of such intent. Circumstances which may be taken into consideration include (1) the operation of the prison (in particular, the systematic nature of the crimes committed against a racial or religious group) and (2) the general attitude of the offence's alleged perpetrator as seen through his behaviour.[816]

An intent to persecute—that is, to remove targeted persons from society or humanity—is not required.[817]

So long as there is the intent to discriminate against a person on one of the listed grounds, specifically, race, religion, or politics, any additional motive of pursuing a military goal is irrelevant.[818]

Shelling of Zagreb with intent to retaliate for attacks was not shown to have been carried out with a discriminatory motive and therefore the crime of persecution was not proven.[819]

Considering the Trial Chamber's findings that the Bosnian Croat army had a military interest in the destruction of the Old Bridge and that it was a military target, no reasonable trier of fact could have found, beyond reasonable doubt, that the Bosnian Croat Army had the specific intent to discriminate.[820]

The aider and abettor in persecution, an offence with a specific intent, must be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory intent of the perpetrators of that crime. He need not share the intent, but he must be aware of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration.[821]

Discriminatory intent may be inferred from the context of the attack—i.e., all guards being of one racial group and all prisoners of another.[822]

Discriminatory intent may be inferred from an accused's knowing participation in a system or enterprise that discriminated on political, racial, or religious grounds.[823]

The circumstances to be taken into consideration include the systematic nature of the crimes committed against a targeted group and the general attitude of the accused as demonstrated by his behaviour.[824]

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[816] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 184
[817] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 111
[818] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 733
[819] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 473
[820] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 422
[821] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 52
[822] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at paras. 130-31
[823] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 711
[824] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 711,727

The mens rea can be satisfied by proof that either the physical perpetrator or the accused (i.e., through order, instigation etc) had the above discriminatory intent.[825]

The use of derogatory language in relation to a particular group – even where such usage is commonplace – is one aspect of an accused's behaviour that may be considered, together with other evidence, to determine the existence of discriminatory intent.[826]

Accused lacked discriminatory intent where only derogatory terms were used against Muslims by him and where he saved a number of Muslim lives by opening a corridor for them to pass.[827]

other acts

Persecution not only includes acts or omissions enumerated in other sub-clauses of Article 5, but also acts or omissions of equal gravity.[828]

Persecution as a crime against humanity does not require that the underlying acts are crimes under international law. A trial chamber does not need to establish the elements of the underlying acts, including the mens rea, even when the underlying act also constitutes a crime under international law. With respect to the mens rea, all that is required is establishing that the underlying act was deliberately carried out with discriminatory intent.[829]

The crime of persecution requires an act or omission that discriminates in fact, and which denies or infringes upon a fundamental right laid down in international customary or treaty law.[830]

While forms of persecution under Article 5(h) need not necessarily themselves be considered as crimes in international law, those acts must be of equal gravity to the underlying offenses listed in Article 5 of the Statute to amount to persecution, whether considered in isolation or in conjunction with other acts.[831]

Not every violation of a fundamental human right will be serious enough to constitute a crime against humanity.[832]

The destruction of the personal belongings and IDs of the men targeted for killing did not rise to the level of gravity to constitute an act of persecution.[833]

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[825] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 181.
[826] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 713
[827] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2095
[828] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 580
[829] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 738
[830] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 761
[831] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 38
[832] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1803

The assessment of whether certain acts meet the sufficient gravity requirement for underlying forms of persecution involves two steps: (1) an assessment in the abstract of whether those acts may be considered to meet the equal gravity test as a matter of law; and (2) an assessment of whether considering the evidence presented at trial, those acts did meet the equal gravity test as a matter of fact.[834]

The underlying act of persecution need not itself be an international crime.[835]

Wilful killing, murder, and inflicting serious bodily and mental harm may constitute persecutions.[836] The use of civilians as hostages and human shields, forced labour to dig trenches under combat conditions and subjecting them to physical and psychological abuse all rise to the level of gravity of other violations enumerated in article 5.[837]

Acts of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecution.[838]

The imposition of restrictive and discriminatory measures in the form of deprivation of housing, property, and humanitarian assistance, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, may only meet the gravity threshold, and constitute a crime of persecution when taken in conjunction with other acts.[839]

The invasion of privacy through arbitrary searches of homes and the denial of equal access to public services constitute the crime of persecution when the general requirements of a crime against humanity and the specific requirements of persecution are satisfied and when these acts are considered in conjunction with other acts constituting persecution[840]

To assess the seriousness of an act, consideration must be given to all the factual circumstances, including the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex, and health, as well as the physical, mental, and moral effects of the act upon the victim[841]

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[833] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 875
[834] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 42
[835] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 735; *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 296
[836] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 106
[837] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 107
[838] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 587
[839] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1807
[840] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-T, *Judgement* (27 March 2013) at para. 92
[841] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 165

Psychological impact on a population may satisfy the required gravity threshold of the crime.[842]

plunder

Plunder and looting of public and private property as an underlying act of persecution is to be understood as any intentional and unlawful appropriation of public or private property that has a serious impact on the owner or user of the property.[843]

The prohibition against plunder is general in scope and extends both to acts of looting committed by individual soldiers for their private gain and to the organised seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory.[844]

Plunder—an intentional appropriation of public or private property, not justified by military necessity, that has a severe impact on the owner or user of the property, constitutes an act of persecution.[845]

An act of plunder which in itself does not have a serious impact on the victim, may still, when carried out on discriminatory grounds, and when the general elements of crimes against humanity are fulfilled, constitute the crime of persecution, when considered in conjunction with other acts.[846]

Under international humanitarian law there is a general exception to the prohibition of appropriation of property when the appropriation is justified by military necessity.[847]

In the context of an international armed conflict, treaty law and international customary law justify battlefield seizures of military equipment of the adverse party as war booty.[848]

The mens rea requirement for plunder or appropriation of property is satisfied when the perpetrator acts knowingly with the intent to appropriate public or private property unlawfully.[849]

sexual violence

[842] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 564
[843] *Prosecutor v Gotovina et al*, No, IT-06-90-T, *Judgement* (19 April 2011) at para. 1821; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3252
[844] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 528
[845] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 768-69
[846] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3254
[847] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3250
[848] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3250
[849] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3251

To be charged as persecution, it need not be shown that sexual assault constituted a crime under international law at the time the relevant acts were committed.[850]

The Chambers of the ICTR have found that sexual violence is not limited to acts of penetration or physical contact and includes forced nudity, which may be considered an inhumane act.[851] The ICTY has also found that sexual mutilation and severe bodily harm violate the right to physical integrity and dignity of a human being.[852]

Sexual assault is not limited to acts of penetration and has been found to include "all serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force or intimidation in a way that is humiliating and degrading to the victim's dignity."[853]

The elements that the Prosecution must prove to find sexual assault are (1) the physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act; (2) that act infringes the victims' physical integrity or amounts to an outrage to the victim's personal dignity; (3) the victim does not consent to the act; (4) the physical perpetrator intentionally commits the act; and (5) the physical perpetrator is aware that the act occurred without the consent of the victim.[854]

Sexual violence is found when (i) the perpetrator commits an act of a sexual nature on another or requires the victim to perform such an act, (ii) that act infringes on the victim's physical integrity or amounts to an outrage to the victim's personal dignity, and (iii) the victim does not consent to the act. The perpetrator must intentionally commit the act, and be aware that the victim did not consent to the act.[855]

Serious abuses of a sexual nature inflicted upon the integrity of a person by means of coercion, threat of force, or intimidation in a way that is humiliating and degrading to the victim's dignity may constitute other acts of sexual violence. These acts are not limited to the physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[856]

In situations of detention in an armed conflict, lack of consent and coercion can be inferred and thus the force required for a sexual assault is only that which is necessary to perform the act of a sexual nature, and actual coercion is not a required element.[857]

Insufficient evidence of sexual assault where the evidence indicated that women had been taken away by Serb forces and returned crying and looking dishevelled.[858]

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[850] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 187.
[851] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 190.
[852] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 191.
[853] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 195.
[854] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 201
[855] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 513
[856] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 512
[857] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 200.
[858] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at paras. 1792,1794

Where only two incidents of sexual assault were proven, and the only evidence of discriminatory intent was the fact that the victims were from the targeted ethnic group, this was insufficient to establish the *mens rea* of persecution.[859]

Trial Chamber erred in finding that rapes were not shown to be committed with discriminatory intent when they were committed during an operation to remove a large number of Kosovo Albanians from the town.[860]

terrorizing the civilian population

Terrorization of the civilian population is of sufficient gravity as to constitute an act of persecution.[861]

The incidents of shelling and sniping of the civilian population in Srebrenica in the months prior to the fall of the enclave were of sufficient gravity to satisfy acts of persecution under Article 5.[862]

The elements of persecution by terrorizing the civilian population are: 1. Acts or threats of violence; 2. the offender wilfully made the civilian population or individual civilians not taking part in hostilities the object of those acts or threats of violence; and 3. the acts or threats of violence were carried out with the primary purpose of spreading terror among the civilian population.[863]

Terrorising of the civilian population does not require an actual infliction of terror. The Prosecution only needs to prove that acts or threats of violence were carried out to create an atmosphere of extreme fear or uncertainty of being subjected to violence among the civilian population.[864]

The offender must have intended to terrorise the civilian population. The infliction of terror need not be the only objective of the acts or threats of violence, but it must be the principal aim.[865]

The Trial Chamber was not required to establish that spreading terror was the primary purpose of the underlying acts of terrorising civilians, although the primary purpose of the underlying acts may have been relevant to the gravity of the acts in question.[866]

To establish the actus reus of persecution in the present case, the Trial Chamber

[859] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at para. 1796
[860] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 580
[861] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 981
[862] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 765
[863] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 589
[864] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 590
[865] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 591
[866] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 763

was required to establish that the underlying acts of terrorising civilians: discriminated in fact, denied, or infringed upon a fundamental right laid down in international customary or treaty law, and were of equal gravity to the crimes listed in Article 5 whether considered in isolation or in conjunction with other acts.[867]

rape

The *actus reus* of the crime of rape in international law is constituted by the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, because of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to affect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[868]

Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. There are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim."[869] Circumstances that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.[870]

self-defence

The question of the legitimacy of the decision to resort to force is irrelevant to the determination of individual criminal responsibility for violations of international humanitarian law. Whether an attack was ordered as pre-emptive, offensive or defensive, is irrelevant, if the way the military operation was carried out was criminal.[871]

torture

Torture has the following constitutive elements; (1) the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (2) the act or omission must be intentional; (3) the act or omission must aim at obtaining information or a confession, or at punishing, intimidating, or coercing the victim or a third person, or at discriminating , on any ground, against the victim or a third person.[872]

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[867] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 762
[868] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 127
[869] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 129
[870] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 130
[871] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Judgement* (23 February 2011) at para. 2053
[872] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 142; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 74

Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way it is justifiably characterised as an act of torture.[873]

Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[874]

The crimes of torture and rape each contain a materially distinct element not contained by the other. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present.[875]

Rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture. The Court must not only look at the physical consequences, but also at the psychological and social consequences of the rape.[876]

Even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering , whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.[877]

Torture is constituted by an act or omission giving rise to severe pain or suffering, whether physical or mental. Whether acts or omission amount to torture must be considered on a case-by-case basis.[878]

Acts inflicting physical pain may amount to torture even when they do not cause the amount of pain of the type accompanying serious injury. Whether an act causes severe pain or suffering is determined on a case-by-case basis.[879]

Falsely telling prisoners that they will be executed, in a brutal context that makes the statement believable can amount to wilfully causing great suffering.[880]

Severe physical abuse during interrogation can amount to wilfully causing great suffering.[881]

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[873] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 150
[874] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 151
[875] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 179-182
[876] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 182-183
[877] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 153
[878] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 299
[879] *Prosecutor v Brdjanin*, No. IT-98-36-A, *Judgement* (3 April 2007) at para. 251
[880] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 300
[881] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 300

While the duration of the acts is relevant, there is no requirement that the acts go on for any fixed period.[882]

Trial Chamber erred in inferring from accused's witnessing of beating of prisoner en route to the prison that he was aware of subsequent mistreatment at the prison.[883]

The perpetrator of the crime of torture need not have been a public official, nor need the crime have been committed in the presence of a public official.[884]

The purpose of torture need not be the "predominant or sole purpose" behind inflicting the severe pain or suffering.[885]

Article 6—personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

The Tribunal's jurisdiction *ratione personae* is not limited to nationals of certain states, irrespective of membership of that state in the United Nations.[886]

Article 7—individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

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[882] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 300
[883] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 306
[884] *Prosecutor v. Kunarac et al*, No. IT-96-23-A & IT-96-23/1-A, *Judgement* (12 June 2002) at para. 148; *Prosecutor v. Simić et al*, No. IT-95-9-T, *Judgement*, (17 October 2003) at para. 82; *Prosecutor v Brdjanin*, No. IT-99-36-T, *Judgement* (1 September 2004) at para 488.
[885] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 508
[886] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on the Accused's Requests for a Ruling of the International Court of Justice Concerning the Tribunal's Jurisdiction Over Nationals of the Federal Republic of Yugoslavia* (21 April 2005)

aiding and abetting

actus reus

The *actus reus* for 'aiding and abetting' is that the accused carried out an act which consisted of practical assistance, encouragement, or moral support to the principal. The criminal act of the principal for which the aider and abettor is responsible must be established. The assistance need not have caused the act of the principal, but it must have had a "substantial effect" on the commission of the crime. The assistance may be provided by either an act or by an omission, and it may occur before, during or after the act of the principal.[887]

There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, and it is not required that such conduct serve as a condition precedent to the commission of the crime. It is sufficient for the aider and abettor's assistance or encouragement to have had a substantial effect on the realization of that crime.[888]

The actus reus for aiding and abetting consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.[889]

The participation of the aider and abettor need not be a crime in itself. Rather, the relevant question is whether his actions assisted in and substantially contributed to the commission of the crime.[890]

The actus reus of aiding and abetting may be removed from the location of the principal crime.[891]

The actus reus of aiding and abetting may be satisfied by a commander permitting the use of resources under his or her control, including personnel, to facilitate the perpetration of a crime.[892]

The criminal responsibility of an aider and abettor does not require the contribution to the crime of persecution to go to the discriminatory nature of this crime.

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[887] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 726; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 517

[888] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para.33

[889] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1732; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at fn. 594; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at paras.28,93

[890] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1765; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 172

[891] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 97

[892] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 127; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1784; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 32

The assistance given need not itself be discriminatory.[893]

after-the-fact

It is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime.[894]

definition

Aiding and abetting requires a three-step test: (1) the participant commits a crime punishable under the statute; (2) the accused aids and abets the participant in the commission of the crime; and (3) the accused acts with the awareness that his acts will assist the participant in the commission of the crime.[895]

***mens rea*--definition**

The *mens rea* for aiding and abetting means that (1) aiding and abetting must be intentional; (2) he must both intend to further his own contribution and to further the intentional completion of the crime by the perpetrator; (3) he is aware of the commission of the crime and accepts it as more likely than not ; and (4) he is aware of the type and essential elements of the crime to be committed.[896]

To satisfy the mens rea requirement for aiding and abetting, it must be shown that the aider and abettor knew that his acts or omissions assisted the commission of the specific crime by the principal, and that the aider and abettor was aware of the essential elements of the crime, which was ultimately committed, including the intent of the principal perpetrator.[897]

The requisite mental element is knowledge that the acts or omissions performed by the aider and abettor assist the commission of a specific crime by the principal.[898]

Although the accused's lending of practical assistance, encouragement, or moral support must itself be intentional, intent to commit the crime or underlying offence is not required. [899]

Knowledge need not have been overtly expressed and may be inferred from the circumstances.[900]

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[893] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1812
[894] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 731
[895] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 269
[896] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 288
[897] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at paras. 109,606
[898] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 127; *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 248; *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 94
[899] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 94

mens rea—knowledge of perpetrator's intent

The aider and abettor must also be aware of the "essential elements" of the crime committed by the principal offender, including the state of mind of the principal offender.[901]

Although the accused must be aware, at a minimum, of the essential elements of the substantive crime or underlying offence for which he is charged with responsibility as an aider and abettor, he need not know the intangible thoughts and feelings of the person or persons who in fact physically perpetrate the crime or underlying offence. [902]

Aiding and abetting liability does not require knowledge of every specific detail of the crimes. It is sufficient that the accused was aware of the "essential elements" of the crimes committed by the principal perpetrators. The degree of knowledge pertaining to the details of the crime required to satisfy the mens rea of aiding and abetting will depend on the circumstances of the case, including the scale of the crimes and the type of assistance provided.[903]

There is no requirement for aiding and abetting of having participated in the planning of crimes. Rather, the mens rea standard requires that the aider and abettor be aware of the essential elements of the crime ultimately committed, including the intent of the principal perpetrator.[904]

It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, if he was aware that one or a number of crimes would probably be committed, and one of these crimes was in fact committed.[905]

mens rea—specific cases

Knowledge that isolated incidents of murder might occur was not sufficient to establish that the accused knew of the probability that the Serb forces would commit the murders in the villages charged in the indictment.[906]

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[900] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 94
[901] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 727; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 518; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 51
[902] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 94
[903] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1800; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1622; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 109
[904] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 109
[905] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 350; *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 58; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1733,1751,1795; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 130
[906] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1792

It could not be established that accused knew that the perpetrators would commit a crime on the scale of extermination at Srebrenica. Therefore, the accused could not be convicted of aiding and abetting extermination.[907]

Fact that accused could have known that crimes might be committed by paramilitaries and other persons if they had access to the prisoners was insufficient to establish aiding and abetting of the offences committed by the perpetrators.[908]

No reasonable Trial Chamber could conclude that knowledge of use of excessive force by Serb troops in Kosovo in 1998 meant that the accused knew of the probability that if ordered to operate in Kosovo in 1999, the Serb troops would act with the intent to commit deportation and forcible transfer.[909]

The evidence referred to by the Prosecution, at best, shows that the accused put vulnerable women in contact with KLA soldiers who had a reputation for violence. There was no evidence as to what happened to the women between the time that they were last seen alive and the time that they were killed, in particular which KLA soldiers killed them or under what circumstances they were killed. None of the evidence shows that the accused was aware that a crime would be committed against the women at the relevant time.[910]

The probability, indeed, the considerable likelihood, that the prisoners of war would be gravely injured and murdered, was one which would have been obvious to the accused and anyone with his knowledge of the perpetrators. By enabling the unrestrained access to the prisoners the Accused was assisting in the commission of the offences of violence and murder that he was aware would indeed probably follow. These matters establish the *mens rea* necessary to constitute aiding and abetting the commission of the murders for the purposes of Article 7(1).[911]

Where the Accused were aware of previous acts of persecution, murder, and forcible displacement committed by Bosnian Serb forces against the non-Serb inhabitants of other areas of Croatia and Bosnia, the only reasonable inference from the evidence is that the accused knew that their acts relating to Bosanski Samac municipality assisted in the commission of murder, deportation, forcible transfer, and persecution, and were aware of the essential elements of the crimes, including of the intent of the perpetrators. They were therefore convicted of aiding and abetting those crimes.[912]

***mens rea*--specific intent crimes**

[907] *Prosecutor v Perisic*, No. IT-03-81-T, *Judgement* (6 September 2011) at para. 1647
[908] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para. 658
[909] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1709
[910] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 60
[911] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 621
[912] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-T, *Judgement* (30 June 2021) at para. 607

In cases of specific intent, crimes such as persecution or genocide, the aider and abettor must know of the principal perpetrator's specific intent.[913]

The requirement that the aider and abettor need merely know of the physical perpetrator or intermediary perpetrator's intent—and need not share it—applies equally to specific-intent crimes or underlying offences such as persecution as a crime against humanity.[914]

relationship with perpetrator

In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution.[915]

For an accused to be liable for aiding and abetting, the underlying crime must ultimately be committed by the principal perpetrator. It is however not necessary that the latter be identified or tried, even in cases of crimes requiring specific intent.[916]

An individual's high-ranking position, coupled with the open and notorious way criminal acts unfold, can provide a sufficient basis for inferring knowledge of the crimes.[917]

For persecution, the aider and abettor need not share the perpetrator's discriminatory intent.[918]

It is well established that the *mens rea* of aiding and abetting requires that an aider and abettor know that his acts would assist in the commission of the crime by the principal perpetrator and must be aware of the "essential elements" of the crime. It does not require that he shares the intention of the principal perpetrator of such crime,[919]

Trial Chamber correctly concluded that it had not been established that soldiers who were expelling the population had the intent to kill Kosovo Albanians. Therefore, it

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[913] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 140; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 127; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1830

[914] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 94

[915] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 102; *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at paras. 81, 146, 200

[916] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 127

[917] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 121

[918] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 101

[919] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 727; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 518; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 51; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 428; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1732-33, 1794; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 130

properly found that the accused was not aware of the mental state of the perpetrators and could not be convicted of aiding and abetting murder.[920]

omission

distinguished from superior responsibility

As superior responsibility under Article 7(3) is the archetypal form of omission liability for superiors, a form of omission liability arising out of Article 7(1) does not take precedence over superior responsibility under Article 7(3). There is a preference for those manifestations of Article 7(1) forms of responsibility that involve the active advancement of a crime—for example, aiding and abetting through positive action—and a conviction pursuant to Article 7(3) is not precluded where the only available Article 7(1) forms of responsibility are realised by means of an omission.[921]

duty to act

Omission may result in individual criminal responsibility under Article 7(1) where the accused had a legal duty to act. This requires that the accused had the ability to act, namely, that he had the means available to fulfil his legal duty, but nonetheless failed to do so.[922]

Aiding and abetting can be achieved by omission, provided that the accused had a duty to prevent the crime from being brought about.[923]

In addition, it must be demonstrated that there were means available to the accused to fulfil this duty.[924]

By the failure to discharge his legal duty to protect the prisoners of war from mistreatment, the Accused aided and abetter the crimes of torture and cruel treatment; not the crime of murder.[925]

The accused's duty to protect prisoners of war includes the obligation not to allow the transfer of their custody without first assuring himself that they would not be harmed.[926]

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[920] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1774
[921] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 79
[922] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 49, 82, 154; *see also* para 134; *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 72
[923] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 283; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 90
[924] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1740
[925] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 674
[926] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1754

The duty to protect also arises when other units or individuals, not just a commander's subordinates, are involved in crimes.[927]

elements

To incur criminal liability for an omission under Article 7(1), the accused must have had a legal duty mandated by a rule of criminal law; he must have had the ability to act; he failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and the failure to act resulted in the commission of the crime.[928]

Along with the "approving spectator" doctrine, aiding and abetting also encompasses culpable omissions, where (a) there is a legal duty to act, (b) the accused has the ability to act, (c) he fails to act either intending the criminal consequences or with awareness and consent that the consequences will ensue, and (d) the failure to act results in the commission of the crime.[929]

"[T]o enter a conviction for aiding and abetting murder by omission, at a minimum, all the basic elements of aiding and abetting must be fulfilled."[930]

The *actus reus* of aiding and abetting may be perpetrated through an omission.[931]

The *actus reus* of aiding and abetting by omission is established when it is shown that the accused failed to perform a legal duty which failure "assisted, encouraged or lent moral support to the perpetration of the crime," and had a "substantial effect" on the commission of the crime.[932]

The required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal. While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[933]

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[927] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1546
[928] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 1117
[929] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 90; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1677
[930] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 49
[931] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 134
[932] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 49; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1740
[933] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 159, *see also* para. 49

It was not required that the accused's failure to act was purposeful.[934]

The requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act. Thus, it must be determined whether, on the particular facts of a case, it is established that the failure to discharge a legal duty assisted, encouraged, or lent moral support to the perpetration of the crime, and had a substantial effect on it. In addition, it must be demonstrated that the accused had the ability to act, or in other words, that there were means available to the accused to fulfil this duty.[935]

Since the accused tried, albeit ineffective, to stop the firing, the Accused's failure to take more effective measures to stop the unlawful shelling of the Old Town does not make him guilty of aiding and abetting.[936]

The Accused knew that both violence and cruel treatment was occurring to the prisoners of war, despite the existing security arrangements he had ordered, and was aware of the animosity to the prisoners of the perpetrators and of their propensity to extreme violence against prisoners. Yet the accused took no action to prevent the continuance of the offences of cruel treatment that had been occurring. He had readily available to him more than adequate officers to ensure that the incidents of mistreatment that had occurred were not repeated. His omission, or failure to act constituted aiding and abetting the acts of cruel treatment.[937]

The accused's failure to discharge his legal duty to protect the Bosnian Muslim prisoners assisted the perpetration of murder and the other crimes committed at Kravica Warehouse against the Bosnian Muslim prisoners detained there and had a substantial effect on the realisation of the said crimes. He thus aided and abetted murder by omission.[938]

substantial effect

Commander's failure to file additional criminal reports, initiate additional investigations, or taken other measures to punish perpetrators was not shown to have made the commission of crimes more likely and therefore his omissions did not have a substantial effect on the crimes.[939]

Whether an act or omission had a substantial effect on the commission of a crime is a fact-based inquiry. This aspect of aiding and abetting by omission has been interpreted to mean that had the accused acted the commission of the crime would have been substantially less likely.[940]

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[934] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1758
[935] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1791
[936] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 355
[937] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 627
[938] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1563
[939] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at paras. 1679, 1682
[940] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1741

plan

In the case of aiding and abetting, no proof is required of the existence of a common concerted plan, let alone the existence of a pre-existence of such a plan. Indeed, the principal need not even know of the accomplice's contribution.[941]

presence

Mere presence at the scene of the crime does not constitute aiding and abetting unless the person has a duty to prevent it.[942]

The Trial Chamber found that the presence and continued interrogation of a witness by a person, can encouraged a third party and substantially contributed to the criminal acts committed by him. The knowing presence constitutes aiding and abetting.[943]

Proximity alone of fighting positions to the prison camp did not support the inference that the accused was present and personally participated in the operation of the prison camp.[944]

Commander's presence and inspections of troops on the ground did not constitute aiding and abetting where it was not shown that they specifically legitimized or encouraged the crimes.[945]

The location at which the *actus reus* takes place may be removed from the location of the principal crime.[946]

principal

Liability for aiding and abetting under the Statute cannot be inchoate: the accused cannot be held responsible under Article 7(1) for aiding and abetting if a crime or underlying offence is never actually carried out with his assistance, encouragement, or moral support.[947]

A defendant may be convicted of having aided and abetted a crime even if the principal perpetrators have not been tried or identified.[948]

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[941] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 263; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 91
[942] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 283
[943] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 126
[944] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para.313
[945] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1689
[946] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at paras. 81, 146, 200; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1783
[947] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 92
[948] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 355

Notwithstanding the requirement that the crime or underlying offence be ultimately committed, however, the physical perpetrator or intermediary perpetrator need not have been tried or even identified, even where the crime or underlying offence requires specific intent, and the perpetrator or perpetrators need not have been aware of the accused's contribution.[949]

Trial Chamber declined to make a finding on allegation that accused created a climate of impunity where it was not shown that the crimes were committed by his subordinates.[950]

specific direction

"Specific direction" is not an element of aiding and abetting liability.[951]

Principle of *lex mitior* does not apply because it has been established that specific direction has never been a part of the elements of aiding and abetting under customary international law, which the Tribunal must apply.[952]

substantial effect

Aiding and abetting may be constituted by any contribution to the planning, preparation, or execution of a finally completed crime provided that the contribution falls short of co-perpetration, instigation, or ordering, but nevertheless makes the performance of the crime easier.[953]

An act of aiding and abetting must have had a substantial effect on the commission of persecutory acts.[954]

Aiding and abetting must be substantial and have a significant effect on the commission of the crime but is not limited to direct contributions.[955]

Encouragement and moral support could only have a substantial effect on the commission of the crime if the perpetrators were aware of it.[956]

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[949] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 92
[950] *Prosecutor v Perisic*, No. IT-03-81-T, *Judgement* (6 September 2011) at para. 1586
[951] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1649; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1758; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 106; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 271
[952] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 128
[953] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 282
[954] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para 277; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 37; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 352
[955] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 284-85
[956] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 277

Appeals Chamber was not convinced that the only inference available from the accused's position and tacit approval of beatings was that he lent substantial assistance to the commission of cruel and inhumane treatment of detainees and reversed his conviction on that count.[957]

There was insufficient evidence to prove beyond a reasonable doubt that the accused's conduct constituted either encouragement or moral support for the camp personnel which had a substantial effect on the commission of torture.[958]

Merely signing orders for the classification and release of civilians on behalf of another individual will not, in the absence of any independent authority, be sufficient.[959]

The provision of engineering machinery and personnel for burial operations can have a substantial effect on the commission of mass executions.

By providing them with logistical support, the accused permitted soldiers under his active control to facilitate the perpetration of the killings and his doing so had a substantial effect upon their commission.[960]

The accused's armed presence fulfilled the substantial assistance requirement for the *actus reus* of aiding and abetting the crimes of other inhumane acts and cruel treatment.[961]

Although the practical assistance, encouragement, or moral support provided by the accused must have a substantial effect upon the commission of the crime or underlying offence, the prosecution need not prove that the crime or underlying offence would not have been perpetrated but for the accused's contribution.[962]

The element of substantial assistance for aiding and abetting does not require that the accused provided the specific weapon used by the perpetrator. The element may be established by the numerous other forms of practical assistance which substantially facilitated the perpetrators' crimes.[963]

The fact that the substantial assistance was part of the accused's "routine duties" is no defence where the conduct substantially contributes to the commission of crimes.[964]

Even a limited involvement may nevertheless have a substantial effect on the realisation of a crime.[965]

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[957] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 130
[958] *Prosecutor v. Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 276
[959] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 357 – 358.
[960] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1784
[961] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 438
[962] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 92; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1740,1783
[963] *Prosecutor v Perisic*, No. IT-03-81-T, *Judgement* (6 September 2011) at para. 1624
[964] *Prosecutor v Perisic*, No. IT-03-81-T, *Judgement* (6 September 2011) at para. 1624

The "limited scope" of the practical assistance provided does not preclude a conclusion that it had a substantial effect on the perpetration of a crime.[966]

timing

The aider and abettor must have acted before the crime was fully completed but may act after the principal act of the crime had been committed.[967]

Aiding and abetting may occur at the planning, preparation or execution stages of the crime/underlying offense and practical assistance, encouragement, or moral support may occur before, during or after the crime/underlying offense occurs.[968]

The accused may aid and abet at one or more of three possible stages of the crime or underlying offence—"planning, preparation or execution"—and the lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs.[969]

The actus reus of the aider and abettor need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[970]

committing

Committing a crime covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law. The *actus reus* is that the accused participated, physically or otherwise directly, in the material elements of a crime through positive acts or omissions, whether individually or jointly with others. The *mens rea* is the intent to commit the crime, or with the awareness of the substantial likelihood that the crime would occur because of one's conduct.[971]

It is not necessary that the perpetrator commit the crime with his own hands. A person who plays a central role in the commission of the crime of murder and embraces and approves as his own the decision to commit murder is not adequately described as an aider and abettor but qualifies as a direct perpetrator who committed the crime.[972]

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[965] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1765
[966] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 33
[967] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 282
[968] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 91.
[969] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 91
[970] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 127; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1783; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 33
[971] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 509; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 615
[972] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Judgement* (20 July 2009) at para. 899

A person may be jointly liable for committing murder if he participated in the material elements of the crime, even it was not shown he fired the fatal bullet.[973]

Joint criminal enterprise comes within the term "committed" and is encompassed within Article 7(1) of the Statute despite not being explicitly referred to.[974]

forms of liability in general

To come within the Tribunal's jurisdiction *ratione personae*, any form of liability must satisfy the preconditions of: (1) it must be provided for in the statute, explicitly or implicitly; (2) it must have existed under customary international law at the relevant time; (3) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (4) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[975]

The Trial Chamber -having found that an element necessary for a finding of the commission pursuant to JCE III liability had not been proven - erred by failing to make findings on whether the accused were responsible for failing to punish crimes under Article 7(3) of the Statute, as an alternative mode of liability.[976]

indirect co-perpetration

The form of liability called "indirect co-perpetration" did not exist in customary international law and therefore could not be charged as a form of liability at the Tribunal.[977]

Co-perpetratorship is not a valid form of liability at the ICTY.[978]

Allegations of indirect co-perpetration in indictment would stand considering Appeals Chamber decision in *Brdjanin* that a member of a joint criminal enterprise may be responsible for non-members who perpetrate crimes.[979]

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[973] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 162
[974] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 19-20; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 28
[975] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 21
[976] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3149
[977] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 62; *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Ojdanic Motion Challenging Jurisdiction: Indirect Co-Perpetration* (22 March 2006) at para. 40; *Prosecutor v Cermak & Markac*, No. IT-01-45-PT, *Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder* (14 July 2006) at para. 26
[978] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.3, *Decision on Petkovic's Appeal on Jurisdiction* (23 April 2008) at para. 21
[979] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Indriz Balaj's Preliminary Motion Concerning Paragraph 29 of the Indictment* (31 May 2007) at para. 6

instigating

actus reus

The *actus reus* of instigating means to prompt another person to commit an offence. While it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[980]

While the accused's prompting must have been a factor "substantially contributing to the conduct of another person committing the crime", the Prosecution need not prove that the crime or underlying offence would not have been perpetrated but for the accused's prompting.[981]

To be convicted of instigating, the offence must be actually committed.[982]

Instigating must be more than facilitating the perpetrator's commission of the offence. It requires influencing the perpetrator by inciting, soliciting, or otherwise inducing him to commit the crime.[983]

Liability for instigating may ensue through implicit, written, or other non-verbal prompting by the accused.[984]

Instigation need not be public or direct and may be committed through intermediaries so long as the instigator possesses the requisite intent.[985]

The accused need only prompt another to "act in a particular way"—and not necessarily to commit a crime or underlying offence *per se*—if he has the intent that a crime or underlying offence be committed in response to such prompting, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed.[986]

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[980] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 27; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 514; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 274; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at paras. 124, 153

[981] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 84; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 131

[982] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 623

[983] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 271

[984] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para.83

[985] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 273

[986] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 84, fn. 88

Proof of threats, enticement, or promises to physical perpetrators may have some relevance in assessing whether a particular conduct amounts to instigation. However, it is not a legal requirement.[987]

distinguished from aiding and abetting

It is not necessary to prove that the idea or plan to commit the crime was generated by the instigator. However, if the perpetrator has already decided to commit the crime, acts of facilitation at that stage qualify as aiding and abetting and not instigation.[988]

The distinction between aiding and abetting and instigation is that for aiding and abetting the perpetrator has already decided to carry out the crime, whereas for instigation, the accused acts before that decision is made.[989]

mens rea

A person who instigates another person to commit an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that instigation has the requisite *mens rea* for instigating.[990]

The instigator must be aware of the type and elements of the crime to be committed.[991]

An instigator must be aware of his influencing effect on the principal perpetrator to commit the crime and must at least accept that the crime be committed. The occurrence of a crime is accepted when the instigator is aware that the commission of the crime will more likely than not occur because of his conduct.[992]

omission

The accused's prompting may occur not only through positive acts, but also through omissions.[993]

Instigation may be committed by omission, provided that the instigator is under a duty to prevent the crime from being brought about.[994]

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[987] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 124
[988] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 271
[989] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 281
[990] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 32; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 514
[991] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 279
[992] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 279
[993] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para.83
[994] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 273; *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 76

Instigation may not be committed by omission.[995]

relationship with instigatee

Instigation does not require superiority by the instigator over the perpetrator.[996]

Instigation does not require that the accused have "effective control" over the perpetrator or perpetrators.[997]

specific cases

The Trial Chamber properly found the accused responsible for instigation on the basis of the totality of the evidence, including the evidence suggesting (i) that he was responsible for the preparation of the operation with the predominant objective to indiscriminately attack Albanian villagers and their property; (ii) that he personally led this operation; (iii) that he was present in Ljuboten while the crimes were committed; and (iv) that he authorized the police members not conduct an inspection in respect of the deaths of three men. (Satisfied Actus Reus of instigation).[998]

A reasonable trier of fact could find such a link to be tenuous in circumstances where there was a significant lapse of time between the statement and the offences, allowing for the reasonable possibility that the accused' s statement did not substantially contribute to the commission of the specific crimes and that other factors may have influenced the conduct of the perpetrators.[999]

Considering the accused's influence over the crowd and the striking parallels between his inflammatory words and the acts subsequently perpetrated by, inter alia, members of the audience, no reasonable trier of fact could have found that, through his speech, he did not substantially contribute to the conduct of the perpetrators.[1000]

In view of the content of his speech, the accused intended to prompt the commission of the crimes or, at the very least, was aware of the substantial likelihood that the crimes of deportation, persecution (forcible displacement), and other inhumane acts (forcible transfer) as crimes against humanity would be committed in execution of his instigation.[1001]

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[995] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at paras. 229-30; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 572
[996] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 272; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1008
[997] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para.83
[998] *Prosecutor v Boskoski & Tarculovski v. Boškoski,* No. IT-04-82-A, *Judgement* (19 May 2010) at para 157.
[999] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 132
[1000] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 154
[1001] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 154

joint criminal enterprise

common elements

When all the elements of JCE are met in a particular case, the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Thus, he is appropriately held liable also for those actions of other JCE members, or individuals used by them, that further the common criminal purpose (first category of JCE) or criminal system (second category of JCE), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE).[1002]

To find individual criminal responsibility pursuant to a joint criminal enterprise in any of the three categories, the elements which must be established are: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (iii) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute.[1003]

The *actus reus* of joint criminal enterprise is common to each of the three categories and comprises the following three elements; (1) a plurality of persons- they need not be organised in a military, political or administrative structure; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute- there is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise; (3) the participation of the accused in the common plan involving the perpetration of one of the crimes provided for in the Statute- this participation need not involve commission of a specific crime under one of those provisions (murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. [1004]

There is no legal requirement that a minimum number of killings occur to support a finding that murder is part of a joint criminal enterprise.[1005]

Liability under this form of responsibility may not be inchoate: the accused cannot be held responsible, even if he was aware that the crime or underlying offence was

[1002] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 172
[1003] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 227; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 698; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 64; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 430; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 77
[1004] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 117
[1005] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 188

reasonably foreseeable if that crime or underlying offence was not ultimately committed.[1006]

To be held responsible for a crime committed pursuant to a joint criminal enterprise, the accused need merely to have participated in the common plan, design, or purpose at the core of the JCE and he need not have performed any part of the *actus reus* of the perpetrated crime.[1007]

A co-perpetrator in a joint criminal enterprise need not physically commit any part of the *actus reus* of the crime involved. Nor is the participant in a joint criminal enterprise required to be physically present when and where the crime is being committed.[1008]

The existence of an agreement or understanding for the common plan, design or purpose need not be express, but may be inferred from all the circumstances. The participation of two or more persons in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act. Furthermore, the common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[1009]

acquiescence

Regarding the first category even if the accused did not have control over a specific stage of the operation, his acceptance of the final result of the enterprise is sufficient to bear individual criminal responsibility.[1010]

If the objective of the joint criminal enterprise changes, such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed, then a new and distinct joint criminal enterprise has been established. For this joint criminal enterprise, like the original joint criminal enterprise, the three elements must be established for criminal responsibility to attach. It may be that members of second joint criminal enterprise are the same as those in the original enterprise.[1011]

The joint criminal enterprise originally had as its objective the forcible transfer and displacement of Bosnian Muslims but expanded to include additional crimes which came to the attention of its members as the implementation of these objectives was seen

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[1006] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 112
[1007] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 64; *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Ojdanic Motion Challenging Jurisdiction: Indirect Co-Perpetration* (22 March 2006) at para. 22
[1008] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 112
[1009] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 699
[1010] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 246
[1011] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 700

to include a greater range of crimes. Thus, those additional crimes became part of the JCE's objective as well.[1012]

As is the case with a common criminal plan in its inception, it is not necessary for the JCE members to explicitly agree to the expansion of criminal means; instead, as with the original criminal plan, that agreement may materialise extemporaneously and be inferred from circumstantial evidence.[1013]

It is not required that all JCE members, including both accused and non-accused JCE members, have been informed of the expanded crimes to show that they had agreed to expand the JCE.[1014]

There is no reason why an accused cannot be alleged to have participated in more than one JCE to commit a number of crimes.[1015]

Although knowledge of crimes in combination with failure to intervene to prevent them may be a basis for inferring intent, it does not compel such a conclusion.[1016]

While an accused's knowledge of particular crimes combined with continued participation in the execution of the common plan from which those crimes result may be a basis, to infer that he or she shared the requisite intent for the crimes in question, this does not necessarily compel such a conclusion.[1017]

Inaction or action might have encouraged or facilitated crimes does not necessarily equate to, or compel a finding of, intent for those crimes.[1018]

There is no error in finding responsibility for an expanded JCE on the theory that when JCE members became aware of the expanded crimes and did not take any measures to prevent their recurrence but contributed to them and persisted in implementing the common objective, they thereby came to intend those expanded crimes.
One incident involving two murders during an attack on one village during the first six months was not sufficient to infer that murder and wilful killing were part of the CCP from the beginning. JCE-based convictions for murder during that period reversed.[1019]

common plan or purpose

Under joint criminal enterprise liability, a trial chamber is required to determine whether a common plan, design, or purpose existed which amounts to or involves the

[1012] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 1118
[1013] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 802
[1014] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 803
[1015] *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Two Motions Alleging Defects in the Form of the Indictment* (12 May 2009) at para. 20
[1016] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 688
[1017] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 672
[1018] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 689
[1019] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 813

commission of a crime provided for in the Statute.[1020]

Participation does not have to be in and of itself criminal, if the accused performs acts that in some way contribute to the furtherance of the common purpose of the JCE and if he shares the intent to implement the common purpose by criminal means. Whether the orders were lawful or militarily justified is irrelevant.[1021]

A trial chamber is required to make a finding that this criminal purpose is not merely the same, but also common to all the persons acting together within a joint criminal enterprise.[1022]

Joint criminal enterprise liability requires an agreement between the participants in the joint criminal enterprise. Therefore, pleading a "joint criminal enterprise with common purpose" failed to charge a crime within the statute of the Tribunal.[1023]

It is not necessary to establish that joint criminal enterprise members acted in unison to reach a conclusion on the existence of the common purpose.[1024]

There is no requirement that the accused have an agreement with the principal perpetrator to be liable under JCE.[1025] However, the perpetrator's crime must have formed part of the criminal purpose of the JCE.[1026]

It is not required that members of the JCE agreed upon a particular form through which the forcible displacement of non-Serbs was to be effectuated or that the accused intended specific acts of coercion causing the displacement of individuals, so long as it is established that the accused intended to forcibly displace the victims.[1027]

Joint criminal enterprise requires the existence of a common purpose which amounts to or involves the commission of a crime. The common purpose need not be previously arranged or formulated; it may materialize extemporaneously.[1028]

A person can still be liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.[1029]

[1020] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 67
[1021] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1988
[1022] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 96
[1023] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 20, 22
[1024] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 138
[1025] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 415
[1026] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 418
[1027] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 917; *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 684
[1028] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 117; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 790; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 86

inferences

The common plan may be inferred from events on the ground.[1030]

A Chamber may infer that a common plan or purpose existed by examining the totality of the circumstances surrounding the commission of a crime or underlying offence. For example, the way in which the crime or underlying offence is committed may support an inference that it must have been pursuant to a common plan. In these cases, the Prosecution is not required to adduce documentary or other explicit evidence of the plan's existence.[1031]

Evidence of beatings and killings at Vukovar Hospital did not establish that they were executed as part of a common plan involving the accused. Therefore, the accused was acquitted of responsibility for the actions of the perpetrators.[1032]

Close co-operation between a principal perpetrator and a JCE member is but one of various factors from which a trial chamber may infer that a crime formed part of the common purpose and is thus imputable to JCE members.[1033]

A common criminal purpose can be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[1034]

The existence of a certain level of coordination on the ground among various factions and the commission of crimes by some of these factions may not necessarily suffice, in the context of a given case, to show beyond a reasonable doubt that such cooperation was in pursuance of a common criminal purpose.[1035]

Where the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period, the argument that there was no common purpose is plainly unsustainable.[1036]

Trial Chamber could not conclude from KLA propaganda threatening collaborators with death that there existed a plan to mistreat civilians.[1037]

[1029] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 82; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 448
[1030] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 611
[1031] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 102
[1032] *Prosecutor v. Mrksic et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para. 608
[1033] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2620
[1034] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 105
[1035] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 117
[1036] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 119
[1037] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 635

plurality of persons

A trial chamber is not required to identify by name each of the persons involved in a joint criminal enterprise or to make a separate finding on the individual actions and intent of each alleged member.[1038]

The Trial Chamber was not required to analyse separately the intentions of each member of the JCE. Rather, it was required to identify the plurality of persons belonging to the JCE and establish that they shared a common criminal purpose.[1039]

Using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose. That principle applies irrespective of the category of joint enterprise alleged. The principal perpetrators of the crimes constituting the common purpose or constituting a foreseeable consequence of it should also be identified as precisely as possible.[1040]

Authority or control over principal perpetrators is not a necessary element to establish JCE liability. However, it is one of the various factors that a chamber may consider in determining whether crimes of principal perpetrators were linked with the accused.[1041]

At all times relevant to the crimes charged in the Indictment, a plurality of persons shared the common criminal purpose to forcibly and permanently remove, through the commission of the crimes charged in the Indictment, the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina.[1042]

object

The Trial Chamber did not conflate the political goal to create a separate Serb entity with the common criminal purpose of the JCE. The Trial Chamber's findings on the political aim of the Bosnian Serb leadership for Serbs to live in one state and the subsequent intensification of the process of territorial demarcation are merely factors that the Trial Chamber considered, together with other factors, in reaching its conclusion on the common criminal purpose of the JCE to forcibly transfer non-Serbs.[1043]

Persons with a common objective are not necessarily members of a JCE. It is the interaction or cooperation among persons—their joint action—which makes these

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[1038] *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 105
[1039] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 191; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1751
[1040] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 116
[1041] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1528
[1042] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-T, *Judgement* (30 June 2021) at para. 597
[1043] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 68

persons a group. Joint action among members of the joint criminal enterprise must be proven.[1044]

A common objective alone is not always sufficient to determine a group, because different and independent groups may happen to share identical objectives. It is thus the interaction or cooperation among persons – their joint action – in addition to their common objective that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE.[1045]

Whether an attack was ordered as pre-emptive, defensive, or offensive is from a legal point of view irrelevant. The issue is whether the way the military action was carried out was criminal or not.[1046]

"Ethnic cleansing" was an adequate description of the common criminal plan where the Trial Chamber found it to include various crimes through which the ethnic cleansing was achieved, including but not limited to forcible transfer and deportation.[1047]

customary international law

The notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal, which recognises common design as a mode of liability separate and distinct from aiding and abetting.[1048]

Joint criminal enterprise existed as part of customary international law and could therefore be the basis of a conviction at the Tribunal.[1049]

distinction from aiding and abetting

Aiding and abetting a JCE is not a valid form of liability at the ICTY.[1050]

A person who participated in its commission may be regarded as a co-perpetrator of a joint criminal enterprise whose purpose was to commit the crime, provided that the individual concerned shared the common intent of the principal offenders. Alternatively,

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[1044] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 884; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para. 1259
[1045] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3561
[1046] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 895
[1047] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 790
[1048] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 220.
[1049] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003); *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 591
[1050] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.3, *Decision on Petkovic's Appeal on Jurisdiction* (23 April 2008) at para. 21

the individual concerned may be considered an aider and abettor if he merely had knowledge of the perpetrators' intent and lent them support which had a significant effect on the perpetration of the crime.[1051]

Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and a better only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes. Where, however, the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for all the crimes committed as part of that common purpose as a co-perpetrator.[1052]

The aider and abettor is always an accessory to a crime perpetrated by another person, the principal, while this is not necessarily true for a participant in a joint criminal enterprise.[1053]

In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.[1054]

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some ways are directed to the furtherance of the common design.[1055]

In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e., as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.[1056]

Joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself. Therefore, it would be inaccurate to refer to aiding and abetting a joint

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[1051] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 122
[1052] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 510; *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 90
[1053] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 229.
[1054] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 229.
[1055] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 229; *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 102; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 33
[1056] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 229; *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 102

criminal enterprise. The aider and abettor assists the principal perpetrator or perpetrators in committing the crime.[1057]

To convict for aiding and abetting the crime of persecution, the accused must have had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate against the Muslim population, and that, with that knowledge, made a substantial contribution to the commission of the discriminatory acts by the principal perpetrators.[1058]

A difference between liability for aiding and abetting and for JCE is that the JCE member must intend to achieve the criminal objective, whereas the aider and abettor need only act with knowledge of the intent of the principal.[1059]

The threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting. Thus, the Trial Chamber's finding of a significant contribution is not equivalent to the substantial contribution required to enter a conviction for aiding and abetting.[1060]

forms

Three broad forms of joint criminal enterprise have been recognised by the International Tribunal's jurisprudence. In the first form of joint criminal enterprise, all the co-perpetrators possess the same intent to affect the common purpose. The second form of joint criminal enterprise, the "systemic" form, a variant of the first form, is characterized by the existence of an organized criminal system, in particular in the case of concentration or detention camps. This form of joint criminal enterprise requires personal knowledge of the organized system and intent to further the criminal purpose of that system.[1061]

forms—JCE I

The first category of JCE is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.[1062]

[1057] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 91; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 886
[1058] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 142
[1059] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 885
[1060] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 149
[1061] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 82; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65
[1062] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 196.

The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.[1063]

Participants in a basic or systemic form of joint criminal enterprise must be shown to share the required intent of the principal perpetrators. Thus, for crimes of persecution, the Prosecution must demonstrate that the accused shared the common discriminatory intent of the joint criminal enterprise. If the accused does not share the discriminatory intent, then he may still be liable as an aider and abettor if he knowingly makes a substantial contribution to the crime.[1064]

The prosecution need not prove, as an element of the first category, that every single person alleged to have been a member of the joint criminal enterprise shared the intent to commit the crime or underlying offence that is the object of the joint criminal enterprise.[1065]

As regards a first-category joint criminal enterprise, where the criminal object consists of a crime requiring specific intent, the Prosecution must prove not only that the accused shared with others the general intent to commit the underlying offence—for example, the intent to kill for "murder" as an underlying offence of persecution as a crime against humanity or "killing members of the group" as an underlying offence of genocide—but also that he shared with the other joint criminal enterprise members the specific intent required of the crime or underlying offence. Therefore, in the case of persecution, the accused must have shared the intent to discriminate against a protected group.[1066]

Where a conviction under the first category of JCE is concerned, the accused must share both the intent to commit the crimes that form part of the common purpose of the JCE and the intent to participate in a common plan aimed at their commission.[1067]

The requisite mens rea for JCE I liability is the intent to commit a specific crime, an intent that must be shared by all the co-participants.[1068]

JCE I requires intent in the sense of *dolus directus*. Recklessness or *dolus eventualis* does not suffice.[1069]

[1063] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 196.
[1064] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 110
[1065] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 108
[1066] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 109
[1067] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1369; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para.522
[1068] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1395
[1069] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at fn. 13437

forms--JCE II

An accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise if they were a natural and foreseeable consequence thereof . However, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[1070]

The second category is characterised by the existence of an organised system set in place to achieve a common criminal purpose. For there to be the requisite intent, the accused must have had personal knowledge of the system in question (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system.[1071]

Requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise goes beyond the criterion set by the Appeals Chamber in the *Tadic* case.[1072] Intent is not dependant on the existence of an agreement in determining guilt as a co-perpetrator under the second form of joint criminal enterprise.[1073]

The *mens rea* of a systemic joint criminal enterprise requires proof of the participant's personal knowledge of the system of ill-treatment, as well as the intent to further this system of ill-treatment.[1074]

The *mens rea* requirement for the first category of joint criminal enterprise is the intent to perpetrate a certain crime, this being the shared intent on the part of all co-perpetrators.[1075]

The first form of the JCE requires intent in the sense of *dolus directus*, and that recklessness or *dolus eventualis* does not suffice.[1076]

To demonstrate that the subjective element of the first category of joint criminal enterprise was met, the Trial Chamber was required to establish that he shared with the other JCE members the intent to commit the JCE I crimes and the intent to participate in

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[1070] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 86
[1071] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 89
[1072] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 97
[1073] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 113
[1074] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 109
[1075] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 77; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1755; *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 584
[1076] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para. 1258, fn,2193

a common plan aimed at their commission.[1077]

JCE III--actus reus

The foreseeable act must be a crime. Therefore, there can be no JCE III liability for reburials, which is not a crime under the statute.[1078]

Provided the 'reasonably foreseeable and natural consequences' standard has been established, "criminal liability under JCE III can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise.[1079]

JCEIII--"commission"

There is no cogent reason for departing from the jurisprudence of the ICTY that JCE, including JCE III, is a form of "commission" that has existed in customary international law since at least 1992.[1080]

JCEIII--definition

Under the third category of joint criminal enterprise, an accused can be held responsible for a crime outside the common purpose if, under the circumstances of the case: (i) it was foreseeable to the accused that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the joint criminal enterprise) to carry out the *actus reus* of the crimes forming part of the common plan. purpose; and (ii) the accused willingly took the risk that such a crime might occur by joining or continuing to participate in the enterprise.[1081]

The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[1082]

The artificial distinction that the subjective element of the third category of JCE contains distinct objective and subjective elements is not valid.[1083]

JCEIII--foreseeability

Probability not required.[1084]

[1077] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at paras. 375, 386
[1078] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1032; *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 1155
[1079] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1440
[1080] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1672,1674; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 281
[1081] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 595
[1082] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 204.
[1083] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2893

"Might be" committed.[1085]

The crime was a "possible" consequence.[1086]

The crime must be shown to have been foreseeable to the accused in particular.[1087]

This question must be assessed in relation to the knowledge of a particular accused, as what is natural and foreseeable to one person might not be natural and foreseeable to another, depending on the information available to them.[1088]

The foreseeability requirement applies to the crime with all its legal elements.[1089]

While an accused's ability to foresee must be established in relation to each incident alleged, this can be done by way of inference from circumstantial evidence, including contextual factors.[1090]

An accused may be responsible for crimes committed beyond the common purpose of the joint criminal enterprise if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. What is natural and foreseeable to one person might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him.[1091]

[1084] *Prosecutor v Karadzic*, No. IT-95-5/18-AR72.1, *Decision on Prosecution 's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability* (25 June 2009) at para. 18; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1432

[1085] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1557; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 907; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2853; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 533; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 688; *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 433

[1086] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 87; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 96; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1055; *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 3560; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2836

[1087] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 647

[1088] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2836

[1089] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 614

[1090] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3072

[1091] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 621

It is not necessary for the purposes of the third category of joint criminal enterprise that an accused be aware of the past occurrence of a crime for the same crime to be foreseeable to him.[1092]

The awareness of similar prior misconduct or past crimes by the direct perpetrators is not a requirement but is one factor which can be considered when determining the foreseeability of a crime to an accused.[1093]

Knowledge of factors such as the nature of the conflict, how a joint criminal enterprise is to be achieved, and how the joint criminal enterprise is implemented on the ground may make the possibility that such a crime might occur sufficiently substantial as to be foreseeable to members of the joint criminal enterprise.[1094]

The fact that the nature of crimes may have been unprecedented since World War II does not undermine the Trial Chamber's findings on the foreseeability of the crimes.[1095]

Where thousands of Kosovo Albanians were being forcibly displaced and mistreated on a massive scale by Serbian forces who could act with near impunity, and where women were frequently separated from men, the possibility of sexual assaults was sufficiently substantial to be foreseeable to the accused such that he attracted liability under JCEIII for the sexual assaults.[1096]

Trial Chamber erred in finding that murders were foreseeable consequence of operation to remove Albanians from Kosovo. While the accused was undoubtedly aware that these events created an atmosphere of violence and insecurity, he was not aware of acts of violence to civilians of such a gravity as to make murders, in particular, foreseeable to him.[1097]

It was not necessarily foreseeable to the accused that opportunistic killings would result from the forcible transfer of members of the population.[1098]

The use of *dolus eventualis* within the context of the third category of joint criminal enterprise does not violate the principles of *nullum crimen sine lege* and *in dubio pro reo.*[1099]

[1092] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 627; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2836
[1093] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2865
[1094] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 627; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2836, 2865
[1095] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 650
[1096] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 926
[1097] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1081
[1098] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1830
[1099] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 103

Under JCE III, the possibility that a crime could be admitted must be sufficiently substantial as to be foreseeable to the accused.[1100]

The subjective element of the third category joint criminal enterprise is, however, not satisfied by implausibly remote scenarios; it requires that the possibility "that a crime could be committed is sufficiently substantial as to be foreseeable to the accused.[1101]

The foreseeability standard does not include an express time frame. Accordingly, a trial chamber is not required to make a finding with respect to precisely when the crimes first became foreseeable to an accused as long as it is clear that prior to their commission, these crimes were foreseeable to the accused, and he willingly took the risk that they might occur by joining or continuing to participate in the joint criminal enterprise.[1102]

For JCE III, the accused need not be aware that the crimes outside the common purpose were being committed, it was sufficient that their occurrence was foreseeable to him and that those crimes did in fact occur.[1103]

In considering the foreseeability of an act being committed with the required special intent for the crime of persecution, the general attitude of the alleged perpetrator as demonstrated by his behaviour is a relevant factor to determining the mens rea of the accused. The use of derogatory language in relation to a particular group is one aspect of an accused's behaviour that may be considered, together with other evidence, to determine the existence of discriminatory intent. The fact that the accused may have also used the term "Muslims" is insufficient to demonstrate that his other use of derogatory terms to refer to Muslims was not indicative of discriminatory intent against the Bosnian Muslim population.[1104]

It was not unreasonable for the Trial Chamber to have considered the climate of extreme violence, and the accused's knowledge thereof, as a factor in determining whether he could have foreseen the occurrence of sexual abuse.[1105]

On review of the judgement in *R v. Jogee*, the Appeals Chamber does not find any cogent reason for departing from the Appeals, Chamber's well-established jurisprudence because UK law was not a basis for the JCE III doctrine and Jogee involved accessory liability while at the international tribunals, JCE is treated as a form of commission.[1106]

JCEIII--mens rea

[1100] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1081; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 2836, 3022
[1101] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1055
[1102] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1056
[1103] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1540
[1104] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 522
[1105] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2871
[1106] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Judgement* (20 March 2019) at para. 434

The *mens rea* requirement for the third category of joint criminal enterprise is the intention to participate in and further the intended activity or the criminal purpose of the group and to contribute to the JCE or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or other members and the accused knowingly took that risk.[1107]

The third, "extended" form of joint criminal enterprise entails responsibility for crimes committed beyond the common purpose, but which are nevertheless a natural and foreseeable consequence of the common purpose. The requisite *mens rea* for the extended form is twofold. First, the accused must have the intention to participate in and contribute to the common criminal purpose. Second, to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.[1108]

It is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further - individually and jointly - the criminal purposes of that enterprise; [1109] (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose;[1110] and (iii) voluntary assumption by the accused of that risk.[1111]

The mens rea standard for JCE III is the possibility that a crime committed outside the agreed common plan is reasonably foreseeable to the accused and that the accused willingly took the risk that such a crime might occur by continuing to participate in the agreed common plan.[1112]

For an accused to incur criminal responsibility for acts that are natural and foreseeable consequences of a joint criminal enterprise, it is not necessary to establish that he was aware in fact that those other acts would have occurred. It is sufficient to show that he was aware that those acts outside the agreed enterprise were a natural and foreseeable consequence of the agreed joint criminal enterprise, and that the accused participated in that enterprise aware of the probability that other crimes may result.[1113]

[1107] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 77
[1108] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 83; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 65
[1109] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 220.
[1110] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 220.
[1111] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 228.
[1112] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 514; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2836
[1113] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 150; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1803

For an accused to incur JCE III liability, it is not necessary to establish that he was aware that the crimes in question occurred; it is sufficient that their occurrence was foreseeable to him.[1114]

The applicable law for JCE III liability does not require that the accused create conditions for those crimes that take place outside of the common criminal purpose.[1115]

JCEIII--relation to JCE I

Reversal of the Trial Chamber's finding that a JCE existed means that other crimes could not be a natural and foreseeable consequence of that JCE's common purpose. Accordingly, the convictions for deviatory crimes entered via the third form of that JCE must also fall.[1116]

The jurisprudence of the Tribunal does not require the category of the JCE I crime and the JCE III crime to match.[1117]

JCEIII--specific intent crimes

It need not be shown that the accused had the intent to commit the extended crime, only that it was foreseeable. This also includes crimes which require a specific intent.[1118]

On review of the STL Decision of 16 February 2011 and the Taylor Trial Judgement, the Appeals Chamber finds that the accused has not demonstrated any error in the Appeals Chamber's well-established jurisprudence that JCE III applies to specific intent crimes.[1119]

While the Convention for the Suppression of Terrorist Bombings, the ICC Statute, and some post-World War II cases do not expressly provide for convictions for specific intent crimes on the basis of the third category of joint criminal enterprise or even the third category of joint criminal enterprise itself, this does not undermine the Appeals Chamber's analysis of customary international law and conclusion in the *Tadic* case, which has been consistently confirmed in the Tribunal's subsequent jurisprudence.[1120]

[1114] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2914
[1115] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2975
[1116] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 97
[1117] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1713
[1118] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Interlocutory Appeal* (19 March 2004); *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 84; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1733; *Prosecutor v Karadzic*, No. IT-95-5/18-PT *Decision on Six Preliminary Motions Challenging Jurisdiction* (28 April 2009) at para. 32; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1441,1708
[1119] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 598
[1120] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 599

mens rea

The fact that the accused did not refuse to participate in a joint enterprise because such refusal would prejudice his career, or that he feared that he would be imprisoned or punished, is not an excuse or a defence to liability for participating in war crimes or crimes against humanity. Nevertheless, these are circumstances which may be taken into consideration when determining the *mens rea*.[1121]

The *mens rea* required for the first and third categories of joint criminal enterprise differs. The first category of joint criminal enterprise requires proof that all participants shared the same criminal intent. It is necessary to establish that the accused voluntarily participated in the enterprise and intended the criminal result. Under the third category of joint criminal enterprise, a member of that enterprise may be held liable for a crime or crimes which he did not physically perpetrate if, having the intent to participate in and further a common criminal design or enterprise, the commission of other criminal acts was a natural and foreseeable consequence of the execution of that enterprise, and, with the awareness that such crimes were a possible consequence of the execution of that enterprise, he participated in that enterprise.[1122]

The *mens rea* differs according to the category of common design under consideration: (1) The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).(2) For the second category which is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as the intent to further this concerted system of ill-treatment. (3) The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*[1123]

It is not required that a participant in the JCE knew about each specific crime committed pursuant to the JCE.[1124]

The mens rea for participation in a joint criminal enterprise may be inferred from an accused's knowledge of the common plan or the crimes it involves, combined with his or her continuous participation in the joint criminal enterprise, if this is the only reasonable inference available on the evidence.[1125]

[1121] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 216
[1122] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 703; *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 30
[1123] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 32
[1124] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 907
[1125] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 522

A participant in a joint criminal enterprise would not need to know of each crime committed to be criminally liable. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that facilitates the commission of a crime, or which allows the criminal enterprise to function effectively or efficiently is enough.[1126]

Knowledge and acceptance of the risk that crimes would be committed is insufficient for the first form of JCE liability.[1127] The accused must share the intent to commit the crimes.[1128]

The fact that the participation of an accused amounted to no more than his or her routine duties will not exculpate the accused - what matters is whether the act in question furthered the common criminal purpose and whether it was carried out with the requisite intent.[1129]

Where it was not proven beyond reasonable doubt that the Accused shared the intent to further the common criminal purpose, the Accused may not be held responsible for committing, through participation in a joint criminal enterprise, the crimes alleged in the Indictment.[1130]

Where an underlying crime forming part of the common criminal purpose requires proof of a special intent, such as discriminatory intent, the accused must share the special intent.[1131]

inferences

The Appeals Chamber recalls that when the Prosecution relies upon proof of the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence. It is settled that the benefit of the doubt must always go to the accused.[1132]

Explicit manifestations of criminal intent are often rare. The requisite intent may therefore be inferred from relevant facts and circumstances, such as, inter alia, the accused's words and/or actions, as well as the general context in which they occurred.[1133]

[1126] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 276; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 474
[1127] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para. 2332; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1802
[1128] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para. 2336
[1129] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1395
[1130] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-T, *Judgement* (30 June 2021) at para. 597-98
[1131] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 536
[1132] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 237
[1133] *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 306

An accused's shared intent and contribution to a JCE can be inferred from his control and command authority over the perpetrators and his failure to intervene to stop or punish the crimes committed pursuant to the common criminal purpose.[1134]

The significance of an accused's contribution to the common criminal purpose is relevant to assessing his or her mens rea in connection with his or her alleged joint criminal enterprise liability.[1135]

Considering the accused's knowledge of crimes, a failure to intervene in the participation of subordinates in the commission of the crimes might suggest that the accused shared the intent to further the common purpose of the JCE, but does not necessarily compel such a conclusion, in particular if the senior civilian and military authorities play a primary role in the criminal operation.[1136]

From the time the accused organized the training of Unit members and local Serb forces at through their subsequent deployment during the takeover of Bosanski Šamac in 1992, the accused shared the intent to further the common criminal purpose to forcibly and permanently remove, through the commission of the crimes of persecution, murder, as well as deportation and forcible transfer, the majority of non-Serbs from large areas of Croatia and Bosnia and Herzegovina and the intent to commit the underlying charged crimes. They continued to share this intent through the period involving the commission of crimes in Sanski Most in September 1995.[1137]

The requisite intent for the first category of joint criminal enterprise can be inferred from factors such as a person's knowledge of the common criminal purpose or the crime(s) it involves, combined with his or her continuing participation in the crimes or in the implementation of the common criminal purpose.[1138]

The requisite mens rea for a conviction under JCE I can be inferred from a person's knowledge of the common plan, combined with his continuous participation, if this is the only reasonable inference available on the evidence.[1139]

Failure to investigate crimes was not indicative of accused's intent to further the common objective of the JCE where he had no authority to arrange for such an investigation.[1140]

Ultimately, responsibility for a document lies in a formal sense with the signatory.

[1134] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1529
[1135] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 522
[1136] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1369
[1137] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 535
[1138] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 393; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2590
[1139] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1652; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1773
[1140] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1047; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 252

However, in the absence of additional information, the accused who claimed he had signed the document without reading it, raised a reasonable doubt as to whether the document was in fact written by him and thus specifically reflected his own personal views. Accordingly, for the purposes of evaluating criminal responsibility the report is an insufficient basis on which to conclude that the accused possessed the necessary criminal intent to carry out the common purpose.[1141]

Concealment of crimes necessarily occurs after the crimes have been committed and may constitute evidence of a shared purpose to commit crimes.[1142]

non-JCE perpetrators

JCE members may be held responsible for crimes carried out by principal perpetrators who were non-JCE members, if it has been shown that the crimes can be imputed to at least one JCE member and that the latter—when using the principal perpetrators—acted in accordance with the common objective.[1143]

Where the principal perpetrator is not found to be a JCE member, factors indicative of this link between the principal perpetrator and a JCE member include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime.[1144]

A JCE may exist if none, or only some of the perpetrators are members because for example, they are not aware of the JCE and its objectives but are procured by members of the JCE to commit crimes which further that objective.[1145]

Crimes committed by persons who share the objective of the JCE but are not linked with the operations of the group are not attributable to the members of the JCE. On the other hand, members of the JCE may procure others who are not members of the

[1141] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2003
[1142] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 479
[1143] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 413; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 109; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement* (27 September 2007) at para. 120; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1256; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 165; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1998; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1050; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 119; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 193; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 545
[1144] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1050; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 1547, 1998; *Prosecutor v Seselj*, No. MICT-16-99-A, *Judgement* (11 April 2018) at para. 109; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 545
[1145] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 883

JCE to commit crimes and crimes by those persons are attributable to members of the JCE.[1146]

There is no requirement that a trial chamber demonstrate how each physical perpetrator was used to commit the crimes in order, but it must identify how one or more members of the joint criminal enterprise used the forces to which these physical perpetrators belonged in furtherance of the common plan.[1147]

In general, in the case of a third category joint criminal enterprise, the crimes must be committed by members of the joint criminal enterprise.[1148]

For JCE III, for a crime committed by someone who was not a member of the JCE, the prosecution must prove (i) that for the accused in question it was foreseeable that a new crime was likely to be committed by the direct perpetrator from outside the JCE who was used by a member of the JCE to achieve the physical element of the crimes included in the common plan and (ii) that the Accused knew that the new crime was the probable outcome of the furtherance of the common goal but nevertheless decided to take part in the JCE.[1149]

Since a member of the JCE can use a non-member to commit the crime of genocide, and since it is not required that the non-member share the *mens rea* for genocide, it is the genocidal intent of the JCE members, and not the physical perpetrators, that is determinative for JCE I.[1150]

Without any further elaboration on the link between these forces and the JNA, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE. The link between the principal perpetrators of these crimes and members of the JCE is therefore too tenuous to support the accused's conviction.[1151]

The origin of the armed men and their affiliation remains uncertain. Without any further elaboration on the affiliation of these armed men, no reasonable trier of fact could have held that the only reasonable conclusion in the circumstances was that these crimes could be imputed to a member of the JCE.[1152]

The link between the physical perpetrator and a joint criminal enterprise member may be indirect, such as within the hierarchical structure of the forces involved in the perpetration of crimes.[1153]

[1146] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 1082
[1147] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 165; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at paras. 498, 545
[1148] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 119
[1149] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 220
[1150] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 79
[1151] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 192
[1152] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 200
[1153] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 169

The Trial Chamber was not required to identify any subordinates of the accused in its evaluation of his liability under JCE.[1154]

Possession of de facto powers is not necessarily dependent on having formally identified subordinates within a hierarchical structure.[1155]

omission

Participation by omission may also extend to all forms of joint criminal enterprise, so long as the accused's failure to act amounted to a significant contribution to the common criminal plan.[1156]

A significant contribution to a JCE may consist of an act or, where there is a legal duty to act, an omission. For omission, the relevant enquiry is whether an accused was obligated by law to act, and if so, whether such an omission significantly contributed to the JCE.[1157]

Participation in a JCE may be by omission.[1158]

The question of whether a failure to act could be considered to establish that the accused significantly contributed to a joint criminal enterprise is a question of fact to be determined on a case-by-case basis.[1159]

The relevant failures to act or acts carried out in furtherance of a joint criminal enterprise need not involve carrying out any part of the *actus reus* of a crime forming part of the common purpose, or indeed any crime at all. One's contribution to a joint criminal enterprise need not be in and of itself criminal, if the accused performs acts (or fails to perform acts) that in some way contribute significantly to the furtherance of the common purpose.[1160]

When establishing an accused's participation in a joint criminal enterprise through his failure to act, the existence of a legal duty to act deriving from a rule of criminal law is not required.[1161]

[1154] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2618
[1155] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2619
[1156] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 103
[1157] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 566
[1158] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2606; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Miko Stanisic's, and Stojan Zupljanin's Motions on Form of the Indictment* (19 March 2009) at para. 39
[1159] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 110; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 228
[1160] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 110; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 228
[1161] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 110; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1394

A failure to intervene to prevent recurrence of crimes or to halt abuses may be considered in assessing an accused's contribution to a joint criminal enterprise and his intent where the accused had some power and influence or authority over the perpetrators sufficient to prevent or halt the abuses but failed to exercise such power.[1162]

Failure of the accused to use his command authority to undertake measures which could have prevented or punished the commission of crimes can be a factor in determine the accused's mens rea to participate in the JCE[1163]

The demonstration of a duty to act that would meet the legal conditions set out in the Tribunal's case law for commission by omission is not required when relying on an accused's failure to act in the context of assessing his participation in a joint criminal enterprise.[1164]

A failure to intervene to prevent recurrence of crimes or to halt abuses may be considered in assessing an accused's contribution to a joint criminal enterprise and his intent, where the accused had some power and influence or authority over the perpetrators sufficient to prevent or halt the abuses but failed to exercise such power.[1165]

The *actus reus* for "commission by omission" is a higher standard than for aiding and abetting by omission, namely, the accused must exert "concrete influence" on the perpetration of the crime. The *actus reus* for aiding and abetting requires merely that the omission have a "substantial effect" upon the perpetration of the crime.[1166]

scope

Joint criminal enterprise is a form of liability and not a separate crime.[1167]

Joint criminal enterprise and the common purpose doctrine are the same.[1168]

Joint criminal enterprise liability applies to internal, as well as international, armed conflicts.[1169]

Joint criminal enterprise is not limited to enterprises of small sizes or scope. It is in fact well suited to cases where numerous persons are concerned with many crimes.[1170]

[1162] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 111
[1163] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2081
[1164] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 732
[1165] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 734; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 1394, 1487; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at paras. 229, 415
[1166] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 156
[1167] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction* (26 September 2005) at para. 16
[1168] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR72, *Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise* (21 May 2003) at para. 36
[1169] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction* (26 September 2005) at para. 20

Joint criminal enterprise is not limited to small scale enterprises.[1171]

significant contribution

criminal nature of contribution

The significant contribution to a JCE need not be criminal *per se*.[1172]

Participation in a JCE need not involve the commission of a specific crime, and does not have to be necessary or substantial, but may take the form of at least a significant contribution to the execution of the common purpose. The contribution must further the execution of the common purpose.[1173]

An accused's acts must in some way be directed to the furthering of the common criminal plan of the JCE, which is an essential consideration in determining whether the contribution to the JCE was significant.[1174]

The actual physical perpetration of a crime or underlying offence by an accused, while not required for joint criminal enterprise liability, tends to support a finding that his participation was significant if the crime or underlying offence advanced the goal of the enterprise.[1175]

Nothing prevented the Trial Chamber from considering the accused's involvement in the commission of crimes as a contribution to the execution of the JCE.[1176]

The accused does not have to contribute to a specific crime to be held responsible for it.[1177]

factors

While the contribution of the accused to the JCE does not have to be a *sine qua non*, without which the crimes could or would not have been committed", its significance

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[1170] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 876
[1171] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 424
[1172] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 985; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1615; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 179; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 395
[1173] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1378; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1535; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 186; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 395, 397
[1174] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1880; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 179
[1175] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 105
[1176] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1881
[1177] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1535

will be relevant in demonstrating that the accused shared the intent to pursue the common purpose.[1178]

The significance and the scope of an individual's material contribution to a JCE may be relevant in determining whether that individual had the requisite mens rea.[1179]

The accused's contribution to the JCE only needs to be "directed to the furthering of the common plan", which implies that the acts could also have served other purposes.[1180]

Factors to consider when evaluating whether the accused's level of participation in the joint criminal enterprise was sufficiently significant include the size of the enterprise, the functions performed by the accused and his efficiency in performing them, and any efforts made by the accused to impede the efficient functioning of the joint criminal enterprise.[1181]

findings

To find an accused criminally responsible pursuant to joint criminal enterprise liability, a trial chamber must be satisfied that the accused participated in furthering the common purpose at the core of the JCE and must characterise the accused's contribution in this common plan.[1182]

Having found that the accused significantly contributed to the JCE, it was unnecessary for the Trial Chamber to expressly find that his contribution furthered the common criminal purpose as this is, at the very least, implicit.[1183]

leaders

An accused's leadership status and approving silence militate in favour of a finding that his participation was significant.[1184]

The receipt of information and regular reports on the activities of a body, as part of the information flow, can be a relevant indicator in determining the accused's authority over that body. Acting on the contents of a report is not a necessary requirement in determining command authority.[1185]

opportunistic visitors

[1178] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1653
[1179] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2402
[1180] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 494
[1181] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 105
[1182] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 136
[1183] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1880
[1184] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 105
[1185] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1478

In the case of "opportunistic visitors" to a detention camp, a substantial contribution to the overall effect of the camp is necessary to establish responsibility under the joint criminal enterprise doctrine.[1186]

routine duties

The fact that the participation of an accused amounted to no more than his routine duties will not exculpate the accused.[1187]

Conduct pursuant to an "administrative" or "logistical" function can be a factor in determining whether an accused's contribution to the JCE was significant. Operational command is not required to satisfy the significant contribution requirement.[1188]

sine que non

The Trial Chamber concurs with the Trial Chamber in the *Brdjanin* case that while the participation of the accused need not be a *conditio sine qua non* for the commission of the offence, the accused's involvement in the criminal act must form a link in the chain of causation.[1189]

The Prosecutor need not demonstrate that the accused's participation is a *sine qua non*, without which the crimes could or would not have been committed. Thus, the argument cannot be made that an accused did not participate in the joint criminal enterprise because he was easily replaceable.[1190]

Although low- or mid-level actors may incur joint criminal enterprise liability, in most situations the accused will not be someone readily replaceable.[1191]

specific cases

Informing a subordinate of the plan to remove the population and ordering a soldier to stop distributing bread did not amount to a substantial contribution to the joint criminal enterprise to forcibly remove the population of Srebrenica.[1192]

Contribution to the concealment of crimes, such as by facilitating the failure to prosecute the perpetrators of crimes directed at furthering the common criminal plan may constitute a contribution to the JCE.[1193]

[1186] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 599
[1187] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1615; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 154; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1395; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 179
[1188] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1410
[1189] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 702
[1190] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 98
[1191] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 105
[1192] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1173

By disseminating false information and issuing a serious threat to UNPROFOR, the accused made a significant contribution to the JCE.[1194]

Considering the Trial Chamber's failure to enter a finding as to which authority exercised control over Luka detention camp, the Trial Chamber's finding that the accused failed to take decisive action to close Luka camp or to withdraw the RS MUP forces from it and its reliance on this finding in the assessment of the accused's contribution to the JCE was unreasonable and therefore an error.[1195]

Evidence that the accused received concurrent information about the arrests, murders, and destructions or that he subsequently launched a fake investigation did not, by itself, show that he contributed to the commission of such crimes. In the absence of any evidence showing that his conduct influenced the commission of these crimes, it was unreasonable for the Trial Chamber to find that he contributed to them.[1196]

The Accused contributed to the furtherance of the common criminal purpose through organizing the training of Unit members and local Serb forces and through their subsequent deployment during the takeover of Bosanski Samac municipality.[1197]

The Trial Chamber erred in law in restricting its examination as to whether Unit members physically committed crimes and by not evaluating whether the accused contributed to the common criminal purpose through the deployment of Unit members. However, having reviewed the relevant evidence, the record did not establish that the Unit contributed to the operations in in a manner that would support the accused's joint criminal enterprise liability.[1198]

The Trial Chamber erred by restricting its analysis to whether the prosecution had proven that payments from the State Security Service went to Serbian Volunteer Guard members "who participated in the commission of the 1995 killings in Sanski Most, charged in the Indictment" and by not assessing contributions to the Serbian Volunteer Guard that might have otherwise significantly contributed to the furtherance of the common criminal purpose in connection with those killings.[1199]

substantial contribution

[1193] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2052
[1194] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1820
[1195] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 344
[1196] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2278
[1197] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-T, *Judgement* (30 June 2021) at para. 597
[1198] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para.470
[1199] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para.499

Contribution of the accused to the JCE need not be substantial or necessary to the achievement of the JCE's objective.[1200]

In general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise.[1201]

The threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting.[1202]

The contribution of the accused to the common plan must be significant, although it need not be necessary or substantial.[1203]

uncharged conduct

A finding of an accused's contributions to the common criminal purpose cannot be based upon uncharged pattern evidence of criminal conduct.[1204]

timing

An accused may be found to have participated in a joint criminal enterprise even after its establishment.[1205]

An accused cannot be held responsible for crimes committed during a time when he was not a member of the JCE.[1206]

Trial Chamber did not err in relying on events which occurred before the JCE to infer the circumstances surrounding the formation of the JCE as well as its common criminal plan.[1207]

Certain conduct of a JCE member which started prior to, and continued during, the period when a common purpose of a JCE was found to have existed could constitute

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[1200] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2768; *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 883; *Prosecutor v Mladic*, No. MICT-13-56-A, *Judgement* (8 June 2021) at para. 186
[1201] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 97
[1202] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2768
[1203] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Judgement* (3 April 2007) at para. 430; *Prosecutor v Haradinaj et al*, No. IT-01-74-T, *Judgement* (2 April 2008) at para. 138; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 136
[1204] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para.398
[1205] *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on .Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder* (25 October 2006) at fn. 59
[1206] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1985; *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 544
[1207] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 711

an act in furtherance of the common purpose by virtue of the continuation of this conduct.[1208]

mens rea

The knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility for serious violations of international humanitarian law…an awareness of a higher likelihood of risk and a volitional element must be incorporated in the legal standard.[1209]

The accused's belief that UN personnel taken hostage were persons taking an active part in the hostilities was not a defence, but a mistake of law.[1210]

Motive must be distinguished from intent. Motive is not an element of any crime.[1211]

omission

An omission may give rise to individual criminal responsibility. The commission of a positive act is not an absolute requirement of criminal responsibility [1212]

Generally, responsibility under 7(1) is classified as direct responsibility and responsibility under 7(3) is classified as indirect responsibility. However, some 7(1) forms i.e., omission are also indirect responsibility and thus the Chamber did not intend omission liability under 7(1) to take precedence over superior liability under 7(3). The Trial Chamber therefore interprets *Blaškić* as merely establishing a preference for those manifestations of Article 7(1) forms of responsibility that involve the active advancement of a crime—for example, aiding and abetting through positive action—and not precluding a conviction pursuant to Article 7(3) where the only available Article 7(1) forms of responsibility are realised by means of an omission.[1213]

ordering

actus reus

The *actus reus* of ordering means that a person in a position of authority instructs another person to commit an offence.[1214]

[1208] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1891
[1209] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 41
[1210] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.9, *Decision on Appeal of Denial of Motion for Judgement of Acquittal for Hostage Taking* (11 December 2012) at para. 22
[1211] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2817
[1212] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 149
[1213] *Prosecutor v. Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para 79.
[1214] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 28; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 515

There can be no liability for ordering unless the underlying crime is actually committed.[1215]

causation

For "ordering", an order need not have been transmitted directly to the physical perpetrator.[1216]

The accused need not give the order directly to the physical perpetrator, and an intermediary lower down than the accused on the chain of command who passes the order on to the physical perpetrator may also be held responsible as an orderer for the perpetrated crime or underlying offence if he has the requisite state of mind.[1217]

While the accused's issuance of the order must have been a factor substantially contributing to the physical perpetration of a crime or underlying offence, the Prosecution need not prove that the crime or underlying offence would not have been perpetrated but for the accused's order.[1218]

express or implied

An order does not necessarily need to be explicit in relation to the consequences it will have.[1219]

The order need not take any particular form; it need not be in writing.[1220]

It was not established beyond reasonable doubt that the accused instructed his troops to perform a campaign of sniping and shelling of the civilian population in Sarajevo as such.[1221]

Unlike the use of "uncontrollable" modified air bombs, snipers are generally precise in hitting the target. Considering evidence that not all the sniping of civilians was intentional, the inference that the accused ordered all sniping incidents is not the only reasonable one on the ground that he generally controlled the sniping activity and training. Convictions for ordering and planning the crimes related to the sniping incidents reversed.[1222]

[1215] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1013; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 98
[1216] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 573
[1217] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 624
[1218] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para.88; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 332; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 573
[1219] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 267
[1220] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87
[1221] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 267
[1222] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 277

The *actus reus* of ordering requires proof of a positive action by the person in a position of authority, *i.e.*, instructing another person to commit an offence. The existence of such prior positive act emanating from the accused with respect to shellings which occurred during his absence was not established.[1223]

mens rea

The accused need only instruct another to carry out an act or engage in an omission—and not necessarily a crime or underlying offence *per se*—if he has the intent that a crime or underlying offence be committed in the execution of the order, or if he is aware of the substantial likelihood that a crime or underlying offence will be committed.[1224]

With regard to the requisite *mens rea*, it must be established that the accused in issuing the order intended to bring about the commission of the crime or was aware of the substantial likelihood that it would be committed in the execution of the order.[1225]

A person who orders an act or omission with the 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) pursuant to ordering.[1226]

Leading military operations does not equate with involvement in crimes. The fact that the accused participated in and was associated with the giving of orders does not mean that he had the requisite *mens rea* for the crimes.[1227]

The evidence fell short of establishing that there was a "substantial likelihood" that the forces of the accused would once again ignore orders and resort to deliberate and indiscriminate shelling known to the accused when he ordered the attack on Srdj. Therefore, he is not responsible for "ordering".[1228]

omission

The *actus reus* of ordering cannot be established in the absence of a prior positive act because the very notion of "instructing", pivotal to the understanding of the question of "ordering", requires "a positive action by the person in a position of authority".[1229]

[1223] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 292
[1224] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87, fn. 94
[1225] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 333 *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 30; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 515; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 152
[1226] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 42
[1227] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 957
[1228] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 347
[1229] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 267; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 624

Ordering cannot be accomplished by omission.[1230]

superior relationship not required

This form of liability requires that at the time of the offence, an accused possessed the authority to issue binding orders to the alleged perpetrator. A formal superior-subordinate relationship between the person giving the order and the one executing it is not a requirement, nor need the order be given in writing, or in any one particular form, or directly to the individual executing it.[1231]

While the Prosecution need not prove that there existed a formal superior-subordinate relationship between the accused and the physical perpetrator or intermediary perpetrator, it must provide proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. Such authority may be informal and of a temporary nature, and therefore the order issued by the accused need not be legally binding upon the physical perpetrator or intermediary perpetrator.[1232]

The accused need merely instruct another person to commit an offence. Liability for ordering may ensue where the accused issues, passes down, or otherwise transmits the order, and that he need not use his position of authority to "convince" the physical perpetrator or intermediary perpetrator to commit the crime or underlying offence.[1233]

Ordering requires that a person in a position of authority, whether de jure or de facto, instructs another person to commit a crime. This authority may be proved expressly or may be reasonably implied from the evidence.[1234]

planning

The *actus reus* of planning requires that one or more persons design the criminal conduct constituting one or more crimes that are later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to the criminal conduct.[1235]

[1230] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 176; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87

[1231] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 331; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 28; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 515; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 624

[1232] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87

[1233] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 87

[1234] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12December 2007) at para. 957

[1235] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 26; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 513; *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12December 2007) at para. 956

With respect to the *actus reus* of planning, it is unclear whether the accused was found to have participated in the design of the military strategy concerning the ongoing campaign as such or whether he planned every incident for which he is held responsible. Considering these uncertainties, the accused's responsibility for planning of the campaign of sniping and shelling of civilians in Sarajevo as such was not established beyond reasonable doubt.[1236]

For "planning", the Prosecution need not establish that the crime would not have been committed but for the accused's plan.[1237]

While the Prosecution need not prove that the crime or underlying offence with which the accused is charged would not have been perpetrated but for the accused's plan, the plan must have been a factor "substantially contributing to criminal conduct constituting one or more statutory crimes that are later perpetrated.[1238]

A person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan has the requisite *mens rea* for planning.[1239]

Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime.[1240] Involvement in planning may, however, be considered an aggravating factor.[1241]

superior responsibility

causation

Causation has not traditionally been postulated as a *conditio sine qua non* for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates. Hence, it is not necessary that the commander's failure to act caused the commission.[1242]

Considering that superior responsibility does not require a causal link between the commander's failure to prevent subordinate's crimes and the occurrence of the crimes,

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[1236] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 270
[1237] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 571
[1238] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 82
[1239] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 31; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 513
[1240] *Prosecutor v. Kordić & Cerkez*, No. IT-95-14/2-T, *Judgement*, (26 February 2001) at para. 386; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 222
[1241] *Prosecutor v. Stakić*, No. IT-97-24-T, *Judgement*, (29 October 2003) at para. 443 *Prosecutor v. Milosevic*, No. IT-98-29/1-T, Judgment (12December 2007) at para. 956 ; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 222
[1242] *Prosecutor v Delalic et al*, No. IT-96-21-T, *Judgement* (16 November 1998) at para 398; *Prosecutor v. Kordić & Cerkez*, No. IT-95-14/2-T, *Judgement*, (26 February 2001) at para 447; *Prosecutor v Brdjanin*, No. IT-99-36-T *Judgement* (1 September 2004) at para 280.

there is no duty for an accused to bring evidence demonstrating that there was no causal link.[1243]

civilians

Command responsibility applies to civilian superiors as well as military commanders.[1244]

criminal negligence

Criminal negligence is not a basis of liability in the context of criminal responsibility.[1245]

defences

The burden is on the accused to establish the defence of "self-defence" and the prosecution is not required to prove its absence.[1246]

The defence of necessity cannot be raised when the accused is convicted of the mistreatment detainees suffered directly or indirectly at his hands or the hands of others over whom he had superior responsibility.[1247]

Acting out of "blind dedication" is no defence, as motive must be distinguished from intent and the subordinate position of an accused is legally irrelevant to determining individual criminal responsibility.[1248]

elements

To hold a commander responsible for the crimes of his subordinates, it must be established beyond reasonable doubt that: (1) there existed a superior-subordinate relationship between the superior and the perpetrator of the crime; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.[1249]

[1243] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 40
[1244] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at paras 195 – 196; *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction* (26 September 2005) at para. 19; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 308; *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 70
[1245] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 71
[1246] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 838
[1247] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 53
[1248] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1027
[1249] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 790; *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at para. 827; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 56; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 520; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 294

It is not necessary to prove under Article 7(3) that the superior ordered the commission of the crime.[1250]

Command responsibility applies to every commander at every level in the armed forces. This includes responsibility for those temporarily assigned to the commander.[1251]

National law provides the framework for the authority attributed to a superior, but the duty to act which stems from that authority must be evaluated under standards of international law.[1252]

jurisdiction

Superior responsibility existed in customary international law for internal conflicts and therefore could be applied in the statute of the Tribunal.[1253]

There is no rule in customary or positive international law which requires a State to prosecute acts which can be characterized as war crimes solely based on international criminal law, setting aside any characterizations of their national criminal law.[1254]

mens rea

The *mens rea* requirement is satisfied when it is established that: (i) the commander had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal; or (ii) he had in his possession such information which would put him on notice of the risk of such offences, in that it indicated or alerted him to the need for additional investigation to determine whether such crimes had been or were about to be committed by his subordinates.[1255]

If a commander uses soldiers, while knowing or having reason to know that there is a serious risk that they will not obey his orders to comply with international humanitarian law, he may not claim that he lacked effective control over those soldiers. A commander may not exonerate himself if he accepted the possibility before the crimes were committed that subsequently he might not be able to control his troops.[1256]

[1250] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 331
[1251] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 61
[1252] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 138
[1253] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility* (16 July 2003) at para. 31
[1254] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 260
[1255] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 792; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 65; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 92
[1256] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 89

The superior's position alone is insufficient to prove actual or constructive knowledge of the crimes committed by his subordinates.[1257]

The more physically removed the superior is from the commission of the crimes, the more supplemental indicia will be required to establish actual knowledge.[1258]

Knowledge that crimes were committed is not sufficient. It must be established that the superior knew of the crimes committed by his subordinates.[1259]

actual knowledge

A superior's actual knowledge that his subordinates were committing or were about to commit a crime cannot be presumed, but it may be established by circumstantial evidence. Factors that may be considered in this respect include the number, type and scope of illegal acts, time during which the illegal acts occurred, number and types of troops and logistics involved, geographical location, whether the occurrence of the acts is widespread, tactical tempo of operations, *modus operandi* of similar illegal acts, officers and staff involved, and location of the commander at the time.[1260]

The threshold required to prove knowledge of a superior may be higher for those exercising more informal authority than those operating within a well-defined and structured chain of command.[1261]

Factors to be considered in determining whether a superior had actual knowledge include (1) the number, type, and scope of unlawful acts; (2) the time during which they occurred; (3) the number and type of troops involved; (4) the logistics involved, if any; (5) the geographical location of the acts; (6) their widespread occurrence; (7) the tactical tempo of the operations; (8) the modus operandi of similar unlawful acts; (9) the officers and staff involved and (10) the location of the commander at the time the acts were committed.[1262]

Actual knowledge may be established through direct or circumstantial evidence but cannot be presumed.[1263]

The fact that a military commander "will most probably" be part of an organised structure with reporting and monitoring systems has been cited as a factor that could facilitate the showing of actual knowledge. Knowledge may be presumed if a superior

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[1257] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 319
[1258] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 248
[1259] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 59
[1260] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 368; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 66; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 319
[1261] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 320
[1262] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 94; *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 150
[1263] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 94

had the means to obtain the relevant information of a crime and deliberately refrained from doing so.[1264]

While high positions or authority in an organization may indicate that persons are being informed of and approve of what is occurring, this is not necessarily the case.[1265]

reason to know

civilians

A stricter test should not be applied to non-military superiors than to military superiors in this regard.[1266]

negligence

The mental element "had reason to know" as articulated in the Statute, does not automatically imply a duty to obtain information.[1267]

A superior cannot be held responsible for negligently failing to acquire knowledge of the acts of subordinates. A superior may be held responsible for deliberately failing to find out, but not for negligently failing to find out.[1268]

It is not required that he actually acquainted himself with such information: it suffices that such information was available to him.[1269]

It is only necessary for the prosecution to prove that the information was provided or made available to the superior. It is not required that the superior actually acquainted himself with the information. A commander will not ordinarily be permitted to deny knowledge of reports received at his headquarters, they being sent there for his special benefit.[1270]

A report sent to headquarters while the commander was away on mission was nevertheless presumed to be "available" to him.[1271]

If an accused deliberately refrains from obtaining further information, despite having the means to do so, he may be considered to have had "reason to know".[1272]

[1264] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 226; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 792
[1265] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 444
[1266] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120
[1267] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 406
[1268] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 96
[1269] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120
[1270] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 479
[1271] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 481
[1272] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120

What is required is information which should have provided a reason for the superior to avail himself of further knowledge. This specific, subjective element makes the "reason to know" standard one of more than mere negligence or an objective test for which strict liability could be found.[1273]

notice

An accused has "reason to know" if he has information available to him putting him on notice of the need for additional investigation, to ascertain whether his subordinates were about to engage, were engaging, or had engaged in conduct constituting a crime or underlying offence under the Statute of the Tribunal.[1274]

It must be established that the superior had information sufficiently alarming to justify further inquiry.[1275]

Knowledge of a strong risk that the subordinates would commit a crime is not required. What is required is sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry.[1276]

presumptions

An accused's position of authority cannot lead to an automatic presumption, beyond a reasonable doubt, that he or she knew or had reason to know of the crimes for which a conviction is sought.[1277]

reliability

Information of mere rumours circulating in the streets does not suffice to constitute the *mens rea* of command responsibility. However, in this case, the accused had information from more reliable sources, including an investigating judge.[1278]

specific cases

Accused had sufficiently alarming information to put him on notice of the risk that crimes had been or were about to be committed by his subordinates to justify further inquiry or the taking of measures.[1279]

Given his awareness of the large numbers of Bosnian Muslim prisoners being

[1273] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 324
[1274] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120
[1275] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 28; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1910
[1276] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 304
[1277] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 313.
[1278] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1223
[1279] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2040

detained in the schools and guarded by members of the Zvornik Brigade as well as the crucial fact that the detention of the prisoners was a precursor to their planned murder, the accused had sufficiently alarming information to justify further inquiry into the conditions in which the prisoners were being kept and the involvement of his subordinates in perpetuating such conditions. At this point in time, the accused had reason to know of the risk that his subordinates might participate in the cruel and inhumane treatment of the prisoners through their role in guarding them.[1280]

Mere knowledge that enemy soldiers are detained does not presume knowledge of the mistreatment of those detainees.[1281]

Accused lacked knowledge of discriminatory intent on part of his subordinates at Srebrenica, given his limited knowledge of the crimes and their involvement in them.[1282]

specificity

Showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know.' This information does not need to provide specific information about unlawful acts committed or about to be committed.[1283]

subordinates

Knowledge of the crime and knowledge of the criminal conduct of someone else are two distinct matters.[1284]

A superior having information that one group of subordinates has committed crimes cannot be presumed to have had reason to know that other groups of subordinates would also commit crimes.[1285]

The prior knowledge of a superior must be narrowly interpreted to the extent it derives from a situation of repeated similar criminal actions and from a set of circumstances such that these actions could not arise in isolation, committed as they were by the same identifiable group of subordinates.[1286]

While a superior's knowledge of and failure to punish his subordinate's past offenses is insufficient in and of itself to conclude that the superior knew that similar future offences would be committed by the same group of subordinates, this may,

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[1280] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1912
[1281] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1291
[1282] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2100
[1283] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 154-155; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3177; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1910
[1284] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 252
[1285] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 117
[1286] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 251

depending on the circumstances of the case, nevertheless constitute sufficiently alarming information to justify further inquiry.[1287]

Knowledge that unit were alleged to have committed crimes two years earlier did not constitute sufficiently alarming information that required an investigation of the later incident.[1288]

Frequent reports of misdemeanours and criminal offences constituted sufficiently alarming information that required the commander to investigate allegation of crimes by the same unit at a later time.[1289]

However, it is error to conclude that a superior's knowledge of and failure to punish his subordinate's past offenses automatically constitutes sufficiently alarming information to justify further inquiry.[1290]

sufficiency

A superior is not liable for failing to acquire such information in the first place. The mental element of "reason to know" is determined only by reference to the information in fact available to the superior. However, the information in fact available to him need not be such that, by itself, it was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, *i.e.*, that it indicated the need for additional investigation to ascertain whether offences were being committed or were about to be committed.[1291]

A superior will be criminally responsible by virtue of the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates, or about to be committed. General information in his possession, which would put him on notice of possible unlawful acts by his subordinates is sufficient. A superior may be regarded as having "reason to know" if he is in possession of sufficient information to be on notice of the likelihood of illegal acts by his subordinates, i.e., if the information available is sufficient to justify further inquiry.[1292]

The form of the information available to him may be written or oral and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed

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[1287] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 30; *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 301
[1288] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 492
[1289] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 512
[1290] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 31
[1291] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 369; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 322
[1292] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 370; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 68; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 525

or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.[1293]

timing

The accused's duty to investigate further only arises from the time at which admonitory information becomes available to him, and a failure to seek out such information in the first place will not, on its own, trigger liability under Article 7(3).[1294]

failure to prevent or punish

The failure to prevent and the failure to punish are not only legally distinct but are factually distinct in terms of the type of knowledge that is involved for each basis of superior responsibility. The duty to prevent arises for a superior from the moment he knows or has reason to know that a crime is about to be committed, while the duty to punish arises only after the commission of the crime.[1295]

Knowledge which is relevant to the failure to punish may or may not be relevant to the failure to prevent depending on when the superior acquired this knowledge.[1296]

To incur individual criminal responsibility under Article 7(3) of the Statute, the superior having actual or imputed knowledge of crimes being about to be committed or having been committed by his subordinates must have "failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[1297]

A superior has a duty to suppress crimes which are ongoing when he learns of them.[1298]

The neglect of a duty to acquire knowledge does not feature in the provision Article 7(3) as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[1299]

While a superior cannot be held responsible solely for neglecting a general obligation, neither can he avoid superior responsibility by proving diligence in meeting

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[1293] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 238; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120
[1294] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 120
[1295] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 260
[1296] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 260
[1297] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 325; *Prosecutor v Brdjanin,* No. IT-99-36-T, *Judgement,* (1 September 2004) at para 279.
[1298] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 71
[1299] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 226.; *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 62

those general duties while failing to take the necessary measures in the particular circumstances.[1300]

The superior therefore cannot be relieved of his duty to act under international law by reference to domestic laws.[1301]

reasonable and necessary measures

causation

Since Article 7(3) contains no requirement of causality, a superior's failure to take the necessary and reasonable measures to prevent the crimes or underlying offences of his subordinates does not have to have caused those crimes or underlying offences.[1302]

defined

"Necessary" measures are the measures appropriate for the superior to discharge his obligation (showing that he genuinely tried to prevent or punish) and "reasonable" measures are those reasonably falling within the material powers of the superior. What constitutes "necessary and reasonable" measures to fulfil a commander's duty is not a matter of substantive law but of evidence.[1303]

disciplinary measures

Measures taken that were limited to disciplinary, rather than criminal, punishment may be sufficient to discharge a superior's duty to take reasonable and necessary measures, depending on the circumstances of the case.[1304]

The use of disciplinary measures may in certain circumstances be sufficient for a superior to discharge his duty to punish crimes under Article 7(3).[1305]

Given the grave nature of the crimes in which the accused's subordinates were suspected of participating, imposing disciplinary sanctions for serious breaches of military discipline would have been insufficient to constitute an appropriate or adequate means to punish. Therefore, his failure to institute such measures will not be considered for the purpose of determining his responsibility under Article 7(3).[1306]

[1300] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 330
[1301] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 155
[1302] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 122
[1303] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 63; *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 177; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1932; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3180
[1304] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 33
[1305] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1942
[1306] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1942

impossible

The measures required of the commander are limited to those which are "within his power", meaning those measures which are "within his material possibility". A commander is not obliged to perform the impossible; he does, however, have a duty to exercise the measures that are possible within the circumstances, including those measures that may be beyond his legal competence.[1307]

Regarding what constitutes reasonable measures, the obligation to take measures is restricted to those that are feasible, so that no responsibility attaches to a superior for whom the fulfilment of the duty to punish was not possible in the prevailing circumstances.[1308]

The determination of what is materially possible in terms of fulfilling the duty to punish is primarily linked to the question of a superior's effective control.[1309]

Feasibility relates to what is realistic and practical in the circumstances. When used in the context of command responsibility, the assessment must remain anchored in the material powers of the superior.[1310]

reporting

The obligation to prevent or punish may, under some circumstances, be satisfied by reporting the matter to the competent authorities.[1311]

If the accused's material ability to intervene merely allows that he report imminent or ongoing crimes or underlying offences of which he knows or has reason to know to the competent authorities, then such reporting may be sufficient to satisfy his duty to prevent. If an accused superior's actual and legal powers allow him to dispense punishment upon his subordinates himself, he may incur Article 7(3) liability. If such powers do not allow him to dispense punishment, however, he may be able to avoid Article 7(3) liability by simply undertaking an investigation, or by forwarding the information in his possession to his own superior or to the prosecutorial authorities.[1312]

A superior's duty to punish the perpetrators of a crime includes at least an

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[1307] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 793; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 373; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 72; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 526-27

[1308] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1928

[1309] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1928

[1310] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1929

[1311] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 793; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 373; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 72; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 526-27

[1312] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 123

obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities. In respect of merely reporting crimes, this would only suffice to fulfil the duty to punish if such a report is likely to trigger an investigation or initiate disciplinary or criminal proceedings.[1313]

To constitute a necessary and reasonable measure to punish, the commander's report must be sufficient to trigger the action of the competent authorities.[1314]

subsequent punishment

Failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be cured simply by subsequently punishing the subordinate for the commission of the offence.[1315]

sufficiency of measures

A superior's duty cannot be discharged by the issuance of "routine" orders, and any measures taken by him should be specific and closely linked to the acts that they are intended to prevent. [1316]

The question whether all necessary and reasonable measures to prevent the commission of crimes or to punish the perpetrators have been taken should be considered considering the accused's material powers at that time. Factors relevant to the Chamber's assessment include, but are not limited to, whether specific orders prohibiting or stopping the criminal activities were issued; what measures to secure the implementation of these orders were taken; what other measures were taken to secure that the unlawful acts were interrupted and whether these measures were reasonably sufficient in the specific circumstances; and, after the commission of the crime, what steps were taken to secure an adequate investigation and to bring the perpetrators to justice.[1317]

"Necessary and reasonable" measures may include carrying out an investigation, transmitting information in a superior's possession to the proper administrative or prosecutorial authorities, issuing special orders aimed at bringing unlawful practices of subordinates into compliance with the rules of war and securing the implementation of these orders, protesting against or criticising criminal action, taking disciplinary measures against the commission of atrocities, reporting the matter to the competent authorities,

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[1313] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1932
[1314] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1932
[1315] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 793; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 373; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 72; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 526-27
[1316] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 122
[1317] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 378; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 74; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 528; *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 76

and/or insisting before a superior authority that immediate action be taken. In certain circumstances, the duty may be discharged by reporting to the proper authorities, where such reporting is likely to trigger an investigation. The superior does not need to be the one administering the punishment or discipline[1318]

Reasonable and necessary measures under Article 7(3) may include carrying out an effective investigation to establish the facts, issuing specific orders prohibiting or stopping the criminal activities and securing implementation of those orders, protesting, or criticising criminal action and taking disciplinary measures against the commission of crimes.[1319]

Based on the alarming information the accused received, merely asking a subordinate if he had any information is insufficient to discharge the accused's duty to investigate under Article 7(3).[1320]

It is not sufficient for a superior to simply try to ascertain the facts – not only must the investigation be adequate, but it must be accompanied by an action either to sanction the subordinates directly or, if the superior lacks that power, to report the suspicion of crimes to a competent authority. The accused's attempts to investigate the crimes were of questionable adequacy and were not followed by any action to report the suspected crimes of his subordinates to the competent authority either directly or through his superiors.[1321]

The accused is responsible as a superior for the crimes of his subordinates given that he failed to take reasonable and necessary measures to punish their crimes.[1322]

existence of other investigations

The conduct of a "sham" investigation by another officer did not relieve the accused of his duty to punish the criminal conduct.[1323]

A superior's responsibility should not turn on the competent authority's possible failure to initiate criminal proceedings. If the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was sham, this entails that such a report would not be sufficient to fulfil the obligation to punish offending subordinates. It does not mean that the action of reporting becomes impossible in the circumstances.[1324]

[1318] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 117; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1045
[1319] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 588
[1320] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1914
[1321] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1944
[1322] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1945
[1323] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 236
[1324] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1929

Even if, in fact, the investigation undertaken was not satisfactory, if the failure of the investigating authorities was not attributable to the superior, and he or she did not know of their failure, or could not anticipate it at the time, the superior cannot be held responsible under Article 7(3). No further reporting or action is required in such a case.[1325]

Where reports were made to the appropriate authorities by subordinates of the accused, the failure of authorities to conduct a serious investigation could not be attributed to the accused. He had discharged his duty to punish by having the matter reported to the competent authorities. Therefore, he could not be held criminally responsible pursuant to Article 7(3) for failure to punish.[1326]

when reporting futile

When faced with manifestly unlawful orders that were issued by his superiors – orders that were invalid domestically and which were in violation of the laws of war – he was legally obligated to ensure that international humanitarian law was applied. In this regard, it was wrong for the accused to do nothing.[1327]

While reporting on crimes committed by one's subordinates to a military organ directly involved in the ordering, planning, and execution of the crimes may not be necessary, this reasoning cannot be extended to other military authorities which were not so involved.[1328]

Commanders face a complex situation during armed conflict when their subordinates have committed crimes upon the orders of the top echelons of the military and political structures. However, international law requires commanders to take some action to punish their subordinates for committing crimes, even in these circumstances.[1329]

The option of the accused reporting directly to the Military Prosecutor about the crimes committed by his subordinates was a reasonable and necessary measure to punish in the circumstances, even though the Main Staff monitored the work of the Military Prosecutor, who worked under the Minister of Defence.[1330]

The accused had the option to report the matter to his direct superior General Krstic. His oblique reference to prisoners in two reports and brief conversation with Krstic cannot be sufficient to fulfil his obligation to take necessary and reasonable measures to punish.[1331]

[1325] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1046
[1326] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para.536; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 261
[1327] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1898
[1328] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1930
[1329] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1931
[1330] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1936
[1331] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 1937-38

While the relevant war-time legislation made the Military Prosecutor the competent authority to which the relevant crimes should be reported, the MUP investigative, prosecutorial, and judicial systems remained fully functioning. In these circumstances, it was necessary and reasonable for Pandurevic to report the crimes committed by his subordinates to the MUP so that they could investigate or pass it on to the competent authority.[1332]

While, as a superior officer, the accused was obliged under the law to take steps to preserve the crime scene and collect information useful for any criminal proceedings, such a measure may have been practically impossible in the circumstances given the direct involvement of the Main Staff in the ordering, planning, execution, and attempted cover-up of the crimes.[1333]

Given that the accused knew about Nikolic's involvement in the crimes committed by his subordinates, it was reasonable for the accused to consider that reporting the crimes to the CPS, who worked under Nikolic's direction, was not a realistic option.[1334]

prevention

A superior's obligation to prevent a crime is not discharged by his subsequent punishment of the perpetrator.[1335]

A superior is obligated to prevent the planning and preparation of a crime, not only its commission.[1336]

A superior is liable if he failed to prevent a crime, even if he subsequently punished the perpetrators.[1337]

The accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. As of around 0700 hours on 6 December 1991 the accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further,

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[1332] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1940
[1333] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1934
[1334] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1935
[1335] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 326; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 116; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 589
[1336] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 328
[1337] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 126; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 256

the accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. At no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. Therefore, the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.[1338]

A commander's failure to take general preventive measures does not entail the same consequences for his criminal responsibility as the failure to act in a specific circumstance where a crime of which he has knowledge is about to be committed.[1339]

The fact that crimes may be substantially beyond prevention does not relieve a commander of his duty to prevent those which may still be prevented.[1340]

Issuing orders to his subordinates to refrain from participating in the murder operation would have been reasonable under the circumstances.[1341]

A commander cannot be held liable for failing to take general measures to provide structure for his subordinates. Although he runs the increased risk that his subordinates will commit criminal acts, this will not necessarily entail his criminal responsibility.[1342]

It is much less foreseeable for violations of international humanitarian law to occur when a commander has taken a series of general preventive measures to instil order and discipline in his troops than when a commander has not taken care to put in place a system which instils respect for the law and discipline. The taking of general measures is also decisive in the evaluation of mitigating circumstances.[1343]

The duty to prevent recurrence of similar acts is limited to the acts of subordinates who form an identifiable group, some members of which have already committed similar acts. Responsibility can only be established when the recurrence is foreseeable.[1344]

The existence of a link between the failure to prevent a crime and the commission of that crime will be presumed unless proven to the contrary by the accused. The prosecution need not prove that the necessary measures would have in fact prevented the crimes.[1345]

What the duty to prevent entails in a particular case will depend on the superior's material ability to intervene in a specific situation. In establishing individual

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[1338] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 446
[1339] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 147
[1340] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1898
[1341] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1898
[1342] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 144
[1343] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 151
[1344] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 164
[1345] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1465

responsibility of superiors military tribunals set up in the aftermath of World War II have considered factors such as the superior's failure to secure reports that military actions have been carried out in accordance with international law, the failure to issue orders aiming at bringing the relevant practices into accord with the rules of war, the failure to take disciplinary measures to prevent the commission of atrocities by the troops under their command, the failure to protest against or to criticise criminal action, and the failure to insist before a superior authority that immediate action be taken. The Tokyo Trial held that a superior's duty may not be discharged by the issuance of routine orders and that more active steps may be required.[1346]

The artificial distinction between "general" and "specific" obligations creates a confusing and unhelpful dichotomy.[1347]

Where a superior fails to take the necessary steps to prevent crimes committed by subordinates under his effective control, a nexus between the omission and those crimes is presumed and the accused must disprove the nexus between the steps taken by the superior and the commission of the crimes.[1348]

Where the accused allowed troops to engage in combat operations even though they had not been trained in international humanitarian law, he could be held liable for failing to prevent their subsequent crimes even if he did not have the time to have prevented a specific incident.[1349]

By issuing orders prohibiting plunder and appointing investigators to investigate specific allegations of plunder, the accused took adequate measures to prevent the crime of plunder.[1350]

The commander has the duty to stop an ongoing offence as well as to prevent an offence which has not yet been committed.[1351]

punishment

The duty to punish includes at least an obligation to investigate possible crimes or have the matter investigated, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities.[1352]

Where a commander had referred murder allegations to the appropriate military judicial authority, he had taken the reasonable and necessary measures to punish required under Article 7(3).[1353]

[1346] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 63, fn. 163
[1347] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 64; *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 177
[1348] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 193
[1349] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1483
[1350] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1885
[1351] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 259
[1352] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 97

The Trial Chamber correctly held that the relevant question for liability for failure to punish is whether the superior took the necessary and reasonable measures to punish under the circumstances and that the duty to punish may be discharged, under some circumstances, by filing a report to the competent authorities.[1354]

A superior need not dispense punishment personally and may discharge his duty to punish by reporting the matter to the competent authorities.[1355]

In the case of a superior who does not have the power to personally punish subordinates, what is required is that there be a report to the competent authorities which is likely to give rise to an investigation or the initiation of appropriate proceedings.[1356]

A superior must bring to justice those who planned or prepared crimes as well as those who committed them.[1357]

The taking of disciplinary measures against perpetrators of a murder, resulting in their detention for up to 60 days, was inadequate measures to punish the crime. The superior had the duty to ensure that the perpetrators were criminally prosecuted. He therefore incurred liability himself for failure to punish this crime.[1358]

By failing to take appropriate measures to punish a crime, a commander creates a situation which encourages subordinates to commit further crimes, and thus entails the commander's responsibility for those crimes.[1359]

If a commander has the material ability to use force to enforce international humanitarian law, he may be compelled to do so if the circumstances leave him no other choice.[1360] Whether a commander with limited numbers of troops and materials could enforce international criminal law by punishing his own troops must be decided on a case-by-case basis.[1361]

In 1993 in Bosnia, there was no rule of customary international law whereby States are obliged to prosecute war crimes solely based on international humanitarian law. As a result, a commander cannot be impugned for relying on domestic law to determine his obligations towards his subordinates.[1362]

[1353] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1061
[1354] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Judgement* (19 May 2010) at para 230.
[1355] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 154; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2053
[1356] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at para. 519
[1357] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 334
[1358] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1777
[1359] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1778
[1360] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 86
[1361] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 88
[1362] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 255

Trial Chamber's finding of accused's failure to take additional measures to follow up on reports of crimes could not be sustained considering steps that he did take and failure of Trial Chamber to refer to testimony of defence expert who concluded that these measures were adequate. There exists reasonable doubt about whether any failure to act was so extensive as to constitute a substantial contribution to crimes or a failure to take necessary and reasonable measures to prevent and punish crimes committed by subordinates.[1363]

subsequent commanders

Superior responsibility does not extend to acts committed by the subordinates prior to the assumption of command by the commander.[1364] Therefore, a subsequent commander cannot be held liable even for acts committed just before he assumed control.[1365]

Where a crime is committed under one commander, but reports of the crime only reach the command when a second commander has assumed the command, the first commander has no duty to punish, since he no longer could exercise effective control.[1366]

An accused may not be held liable for failure to punish crimes committed by a subordinate before the accused assumed command over the subordinate. Thus, the fact that, after the shelling of Zagreb, the accused may eventually have acquired the power to punish the Zagreb Perpetrators does not expose him to liability for failure to punish the Zagreb Crimes.[1367]

A commander cannot be held liable for crimes of persons not under his command at the time the crimes were committed. Where the prosecution failed to prove that the accused had effective control over those committing the crimes, the accused was acquitted.[1368]

acts of subordinates

identity of subordinates

Notwithstanding the degree of specificity with which the culpable subordinates must be identified, in any event, their existence as such must be established. If not, individual criminal liability under Article 7(3) of the Statute cannot arise.[1369]

[1363] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 134
[1364] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility* (16 July 2003) at para. 51; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 335
[1365] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 199
[1366] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 197
[1367] *Prosecutor v Perisic*, No. IT-03-81-A, *Judgement* (28 February 2013) at para. 110
[1368] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 752
[1369] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 35

Failure of Trial Chamber to identify underlying crime committed by subordinate resulted in reversal of conviction.[1370]

It is not necessary that the particular perpetrator be identified so long as it is proven that he was a member of a unit or group under the control of the superior.[1371]

A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes to incur liability under section 7(3).[1372]

intermediate subordinates

Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate. The separate question of whether – due to proximity or remoteness of control – the superior indeed possessed effective control is a matter of evidence, not of substantive law. Likewise, whether the subordinate is found to have participated in the crimes through intermediaries is immaterial if his criminal responsibility is established beyond reasonable doubt.[1373]

modes of liability

Superior responsibility encompasses criminal conduct by subordinates under all modes of participation under Article 7(1) of the Statute. It follows that a superior can be held criminally responsible for his subordinates' planning, instigating, ordering, committing or otherwise aiding and abetting a crime.[1374]

multiple superiors

More than one superior may be held liable for failure to prevent or punish the same crime of the subordinate.[1375]

The commanding officer's responsibility applies to every commanding officer in the chain, regardless of their place in the hierarchy, and comprises responsibility for acts committed by troops placed temporarily under his command, if he wielded effective

[1370] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 48
[1371] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 311; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 90
[1372] *Prosecutor v Blagojevic &* Jokic, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 287
[1373] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 20
[1374] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 21; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 280; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution's Motion to Amend the Indictment* (26 May 2006) at para. 46; *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para.56
[1375] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 62; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 239; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 239

control over these troops at the time the crimes were committed.[1376]

Mere participation in joint combat operations is not sufficient to find that commanders of different units exercise effective control over all participants in a battle.[1377]

nature of responsibility

Superior responsibility is responsibility for an omission to prevent or punish crimes committed by one's subordinates, rather than vicarious responsibility for the acts of subordinates.[1378]

omission by subordinate

A superior may be responsible for a crime committed by omission by a subordinate.[1379]

temporary command

The superior-subordinate relationship need not be permanent in nature.[1380]

The mere ad hoc or temporary nature of a military unit or armed group does not per se exclude a relationship of subordination between a member of the unit and its commander or leader.[1381]

effective control

To be found criminally liable pursuant to Article 7(3), a superior must be shown to have exercised effective control over those of his or her subordinates who have committed crimes.[1382]

Effective control has been defined to mean the material ability to prevent offences or punish the offender.[1383]

The concept of material ability necessarily considers all factors which might

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[1376] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 240; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Judgement* (26 February 2009) at para. 118
[1377] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 84
[1378] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 75
[1379] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 302; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution's Motion to Amend the Indictment* (26 May 2006) at para. 46
[1380] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1039; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Judgement* (27 March 2013) at para. 114
[1381] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 310
[1382] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1857
[1383] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1857

impede a superior's ability to prevent and punish. In circumstances where a superior would not be able to perform the functions necessary to prevent or punish, the superior could not be said to possess the material ability required to exercise effective control.[1384]

Effective control has been accepted as a standard for the purposes of determining superior responsibility under Article 7(3).[1385]

The test of effective control relates to the relationship between the individuals and is not limited to a consideration of whether actual control is being exercised at any given moment. Otherwise, the responsibility would be significantly narrowed – restricted to those who were in control and not reaching those who could have taken that control to prevent these crimes or punish them. Thus, in assessing effective control for these purposes, the issue is not whether the superior was in command or exercising control at any given moment but rather whether he or she had the material ability to prevent or punish the perpetrators of the crimes.[1386]

To the extent that more than one person is found to have effective control over the subordinates who have committed a crime, they may all incur criminal responsibility. Thus, the exercise of effective control by one commander does not necessarily exclude effective control being exercised by a different commander.[1387]

Proving that the perpetrator was the "subordinate" of the accused does not require direct or formal subordination. Rather, the accused must be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, a minimum requirement for the recognition of a superior-subordinate relationship for the purpose of superior responsibility, will almost invariably not be satisfied unless such a relationship of subordination exists.[1388]

A superior cannot rely on a principle of singleness of command, designed to ensure army efficiency, to escape responsibilities which relate to the suppression of the gravest of crimes. In essence, for it to be effective, that responsibility cannot be reserved exclusively for those who were exercising control or were "in command" and thereby could prevent or punish but must also extend to those who had the material ability to do so.[1389]

A material ability to prevent and punish may also exist outside a superior-subordinate relationship relevant for Article 7(3) of the Statute. For example, a police officer may be able to "prevent and punish" crimes under his jurisdiction, but this would

[1384] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1857
[1385] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 196.
[1386] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2023
[1387] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1892
[1388] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 59
[1389] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2026

not as such make him a superior (in the sense of Article 7(3) of the Statute) vis-à-vis any perpetrator within that jurisdiction.[1390]

A commander vested with *de jure* authority who does not, in reality, have effective control over his or her subordinates would not incur criminal responsibility pursuant to the doctrine of command responsibility, while a *de facto* commander who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility.[1391]

Effective control can be exercised by persons with either *de jure* or *de facto* authority. A person having *de jure* authority is presumed to have effective control unless the contrary is proved.[1392]

The power to give orders and have them executed can serve as an indicum of effective control.[1393]

The exercise of effective control by one commander does not necessarily exclude effective control being exercised by a different commander.[1394]

In situations involving formal hierarchies and command structures, a superior's capacity to issue orders can amount to a factor indicative of his effective control over subordinates in the sense of material ability to prevent or punish criminal conduct.[1395] However, such capacity does not automatically establish the material ability to prevent and punish crimes.[1396]

The fact that a particular unit took part in combat operations undertaken by regular forces does not in and of itself establish that the commander of the regular forces had effective control over that unit.[1397]

De jure authority does not relieve the prosecution of its burden of proving effective control beyond a reasonable doubt. It simply creates a *prima facie* reasonable basis for assuming that the accused had control over his subordinates.[1398]

A finding of de jure authority will not necessarily lead to a finding that the accused had control over his subordinates.[1399]

[1390] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 59
[1391] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 791; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 309
[1392] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 197; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 79
[1393] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 199
[1394] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1859
[1395] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 195
[1396] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 253
[1397] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 209
[1398] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 21

If a superior-subordinate relationship existed, it cannot be relevant to ask whether the subordinate's behaviour was erratic. However, if it is not clear whether that relationship existed, it can be relevant to consider the erratic behaviour of the subordinate in determining whether the superior had the "material ability to prevent or punish" necessary for effective control.[1400]

The fact that a unit fought alongside a unit of the regular Army is insufficient to establish *de facto* control over that unit.[1401]

The fact that some members of the unit were punished for other crimes demonstrated that they were under effective control of the authorities.[1402]

Neither the formal position or title of the accused, nor the fact that other people regard him or her as having that position or title, will be sufficient to establish "control" in terms of Article 7(3) in the absence of *actual* authority.[1403]

The prosecution bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates.[1404] The possession of *de jure* authority, without more, provides only some evidence of such effective control. Before the International Tribunal there is no such presumption to the detriment of an accused.[1405]

There is no definitive list of indicators of effective control. Indicators considered will necessarily depend on the case and are a matter of evidence showing that the accused had the power to prevent or punish the alleged perpetrators where appropriate.[1406]

Merely being tasked with coordination does not necessarily mean to have command and control.[1407]

If a superior has functioned as a member of a collegiate body, his actual control must be assessed on a case-by-case basis, considering the cumulative effect of the accused's functions.[1408]

[1399] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para.21, fn. 55; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 1 para. 241
[1400] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 159
[1401] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 345
[1402] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 470
[1403] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 306.
[1404] *Hadzihasanovic and Kubura* Appeal Judgement, para. 21.
[1405] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 92
[1406] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1860
[1407] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 311
[1408] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 313

A commander in unoccupied territory is only responsible for soldiers under his command, while a commander in occupied territory may be responsible for crimes committed in his territorial area of responsibility.[1409]

There is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate be immediately answerable to that superior or more remotely under his command.[1410]

A superior must be aware that he has effective control over those committing or who had committed crimes.[1411]

If a commander uses soldiers, while knowing or having reason to know that there is a serious risk that they will not obey his orders to comply with international humanitarian law, he may not claim that he lacked effective control over those soldiers. A commander may not exonerate himself if he accepted the possibility before the crimes were committed that subsequently he might not be able to control his troops.[1412]

The identifiable group for purposes of recurrent acts must be defined as the same brigades or battalions operating in the same geographical zone, or the same detention facilities being operated by the same supervisory power.[1413]

Where a superior fails to take the necessary steps to prevent crimes committed by subordinates under his effective control, a nexus between the omission and those crimes is presumed and the accused must disprove the nexus between the steps taken by the superior and the commission of the crimes.[1414]

Beneficial acts done by the accused to victims or potential victims of serious violations of international humanitarian law may be regarded as further evidence of the powers the accused exercised and thus of his authority, not mitigating factors.[1415]

effective control factors

Factors to be considered in determining the authority of the accused and effective control include (1) the official position held by the accused; (2) his capacity to issue

[1409] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 81
[1410] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 363; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 63; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 311
[1411] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 316
[1412] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 89
[1413] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 168-69
[1414] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 193
[1415] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 213.

orders; (3) the procedure for appointment; (4) the position of the accused within the military or political structure; and (5) the actual tasks that he performed.[1416]

Criteria indicative of control include (1) the formality of the procedure used for the appointment of the superior; (2) the power of the superior to issue orders: (3) the power to take disciplinary action; (4) the fact that the subordinates show greater discipline than when he is absent; (5) the capacity to transmit reports resulting in discipline; (6) the capacity to sign orders; (7) the high public profile of the accused; and (8) participation in international negotiations.[1417]

Factors used to determine the existence of effective control include (1) the official position of the accused; (2) the power to give orders and have them executed; (3) the conduct of combat operations involving the forces in question; (4) the authority to apply disciplinary measures; (5) the authority to promote or remove soldiers; and (6) participation in negotiations regarding the troops in question.[1418]

Factors relevant to a determination of de facto authority have included evidence that: (1) the accused acknowledged his possession of authority; (2) the accused used his 'limited' authority to prevent crimes and to order that detainees not be mistreated; (3) perpetrators of violations of international humanitarian law tried to conceal offences from the accused; (4) when the accused was at the camp, there was 'far greater' discipline than when he was absent (5) a co-accused told the detainees that the accused was commander; (6) the accused arranged for the transfer of detainees; (7) the accused classified detainees for the purpose of continued detention or release; (8) the accused controlled guards; and (9) the accused had the authority to release prisoners.[1419]

Factors considered insufficient to establish "effective control" have included that: (1) other guards at the camp feared the accused, and he occasionally criticized them severely;[1420] (2) the accused may have ordered the beating of detainees on certain occasions (although this was not established beyond reasonable doubt);[1421] and (3) the accused assisted with the organization and arrangement of daily activities in the camp.[1422] Whilst such factors were indicative of a degree of influence held by the accused on some occasions in the commission of criminal acts, they were not sufficient to attribute superior responsibility to him.[1423]

Factors considered to determine whether unit was under effective control of regular Army included (1) compliance with Army orders; (2) participation in combat with regular Army; (3) compliance with Army procedures; (4) access of the Army to premises and prisoners; (5) recruitment from civilians and soldiers; (6) mutual assistance; (7)

[1416] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 58
[1417] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 312
[1418] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 83
[1419] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 206.
[1420] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 308.
[1421] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 309.
[1422] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 310.
[1423] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 312.

reporting procedure; (8) cooperation with the Army; (9) ability to investigate and punish unit members; (10) appointment of members of the unit; and (11) disbanding the unit.[1424]

Factors indicative of an individual's position of authority and effective control may include: (1) the procedure used for appointment of an accused, (2) his official position, (3) his ability to issue orders and whether these are in fact followed, (4) the power to order combat action and re-subordinate units, (5) the availability of material and human resources, (6) the authority to apply disciplinary measures,(7) the authority to promote, demote or remove particular soldiers, and (8) the capacity to intimidate subordinates into compliance[1425]

effective control v influence

Effective control means more than having general influence over the behaviour of others.[1426]

Substantial influence over subordinates is not sufficient for superior responsibility. What is required is the material ability to prevent offenses and punish offenders.[1427]

The critical factor that must be established to find a superior-subordinate relationship is that the superior had "effective control" over the person or persons in question, namely those persons committing the offences. Effective control means the "material ability to prevent or punish the commission of the offences". "Substantial influence" over subordinates that does not meet the threshold of "effective control" is not a sufficient basis for imputing criminal liability under customary law.[1428]

The doctrine of command responsibility is not intended to impose criminal liability on one of two persons of completely equal rank and status who, due to force of personality or sheer strength, may have a practical ability to prevent the criminal conduct of the other.[1429]

effective control found

Although he was away from Srebrenica during the period when the crimes were committed, and often out of communication, and his Deputy was issuing orders in his

[1424] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 368
[1425] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 148
[1426] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 311
[1427] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 80
[1428] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 266, 300; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 791; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 59; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 273
[1429] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 303.

absence, the accused retained effective control over his brigade within the meaning of Article 7(3).[1430]

Accused retained effective control over security officer of his brigade, even where that superior officer was acting on orders of the security apparatus under the command of the Main Staff.[1431]

Minister of Interior was not simply figurehead to inform Parliament but had de jure and de facto control over police.[1432]

Where the 7th brigade was *de jure* subordinated to the 3rd Corps headed by the accused, it was presumed that the accused had effective control over members of the 7th brigade who committed murders. This presumption was supported by the fact that the 7th brigade had carried out orders for combat readiness promulgated by the accused.[1433]

Chief of General Staff of the Yugoslavian Army had effective control over the Army of Serbian Krajina, but not the Bosnian Serb Army.[1434]

effective control not found

Appellant lacked effective control over the military units responsible for the commission of crimes, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility have not been satisfied.[1435]

Foreign mujahadeen fighters were not under effective control of Bosnian Muslim Army and therefore commanders of that army were not responsible for their crimes.[1436]

President of Bosnian Serb parliament had power and influence but did not have effective control over political and military authorities. Effective control requires a material ability to prevent, punish, or take measures resulting in disciplinary or criminal proceedings against the principal perpetrators of the crimes.[1437]

A commander may have *de jure* command over a perpetrator, but not *de facto* effective control. Commander of Bratunac Brigade did not have effective control over his subordinate, who was acting under direction of Main Staff security organs.[1438]

[1430] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2034
[1431] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2033
[1432] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Judgement* (10 July 2008) at paras. 513-15
[1433] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1033-36
[1434] *Prosecutor v Perisic*, No. IT-03-81-T, *Judgement* (6 September 2011) at paras. 1769, 1777
[1435] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 421
[1436] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 1101; *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 345, 350
[1437] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 1121
[1438] *Prosecutor v Blagojevic &* Jokic, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 303

The use of non-coercive terms such as "please" suggests that the accused did not exercise effective control over VJ soldiers seconded through the 40th PC.[1439]

A reasonable alternative interpretation of the record is that the accused could influence, but did not possess effective control over, the Zagreb Perpetrators at the time of the shelling of Zagreb.[1440]

Article 8—territorial and temporal Jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

The temporal jurisdiction of the Tribunal covers the period from 1 January 1991 and a date to be determined by the Security Council upon restoration of peace. At present, no such end date has been determined. Therefore, the Tribunal's temporal jurisdiction is open-ended and includes events in Macedonia in 2001.[1441]

The temporal jurisdiction of the Tribunal did not end with the signing of the Dayton peace accords in 1995.[1442]

Article 9—concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

The primacy of the International Tribunal does not unlawfully infringe upon State sovereignty[1443], nor offend the principle of *jus de non evocando*.[1444]

[1439] *Prosecutor v Perisic*, No. IT-03-81-A, *Judgement* (28 February 2013) at para. 103
[1440] *Prosecutor v Perisic*, No. IT-03-81-A, *Judgement* (28 February 2013) at para. 117
[1441] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR72.1, *Decision on Interlocutory Appeal on Jurisdiction* (22 July 2005) at para. 10
[1442] *Prosecutor v Djordjevic*, No. IT-05-87/1-PT, *Decision on Vlastimir Djordjevic's Preliminary Motion on Jurisdiction* (6 December 2007) at para. 10
[1443] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 60
[1444] *Prosecutor v Tadic*, No. IT-94-1-AR 72, *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995) at para. 64

Although transfer of cases to national jurisdictions are not specifically provided for in the Statute, Article 9 contemplates that not all violations committed in the former Yugoslavia would be prosecuted by the Tribunal. Considering subsequent Security Council resolutions, transfer to national jurisdictions is deemed within the power and competence of the Tribunal.[1445]

Article 10—non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
- **(a) the act for which he or she was tried was characterized as an ordinary crime; or**
- **(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.**

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall consider the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Where charges brought in Bosnia were different from those for which accused was acquitted in ICTY, there was no basis to issue process to enjoin the national prosecution.[1446]

Article 11—organisation of the International Tribunal

The International Tribunal shall consist of the following organs:
(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12—composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

[1445] *Prosecutor v Stankovic*, No. IT-96-23/2.AR11*bis, Decision on Rule 11 bis Referral* (1 September 2005) at para. 15-16
[1446] *Prosecutor v Oric*, No. IT-03-68-A, *Decision on Oric's Motion Regarding a Breach of Non-Bis-in-Idem* (7 April 2009)

2. A maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.
6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13—qualification of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Age is not a "qualification" within the meaning of Article 13 and a Judge who is not eligible for appointment to the highest court in his country because he is past the mandatory retirement age nevertheless may possess the qualifications for appointment as an ad litem judge.[1447]

Article 13 *bis*—election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
(a) The Secretary-General shall invite nominations for judges of the International

[1447] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motion to Recuse Judge Melville Baird* (30 September 2009) at para. 15; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion to Recuse Judge Baird* (20 October 2009) at para. 21

Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 *bis* of the Statute of that Tribunal;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

UN Security Council was competent to extend the terms of judges and to continue judge's service on particular case until its completion.[1448]

Article 13 *ter*—election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General

[1448] *Prosecutor v Krajisnik*, No. IT-00-39-AR73.2, *Decision on Krajisnik's Appeal Against the Trial Chamber's Decision Dismissing the Defence Motion for a Ruling that Judge Canivell is Unable to Continue Sitting in this Case* (15 September 2006); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disqualification of Judges Kwon, Morrison, Baird and Lattanzi* (31 July 2014) at paras. 10-11

Assembly from a list submitted by the Security Council, in the following manner:
(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, considering the importance of a fair representation of female and male candidates.
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
(e) The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.
2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*—status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
(a) Be eligible for election as, or to vote in the election of, the President of the

Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
(b) Have power:
(i) To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
(ii) To review an indictment pursuant to article 19 of the Statute;
(iii) To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.
3. Notwithstanding, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:
(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(c) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.
4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

Article 14—officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, the President may assign to the Appeals Chamber up to four additional permanent judges serving in the Trial Chambers, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.
4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, up to four additional permanent judges serving in the Trial Chambers of the International Criminal Tribunal for Rwanda may be assigned to the Appeals Chamber by the President of that Tribunal, on the completion of the cases to which each judge is assigned. The term of office of each

judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.
5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15—rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16—the Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. 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.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

The Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. However, there are several limitations on this discretion derived from the Statute and the Rules.[1449] Exercise of the prosecutorial discretion to prosecute must be: (1) entirely independent from any government or other source, as required by Rule 16(2) of the Rules;[1450] (2) free from discrimination based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin, as implied by Article 21 of the Statute;[1451] and (3) consistent with the recognized principles of human rights, including equality before the law, as embodied in

[1449] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 602.
[1450] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 603.
[1451] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 605.

instruments such as Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.[1452]

The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute. This requires application of a two-pronged test involving: (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted.[1453]

Article 17—the Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18—investigation and preparation of indictment

1. 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.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

[1452] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 604.
[1453] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 611.

Article 19—review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial

A *prima facie* case is defined as "a credible case which would, if not contradicted by the defence, be a sufficient basis to convict the accused on the charge."[1454]

Article 20—commencement and conduct of trial

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

attentiveness of judges

Proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, *if it causes actual prejudice to a party*, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy.[1455] However, some identifiable prejudice to the complaining party must be proved by clear evidence.[1456] That prejudice may be manifested where the judge fails in some identifiable way to assess the evidence properly or expresses an incorrect understanding of the evidence which was given or the submissions which were put.[1457]

[1454] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution Motion for Leave to Amend the Amended Indictment* (16 December 2005) at p. 3; *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 13
[1455] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 625.
[1456] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 630.
[1457] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 631.

delay

An accused's offer to waive his right to an expeditious trial is not determinative since the international community, whose interests are represented by the prosecution, also has a right to enforce the fair trial guarantee.[1458]

The right to be tried without undue delay includes the period between the arrest of an accused and the commencement of his trial.[1459]

For purposes of evaluating pretrial delay, the period begins at the time of the arrest or surrender, not the time when the prosecution became aware of the crimes.[1460]

Trial Chamber has the right to order prosecution to bring its case to an end at a specific time to preserve the right to an expeditious trial and to comply with the completion strategy to finish all trials by the end of 2008.[1461]

Pretrial delay of 2 ½ years in a complex case was not unreasonable.[1462]

Delays in complex case were necessary and did not warrant dismissal for abuse of process.[1463]

mental capacity

For a case to go forward, the accused must have the mental capacity to (1) plead; (2) understand the nature of the charges; (3) understand the course of the proceedings; (4) understand the details of the evidence; (5) instruct counsel; (6) understand the consequences of the proceedings; and (7) testify.[1464]

[1458] *Prosecutor v Kvocka et al*, No. IT-98-30/1-AR73.5, *Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of Trial Chamber I of 5 December 2000* (25 May 2001) at para. 21; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Adoption of New Measures to Bring the Trial to an End Within a Reasonable Time* (13 November 2006) at para. 14

[1459] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para. 21

[1460] *Prosecutor v Perisic*, No. ICTR-04-81-PT, *Decision on Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay* (23 November 2007) at para. 21

[1461] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Adoption of New Measures to Bring the Trial to an End Within a Reasonable Time* (13 November 2006)

[1462] *Prosecutor v Perisic*, No. ICTR-04-81-PT, *Decision on Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay* (23 November 2007)

[1463] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Oral Request of the Accused for Abuse of Process* (10 February 2010); *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Motion by Accused to Discontinue Proceedings* (29 September 2011)

[1464] *Prosecutor v Kovacevic*, No. IT-01-42/2-I, *Public Version on the Accused's Fitness to Enter a Plea and Stand Trial* (12 April 2006) at para. 29; *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 38

The applicable standard for fitness to stand trial is that of meaningful participation which allows an accused to exercise his fair trial rights to such a degree that he can effectively participate in his trial and has an understanding of the essentials of the proceedings.[1465]

What is required from an accused to be deemed fit to stand trial is a standard of overall capacity allowing for a meaningful participation in the trial, if he or she is duly represented by counsel.[1466]

An accused claiming being unfit to stand trial bears the burden of proof by a preponderance of the evidence.[1467]

The Trial Chamber held that accused who suffered from somatic and mental illnesses was nevertheless fit to stand trial, particularly since he was not representing himself.[1468]

Where the accused, who suffered from a terminal brain tumour, understands the essentials of the proceedings, has the ability to communicate and instruct counsel, and has the requisite broad understanding of the trial and its significance to meaningfully participate in the proceedings, the defence had not discharged its burden of proving that the accused is unfit to stand trial.[1469]

Appeals proceedings suspended pending independent neurological examination of appellant who had suffered a stroke and whose own experts indicated was unable to meaningfully participate in the proceedings.[1470]

Appeals Chamber found that appellant had sufficiently recovered from stroke and now had the ability to understand the substance of the judgement against him, understand the appeals process and its possible consequences, understand the substance of the Prosecution's grounds of appeal against him, and instruct his counsel.[1471]

[1465] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 55; *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 39
[1466] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 60; *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 40
[1467] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 56; *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 42
[1468] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 64
[1469] *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 55
[1470] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Motion by Counsel Assigned to Milan Gvero Relating to his Present Health Condition* (16 May 2011)
[1471] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Request to Terminate Appellate Proceedings in Relation to Milan Gvero* (30 November 2012) at para. 29

Accused who suffered from terminal brain tumour was unable to effectively communicate with and instruct his counsel and was unfit to stand trial. The trial was therefore suspended indefinitely.[1472]

physical capacity

A termination or stay of proceedings should not be automatic procedural mechanisms applied once it is discovered that an accused is terminally or seriously ill. These mechanisms should be employed on a case-by-case basis and take into consideration relevant factors, such as an accused's fitness to stand trial, the stage of proceedings, the availability of accommodations for health concerns which facilitate the continuation of proceedings, and the public interest in a determination of an accused's responsibility along with the gravity of the charges against an accused.[1473]

Where the accused suffered from an inoperable brain tumour and could no longer care for himself, the trial cannot continue in a manner consistent with the full and fair adjudication of the case without detriment to the fundamental principles of respect for the inherent human dignity of an accused and the presumption of innocence.[1474]

Indefinite stay of proceedings, rather than termination of proceedings, was appropriate remedy for terminally ill accused.[1475]

A limited, but renewable, suspension of the proceedings for three months in the first instance was the most prudent course of action for an accused with inoperable brain tumour, as, unlike termination of the proceedings, it leaves open the possibility, however improbable, that, if the accused's health does improve, the Chamber will be able to resume proceedings.[1476]

Evidence did not show that accused was unable to assist in his defence at the pre-trial phase of the case and any determination of his fitness to stand trial was premature.[1477]

Fitness to attend the delivery of the judgement is fundamentally different than fitness to attend the trial, as participation by the accused, such as by instructing counsel,

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[1472] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Remand on the Continuation of Proceedings* (5 April 2016) at para. 29
[1473] *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 56
[1474] *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 65
[1475] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion on Formal Termination of Proceedings* (17 June 2016) at paras. 11-12
[1476] *Prosecutor v Hadzic*, No. IT-04-75-T, *Consolidated Decision on the Continuation of Proceedings* (26 October 2015) at para. 66
[1477] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Stanisic Defence's Motion on the Fitness of the Accused to Stand Trial* (27 April 2006)

is not required during delivery of the judgement. Accused can follow the judgement by video-link if necessary.[1478]

Defence failed to show that accused's medical condition rendered him unfit such as to warrant the postponement of the delivery of his judgement.[1479]

Trial Chamber was unreasonable in rejecting medical evidence that five day per week schedule was detrimental to the health of the accused.[1480]

Five day per week schedule re-instated for defence case where health of the accused would be more adversely affected by prolonging the proceedings than by a more intense trial schedule.[1481]

witness intimidation

In circumstances of witness intimidation, it is incumbent upon a Trial Chamber to do its utmost to ensure that a fair trial is possible. Countering witness intimidation is a primary and necessary function of a Trial Chamber. For the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*.[1482]

Trial Chamber failed to take adequate measures to obtain the testimony of important witnesses and, in the context of a trial plagued by witness intimidation, abused its discretion, requiring a new trial.[1483]

The Trial Chamber's failure to show the required flexibility regarding subsidiary issues of witness scheduling, trial logistics, and deadlines effectively helped to ensure that witness intimidation succeeded in denying the Prosecution an opportunity to present potentially crucial evidence in support of its case.[1484]

Article 21—Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

[1478] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion to Reconsider Decision on Urgent Defence Motions of 10 November 2017 or…Motion for Certification to Appeal* (21 November 2017) at para. 14
[1479] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Defence Motions* (10 November 2017) at p. 3
[1480] *Prosecutor v Mladic*, No. IT-09-92-AR73.3, *Decision on Mladic's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule due to Health Concerns* (22 October 2013) at para. 13
[1481] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Trial Sitting Schedule* (14 March 2014) at para. 16
[1482] *Prosecutor v Haradinaj*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 35
[1483] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 40
[1484] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para.48

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) 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;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

The primary duty of the Trial Chamber is to safeguard the fairness of the trial, ensuring that the proceedings are conducted with full respect for the rights of the accused.[1485]

Article 21(1)--equality of arms

The principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial. This obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case. It does not necessarily amount to equality of resources.[1486]

Under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld regarding proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case.[1487]

[1485] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 100
[1486] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras 175-76; *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 23
[1487] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 52.

The principal of equality of arms applies to the prosecution as well as the defence.[1488]

The accused cannot rely on a lack of resources during the pre-trial stage to establish that he is disadvantaged in presenting his case at trial.[1489]

The principle of equality of arms falls within the fair trial guarantee of the Statute.[1490]

The defence is not entitled to equality of resources with the prosecution.[1491]

Defence failed to substantiate that it was placed at a disadvantage vis a vis the Office of the Prosecutor where it received the maximum funding under the Appeals Legal Aid Policy.[1492]

While equality of arms does not mean equality of resources, each party must have a reasonable opportunity to defend its interests under conditions which do not put him under a substantial disadvantage vis-à-vis his opponent. However, it was not relevant to compare number of documents translated for prosecution to determine if number of documents to be translated for the defence was reasonable.[1493]

The principle of equality of arms goes to the heart of the fair trial guarantee.[1494] This does not necessarily entitle the accused to the same amount of time as the prosecution to present his case. A principle of basic proportionality, rather than strict mathematical equality, generally governs the relationship between the time allotted to both sides. In this case, that principle was violated by restrictions on the number of witnesses and time allowed to the defence.[1495]

The principle of equality of arms "goes to the heart of the fair trial guarantee." While equality of arms does not mean that the Appellant is necessarily entitled to the same means and resources available to the Prosecution, it does require a judicial body to

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[1488] *Prosecutor v Aleksovski*, No. IT- 95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para. 25; *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007) at para. 14

[1489] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 24

[1490] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007) at para. 14

[1491] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Motion to Appoint Amicus Curiae to Investigate Equality of Arms* (18 June 2007) at para. 9

[1492] *Prosecutor v Prlic*, No. IT-04-74-A, *Decision on Slobodan Praljak's Defence Request for Judicial Review of Decision on Additional Funds* (16 August 2017) at para. 26

[1493] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008) at para. 29

[1494] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 44

[1495] *Prosecutor v Oric*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 9

ensure that neither party is put at a disadvantage when presenting its case, particularly in terms of procedural equity. In assessing an equality of arms challenge by an accused, a judicial body must ask two basic questions: (1) was the Defence put at a disadvantage *vis-à-vis* the Prosecution, considering the "principle of basic proportionality" and (2) was the accused permitted a fair opportunity to present his case.[1496]

It is for the Trial Chamber, and not the President, to determine whether the Registrar's denial of funds to self-represented accused impacts on his rights to equality of arms and a fair trial.[1497]

Prosecution's citation to confidential decisions to which the accused does not have access violates his right to equality of arms. The prosecution should refrain from citing such decisions or obtain a public redacted version prior to making its submissions.[1498]

Article 21(3)—Presumption of Innocence

The accused is presumed innocent until proven guilty. The prosecution must establish each element of the offences beyond a reasonable doubt.[1499] The Trial Chamber resolved every doubt in favor of the accused in accordance with the principle of *in dubio pro reo.*[1500]

Where the challenge on appeal is to an inference drawn to establish a fact on which the conviction relies, the standard is only satisfied if the inference drawn was the only reasonable one that could be drawn from the evidence presented. In such instances, the question for the Appeals Chamber is whether it was reasonable for the Trial Chamber to exclude or ignore other inferences that lead to the conclusion that an element of the crime was not proven. If no reasonable Trial Chamber could have ignored an inference which favours the accused, the Appeals Chamber will vacate the Trial Chamber's factual inference and reverse any conviction that is dependent on it.[1501]

The test when inferring intent from the acts of an accused is that the inference must be "the only reasonable inference available."[1502]

While an inference can be drawn from direct or circumstantial evidence, it must be reasonable and narrowly construed. Inferences based on a series of inferences was rejected.[1503]

[1496] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 149
[1497] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Appeal Against Registry Decision of 19 December 2006* (12 March 2007)
[1498] *Prosecutor v Prlic et al*, No. 04-74-T, *Decision on a Stojic Defence Request Regarding References to Confidential Decisions Rendered by Other Chambers* (23 March 2009)
[1499] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 23
[1500] *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para. 24
[1501] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 219
[1502] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 128
[1503] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 309

An inference to be drawn from circumstantial evidence must be the only reasonable conclusion available.[1504]

Trial Chamber did not err in concluding that there was another reasonable inference to the capture of civilians at Srebrenica besides that they would be executed, and the accused may well have believed they would be exchanged.[1505]

If there is any other reasonable interpretation of the evidence against the accused other than guilt, he must be acquitted.[1506]

Findings at trial based on circumstantial evidence must be the only reasonable conclusions available from that evidence. If there is another conclusion which is also reasonably open from the circumstantial evidence, and which is consistent with the innocence of the accused, he must be acquitted.[1507]

Not every fact in the Trial Judgement must be proved beyond reasonable doubt, but only those on which a conviction or the sentence depends.[1508]

An inference drawn from circumstantial evidence to establish a fact that is material to the conviction or sentence cannot be upheld on appeal if another reasonable conclusion consistent with the non-existence of that fact was also open on that evidence, given that such inference should be the only reasonable one.[1509]

Cumulative effect of taking judicial notice of 1500 adjudicated facts and admitting 144 statements without cross examination did not violate the presumption of innocence nor shift the burden of proof to the accused.[1510]

Article 21(4)(A)—specificity of the indictment

prosecution must know its case

The prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused during the trial depending on how the evidence unfolds.[1511]

[1504] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 24
[1505] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 223
[1506] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 15; *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 7; *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 83
[1507] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 458; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 218
[1508] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 20
[1509] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 20
[1510] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Stay of Proceedings* (8 April 2010)
[1511] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 575; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 71

Even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused and the trial should only proceed where the right of the accused to know the case against him and to prepare his defence has been assured.[1512]

An accused cannot be expected to engage in guesswork to ascertain what the case against him is, nor can he be expected to prepare alternative or entirely new lines of defence because the prosecution has failed to make its case clear.[1513]

Before a Chamber holds that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, it should generally ensure that such a finding is not prejudicial to the accused. An example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged.[1514]

degree of specificity required

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 with which the Prosecution must plead the material facts of its case in the indictment to provide the accused with adequate notice.[1515]

As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him.[1516]

A high degree of specificity is not required for indictments in cases where the crime base is of a large scale and long duration and where the accused is a high-ranking politician who is not alleged to have been a physical perpetrator or proximate to many of the events alleged.[1517]

incorporation by reference

[1512] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 30
[1513] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 71
[1514] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 133
[1515] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 28; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 28
[1516] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 65
[1517] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Relief from Defects in the Indictment* (30 September 2014) at para. 25

Term "including but not limited to" ordered stricken from amended indictment.[1518]

indictment schedules

The events contained in schedules to an indictment amount to material facts that must be proven before the accused can be held responsible for the crimes contained in the indictment.[1519]

A systematic approach, consisting of making factual findings in relation to each incident contained in the Schedules and underlying the crimes contained in the Indictment, would have been the appropriate approach. An accused is entitled to know whether he has been found guilty of a crime in respect of the alleged incidents under the principle of a fair trial.[1520]

identification of perpetrators

Where the prosecution is able to identify perpetrators by name, it is obliged to do so.[1521]

identification of victims

If the personal physical commission of criminal acts is charged, the indictment should set forth the victim's identity, the place and time of the events and the means by which the acts were committed.[1522]

The prosecution is not required to identify every victim when the scale of the crimes renders such a high degree of specificity impractical. However, the identity of those victims who are known should be included in a schedule to the indictment.[1523]

Since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is able to name the victims, it should do so.[1524]

[1518] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Further Amendments and Challenges to the Indictment* (13 July 2006) at para. 49
[1519] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 67
[1520] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 68
[1521] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 40
[1522] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 28
[1523] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 35, 37; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Prosecution Submission on Additional Victims…*(24 March 2011) at paras. 7, 14; *Prosecutor v Mladic*, No. IT-09-92-PT, *Decision on Defence Preliminary Motion Objecting to the form of the Indictment* (13 October 2011) at para. 8
[1524] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 90; *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.3, *Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims* (26 January 2009)

Since it was the prosecution's case that the transfers took place repeatedly and on a large scale, it was sufficient to identify the victims by the category of Bosnian Muslim civilians.[1525]

meetings and speeches

Meeting of civilian and military leaders at which accused's responsibility for crimes at Amici supposedly arose was a material fact which should have been pleaded in the indictment.[1526]

The details of speeches by the accused ordered to be set out in detail in an annex to the indictment.[1527]

dates

Indictment which charged events on 25 March 1999 and "during the following days" did not encompass deportation which occurred on 21 May 1999.[1528]

Reference to crimes beginning on or about 25 March 1999 was sufficient to include acts which occurred about 20-21 March 1999.[1529]

Second deportation from same location a month later was not charged in the indictment and sufficient notice was not provided by other documents so conviction for that deportation could not be sustained.[1530]

The allegations that unlawful transfer took place in the municipality of Mostar in "the days following the 9 May 1993 attack" and "during the first days of July 1993"155 do not sufficiently plead the dates of the 13-14 June and 29 September 1993 incidents of unlawful transfer, and that the more general reference to a nine-month range is insufficiently specific.[1531]

The alleged discrepancy between the material facts pleaded in the Indictment and the Trial Chamber's ultimate conclusions concerning the date of the attack, which involved different, but partly overlapping date ranges, did not constitute a significant variation.[1532]

In view of the approximate time frame of the JCE to Forcibly Remove provided in

[1525] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 58
[1526] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at para. 147
[1527] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Preliminary Motion Filed by the Accused* (27 November 2007) at para 54
[1528] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 615
[1529] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 225
[1530] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at paras. 615-17, 642-43
[1531] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 59
[1532] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 68

the Indictment, the fact that the killing was found to have occurred within a week of that indicated time frame, and that the accused received timely notice if the date of the killing the fact that the killing was outside of the dates alleged in the indictment was of no legal consequence.[1533]

As a general principle, it is not an error of law to rely on evidence originating from outside the period of the Indictment.[1534]

The Trial Chamber did not abuse its discretion by relying on Tolimir's actions prior to the Indictment period to establish his *mens rea* for the crimes committed during that period.[1535]

Even if the 22 February 1997 letter was *ex post facto* in time, and outside the indictment period, constructively it was contemporaneous with the murder operation. The Trial Chamber did not abuse its discretion by relying on the 22 February 1997 letter as additional evidence in support of its finding that Tolimir possessed genocidal intent.[1536]

state of mind

Where the state of mind with which the accused carried out his alleged acts is relevant, the prosecution must plead either (i) the relevant state of mind as a material fact, in which case the facts by which that state of mind is to be established are ordinary matters of evidence and need not be proved; or (ii) the facts from which the relevant state of mind is to be inferred.[1537]

The prosecution's failure to specify the accused's state of mind for each mode of liability, or the facts from which the state of mind could be inferred, rendered the indictment defective.[1538]

The statement that each accused had the requisite state of mind required for each individual crime is insufficient to plead *mens rea* with sufficient particularity.[1539]

defective indictment in general

An indictment that fails to set forth material facts in sufficient detail is defective.[1540]

[1533] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 536
[1534] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 564
[1535] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 565
[1536] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 569
[1537] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Motions Regarding Defects in the Form of the Second Amended Indictment* (12 April 2006) at para. 11
[1538] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 21
[1539] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at para. 66

In accordance with Article 21(4)(a) of the Statute, an accused has the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him"[1541]

Under Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules, the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.[1542]

An indictment is defective if it does not plead the material facts underpinning the charges in sufficient detail so as to provide notice to the accused and enable the accused to prepare his or her defence.[1543]

An indictment may also be defective when the material facts are pleaded without sufficient specificity, such as, unless there are special circumstances, when the times refer to broad date ranges, the places are only generally indicated, and the victims are only generally identified.[1544]

Allegations of acts committed in the period prior to that charged in the indictment constituted material facts that must be pled with specificity when used to prove the accused's criminal responsibility.[1545]

In determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[1546]

A defective indictment which has not been cured causes prejudice to the accused. The defect may only be deemed harmless through a demonstration that the accused's ability to prepare his or her defence was not materially impaired.[1547]

curing defect

The defect may be cured if the prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[1548]

[1540] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 576; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 29
[1541] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 20
[1542] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 20; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 27
[1543] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 262; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 322; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 20
[1544] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 31
[1545] *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006) at para. 15
[1546] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 27
[1547] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 100

Considering the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within the category of a defective indictment being cured by clear, consistent, and timely notice.[1549]

An inconsistency in the indictment cannot be cured by the pre-trial brief but requires amendment of the indictment.[1550]

Defects concerning vagueness in an indictment can be cured in certain circumstances and through post-indictment documents such as the pre-trial briefs, Rule 65ter witness summaries, and witness statements.[1551]

There was a radical "transformation" of the prosecution case against the accused. Based on the indictment, they had to mount a defence against an allegation of wide-ranging criminal conduct against Bosnian Muslim civilians in the Ahmici region during a seven-month period, such as systematic and deliberate killing, comprehensive destruction of houses, and organised detention and expulsion. However, when it came to trial, this was not the case that the Prosecution tried to prove. Instead, it pursued a trial strategy which sought to demonstrate that the accused were guilty of persecution, principally, because of their participation in two individual attacks. Considering this drastic change in the prosecution case, the accused were not informed with sufficient detail of the charges against them, so as to cure the defects in the Amended Indictment.[1552]

Information from one witness contained in witness summary appended to pre-trial brief was insufficient to provide timely, clear, and consistent notice to defence of the new material facts that the prosecution intended to prove at trial and therefore defect in the indictment as to charge of deportation from a certain village was not cured.[1553]

Where information in witness summaries did not refer to the murder of men at specific time and place but referred to "other relatives" or "almost all women and children", defect in indictment to charge murder of two men there was not cured.[1554]

Witness summaries appended to pre-trial brief did not cure defect where they mentioned that the accused beat prisoners but failed to identify the individual victims of provide the approximate dates of the incidents.[1555]

[1548] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 576; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 262; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 29
[1549] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 114
[1550] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-PT, *Decision on Shortened Form of the Fourth Amended Indictment* (14 January 2011) at para. 39
[1551] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 29
[1552] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 121
[1553] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at paras. 600, 617
[1554] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 660
[1555] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 42

Failure to specifically allege extended form of JCE in the indictment was not cured by its inclusion in pre-trial brief where Trial Chamber had indicated its understanding that extended form was not charged, and prosecution did nothing to correct this understanding.[1556]

In some instances, information given in an opening statement of the prosecution may cure a defective indictment.[1557]

The mere service of witness statements does not serve to cure a defect in the indictment.[1558]

Service of potential exhibits does not serve to cure a defect in the indictment.[1559]

Prosecution final trial briefs and closing arguments occur only at the end of a trial, after the presentation of all the evidence, and are therefore not relevant for the preparation of an accused's case for notice purposes.[1560]

An accused's submissions at trial, for example the motion for judgement of acquittal, the final trial brief, or the closing arguments, may in some instances assist in assessing to what extent the accused was put on notice of the Prosecution's case and was able to respond to the Prosecution's allegations.[1561]

No lack of notice of material facts supporting allegation of genocidal intent where indictment contained general categories, pre-trial brief included reference to specific acts used to prove genocidal intent and accused defended himself in detail against the genocide count.[1562]

expansion of charges

An expansion of charges through the introduction of new material facts should not lead to a "radical transformation" of the prosecution's case which may lead to unfairness and prejudice to an accused.[1563]

If the new material facts are such that they could, on their own, support separate charges, a formal amendment pursuant to Rule 50 is required.[1564]

[1556] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 144
[1557] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 169; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 27
[1558] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 24
[1559] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at paras. 27,61
[1560] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 58, fn. 209
[1561] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 24
[1562] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Relief from Defects in the Indictment* (30 September 2014) at para. 27
[1563] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 576
[1564] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 576

When an indictment is very specific in pleading certain crimes—for example, by giving an exhaustive list of locations and indicating a precise time period of incidents occurred within those locations—the addition of new material facts by the prosecution, such as an incident occurred in a location and/or a time period that was not specifically alleged in the indictment, constitutes an expansion of charge which may lead to prejudice to an accused.[1565]

Inclusion in Rule 65 ter witness summaries of information about forcible transfer from other villages not specified in the indictment constituted a radical transformation of the prosecution's case and required reversal of accused's conviction based on those events.[1566]

armed conflict

The indictment must plead the nexus between the acts of the accused and the armed conflict.[1567]

Where the alleged armed conflict is internal in nature, there is no requirement that the indictment specify the parties to the conflict.[1568]

An indictment is not defective for failure to plead the *mens rea* with respect to the armed conflict.[1569]

persecution

The fact that the offence of persecution is a so-called "umbrella" crime does not mean that an indictment need not specifically plead the material aspects of the prosecution case with the same detail as other crimes.[1570]

This does not mean, however, that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statute, is to particularise the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.[1571]

[1565] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 576
[1566] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at paras. 605, 643
[1567] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment* (22 July 2005) at para. 71
[1568] *Prosecutor v Milosevic*, No. IT-98-29/1-PT, *Decision on Defence Preliminary Motion Pursuant to Rule 72(A)(ii)* (18 July 2005) at para.17
[1569] *Prosecutor v. Boskoski and Tarculovski*, No. IT-04-82-PT, *Decision on Assigned Pro Bono Counsel Motion on Jurisdiction* (8 September 2006) at para. 19
[1570] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 98
[1571] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 98

In the context of persecution, the indictment must set out the material facts as they allegedly pertain to the persecutory acts of the accused.[1572]

The allegation that the accused were part of a group of soldiers who, in the early morning of 16 April 1993, participated in the attack on a house, which resulted in the murder of two persons, the house being set on fire, and the surviving members of the family being expelled, constituted material facts in the Prosecution case against them. Thus, the attack on the house and its consequences should have been specifically pleaded in the Amended Indictment.[1573]

The attack on a specific house was pleaded elsewhere in the indictment. However, the prosecution should have incorporated the factual allegations, at least by way of reference, into the persecution count if it wanted to put the accused on notice that he was charged with persecution for this attack.[1574]

Count charging persecution did not adequately refer to events at Velepromet and information in pre-trial brief and opening statement did not make it clear that events were part of persecution charge. Therefore, proof of events could not form basis of conviction for persecution.[1575]

The prosecution's failure to allege a discriminatory motive in its persecution charge required that the charge be amended.[1576]

unlawful attacks against civilians

Indictment which alleged that forces shelled civilian areas was defective for charging indiscriminate attacks against civilians.[1577]

cruel treatment

Allegation that the accused regularly beat prisoners was defective where it failed to specify the individual incidents for which he was convicted.[1578]

forced labour

Because the crime consists of forcing prisoners to perform labour that was connected to war operations, the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact.[1579]

[1572] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 105
[1573] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at paras. 99,320
[1574] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 312
[1575] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision on Motion Seeking Clarification With Regard to Count One of the Indictment* (19 May 2006)
[1576] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 25
[1577] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 46
[1578] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 40

Allegations that prisoners were forced to perform labour such as construction on private property of the commanders and perform labour at locations away from the front line were not sufficient to cover incident in which prisoners were forced to turn private property into premises for the military command and failed to allege that such forced labour was for military purpose.[1580]

deportation and forcible transfer

Merely pleading a general pattern of events throughout Kosovo is insufficient to support the charge of deportation from a certain village. Where the indictment charged a deportation from that village on one occasion after one attack, but the evidence established a second deportation two weeks later after a second attack, the second attack was not properly pleaded in the indictment and the indictment for that incident was defective.[1581]

Indictment which failed to specify locations and times of forcible transfers was defective, even where forcible transfers were widespread.[1582]

Indictment which failed to allege deportation or forcible transfer arising from a village in a charged municipality was defective and conviction for those events was reversed.[1583]

Indictment which listed certain villages in municipality from which forcible transfers occurred was defective when failing to mention two villages which were the subject of the accused's conviction at trial where indictment did not allege transfers "throughout the municipality" nor indicate that the villages listed were only examples.[1584]

Accused's authorship of directive was a matter of evidence to prove the allegation that the accused took part in and helped implement the policy of forcible transfer and it was not required to be pled in the Indictment.[1585]

murder

Indictment that charged murder of women and children at a specific place and time was defective and could not include the killing of two men at that same time and location.[1586]

[1579] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 30
[1580] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 32
[1581] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 599
[1582] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at para. 163
[1583] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 263
[1584] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 604
[1585] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 50
[1586] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 659

Indictment that charged murder of 105 people at a barn on a certain day was defective and could not include the killing of nine men at a different location in the same village the day before.[1587]

The Trial Chamber therefore erred by making findings that 779 persons were unlawfully killed by Bosnian Serb Forces in circumstances not specified in the Indictment and by relying on this higher figure in support of its conclusions on Tolimir's convictions.[1588]

However, the accused failed to show why his convictions should not stand based on at least 4,970 individuals being unlawfully killed in the specific circumstances detailed in the Indictment, as opposed to the 5,749 individuals found by the Trial Chamber.[1589]

plunder

Nine-month range of systematic plunder was insufficiently specific and indictment was defective in this regard.[1590]

other inhumane acts

Indictment which charges "other inhumane acts" without a clear indication of what the inhumane acts are is impermissibly vague.[1591]

forms of liability

The prosecution has repeatedly been discouraged from simply restating the language of Article 6(1) of the Statute.[1592]

Cumulative charging based on the same acts, as well as alternative charging, is permissible.[1593]

Cumulative charging of several forms of responsibility in an indictment is allowed, provided that the prosecution discharges its obligation to state all material facts underpinning each charge.[1594]

[1587] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 665
[1588] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 90
[1589] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 91
[1590] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 78
[1591] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 12-14
[1592] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 138, fn. 499; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 21
[1593] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 400; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 103
[1594] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 29

The Prosecution may alternatively rely on one or more legal theories, on condition that it is done clearly, early enough and allowing enough time to enable the accused to know what exactly he is accused of and to enable him to prepare his defence accordingly.[1595]

Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.[1596]

An indictment charging liability under Article 7(1) must specify the conduct of the accused giving rise to the form of liability as well as the acts of others for which the accused is sought to be held responsible.[1597]

instigating

"Instigation" is a distinct form of participation under Article 7(1), and thus when the Prosecution pleads such a case, the instigating acts, and the instigated persons or groups of persons, are to be described precisely.[1598]

ordering

Despite pleading ordering as a mode of responsibility, the indictment did not include any material facts that allege that any accused ordered the commission of any particular crime on any occasion. As a result, the indictment was defective.[1599]

committing

When the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the said term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both.[1600]

joint criminal enterprise

In cases where the Prosecution alleges liability pursuant to a JCE, the following material facts must be pleaded: "the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise."[1601]

[1595] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 55
[1596] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 575, fn. 1902
[1597] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at para. 7
[1598] *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 226
[1599] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 41
[1600] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 22

A common purpose, design or plan is a material fact concerning the existence of a joint criminal enterprise and, as such, must be pleaded in the Indictment.[1602]

The common criminal purpose of the joint criminal enterprise is a material fact which must be pleaded in the indictment.[1603]

The accused's authority and role in the joint criminal enterprise during the indictment period are material facts that must be pleaded in the indictment.[1604]

The nature of the participation of the accused in the joint criminal enterprise must be specified. Where such participation is to be established by inference, the prosecution must identity in the indictment the facts and circumstances from which that inference is sought to be drawn.[1605]

Indictment must specify the conduct by which the accused participated in the joint criminal enterprise separate and apart from his conduct for which he is alleged to be individually liable.[1606]

The way in which each accused participated in the enterprise must be specified.[1607]

The indictment should clearly indicate which form of joint criminal enterprise is alleged.[1608]

Prosecution ordered to further identify the "others" it alleged were members of the joint criminal enterprise, if not by name, then by categories of participants.[1609]

The plurality of persons can be sufficiently identified by referring to categories or

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[1601] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 214; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 22; *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 28

[1602] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 118

[1603] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 28

[1604] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 119

[1605] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 7

[1606] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at paras 58-60

[1607] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment* (22 July 2005) at para. 27; *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Ante Gotovina's Preliminary Motions Alleging Defects in the form of the Joinder Indictment* (19 March 2007) at para. 23

[1608] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 28; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 55

[1609] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at para. 57

groups of persons. It is not necessary to name each of the individuals involved.[1610]

The identity of those known to be members of the joint criminal enterprise must be specified in the indictment.[1611] If the identity of some members is unknown, it should be specified what categories these persons belonged to.[1612]

Use of the term "committed" in the indictment was insufficient to plead joint criminal enterprise liability.[1613]

Indictment that charged accused with acting in concert together and with a common purpose failed to sufficiently put the accused on notice that they were being charged with the joint criminal enterprise form of liability.[1614]

Since a large component of the case against the accused concerned the exercise of his powers and functions - both in relation to JCE liability and superior responsibility - facts concerning his acts and conduct after the change of an official position should have been clearly pleaded in the Indictment as material facts.[1615]

The Indictment itself did not provide clear notice to the accused that his alleged responsibility extended to his acts and conduct as Minister of the Interior. The defect in the Indictment was not subsequently cured through post-Indictment disclosures.[1616]

superior responsibility

In a case where superior responsibility pursuant to Article 7(3) is alleged, the material facts which must be pleaded are: (1) that the accused is a superior; (2) the identity of subordinates; (3) over whom he had effective control; and (4) for whose acts he is sought to be held responsible.[1617]

[1610] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1522
[1611] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 25
[1612] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 26
[1613] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 42
[1614] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 46
[1615] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 92
[1616] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 94, 99
[1617] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Sreten Lukic's Preliminary Motion on the Form of the Indictment* (8 July 2005); *Prosecutor v Milosevic*, No. IT-98-29/1-PT, *Decision on Defence Preliminary Motion Pursuant to Rule 72(A)(ii)* (18 July 2005) at para. 11; *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment* (22 July 2005) at para. 12; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 26; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment* (13 December 2005) at para. 8

Among the material facts which must be included in an indictment when alleging superior responsibility are (1) the conduct of the accused by which he may be found to have had the requisite mens rea; (2) the acts of those others for which he is alleged to have been responsible; and (3) the conduct of the accused by which he had failed to take the necessary measures to prevent or punish the crimes.[1618]

Failure to allege that the accused could be liable for his position as a team leader of an inspection team, rather than as a military commander precluded the Trial Chamber from convicting him for failure to prevent or punish crimes in his capacity on the inspection team.[1619]

The phrase "forces of the FRY and Serbia" is not sufficiently specific. The prosecution must specify which forces and units were involved in the events in each municipality.[1620]

Indictment failed to adequately specify the forces alleged to be under the control of the accused and to over whom there was a duty to prevent and punish.[1621]

The forces committing the crimes must be specified for each municipality in which crimes are alleged to have occurred.[1622]

Failure to identify guards as persons over which the accused had effective control precluded his conviction under Article 7(3) for failing to prevent or punish the crimes of the guards.[1623]

Prosecution ordered to specify subordinates who participated in the alleged crimes and to specify whether accused is sought to be held liable as a superior for acts of civilians, special police, prison guards, and hospital personnel.[1624]

Indictment failed to adequately specify the source of the accused's knowledge of the crimes of their subordinates.[1625]

The Prosecution was obliged to allege in the Indictment the specific acts or course of conduct of the accused himself that formed the basis for his liability as a superior for the crimes of his subordinates and failed to do so.[1626]

[1618] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 67, 75
[1619] *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 82
[1620] *Prosecutor v Pavkovic et al*, No. IT-03-70-PT, *Decision on Vladimir Lazarevic's Preliminary Motion on the Form of the Indictment* (8 July 2005) at para. 34
[1621] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at para. 33, 38
[1622] *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006) at para. 10
[1623] *Prosecutor v Oric*, No. IT-03-68-A, *Judgement* (3 July 2008) at para. 76
[1624] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Ljube Boskoski's Motion Challenging the Form of the Indictment* (22 August 2005)
[1625] *Prosecutor v Cermak & Markac*, No. IT-03-73-PT, *Decision on Ivan Cermak's and Mladen Markac's Motions on Form of Indictment* (8 March 2005) at para. 37

It was sufficient to plead that the accused did not take any necessary and reasonable measure to prevent or punish the commission of criminal acts without specifying how he failed to act.[1627]

Allegation that crimes were carried out on the accused's orders and directives was sufficient to allege a failure to take the necessary measures to prevent and punish crimes.[1628]

sentencing

There is no requirement that aggravating facts for sentencing be pleaded in the indictment.[1629]

burden of proof

When an accused raises the issue of lack of notice before the Trial Chamber, the burden rests on the prosecution to demonstrate that the accused's ability to prepare a defence was not materially impaired. When an appellant raises a defect in the indictment for the first time on appeal, then the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[1630]

Where accused filed challenge to defects in indictment just prior to closing arguments, Trial Chamber considered that challenge was untimely and therefore burden had shifted to the accused to show that his defence was materially impaired.[1631]

As the accused raised the issue of inadequate notice in his closing arguments and the Trial Chamber addressed his claim without considering it untimely, the Appeals Chamber considers that the burden of proof rests with the Prosecution to demonstrate the accused's ability to prepare his defence was not materially impaired.[1632]

[1626] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 90
[1627] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3140
[1628] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 69
[1629] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 142; *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 376
[1630] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 35; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para.22 and fn.76; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 25; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 573; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 224; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 30
[1631] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Relief from Defects in the Indictment* (30 September 2014) at para. 22
[1632] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 101

Where accused had called 240 witnesses and defended against all charges in the indictment, he had not demonstrated that his defence was materially impaired.[1633]

remedies for defective indictment

Where evidence is presented at trial which, in the view of the accused, falls outside the scope of the indictment, an objection as to lack of fair notice may be raised and an appropriate remedy may be provided by the Trial Chamber, either by way of an adjournment of the proceedings, allowing the Defense adequate time to respond to the additional allegations, or by excluding the challenged evidence.[1634]

The prejudicial effect of a defective indictment maybe "remedied" if the Prosecution provided the accused with clear, timely and consistent and consistent information that resolves the ambiguity or clarifies the vagueness, thereby compensating for the failure of the indictment to give proper notice of the charges. Nevertheless, considering the factual and legal complexities normally associated with the crimes within the jurisdiction of the International Tribunal, there can only be a limited number of cases that fall within this category.[1635]

There is no jurisdiction for a Trial Chamber to review the sufficiency of the evidence before the confirming judge. Such a challenge must wait for the close of the prosecution's case at trial.[1636]

Trial Chamber correctly declined to exclude late-named victims from forming basis of conviction of accused and found that the appropriate remedy was to give the accused additional time to investigate those witnesses.[1637]

Challenges to language of the indictment must be raised by preliminary motion. Challenge raised at time of filing closing brief rejected as untimely.[1638]

The Prosecution failed to meet its burden of demonstrating that the accused's defence was not materially impaired in relation to his role in the ICE as Minister of the Interior, requiring that convictions in relation to his ICE responsibility as Minister of the Interior be vacated.[1639]

[1633] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Relief from Defects in the Indictment* (30 September 2014) at para. 24
[1634] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 61
[1635] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 23
[1636] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on the Gotovina Defence's Motion to Dismiss Counts 6 and 7 of the Indictment* (7 May 2008)
[1637] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.4, *Decision on Joint Appeal Against Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims* (7 May 2009); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims* (2 March 2009) at para. 8
[1638] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion Alleging Defects in the form of the Indictment* (30 November 2016) at para. 12
[1639] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 105

Article 21(4)(b)--adequate time and facilities

adjournment of trial

Five weeks continuance after Rule 98 *bis* hearing granted to allow defence to investigate additional killing incidents added during the prosecution's case.[1640]

Adjournment was not required due to delayed disclosure of witness identity to the accused to interview 12 individuals in preparation of the witness' cross-examination to ensure his fair trial rights.[1641]

Four-week adjournment during defence case granted considering recent disclosures, including those under Rule 66(B) and delays in translation.[1642]

Two-week continuance of trial granted to allow accused to review audio tapes recently discovered by prosecution at family residence of General Mladic.[1643]

New defence team granted four-month adjournment after death of lead counsel, save for 8 sitting days which would be conducted during the third month.[1644]

Four-week adjournment during defence case granted to allow review of new disclosure, prepare two witnesses who would testify in lieu of the accused, and improve expert reports.[1645]

Continuance of commencement of cross examination not warranted by late disclosure of materials authored by the witness under Rule 66(B), where the prosecution promptly provided the documents after receipt of the request and where requests for Rule 66(B) material may be an ongoing process during the trial.[1646]

Two-month suspension of trial granted for accused to prepare defence case on count for which he was acquitted, but was re-instated by the Appeals Chamber.[1647]

[1640] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Joint Defence Request for a Stay of Proceedings* (23 March 2009)
[1641] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Ninth Suspension of Proceedings* (28 October 2011) at para. 11
[1642] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision Partially Granting the Stanisic Defence Motion for Suspension of the Proceedings After the Summer Recess* (28 September 2011) at paras. 16,18
[1643] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion for Suspension of Proceedings* (18 August 2010)
[1644] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Motion for Adjournment of Proceedings by the Simatovic Defence* (15 October 2009)
[1645] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision Partially Granting the Simatovic Defence Urgent Request for Adjournment* (17 April 2012)
[1646] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Additional Time to Prepare Cross Examination of Momcilo Mandic* (2 July 2010) at para. 9
[1647] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motions to Sever Count One and for Suspension of Defence Case* (2 August 2013) at paras. 21-24

One-month suspension of trial for accused to prepare for re-opening of prosecution case during defence case was reasonable.[1648]

Unlike the case of the prosecution, which bears the burden of proof, defence strategies often focus on poking specifically targeted holes in the prosecution's case, an endeavour which may require less time and fewer witnesses. Therefore, there was no error in allowing the defence less time to prepare than the prosecution.[1649]

assistance of the Registrar

An accused does not have the right to have the Registrar serve his correspondence on States or international organizations, where the accused has means to do so through his defence team.[1650]

assistance of States and UN organs

UNMIK ordered to assist defence in investigating in Kosovo after defence counsel attacked on first visit, but motion to stay proceedings denied.[1651]

Efforts by UNMIK to facilitate defence visit and investigation in Kosovo were sufficient to enable the defence to have adequate time and facilities for the preparation of the defence.[1652]

courtroom facilities

An accused does not have a right to use a computer in court, or to be seated next to his counsel.[1653]

Legal interns may be present in the courtroom but only in lieu of the case manager or legal associate when the accused deems it is necessary. The Chamber does

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[1648] *Prosecutor v Mladic*, No. IT-09-92-AR73.5, *Decision on Interlocutory Appeal of the…Decision on Modality for Prosecution Re-Opening* (22 May 2015); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Request to Adopt Modality for Prosecution Re-Opening* (27 March 2015) at para. 13

[1649] *Prosecutor v Mladic*, No. IT-09-92-AR73.5, *Decision on Interlocutory Appeal of the…Decision on Modality for Prosecution Re-Opening* (22 May 2015) at para. 13

[1650] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Motion for Service of Documents* (20 April 2009) at para. 8

[1651] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Ojdanic Motion to Stay Proceedings* (9 June 2006)

[1652] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Second Ojdanic Motion for Stay of Proceedings* (19 October 2006); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Third Motion for Stay of Proceedings* (27 August 2007)

[1653] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Oral Request of the Accused Jadranko Prlic for Request for Authorization to use a Laptop Computer at Hearings or to be Seated Next to his Counsel* (29 June 2006)

not agree that interns should be allowed in the courtroom as a reward for their voluntary work.[1654]

funding

Motion to rectify inadequate funding of the defence was premature where the Registrar had not made a final decision on the amount of funding for the prosecution phase of the case.[1655]

time to prepare for trial

Whether an accused has had adequate time and facilities for the preparation of his defence is not limited to the time on the case by his current defence team, but also must consider the time the accused has had to prepare.[1656]

When analyzing allegations related to a violation of the right to have adequate time and facilities for the preparation of a defence, the Appeals Chamber must assess whether the defence as a whole, and not any individual counsel, was deprived of adequate time and facilities.[1657]

The fact that counsel for the accused have been able to read less than 20% of the disclosure material does not mean that adequate time and facilities for preparation have not been provided.[1658]

The factors enumerated in *Ngirabatware* are not an objective checklist that Trial Chambers must apply to a request for continuance of the trial, but are simply examples of indicia that a Trial chamber might consider.[1659]

Assessing the amount of pre-trial preparation time required is not a mechanical duty and a Trial Chamber is not required to articulate its reasoning in detail.[1660]

[1654] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Request for Authorisation for Legal Interns to be Present in the Courtroom* (5 May 2010)
[1655] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Motion for Equality of Arms and Immediate Suspension of the Trial…*(10 March 2011) at para. 19
[1656] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Second Defence Motion for Adjournment* (4 March 2005) at para. 9 affirmed *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 18
[1657] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 30
[1658] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Second Defence Motion for Adjournment* (4 March 2005) at para. 13; affirmed *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 42
[1659] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.5, *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of the Trial* (13 October 2009) at para. 19
[1660] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.5, *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of the Trial* (13 October 2009) at para. 20

While Trial Chamber should consider President's determination that additional remuneration for defence team was required, it was not obligated to postpone the trial to give effect to the President's decision.[1661]

Trial Chamber did not abuse its discretion in deciding to commence trial notwithstanding President's finding that defence team funding had been inadequate. The Trial Chamber properly determined that the problems could be remedied during the trial.[1662]

Comparison to the amount of pre-trial preparation allowed in other cases is not informative given the particularized circumstances of each individual tried by the Tribunal.[1663]

Preparation time during the trial is a valid factor for a Trial Chamber to consider when setting the date for the trial.[1664]

Trial Chamber granted delay of five weeks in the commencement of the evidence in the trial due to disclosure errors by the prosecution.[1665]

Trial Chamber erred in allowing accused only two days to review marked up indictment after reducing scope of case. It should have allowed him seven days.[1666]

Erroneous decision of the Registrar which deprived the accused of funding of his defence team for a four-month period did not justify postponement of the trial where tasks that could have been performed during that period could be performed during the course of the trial.[1667]

Failure of the prosecution to disclose witness statements in the language of the accused required a continuance of the trial date. Counsel's familiarity with English was not determinative since the accused must be able to understand the material to instruct counsel adequately.[1668]

[1661] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appeal from Decision on Further Postponement of the Trial* (31 March 2010) at para. 21
[1662] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appeal from Decision on Further Postponement of the Trial* (31 March 2010) at para. 28
[1663] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.5, *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of the Trial* (13 October 2009) at para. 23
[1664] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.5, *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of the Trial* (13 October 2009) at para. 24
[1665] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Defence Motion of 14 May 2012 and Reasons for Decision on Two Defence Requests for Adjournment of the Trial…*(24 May 2012)
[1666] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.5, *Decision on Radovan Karadzic's Appeal of the Decision on Commencement of the Trial* (13 October 2009) at para. 26
[1667] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Postponement of Trial* (26 February 2010) at paras. 38-40
[1668] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Joint Defence Motion for Postponement of Trial* (22 September 2005) at para. 6

time to present defence case

While a Trial Chamber has the authority to place limitations on the presentation of the defence case, including limiting time for presentation of oral testimony and translation of documents, it must assess the limitations as a whole to assure that it does not hinder the capacity of the accused to make an adequate defence.[1669]

While the Trial Chamber must ensure that the proceedings do not suffer undue delays and that the trial is completed within a reasonable time, it must equally ascertain that the proceedings are not compromised by the imposition of excessive time constraints.[1670]

Logistical considerations should not take priority over the Trial Chamber's duty to safeguard the fairness of the proceedings.[1671]

translations

While a Trial Chamber has the authority to control the number of documents to be translated for defence exhibits to be used at trial, it erred in the exercise of that authority by miscalculating the number of pages allotted to the co-accused, and by basis one accused's entitlement on the number of pages granted to a co-accused.[1672]

trial schedule

Sitting four days per week does not violate self-represented accused's right to adequate time and facilities for the preparation of his defence.[1673]

Sitting four days a week was not imperative for the health of the accused where there was no showing that the benefit of shorter weeks would outweigh the detriment of a longer trial.[1674] However, in a later decision, the Trial Chamber decided to sit four days a week due to a heightened risk of stroke.[1675]

Article 21(4)(d)—presence of the accused

The right to be present at one's trial means to be physically present.[1676]

[1669] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008) at para. 26
[1670] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 101
[1671] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 101
[1672] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008)
[1673] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order on the Trial Schedule* (27 May 2010)
[1674] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Second Defence Motion Seeking Adjustment to the Trial Sitting Schedule Due to the Health Concerns of the Accused* (12 July 2013) at para. 17
[1675] *Prosecutor v Mladic*, No. IT-09-92-T, *Reasons for Decision on the Future Trial Sitting Schedule* (17 September 2014 (17 September 2014) at para. 16
[1676] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 6

The right to be present is not absolute.[1677] However, restriction on this fundamental right must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective.[1678]

While it might be possible to proceed in the absence of an accused who has voluntarily waived his right to be present by failing to appear for his trial, and in the absence of any representative of the defence, such a course would be neither in the interests of justice nor would it foster reconciliation in the former Yugoslavia.[1679]

Derogation of the right to be present may be based upon substantial trial disruptions which are not intentional on the part of the accused.[1680]

Trial Chamber erred in commencing trial when accused was too ill to attend rather than postponing the trial for 3-6 months.[1681]

Accused was sufficiently healthy to participate in his trial, under a modified regime which would allow for sitting two days a week and other measures to accommodate his illness.[1682]

Establishment of a video link to UNDU was not a reasonable alternative to postponing commencement of the trial where it was not established that the accused was well enough to effectively participate in trial via video link.[1683]

Additional three-month delay in the commencement of the trial was the least intrusive alternative given the fact that one accused was not medically fit to stand trial, even though commencement of trial had already been postponed for 6 months.[1684]

Trial Chamber erred in case of terminally ill accused in determining not to proceed with the trial in the absence of the accused without considering, pursuant to the proportionality principle, whether there were means to accomplish the objective of a fair

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[1677] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 6
[1678] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 6
[1679] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appointment of Counsel and Order on Further Trial Proceedings* (5 November 2009) at para. 20
[1680] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 15
[1681] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 19
[1682] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Revocation of Jovica Stanisic's Provisional Release and Re-assessment of his Health and Revocation of Franko Simatovic's Provisional Release* (24 April 2009)
[1683] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR73.2, *Decision on Defence Appeal of the Decision on Future Course of the Proceedings* (16 May 2008) at para. 20
[1684] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution Motion for Re-assessment of Jovica Stanisic's Health and Re-commencement of Trial…*(17 December 2008)

and expeditious completion of the trial without impairing the rights of the accused any more than necessary, such as allowing him to attend via video conference, or to review video or audio recordings or transcripts of the trial and be kept abreast of the trial through contacts with his counsel.[1685]

Trial Chamber, which found accused fit to participate in his trial, erred in applying a different standard to the issue of whether the trial could continue with him monitoring the proceedings via videoconference.[1686]

Trial Chamber erred in failing to consider that prosecution's offer to unconditionally waive its cross-examination of remaining defence witnesses, which was binding and not revocable, could militate in favor of proportionality of continuing the trial in the absence of the accused.[1687]

The accused bears the burden of proving that he is unfit to stand trial by a preponderance of the evidence. This is also true of a claim that an accused is unwell to attend trial on a particular day.[1688]

Article 21(4)(d)--self-representation

amicus curiae

Motion for accused representing himself on appeal to consult with amicus curiae denied where amicus curiae has no mandate to assist the accused.[1689]

assistance to self-represented accused

The Appeals Chamber sees no error in the Registry's determination that a self-represented accused may have privileged access to up to three designated legal associates and presumably to team members who visit the accused in the company of these associates, but to no one else.[1690]

[1685] *Prosecutor v Hadzic*, No. IT-04-75-AR73.1, *Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of the Proceedings* (4 March 2016) at para. 24
[1686] *Prosecutor v Hadzic*, No. IT-04-75-AR73.1, *Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of the Proceedings* (4 March 2016) at para. 28
[1687] *Prosecutor v Hadzic*, No. IT-04-75-AR73.1, *Decision on Prosecution's Urgent Interlocutory Appeal from Consolidated Decision on the Continuation of the Proceedings* (4 March 2016) at para. 29
[1688] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Denying the Stanisic Defence Request to Adjourn the Hearings…*(2 July 2009) at para. 11; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for the Decision Denying the Stanisic Defence Request to Postpone the Court Proceedings and Decision Proceeding with the Court Session of 29 June 2009 in the Absence of the Accused* (22 July 2009) at para. 14
[1689] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Request for Reconsideration of the Pre-Appeal Judge's Decision of 11 June 2008* (4 July 2008)
[1690] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 33

The Registry reasonably requires that designated legal associates meet the requirements of Rule 44 of the Rules, including lack of discipline.[1691]

A self-represented accused is not entitled to associates paid at a rate higher than that of support staff.[1692]

For the Registrar to be obligated to remunerate legal associates to a self-represented accused, the accused must demonstrate that he is indigent.[1693]

Trial Chamber had the authority to reinstate associates accused of divulging confidential information to participate in open sessions of the trial to ensure that the accused receives a fair trial.[1694]

Where an accused lacks the requisite knowledge of the law or legal procedures to the extent that it will substantially and persistently obstruct the proper and expeditious conduct of the trial, the solution is not the funding of highly experienced legal associates, but rather the curtailment of his right to self-representation.[1695]

Where the self-represented accused does not have a legal background and the case against him involves complex factual and legal issues, the Chamber encourages the assistance he receives from his defence team, including his Legal Advisor.[1696]

Legal Advisor granted right of audience to address Chamber on legal issues and matters arising out of his contacts with the prosecution, but not to cross examine witnesses.[1697]

Decision to grant a limited right of audience to a self-represented accused's legal advisor is discretionary and depends upon the circumstances of the particular case.[1698]

[1691] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 37

[1692] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates* (28 January 2009) at para. 31; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at paras. 15-20

[1693] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Vojislav Seselj's Request for Review of Registrar's Decision of 10 September 2009* (21 October 2009) at para. 25

[1694] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Accused's Oral Request to Reinstate Messrs. Zoran Krasic and Slavko Jerkovic as Privileged Associates* (10 February 2010)

[1695] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at para. 14

[1696] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on the Accused's Request to the Trial Chamber Concerning Assistance of his Legal Advisor* (28 April 2010) at para. 20

[1697] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on the Accused's Request to the Trial Chamber Concerning Assistance of his Legal Advisor* (28 April 2010)

[1698] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Further Notifications to the President by the Legal Advisor to Vojislav Seselj* (21 March 2012) at para. 11

Legal advisor would not be granted audience in complaint before President where self-represented accused could address the President himself.[1699]

An accused who chooses to self-represent is not entitled to legal assistance. Hence, he is not entitled to the subsidiary right mentioned later in Article 21(4)(d) to have legal assistance paid for by the Tribunal if he is indigent.[1700]

To the extent that the Registry requires or encourages indigent self-representing accused to coordinate their defences through designated legal associates, it is appropriate for the Tribunal to provide some funding for such associates. Such funding should not be comparable to that paid to counsel for represented accused (particularly since work such as the drafting of written filings should be considered the responsibility of the self-representing accused), but nonetheless should adequately reimburse the legal associates for their coordinating work and for related legal consultation.[1701]

Registrar erred in failing to remunerate legal associate at rate of co-counsel after he had been granted right of audience to make legal submissions before the Chamber.[1702]

Legal associate not entitled to DSA payments for period before he was granted right of audience.[1703]

The Appeals Chamber sees no reason for disturbing the Registry's finding that Article 21(4)(b) requires it to provide certain technical and logistical support and conceivably the assignment of a Tribunal-paid investigator and/or expert, depending on the stage of the proceedings.[1704]

While by reason of detention, there are certain tasks normally undertaken by counsel which the accused will not be able to complete himself, in general a self-represented accused is expected to undertake all the tasks normally assumed by counsel. Those tasks he cannot perform by virtue of his detention should be performed by his legal associates, but do not justify remuneration above the level of support staff.[1705]

[1699] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Further Notifications to the President by the Legal Advisor to Vojislav Seselj* (21 March 2012) at para. 11
[1700] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 40
[1701] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 42
[1702] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of OLAD Decision on Trial Phase Remuneration* (19 February 2010) at para. 52; *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Appeal against Registrar's 10 February 2010 Decision* (13 July 2010) at para. 42; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Decision on Request for Review* (24 July 2014) at para. 28
[1703] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Appeal against Registrar's 10 February 2010 Decision* (13 July 2010) at para. 46
[1704] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 43
[1705] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at para. 23

Funding of associates for self-represented accused need not be comparable to that provided to amicus curiae or standby counsel.[1706]

Registrar erred in concluding that self-represented accused was not entitled to investigators and persons who could provide other technical assistance to him, rather than simply persons performing consulting tasks and coordinating his work with the Registry.[1707]

Registrar was unreasonable in concluding that review of 300,000 new pages of disclosure and other tasks associated with further preparing for trial could be done with a support staff of two persons. Rather, the Registrar should have continued to fund the 8 people it had agreed were necessary for preparation during the pre-trial phase.[1708]

Registrar's decision that accused was entitled to only one person working 150 hours per month to assist him during trial was unreasonable and was insufficient to allow the accused to effectively represent himself in a complex case. Rather, five persons working at 150 hours per month were required.[1709]

Registrar's limitation of 150 hours per month for legal associate to self-represented accused during trial was reasonable.[1710]

The Registrar did not err in declining to pay the travel and DSA of the accused's case manager, or in refusing privileged meetings with the case manager.[1711]

The Registry has sought to strike a balance between these competing interests by enabling the self-represented accused to share confidential information only with designated legal associates, who in turn can provide the professional supervision needed to ensure appropriate use of the confidential information.[1712]

Registrar was not required to provide office space to defence teams of self-represented accused apart from use of the common staging area at the Tribunal.[1713]

[1706] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at para. 26
[1707] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of OLAD Decision on Trial Phase Remuneration* (19 February 2010) at para. 37
[1708] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of OLAD Decision on Trial Phase Remuneration* (19 February 2010) at paras. 39, 45
[1709] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of OLAD Decision on Trial Phase Remuneration* (19 February 2010) at paras. 43,46
[1710] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Appeal against Registrar's 10 February 2010 Decision* (13 July 2010) at para. 44
[1711] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Request for Review of Registry Decision Regarding Visit of Defence Team Members* (10 August 2011) at paras. 19, 23
[1712] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 34
[1713] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Office Space* (10 February 2012)

limitations and termination on self-representation

Any restrictions on the right of self-representation must be limited to the minimum extent necessary to protect the Tribunal's interest in a reasonably expeditious trial. Trial Chamber erred in relegating accused to secondary role to assigned counsel. Instead, it should provide assigned counsel to fill in only when the accused's health does not allow him to continue.[1714]

Potential disruption to the trial proceedings is a reason to deny self-representation. When a request for self-representation is made after the trial commences, it will be treated less favourably than a request before trial. Here the potential disruption and equivocal request for self-representation justified denial of self-representation.[1715]

The conduct of the accused as a whole, disruptive and obstructionist behaviour, deliberate disrespect for the rules, intimidation of and slanderous comments about witnesses, led the Trial Chamber to conclude that there is a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of the trial. Therefore, his right to self-representation was denied.[1716]

Self-representation denied based upon the attitude and actions of the accused in being deliberately disrespectful and inappropriate in court.[1717]

A Trial Chamber may place restrictions on the right of an accused to self-representation where a defendant's self-representation is substantially and persistently obstructing the proper and expeditious conduct of his trial. A Trial Chamber has the discretionary power to do so whether the conduct of the Accused is intentional or unintentional. All that matters is that the disruptive behaviour of the Accused is substantially and persistently obstructing the proper and expeditious conduct of his trial.[1718]

The right of self-representation may be limited when five successive conditions are met: (1) the accused's behaviour substantially and persistently obstructs the proper and expeditious conduct of the trial; (2) an explicit warning is made to the accused that if his conduct persists, counsel may be imposed; (3) after a warning, the accused continues to obstruct the proceedings; (4) the restriction on self-representation must be limited to

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[1714] *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 19

[1715] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Reasons for Oral Decision Denying Mr. Krajisnik's Request to Proceed Unrepresented by Counsel* (18 August 2005)

[1716] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Assignment of Counsel* (21 August 2006) at para. 79

[1717] *Prosecutor v Jankovic & Stankovic*, No. IT-96-23/2-PT, *Decision Following Registrar's Notification of Radovan Stankovic's Request for Self-Representation* (19 August 2005); *Prosecutor v Seselj*, No. IT-03-67-AR73.3, *Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel* (20 October 2006) at para. 28

[1718] *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal of the Trial Chamber Decision (No. 2) on Assignment of Counsel* (8 December 2006) at para. 19

the minimum extent necessary to assure a reasonably expeditious trial; and (5) the accused must be given an opportunity to be heard prior to imposition of counsel.[1719]

Trial Chamber did not err in denying adjournment of trial at request of prosecution pending decision on prosecution motion to impose counsel on accused.[1720]

Trial Chamber declined to revoke accused's self-representation where it was able to control accused's offensive in-court statements by striking them from the record or ordering the accused to stop making such representations.[1721]

Act of contempt by revealing identity of protected witnesses, which led to contempt conviction, did not justify removal of right of self-representation as it was an isolated act.[1722]

Warning to accused for different conduct did not count towards required warning before counsel could be imposed.[1723]

Trial Chamber erred in failing to provide warning to accused that continued disruptive behaviour will result in his loss of right of self-representation before assigning counsel against his will.[1724]

Self-representation terminated where, after warnings, accused went on hunger strike and said he was too weak to attend the proceedings.[1725]

right to self-representation

An accused has a presumptive right to self-representation.[1726]

Limitations on the right of self-representation are a rare occurrence and their details are necessarily context specific.[1727]

[1719] *Prosecutor v Seselj*, No. IT-03-67-T, *Consolidated Decision on the Assignment of Counsel, Adjournment, and Prosecution Motion for Additional Time* (24 November 2009) at paras. 52-57
[1720] *Prosecutor v Seselj*, No. IT-03-67-AR73.8, *Decision on Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of the Proceedings* (16 September 2008)
[1721] *Prosecutor v Seselj*, No. IT-03-67-T, *Redacted Version of the Redacted Version on Decision on the Prosecution Motion to Terminate the Accused's Self Representation…*(27 November 2008) at para. 23
[1722] *Prosecutor v Seselj*, No. IT-03-67-T, *Consolidated Decision on Assignment of Counsel, Adjournment, and Prosecution Motion for Additional Time* (24 November 2009) at para. 73
[1723] *Prosecutor v Seselj*, No. IT-03-67-T, *Consolidated Decision on Assignment of Counsel, Adjournment, and Prosecution Motion for Additional Time* (24 November 2009) at para. 75
[1724] *Prosecutor v Seselj*, No. IT-03-67-AR73.3, *Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel* (20 October 2006)
[1725] *Prosecutor v Seselj*, No. IT-03-67-T, *Reasons for Decision (No. 2) on Assignment of Counsel* (27 November 2006)
[1726] *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 11; *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Assignment of Counsel* (21 August 2006) at para. 13
[1727] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 35

The right to self-representation is a qualified one, however.[1728] An accused who substantially and persistently disrupts the trial may have his right to self-representation curtailed.[1729] Similarly, an accused whose health does not permit him to represent himself cannot assert that right and bring his trial to a halt.[1730]

self-representation on appeal

An accused has the right to represent himself on appeal from his conviction.[1731]

The right is not unqualified. Should the accused substantially and persistently obstruct the expeditious conduct of his appeal, then counsel may be imposed upon him.[1732]

Legal advisor granted right of audience on appeal from judgement concerning any question of a legal nature that may arise in the presentation of arguments on alleged errors of fact or law in the trial judgement.[1733]

special treatment

Where an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair.[1734] Trial Chamber's decision on length of time needed to prepare defence case was not abuse of discretion.[1735] Trial Chamber's decision on sitting four days a week was not an abuse of discretion.[1736]

[1728] *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 12
[1729] *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 13; *Prosecutor v Seselj*, No. IT-03-67-AR73.3, *Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel* (20 October 2006) at para. 20
[1730] *Milosevic v Prosecutor*, No. IT-02-54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel* (1 November 2004) at para. 14
[1731] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Right 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) at para. 10
[1732] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Right 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) at para. 13
[1733] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Decision on Tolimir's Request to Grant a Right of Audience to Mr. Aleksandar Gajic* (20 June 2014) at p. 3
[1734] *Prosecutor v Milosevic*, No. IT-02-54-AR73.6, *Decision on the Interlocutory Appeal by the Amicus Curiae Against Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case* (20 January 2004) at para. 19
[1735] *Prosecutor v Milosevic*, No. IT-02-54-AR73.6, *Decision on the Interlocutory Appeal by the Amicus Curiae Against Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case* (20 January 2004)
[1736] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.8, *Decision on Appeal from Order on the Trial Schedule* (19 July 2010) at para. 13

The principle of a fair trial, in the circumstances of self-representation, demands that the accused is provided the conditions which fairly allow him to prepare his defence. Night monitoring ordered discontinued because it caused lack of sleep which might detrimentally impinge on the accused's ability to represent himself.[1737]

An accused who is representing himself has no right to disclosure in hard copy format, but if electronic disclosure is provided, he must be given training and equipment to utilize it.[1738]

An indigent self-represented accused does not have the right to payment of travel expenses for prosecution witnesses to interview them at the detention unit.[1739]

standby counsel

Trial Chamber erred in immediately ordering the assignment of standby counsel without establishing any persistent or obstructionist behaviour on the part of the accused.[1740]

An accused whose right of self-representation is terminated by persistent obstructive behaviour does not have the right to choose the counsel imposed upon him by the Trial Chamber, or the standby counsel assigned to prepare in the event of that eventuality.[1741]

If standby counsel is to be appointed, the accused should be given the opportunity to choose his standby counsel from the Rule 45 list.[1742]

However, the Registrar was not obligated to make the list available to a self-represented accused who had not had a troubled history with the standby counsel.[1743] The Seselj decision provided more rights to the accused than he was entitled to because of the unique factual circumstances of his case.[1744]

[1737] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Order Regarding the Nightly Monitoring of the Accused* (25 August 2010) at para. 17

[1738] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Form of Disclosure* (4 July 2006) at para. 13, affirmed *Prosecutor v Seselj*, No. IT-03-67-AR73.5, *Decision on Vojislav Seselj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure* (17 April 2007) at para. 19

[1739] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused's Motion for Order re: Interview of Prosecution Witness KDZ222* (26 August 2009)

[1740] *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal of the Trial Chamber Decision (No. 2) on Assignment of Counsel* (8 December 2006)

[1741] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 27

[1742] *Prosecutor v Seselj*, No. IT-03-67-AR73.4, *Decision on Appeal of the Trial Chamber Decision (No. 2) on Assignment of Counsel* (8 December 2006) at para. 28

[1743] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 37

[1744] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 31

Standby counsel assigned to self-represented accused who, while cooperative in pre-trial proceedings, substantially and persistently obstructed the proceedings by failing to appear for his trial.[1745]

Registrar's decision to exclude all Serbian lawyers because they had previously represented accused persons in related cases or were unavailable due to current assignments was reasonable even though it had not excluded some non-Serbian lawyers based upon those same criteria.[1746]

Trial Chamber did not err in concluding that Registrar's pre-screening criteria for standby counsel neither contravened any legal requirement nor was unfair or nonsensical.[1747]

Self-representation of accused could continue during 3 ½ month period while standby counsel familiarized himself with the case and until such time as accused obstructed the trial proceedings once they resumed.[1748]

Registrar's procedure for appointing standby counsel was an issue which went to the fairness of the trial and therefore was subject to review by the Trial Chamber.[1749]

Article 21(4)(d) does not provide the right of a self-represented accused to choose the standby counsel imposed by the Trial Chamber.[1750]

Standby counsel's assignment would continue in the defence phase of the case, where the standby counsel would be expected to formulate a defence strategy and investigate the case to be prepared to present a defence if the accused lost his right of self-representation.[1751]

Article 21(4)(e)--compulsory process

Article 21(4)(e) of the Statute grants an accused the right "to obtain the attendance and examination of witnesses on his behalf". This right is, for obvious reasons, subject to

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[1745] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appointment of Counsel and Order on Further Trial Proceedings* (5 November 2009) at para. 21
[1746] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 41
[1747] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 34
[1748] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appointment of Counsel and Order on Further Trial Proceedings* (5 November 2009) at para. 25
[1749] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 23
[1750] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 26
[1751] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Continuation of Standby Counsel Assignment* (21 June 2012) at p. 3

certain conditions, including a requirement that the evidence should be called at the proper time.[1752]

Article 21(4)(e)—cross examination

The right to cross examine witnesses is a fundamental right recognized under international human rights law.[1753]

Evidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case cannot be used as the sole basis by which to establish a conviction[1754]

A conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial.[1755]

A conviction which rests decisively on untested evidence must be overturned. Where conviction rested on statements of co-accused who did not testify, it was reversed.[1756]

It is considered to run counter to the principles of fairness to allow a conviction based on untested evidence without sufficient corroboration.[1757]

Article 21(4)(g)—self incrimination

The accused has a right not to testify and no adverse inference is drawn from this fact.[1758]

The prosecution may not summon a witness to testify at his own trial.[1759]

A Trial Chamber is not under a strict obligation to inform a witness of his right to remain silent. However, to determine whether a witness has waived his right to self-incrimination, it is not sufficient to establish that the testimony was voluntary and free of

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[1752] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 75
[1753] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.2, *Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief* (4 July 2006) at p. 2; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 171
[1754] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement* (10 June 2010) at para.60
[1755] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 137
[1756] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4A, *Judgement* (23 July 2009) at para. 62
[1757] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4A, *Judgement* (23 July 2009) at para. 62
[1758] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 783; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 19; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para.11; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 16; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 22
[1759] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.6, *Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence* (23 November 2007) at para. 38

duress. The witness would have to know of the right to remain silent and the consequences of waiving it. Failure to so inform the witness renders his testimony inadmissible in a case against him.[1760]

Article 22—protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

See Rule 69

Article 23—judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

The right of an accused under Article 23(2) to a reasoned opinion is an aspect of the fair trial requirement of Articles 20 and 21.[1761]

Pursuant to Article 23 of the Statute and Rule 98ter(C) of the Rules, every accused is guaranteed the right to a reasoned opinion.[1762]

Only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.[1763]

A Trial Chamber is not required to make explicit findings as to facts agreed to by the parties.[1764]

A Trial Chamber is required to make findings on those facts which are essential to a determination of guilt on each count.[1765]

[1760] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motion for the Admission into Evidence of the Testimony of Milivoj Petkovic Given in Other Cases Before the Tribunal* (17 October 2007)
[1761] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 17; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 603; *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 69; *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 41
[1762] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 53
[1763] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para.. 41
[1764] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 18
[1765] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 78

The absence of any relevant legal findings in a trial judgement also constitutes a manifest failure to provide a reasoned opinion.[1766]

Every accused has the right to a reasoned opinion under Article 23 of the Statute and Rule 98 *ter* (C). This makes it possible for an individual to exercise their right of appeal and for the Appeals Chamber to understand and review the findings of the Trial Chamber and the evaluation of the evidence.[1767]

The requirement of a reasoned opinion applies to the Trial Chamber's judgement and not to all decisions made during a trial.[1768]

A trial chamber is not obliged to justify its findings in relation to every submission made during trial. A trial chamber has discretion in deciding which legal arguments to address and is only required to make factual findings which are essential to the determination of guilt on a particular count.[1769]

The Trial Chamber failed to explain in a clear and articulate manner how it reached the conclusion that the accused were not responsible for the incidents at issue under JCE III liability. This omission amounted to a failure to provide a reasoned opinion.[1770]

Trial Chamber failed to provide reasoned opinion by not stating whether it was considering as a mitigating factor for sentencing the assistance rendered by the accused to Muslims.[1771]

Trial Chamber failed to provide a reasoned opinion when it acquitted accused based upon lack of *mens rea* for JCE without first addressing the *actus reus*. Without making findings on the existence and scope of the common criminal purpose shared by a plurality of persons, the Trial Chamber could not properly assess the words and conduct of the accused to determine if *mens rea* could be inferred.[1772]

Failure to specify the evidence showing that the crisis staff used the security service as an operating tool in the judgement violated the right of the accused to a reasoned opinion.[1773]

[1766] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 78
[1767] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 603; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1387; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 78; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 990
[1768] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 603; *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 81
[1769] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 53
[1770] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3113
[1771] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 605
[1772] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at paras. 79, 82, 88
[1773] *Prosecutor v Brdjanin*, No. IT-98-36-A, *Judgement* (3 April 2007) at para. 142

The Trial Chamber's failure to enter express findings as to whether and how the accused's acts and conduct furthered the JCE, and whether his contribution was significant constitutes a failure to provide a reasoned opinion.[1774]

The Trial Chamber did not err in determining that the accused was not truthful in his testimony at the trial of another accused but erred in failing to specify the false testimony as part of its duty to render a reasoned opinion.[1775]

A Trial Chamber is not obliged to address every minor inconsistency in a witness's statement; however, neither can a Trial Chamber fail to address alleged inconsistencies when the evidence of the witness at issue is the principal evidence relied upon to convict an accused. This failure contravened the accused right to a reasoned opinion, constituting an error of law.[1776]

A trial chamber is not required to set out in detail why it accepted or rejected a particular testimony. An accused's right to a reasoned opinion does not ordinarily demand a detailed analysis of the credibility of particular witnesses. However, a trial chamber must provide reasons for accepting testimony despite alleged or material inconsistencies when it is the principal evidence relied upon to convict an accused.[1777]

Under some circumstances, a reasoned explanation of the Trial Chamber's assessment of a particular witness's credibility is a crucial component of a reasoned opinion - for instance, where there is a genuine and significant dispute surrounding a witness's credibility and the witness's testimony is truly central to the question whether a particular element is proven.[1778]

Where a trial chamber does not refer to evidence it is to be presumed that it assessed and weighed the evidence, if there is no indication that the trial chamber completely disregarded evidence which is clearly relevant.[1779]

In making factual findings, a trial chamber is entitled to rely on the evidence it finds most convincing and is not obliged to refer to every witness testimony or evidence on the record if there is no indication that a trial chamber completely disregarded evidence which is clearly relevant.[1780]

Unless there is an indication that the Trial Chamber completely disregarded a particular piece of evidence, it is presumed that the Trial Chamber evaluated all the evidence before it. There may be an indication of disregard when evidence which is

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[1774] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 140
[1775] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 101
[1776] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 134
[1777] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 133; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1642
[1778] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 202
[1779] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1196
[1780] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 53

clearly relevant to the findings is not addressed in the Trial Chamber's reasoning.[1781]

There is a presumption that a trial chamber has evaluated all the evidence presented to it, if there is no indication that it completely disregarded any particular piece of evidence. This presumption may be rebutted when evidence which is clearly relevant to the trial chamber's findings is not addressed in its reasoning.[1782]

Only where it is shown within the substance of a trial chamber's reasoning that clearly relevant evidence has been disregarded, should the Appeals Chamber intervene to assess whether that evidence would have changed the factual basis supporting the trial chamber's conclusion.[1783]

A trial chamber's failure to explicitly refer to specific evidence on the record will often not amount to an error of law, especially where there is significant contrary evidence on the record.[1784]

It is not necessary for the Trial Chamber to refer to every piece of evidence on the record and it is presumed that it evaluated all evidence presented before it.[1785]

Given that the testimony of the witness was critical to the conviction, the Trial Chamber was required to specifically explain why it found the witness credible despite evidence of a possible motive on his part. The Trial Chamber's failure to do so violated the accused's right to a reasoned opinion, constituting an error of law[1786]

In certain circumstances, insufficient analysis of evidence on the record can amount to a failure to provide a reasoned opinion. Such a failure constitutes an error of law requiring de novo review of evidence by the Appeals Chamber.[1787]

Even if required to discuss a specific piece of evidence, trial chamber's failure to do so will often not amount to an error of law, especially when there is significant contrary evidence on the record.[1788]

An analysis limited to a select segment of the relevant evidentiary record is not necessarily sufficient to constitute a reasoned opinion. The Trial Chamber's failure to explicitly discuss and analyse the evidence of two defence witnesses constituted a failure to provide a reasoned opinion on the issue of effective control.[1789]

[1781] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 359
[1782] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 536
[1783] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 537
[1784] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 53
[1785] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 56
[1786] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 147
[1787] *Prosecutor v Perisic*, No. IT-03-81-A, *Judgement* (28 February 2013) at para. 92
[1788] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2624
[1789] *Prosecutor v Perisic*, No. IT-03-81-A, *Judgement* (28 February 2013) at para. 95

It is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings, or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.[1790]

Where a finding of guilt is made based on identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion. Setting forth the standards for weighing identification evidence in general was not sufficient.[1791]

In accordance with the right to a reasoned opinion, Trial Chambers are obliged to provide sufficient reasons for preferring the testimony of one crucial witness over another.[1792]

A Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber shows its cautious assessment of this evidence.[1793]

Article 24—penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should consider such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

See Rule 101

Article 25—appellate proceedings

The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

[1790] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 25; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1367; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 137
[1791] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 152
[1792] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 196
[1793] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para.242

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

acquittal

Article 25 of the Statute does not confer on an accused person the right to appeal from an acquittal.[1794]

Although the standard of unreasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution. This is because it has the more difficult task of showing that there is no reasonable doubt about the appellant's guilt when account is taken of the Trial Chamber's errors of fact.[1795]

The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal[1796].

The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[1797]

appeal of right

The spirit of the Rules justified allowing an accused to appeal a decision to continue his trial with a substitute Judge, even though the Trial Chamber had held that Rule 15 *bis*, which provided for an appeal of right, did not apply to the situation.[1798]

binding nature of decisions

Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where : (1) the previous decision has been decided based on a wrong legal principle; (2) cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[1799]

[1794] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 7.
[1795] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 14; *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 11
[1796] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement* (27 September 2007) at para. 13
[1797] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement* (27 September 2007) at para. 13; *Prosecutor v Halilovic*, No. IT-01-48-A, *Judgement* (16 October 2007) at para. 11; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Judgement* (19 May 2010) at para 272; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 514
[1798] *Prosecutor v Seselj*, No. IT-03-67-AR15*bis*, *Decision on Appeal Against Decision on Continuation of Proceedings* (6 June 2014) at para. 21
[1799] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 108; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 8

Where an Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.[1800]

The notion of "cogent reasons" encompasses considerations that are clear and compelling.[1801]

The Appeals Chamber may, exceptionally, depart from its previous decisions if there are cogent reasons to do so, i.e., if the previous decision was made "'on the basis of a wrong legal principle' or given per incuriam, that is, 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law'". It is for the party advocating a departure to demonstrate that there are cogent reasons in the interests of justice that justify such departure.[1802]

To constitute a cogent reason for departing from its established jurisprudence on a matter, the party advocating a departure would need to show that a non-binding opinion of another court is the correct law and demonstrate that there is a clear mistake in the Appeals Chamber's approach.[1803]

The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers.[1804]

Decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.[1805]

The probative value of a document may be assessed differently in different cases, depending on the circumstances.[1806]

Decisions of Trial Chambers have no binding force on each other. Factual findings made in a case at the Tribunal are binding only for that individual accused in that specific case.[1807]

As a rule, factual findings made by one chamber are not binding upon subsequent

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[1800] *Prosecutor v Sainovic et al*, No. IT-05-87-T, *Judgement* (23 January 2014) at para. 1622
[1801] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 24; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 588
[1802] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 596; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 588
[1803] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 598
[1804] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 113
[1805] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 114
[1806] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 90
[1807] *Prosecutor v Mladic*, No. IT-09-92-AR73.4, *Decision on Defence Interlocutory Appeal from the Trial Chamber Rule 98 bis Decision* (24 July 2014) at para. 28; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 337

chambers.[1808]

Findings of criminal responsibility made in a case before the Tribunal are binding only on the accused in a specific case.[1809]

Two reasonable triers of fact may come to different but equally reasonable conclusions based on the same evidence.[1810]

An error cannot be established by merely pointing to the fact that other trial chambers have exercised their discretion in a different way.[1811]

Trial Chamber declined to invite the prosecution to withdraw charges based on same evidence which Appeals Chamber had held to be insufficient in another case. A particular body of evidence deemed insufficient by a Trial Chamber or even the Appeals Chamber in another case will not necessarily also be regarded as insufficient in a different case.[1812]

The International Tribunal need not defer to the International Court of Justice such as to be bound by its decisions. It need not await a decision of that Court or of the General Assembly, even if the same issue is being considered. However, the decisions of the ICJ are of the utmost significance.[1813]

Whilst the Tribunal recognizes the status of the International Court of Justice as the 'principal judicial organ' within the United Nations system, the Tribunal is an autonomous international judicial body, and there is no hierarchical relationship between the two courts. Accordingly, although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.[1814]

The Appeals Chamber is not bound by the legal determinations reached by trial chambers of this Tribunal or by the ICJ. However, the ICJ is the principal organ of the United Nations and the competent organ to resolve disputes relating to the interpretation of the Genocide Convention.[1815]

The Appeals Chamber is not bound by the findings of other courts - domestic, international, or hybrid. Even though it might take them into consideration, it may, after

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[1808] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 33
[1809] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion Seeking to Disqualify the Honourable Judge Alphons Orie and the Honourable Judge Christoph Flugge* (26 August 2016), at p. 4
[1810] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1677
[1811] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1677
[1812] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Withdrawal of Charges* (13 October 2014) at para. 8
[1813] *Prosecutor v Kvocka et al*, No. IT-98-30/1-AR73.5, *Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of Trial Chamber I of 5 December 2000* (25 May 2001) at paras. 17, 22
[1814] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 24.
[1815] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 226

careful consideration, come to a different conclusion on a matter than that reached by another judicial body.[1816]

clarification

While clarification of a decision is available to the parties, a final judgement will not be clarified by the Appeals Chamber.[1817]

collateral estoppel and *res judicata*

The principle of *res judicata* applies only to the accused in a particular case and does not extend to accused in other cases. Even if the evidence is the same, each Trial Chamber is entitled to reach its own conclusions.[1818]

The doctrine of collateral estoppel is not applicable in international criminal law and one who was not a party to the first proceedings cannot preclude the other party from re-litigating a matter it lost.[1819]

In a trial of an individual who has not been tried before, both the prosecution and the defence should be able to present their best evidence in relation to all the issues relevant to the case, including those that may have been touched upon or adjudicated by previous Chambers.[1820]

death of appellant

Upon the death of the appellant before the appeal is concluded, there is no jurisdiction to continue the appeal proceedings. The trial judgement would not be vacated but would be considered final.[1821]

The son of a deceased appellant has no standing to request that the appeal be decided.[1822]

expedited appeals

[1816] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 590
[1817] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Decision on Motion for Clarification* (1 August 2013) at p, 1
[1818] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 42
[1819] *Prosecutor v Karadzic*, No.IT-95-5/18-T, *Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel* (31 March 2010)
[1820] *Prosecutor v Karadzic*, No.IT-95-5/18-T, *Decision on Accused's Motion to Strike Scheduled Shelling Incident on Grounds of Collateral Estoppel* (31 March 2010) at para. 8
[1821] *Prosecutor v Delic*, No. IT-04-83-A, *Decision on the Outcome of the Proceedings* (29 June 2010) at paras. 8,15; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision Terminating Appellate Proceedings in Relation to Milan Gvero* (7 March 2013) at para. 6
[1822] *Prosecutor v Delic*, No. IT-04-83-A, *Decision on Motion for Continuation of the Appellate Proceedings* (29 June 2010)

Appeals Chamber declined to expedite its consideration of issue of validity of judgement considering participation by Trial Chamber judge who was later disqualified in another case for bias. Consideration of the issues during the normal appeals process was not shown to be prejudicial to the accused where the application of the disqualification to his case was speculative.[1823]

factual findings

The Appeals Chamber may summarily dismiss challenges to factual findings which were not relied upon for conviction.[1824]

When considering alleged errors of fact on appeal from the Defence, the Appeals Chamber will determine whether no reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt.[1825]

A Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record, "as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence." Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning.[1826]

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[1827].

inconsistent findings

It is accepted that two reasonable triers of facts might reach different but equally reasonable conclusions, even if they concern the same events. However, on appeal, the question is whether no reasonable trier of fact could have reached the same conclusion and not whether the conclusion reached by another trial chamber was a reasonable one.[1828]

interlocutory decisions

The Appeals Chamber has the authority in extraordinary circumstances to rule on alleged bias of Trial Chamber judge on an interlocutory basis on an appeal from

[1823] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Joint Motion…Seeking Expedited Adjudication…* (23 October 2014) at para. 16
[1824] *Prosecutor v Brdjanin*, No. IT-98-36-A, *Judgement* (3 April 2007) at para. 22
[1825] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 12
[1826] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 86
[1827] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 12
[1828] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 180

judgement but declined to do so where normal appellate process was capable of protecting rights of accused.[1829]

issues of general importance

The Appeals Chamber may consider issues of general significance to the Tribunal's jurisprudence, even if they do not affect the verdict, so long as there is a nexus with the case at hand.[1830]

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 judgement but is nevertheless of general significance to the International Tribunal's jurisprudence[1831].

It is appropriate to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law, and it involves an important point of law that merits examination. This is because the Appeals Chamber must give the Trial Chambers guidance in their interpretation of the law.[1832]

reconsideration

The Appeals Chamber, in its judgement on appeal from a final conviction, may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[1833]

remedy

The Appeal Chamber is not obliged, having identified an error in the decision of the Trial Chamber and upheld the appeal, to remit for retrial. It could exercise its discretion not to order a retrial, even though a ruling in favor of the accused was in error.[1834]

An order for retrial is an exceptional measure to which resort must necessa1ily be limited.[1835]

[1829] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-A, *Decision on Mico Stanisic's Motion Requesting a Declaration of Mistrial…*(2 April 2014) at paras. 23-27

[1830] *Prosecutor v Brdjanin,* No. IT-98-36-A, *Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal* (5 May 2005) at pg. 3; *Prosecutor v Krnojelac,* No. IT-97-25, *Judgement* (17 September 2003) at para. 6

[1831] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 8; *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at paras. 10, 232

[1832] *Prosecutor v Krnojelac,* No. IT-97-25-A, *Judgement* (17 September 2003) at para. 7

[1833] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 39

[1834] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 77.

[1835] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3131

The factors considered included; (1) the fact that the genocide count for which the cross-appellant had been acquitted was based on the killings to which he has already pleaded guilty. The issue at the retrial would then be one of whether the intent was present, and the definition of specific intent had already been clarified in the context of the Appeal Courts decision. (2) A prison would generally be in a better position than the United Nations Detention Unit to provide long-term consistent psychological and psychiatric follow-up treatment. (3) It was through no fault of the accused that the Trial Chamber erred in law. In addition, the *ad hoc* nature of the International Tribunal means that the resources are limited in terms of manpower and the uncertain longevity of the Tribunal. Following this, the court held that it would not be in the interests of justice to pursue a retrial.[1836]

Where the Appeals Chamber finds an error committed by a trial chamber, the choice of a remedy lies within the discretion of the Appeals Chamber. This discretion must be exercised on proper judicial grounds on a case-by-case basis, balancing factors including fairness to the accused, the interests of justice, the nature of the offences, and the circumstances of the case.[1837]

Considering the impossibility of making findings on issues for which the Trial Chamber erroneously acquitted the accused, and in remanding the case to the original Trial Chamber and considering the fact that the accused remained convicted of serious crimes, the interests of justice was better served by declines to order a retrial or remit limited issues for further proceedings.[1838]

Conviction for 7(3) liability can be entered on appeal where, although the Trial Chamber did not convict under Article 7(3), it made the findings necessary for the establishment of his responsibility under this provision for the sniping incidents.[1839]

Despite finding that the Trial Chamber had erred in acquitting the accused of some murders of prisoners in detention, conscious of the interests of fairness and the interests of justice and considering the nature of the offences and the circumstances of the case, the Appeals Chamber declined to enter new convictions on appeal in relation to these incidents.[1840]

remit to Trial Chamber

The Appeals Chamber‘s inherent power to control proceedings in such a way as to ensure that justice is done encompasses a power to remit limited issues to a Trial Chamber for determination.[1841]

[1836] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 74-77.
[1837] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3122
[1838] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3131
[1839] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 281
[1840] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3055
[1841] *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, Judgment on Sentence Appeal (8 April 2003) at para. 16.

The Appeals Chamber has the inherent power to remit limited issues to be determined by either the original or a newly composed trial chamber.[1842]

Where the Appeals Chamber remanded a matter for decision by the Trial Chamber, it retained jurisdiction to ensure that its decision was complied with.[1843]

revision of judgement

Appeals Chamber has the power to convict an accused on modes of liability not relied upon by the Trial Chamber under its power to "revise" a judgement.[1844]

Trial Chamber is not required to make findings on all modes of liability, and it would be detrimental to an expeditious trial to require it to do so.[1845]

Appeals Chamber power to enter convictions based on alternate 'modes of liability is not dependent on whether the Prosecution appeals.[1846]

The Appeals Chamber will not enter convictions under alternate modes of liability where this would substantially compromise the fair trial rights of appellants or exceed its jurisdiction as delineated in the Statute.[1847]

The Trial Chamber did not make explicit findings sufficient, on their face, to enter convictions based on the two alternate modes of liability deemed relevant by the Appeals Chamber. In the absence of such findings, and considering the circumstances of this case, the Appeals Chamber declined to analyse the Trial Chamber's remaining findings and evidence on the record to determine whether the accused's actions were sufficient to satisfy the elements of alternate modes of liability. To undertake such an investigation in this case would require the Appeals Chamber to engage in excessive fact finding and weighing of evidence and, in so doing, would risk substantially compromising the accused's fair trial rights.[1848]

Any attempt by the Appeals Chamber to derive inferences required for convictions under alternate modes of liability would require disentangling the Trial Chamber's findings from its erroneous reliance on unlawful artillery attacks, assessing the persuasiveness of this evidence, and then determining whether the accused's guilt was proved beyond reasonable doubt in relation to the elements of a different mode of

[1842] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3126
[1843] *Prosecutor v Gotovina*, No. IT-06-90-AR73.3, *Decision on Joint Request of Ante Gotovina and Mladen Markac for a Writ of Mandamus* (27 March 2009) at para. 5
[1844] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 106
[1845] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying Prosecution Motion Requesting Findings on all Modes of Liability Charged in the Indictment* (16 January 2013)
[1846] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 107
[1847] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 108
[1848] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 150

liability. Such a broad-based approach to factual findings on appeal risks transforming the appeals process into a second trial.[1849]

scope of review

The prosecutor was not estopped from changing its position on appeal where the rights of the accused would not be affected.[1850]

The Appeals Chamber is free to substitute its own decision for a decision of the Trial Chamber where it is sufficiently apprised of the issues in the case.[1851]

Arguments may not be made *de novo* before this Chamber and those not presented to the Trial Chamber, such as a particular basis for admission of evidence, are deemed waived.[1852]

standard of review

On appeal, the Parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice. In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to the invalidation of the judgement but is nevertheless of general significance to the Tribunal's jurisprudence.[1853]

An allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised is not *a priori* legitimate and may therefore be rejected on that ground.[1854]

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[1855]

[1849] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Judgement* (16 November 2012) at para. 153
[1850] *Prosecutor v Brdjanin*, No. IT-98-36-A, *Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal* (5 May 2005) at pg. 3
[1851] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Motion for Modification of Decision on Provisional Release and Motion to Admit Additional Evidence* (12 December 2002)
[1852] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 199
[1853] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 7; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 36; *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 8
[1854] *Prosecutor v Krnojelac*, No. IT-97-25-A, *Judgement* (17 September 2003) at para. 10; *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 9
[1855] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 16; *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 6; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 9

The Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions based on the same evidence.[1856]

The Appeals Chamber will only interfere in findings of fact where no reasonable trier of fact could have reached the same finding, If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice. A miscarriage of justice is "a grossly unfair outcome in a judicial proceeding when a defendant is convicted despite a lack of evidence on an essential element of the crime.[1857]

That the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.[1858]

Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[1859]

Discernible errors that will cause the Appeals Chamber to overturn the exercise of discretion by a Trial Chamber are that the Trial Chamber (1) misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion; (2) took into account irrelevant considerations; (3) failed to consider relevant considerations; (4) gave insufficient weight to relevant considerations; (5) made an error as to the facts upon which it has exercised its discretion; or (6) reached a decision that no reasonable Trial Chamber could have reached.[1860]

A trial chamber enjoys considerable discretion in setting the parameters of cross-examination and in outlining the exercise of this right, as well as in allocating time to the parties for the presentation of their cases.[1861]

A trial chamber is best placed to assess the credibility of a witness and reliability of the evidence adduced.[1862]

[1856] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 64.
[1857] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at paras 18-19; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 39
[1858] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 37
[1859] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 39
[1860] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 7; *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 5
[1861] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 40

Trial Chambers exercise discretion in different types of decisions—such as when imposing sentence, in determining provisional release, in relation to admissibility of some types of evidence, in evaluating evidence, and in deciding points of practice and procedure. Deference is afforded to the Trial Chamber's discretion in these decisions because they draw on the Trial Chamber's organic familiarity with the day-to-day conduct of the parties and practical demands of the case and require a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly-variable set of trial proceedings.[1863]

For the error to be one that occasioned a miscarriage of justice, it must have been "critical to the verdict reached"[1864].

Decision to deny adding General Wesley Clark to prosecution witness list under specified conditions pursuant to Rule 70 was a discretionary one to which deference to the Trial Chamber was required.[1865]

The standard of review of a judgement of acquittal entered at the close of the prosecution's case pursuant to Rule 98 *bis* is the same as review of a final judgement.[1866]

When reviewing a decision of the Trial Chamber concerning review of a decision of the Registrar, the Appeals Chamber applies the same standard of review as it does for other trial-related decisions.[1867]

Where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Rules and that this caused prejudice to the alleging party, such as to amount to an error of law invalidating the trial judgement.[1868]

The mere existence of a dissent does not render the majority's conclusion unreasonable.[1869]

standing

[1862] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 200
[1863] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para. 4
[1864] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 13
[1865] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 ter Witness List* (20 April 2007) at para. 9
[1866] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 9
[1867] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 6
[1868] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 26
[1869] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 670

Although not a "party", the interlocutory appeal of a subpoenaed witness would be heard in the interests of justice.[1870]

stay pending appeal

While a stay of proceedings pending interlocutory appeal may be ordered pursuant to Rule 54, it is an exceptional measure.[1871]

Decision finding that accused had sufficient funds to remunerate his defence team stayed pending appeal in the interests of justice.[1872]

Where evidence would have to be repeated should the Appeals Chamber overturn the Trial Chamber's decision not to postpone the trial, it was in the interest of justice to stay the resumption of the trial pending decision on the appeal.[1873]

Decision that remuneration of defence team by accused must take place immediately stayed pending review by the Trial Chamber and President where implementation of the decision would affect the ability of the accused to file his closing brief and have the assistance of his defence team during closing arguments.[1874]

waiver

A party is under an obligation to formally raise before the Trial Chamber, either at the pre-trial stage or during trial, any issues that require resolution. If a party raises no objection to a particular issue before the Trial Chamber, when it could reasonably have done so, in the absence of special circumstances the Appeals Chamber will find that the party has waived its right to bring the issue as a valid ground of appeal.[1875]

Prosecution waived its right to appeal decision on specificity of the indictment in final judgement where it failed to appeal Rule 98 bis decision indicating that crimes in question were not properly pleaded in the indictment.[1876]

[1870] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.11, *Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (13 November 2013) at para. 11
[1871] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Urgent Motion for Stay of Proceedings Pending Appeal* (21 October 2016) at p. 2
[1872] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Chamber's Decision on Indigence* (10 April 2014) at p. 4
[1873] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Stay Pending Appeal of Decision to Postpone Trial* (2 March 2010) at T994-95
[1874] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order Regarding Accused's Request for Review of Registrar's Decision and Urgent Motion for Stay* (11 August 2014) at p. 3; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order on Urgent Motion for Stay of Registrar's Decision* (18 September 2014) at p. 3
[1875] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 21; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 61; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para.176; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 170
[1876] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 260

Where the accused failed to object to the admission of evidence during the trial, he waived his right to claim prejudice.[1877]

The fact that the accused was self-represented at trial is a special circumstance justifying the consideration of an issue raised for the first time on appeal.[1878]

If an appellant fails to specifically refer in his final brief or closing arguments to a mitigating circumstance, the appellant cannot raise it for the first time on appeal.[1879]

As the Prosecution did not expressly and formally withdraw JCE I as a form of liability that could possibly be applied to all counts, the Prosecution did not abandon JCE I as a possible mode of liability for some crimes by qualifying those crimes as only JCE III crimes in its final trial brief. The Prosecution merely articulated its view on the more appropriate mode of liability. Its qualification of some crimes as only JCE III crimes in its final trial brief was not binding on the Trial Chamber.[1880]

withdrawal of appeal

The decision to withdraw an appeal must be an informed one.[1881]

Misunderstanding by accused of the ability to serve his sentence in Montenegro rendered his withdrawal of appeal uninformed, and he would be allowed to reinstate his appeal.[1882]

Article 26—review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.
See Rule 119

Article 27—enforcement of sentences

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 accept convicted persons. Such imprisonment shall be in accordance with the

[1877] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1314
[1878] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at paras. 170, 184
[1879] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2060
[1880] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 60-61
[1881] *Prosecutor v Strugar*, No. IT-01-42-Misc.1, *Decision on Strugar's Request to Reopen Appeal Proceedings* (7 June 2007) at para. 27
[1882] *Prosecutor v Strugar*, No. IT-01-42-Misc.1, *Decision on Strugar's Request to Reopen Appeal Proceedings* (7 June 2007) at para. 29

applicable law of the State concerned, subject to the supervision of the International Tribunal.

A convicted person does not have a right to be heard on the issue of which State the President designates for him to serve his sentence.[1883]

Article 28—pardon or commutation of sentences

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.

See Rule 125

Article 29—co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
(a) the identification and location of persons;
(b) the taking of testimony and the production of evidence;
(c) the service of documents;
(d) the arrest or detention of persons;
(e) the surrender or the transfer of the accused to the International Tribunal.

States are obligated to comply without undue delay with any request for assistance or an order by a Trial Chamber for the service of documents.[1884]

States may not withhold documents on grounds of national security concerns.[1885]

A State cannot point to its domestic law to justify non-compliance with its international obligations. Domestic law not in conformity with a State's obligations to the Tribunal must be amended.[1886]

[1883] *Prosecutor v Milosevic*, No. IT-98-29/1-ES, *Decision on Dragomir Milosevic's Request for Reconsideration of Order Designating State in Which he is to Serve his Sentence* (10 March 2011) at para. 3
[1884] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (17 November 2005) at para. 17
[1885] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) at para. 67
[1886] *In the case against Jojic et al*, No. IT-03-67-R77.5, *Decision in Relation to the Cooperation of the Government of the Republic of Serbia with the Tribunal* (1 August 2016) at para. 8

A State has no standing to challenge the merits of an arrest warrant issued by the Tribunal.[1887]

The Trial Chamber is empowered to issue an order against NATO or other international organizations which are collections of States.[1888]

UNMIK is required to cooperate with the Tribunal, including through requests to assist defence teams in preparing their defences.[1889]

The parties are not required to go through the official channels of the States or entities of the former Yugoslavia for identifying, summoning, or interviewing witnesses, or conducting on-site investigations. The obligation of States under this Article requires that the prosecution and defence must be allowed to fulfil their tasks free from any possible impediment or hindrance.[1890]

Although a Trial Chamber has the power to order a State to cooperate by providing documents to the Registry needed to assess the indigence of an accused, the Registrar failed to seek the cooperation voluntarily prior to applying for an order.[1891]

States' duty to cooperate with the Tribunal in its work includes co-operation with the defence who is investigating issues relevant to its case. The State should therefore cooperate with the defence to the maximum extent possible without involving the Chamber or Registry.[1892]

States are obligated to cooperate with the Tribunal regarding contempt matters.[1893]

Article 30—status, privileges, and immunities

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

[1887] *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis*, *Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 12
[1888] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.1, *Decision on Request of NATO for Review* (12 May 2006) at para. 8
[1889] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Third Motion for Stay of Proceedings* (27 August 2007) at para. 38
[1890] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 30
[1891] *Prosecutor v Seselj*, No. IT-03-69-T, *Decision on Registry Submission Pursuant to Rule 33(B)…on 22 June 2011* (21 July 2011)
[1892] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order to France* (4 May 2012) at p. 3
[1893] *In the case against Jojic et al*, No. IT-03-67-R77.5, *Decision in Relation to the Cooperation of the Government of the Republic of Serbia with the Tribunal* (1 August 2016) at para. 8

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

It was not necessary for *amicus curiae* to obtain waiver of immunities to interview ICTY staff members, and the accused had no standing to object in any event.[1894]

OTP spokesperson did not have immunity for a book she wrote after she left the employment of the ICTY.[1895]

Defence counsel and investigators are covered by the privileges and immunities granted by Article 30(4).[1896]

Defence members enjoy functional immunity from legal process that is immunity from legal process "with respect to words spoken or written and acts done by them during the performance of their duties as [defence members] before the Tribunal.[1897]

Croatia enjoined from further investigating or prosecuting defence investigators for acts during the performance of their duties and must return all items seized from the defence during the investigation.[1898]

Article 31—seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32—expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

[1894] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009) at para. 7
[1895] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009) at para. 7
[1896] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.5, *Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (14 February 2011) at para. 27
[1897] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.5, *Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (14 February 2011) at para. 28
[1898] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.5, *Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (14 February 2011) at paras. 36,67

Article 33—working languages

The working languages of the International Tribunal shall be English and French.

Article 34—annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

Rules of Procedure and Evidence

Rule 1—entry into force

These Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute of the Tribunal, shall come into force on 14 March 1994.

Rule 2—definitions

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:
Rules: The Rules of Procedure and Evidence in force;
Statute: The Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993;
Tribunal: 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, established by Security Council resolution 827 of 25 May 1993.
Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;
Ad litem Judge: A Judge appointed pursuant to Article 13 ter of the Statute;
Arrest: The act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;
Bureau: A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;
Defence: The accused, and/or the accused's counsel;
Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed;
Parties: The Prosecutor and the Defence;
Permanent Judge: A Judge elected or appointed pursuant to Article 13 bis of the Statute;
President: The President of the Tribunal;
Prosecutor: The Prosecutor appointed pursuant to Article 16 of the Statute;
Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor;
State: (i) A State Member or non-Member of the United Nations; (ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or (iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not;
Suspect: A person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction;

Transaction: 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;
Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.
(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3—languages

(A) The working languages of the Tribunal shall be English and French.
(B) An accused shall have the right to use his or her own language.
(C) Other persons appearing before the Tribunal, other than as counsel, who do not have sufficient knowledge of either of the two working languages, may use their own language.
(D) Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, considering the rights of the defence and the interests of justice.
(E) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.
(F) If:
(i) a party is required to take any action within a specified time after the filing or service of a document by another party; and
(ii) pursuant to the Rules, that document is filed in a language other than one of the working languages of the Tribunal, time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal.

exhibits

Limits on translation of potential defence exhibits were reasonable where Trial Chamber determined that some of proposed documents were not relevant.[1899]

Trial Chamber erred in failing to make an individualized assessment of the resources needed by the accused for the translation of documents to ensure the effective presentation of his case.[1900]

When imposing limitations on the number of pages to be translated on behalf of the accused, a Trial Chamber is required to ensure that the allotted resources are reasonably sufficient considering the complexity and number of issues to be litigated.[1901]

[1899] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.12, *Decision on Slobodan Praljak's Appeal of the Trial Chamber's 13 October 2008 Order Limiting the Translation of Defence Evidence* (5 December 2008) at para. 17
[1900] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 119

It would not be appropriate to limit the number of pages translated for the accused purely on the capacity restraints of the Language Section.[1902]

Trial Chamber violated right of accused at joint trial to have his case considered separately when it based allocation of translations on amount given to co-accused without making assessment of whether it was adequate for the needs of the accused.[1903]

for the accused

The standard for determining whether materials need to be translated into the native language of a self-represented accused is whether an accused understands one of the working languages of the Tribunal sufficiently to allow for the effective exercise of his right to conduct his defence.[1904]

The Tribunal need not adopt the standard of the International Criminal Court that the accused must "fully understand" one of the working languages to dispense with the requirement of translation.[1905]

An accused does not have a general right to have the prosecution's pre-trial brief translated into a language he understands.[1906]

Trial Chamber did not err in concluding that the accused could read Serbian in Latin script and did not abuse its discretion in failing to order translation of documents into Cyrillic script.[1907]

Trial Chamber did not err in considering evidence of accused's use of English 14-17 years earlier. Such evidence was relevant and was supplemented by additional

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[1901] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 117
[1902] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.12, *Decision on Slobodan Praljak's Appeal of the Trial Chamber's 13 October 2008 Order Limiting the Translation of Defence Evidence* (5 December 2008) at para. 24; *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 114
[1903] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.9, *Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 16 May 2008 on Translation of Documents* (4 September 2008) at para. 21
[1904] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English* (4 June 2009) at para. 11
[1905] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English* (4 June 2009) at para. 11
[1906] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Joint Defence Motions Requesting the Translation of the Pre-Trial Brief and Specific Motions* (24 May 2006) at para. 11
[1907] *Prosecutor v Tolimir*, No. IT-05-88/2-AR73.1, *Decision on Interlocutory Appeal Against Oral Decision of the Pre-Trial Judge of 11 December 2007* (28 March 2008); *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008) at para. 14

evidence showing that the accused continued to be able to speak and understand English.[1908]

An accused has the right to translation of statements and testimony to be admitted into evidence pursuant to Rule 92 *bis*. This requirement may be fulfilled by providing audio recordings of prior testimony. There is no right to translation of the Rule 92 *bis* motion.[1909]

A self-represented accused is not entitled to written BCS transcripts of prior testimony rather than audio recordings. Although listening to recordings is more time-consuming, there were adequate resources allocated to the defence team to assist him.[1910]

The accused is not entitled to receive all documents in a language he understands. However, certain documents, such as the indictment and items disclosed pursuant to Rules 66(A)(i) and (ii) must be translated into the language of the accused.[1911]

All transcripts disclosed to the accused pursuant to Rule 66(A) must be translated into Serbian, rather than the accused being provided with the audio recordings.[1912] However, the accused is not entitled to transcripts of his own proceedings when audio recordings were available.[1913]

Translation of motions and decisions into Serbian was practice of Registry and should continue.[1914]

Exculpatory material must be translated into a language which the accused understands where the accused is representing himself.[1915]

Rule 4—meetings away from the seat of the Tribunal

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.

[1908] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Prosecution Motion Seeking Determination that the Accused Understands English* (4 June 2009) at para. 15
[1909] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Joint Defence Motions Requesting the Translation of the Pre-Trial Brief and Specific Motions* (24 May 2006) at para. 16
[1910] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Zdravko Tolimir's Request for Transcripts in a Language Which he Understands* (August 2010) at p. 8
[1911] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008) at para. 7
[1912] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008) at para. 11
[1913] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008) at para. 13
[1914] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Request that all Materials, Including Transcripts, be Disclosed to him in Serbian and Cyrillic Script* (25 September 2008) at para. 12
[1915] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Form of Disclosure* (4 July 2006) at para. 15

denied

Request for trial sessions in former Yugoslavia denied where only mere convenience to witnesses was shown.[1916]

Trial Chamber did not abuse its discretion in denying a site visit to Sarajevo where the accused could point to no prejudice from the lack of visit.[1917]

Trial Chamber denied request for site visit to Kosovo, holding that maps, aerial photographs and video recordings were adequate for determination of the issues in the case.[1918]

evidence

A site visit is part of the trial.[1919]

Trial Chamber admitted video record of site visit as an exhibit finding it to be relevant and have probative value in the trial.[1920]

presence of accused

Because a site visit is part of the trial, the accused should be present for it, in principle.[1921]

Where security reasons prevented the accused from being present for the site visit, the reasons for holding a site visit in his absence must be compelling.[1922]

Value of site visit was not so great as to warrant conducting it in the absence of the accused.[1923]

Since there was no evidence gathering during the site visit, the right of the accused to be present at his trial was not abridged.[1924]

[1916] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Trial in the Former Yugoslavia* (4 July 2012) at para. 5
[1917] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at paras 50-54
[1918] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Motion for a Site Visit* (2 October 2007)
[1919] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo* (4 February 2003) at para. 9
[1920] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on the Admission into Evidence of Record of Site Visit* (2 December 2010)
[1921] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo* (4 February 2003) at para. 11
[1922] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo* (4 February 2003) at para. 16
[1923] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Prosecution's Motion for the Trial Chamber to Travel to Sarajevo* (4 February 2003) at para. 19
[1924] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Site Visit* (4 June 2013) at para. 8

Self-represented accused could be represented by his legal advisor at the site visit where he requested it and where the purpose is not the collection of evidence.[1925]

Rule 5—non-compliance with rules

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.
(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.
(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness.

Rule 6—amendment of the Rules

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten permanent Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges.
(B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the permanent Judges.
(C) Proposals for amendment of the Rules may otherwise be made in accordance with the Practice Direction issued by the President.
(D) An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.

Rule 7—authentic texts

The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.

Rule 7 *bis*—non-compliance with obligations

(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings

[1925] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Proposal for Site Visit* (2 July 2010) at p. 2

before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council.
(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.

Prosecution did not violate prerogative of President by commenting on non-cooperation of Croatia before Security Council nor did such action violate equality of arms.[1926]

Rule 8—request for information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, the Prosecutor may request the State to forward all relevant information in that respect, and the State shall transmit such information to the Prosecutor forthwith in accordance with Article 29 of the Statute.

Rule 9—Prosecutor's request for deferral

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:
(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,
the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

Rule 10—formal request for deferral

(A) If it appears to the Trial Chamber seised of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal.
(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.
(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any

[1926] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz* (1 December 2009) at paras. 8-9

subsequent trial shall be held before another Trial Chamber.

A Trial Chamber has the power to revoke an order of deferral of prosecution from a State to the Tribunal and authorize the State to proceed with its investigation and prosecution.[1927]

Rule 11—non-compliance with a request for deferral

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may request the President to report the matter to the Security Council.

Rule 11 *bis*—referral of the indictment to another court

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:
(i) in whose territory the crime was committed; or
(ii) in which the accused was arrested; or
(iii) having jurisdiction and being willing and adequately prepared to accept such a case,
so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (
(B) The Referral Bench may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.
(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004)1, consider the gravity of the crimes charged and the level of responsibility of the accused.
(D) Where an order is issued pursuant to this Rule:
(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;
(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;
(iii) the Prosecutor shall provide to the authorities of the State concerned all of the

[1927] *In Re: the Former Yugoslav Republic of Macedonia*, No. IT-02-55-Misc.6, *Decision on Prosecution's Motion for a Ruling Under Rule 73(A) Concerning the Effect of Deferral Under Rule 10 and Reconsideration of Request for Deferral* (17 January 2008) at para. 14

information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;
(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.
(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial.
(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10.
(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused.
(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules.
(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.

choice of state

There is no hierarchy among the factors to be considered when determining which State is the most appropriate for referral. The Referral Bench did not err in concluding that the nexus with Bosnia was greater than Serbia and deciding to refer the case to Bosnia.[1928]

Nexus with Bosnia, where crimes were committed, was greater than with Serbia, where the accused lived and when unrelated charges were pending.[1929]

Citizenship has no significant relevance to the determination of the State to which referral should be ordered.[1930]

The factors to be considered in determining the designation of the referral venue are (1) proximity to victims; (2) safety of witnesses; (3) availability of evidence; and (4) the prospects of a fair and expeditious trial for the accused.[1931]

[1928] *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 33,39; *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis*, *Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 45
[1929] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 41
[1930] *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Appeal Against Decision on Referral Pursuant to Rule 11 bis* (7 April 2006) at para. 33

The Referral Bench can consider referral to a state other than that requested by the prosecution and must apply a nexus test to determine the most appropriate referral venue.[1932]

conditions of detention

The conditions of detention in the receiving jurisdiction are a legitimate subject of inquiry for the Referral Bench. However, the Referral Bench drew well-informed conclusions that the conditions of detention for the accused would be adequate in Bosnia.[1933]

The conditions of detention in a national jurisdiction, both pre- and post-trial, is a matter that touches upon the fairness of the State's criminal justice system and are properly considered by a referral bench.[1934]

death penalty

An accused may face the risk of death not only by the possible imposition of the death penalty, but also by attacks on him by private individuals. Although this issue is not *prima facie* one to be considered under the first prong of the test in Rule 11 *bis*(B), the Bench will nevertheless consider it, since the security of an accused "touches upon the fairness of the State's criminal justice system" and is therefore always a matter of concern when determining whether a case should be referred pursuant to Rule 11 *bis*.[1935]

defence investigation

There is no need for the defence to conduct its own investigation or take statements since in contrast to preparing a case for trial, the issue on a proposed transfer is based upon the case made by the prosecution concerning the gravity of the offences and responsibility of the accused as well as the suitability of the State to receive the case.[1936]

[1931] *Prosecutor v Ljubicic*, No. IT-00-41-PT, *Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 bis* (12 April 2006) at para. 28

[1932] *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis.*1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 13

[1933] *Prosecutor v Stankovic*, No. IT-96-23/2.AR11*bis*, *Decision on Rule 11 bis Referral* (1 September 2005) at para. 34,37; *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 76; *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis.*1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 43

[1934] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 115

[1935] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 64

[1936] *Prosecutor v Zelenovic*, No. IT-96-23/2-PT, *Decision on Defence Motion to Vacate Order for Further Information in the Context of Prosecutor's Motion Pursuant to Rule 11 bis* (13 September 2006)

discretion

If the prerequisites of Rule 11 *bis* are satisfied, the Referral Bench retains the discretion whether to order the transfer of a case.[1937]

ex post facto

Rule 6(D) which prohibits application of an amended rule to the disadvantage of an accused does not apply to defeat the transfer of a case where Rule 11 *bis* was enacted after the accused had surrendered.[1938]

factors

An evaluation of whether a case should be referred to a State involves a two-step process requiring consideration of (1) whether the gravity of the crimes charged and the level of responsibility of the accused renders the case appropriate for referral because it involves intermediate or lower-rank accused; and (2) whether the State to which the prosecution seeks to refer the case is a competent national jurisdiction whose legal system is compatible with the requirements of Rule 11 *bis* (B).[1939]

fair trial

The Referral Bench was reasonable in determining that the accused would receive a fair trial in Bosnia.[1940]

The fact that the accused will not have the same level of public funding for his defence as he has at the ICTY is not grounds for finding that he would not receive a fair trial.[1941]

Because the receiving State had adequate protections in place for an accused who was not mentally fit to stand trial, referral was consonant with the rights of the accused.[1942]

[1937] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Referral of Case Under Rule 11 bis* (27 April 2007) at para. 18

[1938] *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis.*1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 9

[1939] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision for Further Information in the Context of the Prosecutor's Motion Under Rule 11 bis* (15 April 2005) at page 2

[1940] *Prosecutor v Stankovic*, No. IT-96-23/2.AR11*bis*, *Decision on Rule 11 bis Referral* (1 September 2005) at para. 30; *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 54; *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis.*1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 49; *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006)

[1941] *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis.*1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 25; *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 56

gravity of offence

When assessing the gravity of the charges, the Referral Bench is limited to the offenses charged in the indictment.[1943] The Referral Bench did not err in refusing to examine extrinsic facts outside of the indictment.[1944]

The currently operative indictment, not that which is pending at the time of the request for referral, should be used.[1945]

The temporal length and geographical scope of the charged crimes are relevant to the determination of the gravity of the offence.[1946]

When determining the gravity of the charges, the referral bench may consider the number of victims, the time frame and geographical area where they were committed, the number of incidents, and the way in which the criminal conduct was realized.[1947]

indictment

Referral bench erred in ordering referral without a determination of the application to amend the indictment.[1948]

Whether the events charged in the indictment have previously been sufficiently tried before the Tribunal is irrelevant to the transfer decision.[1949]

jurisdiction of Trial Chamber

The Trial Chamber has no jurisdiction to entertain motions after referral of a case to a national jurisdiction by the Referral Bench.[1950]

[1942] *Prosecutor v Kovacevic*, No. IT-01/42/2-I, *Decision on Referral of Case Pursuant to Rule 11 bis* (17 November 2006) at para. 56; *Prosecutor v Kovacevic*, No. IT-01/42/2-AR11*bis*, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (28 March 2007) at para. 21; *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Referral of Case Under Rule 11 bis* (27 April 2007) at para. 38

[1943] *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 21,24; *Prosecutor v Ljubicic*, No. IT-00-41-PT, *Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11 bis* (12 April 2006) at para. 18

[1944] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-AR11*bis*.1, *Decision on Milan Lukic's Appeal Regarding Referral* (11 July 2007) at para. 17

[1945] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-AR11*bis*.1, *Decision on Milan Lukic's Appeal Regarding Referral* (11 July 2007) at para. 12

[1946] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at paras. 13-14

[1947] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 27

[1948] *Prosecutor v Todovic* No. IT-97-25-AR11*bis*, *Decision on Rule 11bis Referral* (23 February 2006)

[1949] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 30

[1950] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Trial Chamber's Competence to Entertain Motion Filed After Entry into Force of Decision Under Rule 11 bis* (1 June 2007)

level of responsibility of the accused

The Referral Bench did not err in referring the case of an intermediate military superior to Bosnia. The accused could not be characterized as a leader for purposes of Rule 11 *bis*.[1951]

The Referral Bench erred in determining that paramilitary leader was not of sufficient responsibility to warrant trial by the Tribunal. It is important that some paramilitary leaders be prosecuted at the ICTY.[1952]

The level of responsibility relates both to the role of the accused in the offence and his position in the hierarchy of the relevant organ.[1953]

Chief of Staff of Bosnian Army was among the most senior leaders, even if he was alleged to be only remotely connected to the crimes. Referral to Bosnia was denied.[1954]

To qualify for a level of responsibility not appropriate for transfer, the accused must be alleged to have exercised such a significant degree of authority that it is appropriate to refer to him as among the "most senior" rather than intermediate leaders.[1955]

Assistant Warden of a prison was not a leader for purposes of Rule 11 *bis*.[1956]

Leaders of local paramilitary group were not leaders for purposes of Rule 11 *bis*.[1957]

Even though the crime of genocide at Srebrenica was extremely grave, the role of the accused justified referral of the case to Bosnia.[1958]

[1951] *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 20
[1952] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-AR11*bis*.1, *Decision on Milan Lukic's Appeal Regarding Referral* (11 July 2007) at para. 22
[1953] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 28
[1954] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Motion for Referral of Case Pursuant to Rule 11 bis* (9 July 2007) at para 25
[1955] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 28
[1956] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 22
[1957] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Referral of Case Pursuant to Rule 11 bis* (5 April 2007) at para. 30
[1958] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Referral of Case Under Rule 11 bis* (27 April 2007)

monitoring compliance

The Referral Bench had the authority to order the prosecution to monitor the progress of a referred case and report back to the Bench but did not have the authority to direct the prosecution to engage outside bodies to do the monitoring.[1959]

The referral bench, as part of its duties to ensure a fair trial, has the power to recall the transfer of the accused if at any time it appears that his safety cannot be guaranteed in the receiving State.[1960]

post-conviction proceedings

The Tribunal does not have appellate jurisdiction to review general claims regarding the proceedings against a defendant who was convicted in a national jurisdiction after a referral to that jurisdiction. Post-conviction claims should be submitted to the appellate courts of the receiving State.[1961]

A national jurisdiction may amend an indictment following referral if there is a proper factual and legal basis for the amendment.[1962]

re-transfer

Since transfer to and from the Tribunal is not an extradition, a State cannot impose conditions on the transfer of an accused or invoke the rule of specialty or non-transfer concerning its nationals. United Nations Security Council resolutions authorizing referrals override provisions of treaties or national law relating to extradition.[1963]

A citizen of a state with a "no extradition" clause who voluntarily surrendered to the Tribunal cannot invoke extradition provisions to object to the transfer of his case.[1964]

[1959] *Prosecutor v Stankovic*, No. IT-96-23/2.AR11*bis*, *Decision on Rule 11 bis Referral* (1 September 2005) at para. 59; *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis*, *Decision on Rule 11 bis Referral* (15 November 2005) at para. 60-61; *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Appeal Against Decision on Referral Pursuant to Rule 11 bis* (7 April 2006) at para. 95

[1960] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Referral of Case Under Rule 11 bis* (27 April 2007) at para. 41

[1961] *Prosecutor v Jankovic*, No. IT-96-23/2-PT, *Decision on Gojko Jankovic's Motion of 12 April 2010* (21 June 2010) at para. 10

[1962] *Prosecutor v Jankovic*, No. IT-96-23/2-PT, *Decision on Gojko Jankovic's Motion of 12 April 2010* (21 June 2010) at para. 12

[1963] *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Appeal Against Decision on Referral Pursuant to Rule 11 bis* (7 April 2006) at para. 31; *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis*.1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 8

[1964] *Prosecutor v Ljubicic*, No. IT-00-41-AR11*bis*.1, *Decision on Appeal Against Decision on Referral Under Rule 11 bis* (4 July 2006) at para. 8

revocation of referral

Only the prosecutor and not the accused can move to revoke a referral. Although the Chamber may do so *proprio motu*, it would only do so in the circumstances of a grave violation left unchallenged by the prosecution, or untimely submitted.[1965]

severance

There is nothing in the rules which prohibit transferring one accused in a multi-accused case.[1966]

standard of review on appeal

The decision to make a referral pursuant to Rule 11 *bis* is a discretionary one and will not be disturbed on appeal unless it can be shown that the Referral Bench misdirected itself either as to a principle to be applied, or as to the law which is relevant to the exercise of discretion, or gave weight to extraneous or irrelevant considerations, failed to give sufficient weight to relevant considerations, made an error as to the facts, or reached a conclusion that was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Referral Bench did not exercise its discretion properly.[1967]

standing to request transfer

The defence has no standing to make a request for referral pursuant to Rule 11*bis*. The Trial Chamber is without authority to order a referral *proprio motu*. This is the exclusive province of the referral bench.[1968]

Neither the accused nor a State has standing to request a transfer.[1969]

willing and able

Since the Tribunal is without authority to compel a national jurisdiction to receive a case for prosecution, it must be shown that the national jurisdiction is willing and adequately prepared to accept the referral of a case from the Tribunal.[1970]

[1965] *Prosecutor v Jankovic*, No. IT-96-23/2-PT, *Decision on Gojko Jankovic's Motion of 12 April 2010* (21 June 2010) at para. 14

[1966] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Decision on Referral of Case Under Rule 11 bis* (27 April 2007) at para. 47

[1967] *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Appeal Against Decision on Referral Pursuant to Rule 11 bis* (7 April 2006) at para. 10; *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 8

[1968] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motions for Separate Trials and Severance of Counts* (1 July 2005) at para. 6

[1969] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR11*bis, Decision on Savo Todovic's Appeals Against Decisions on Referrals Pursuant to Rule 11 bis* (4 September 2006) at para. 40

Rule 12—determinations of courts of any State

Subject to Article 10, paragraph 2, of the Statute, determinations of courts of any State are not binding on the Tribunal.

Rule 13—non bis in idem

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following mutatis mutandis the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

Rule 14—solemn declaration

(A) Before taking up duties each Judge shall make the following solemn declaration:
"I solemnly declare that I will perform my duties and exercise my powers as a Judge 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 honourably, faithfully, impartially and conscientiously".
(B) The declaration shall be signed by the Judge and witnessed by, or by a representative of, the Secretary-General of the United Nations. The declaration shall be kept in the records of the Tribunal.
(C) A Judge whose service continues without interruption after expiry of a previous period of service shall not make a new declaration.

Rule 15—disqualification of judges

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.
(B) (i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President.
(ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers

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[1970] *Prosecutor v Stankovic*, No. IT-96-23/2.AR11*bis, Decision on Rule 11 bis Referral* (1 September 2005) at para. 40; *Prosecutor v Jankovic*, No. IT-96-23/2-AR11*bis, Decision on Rule 11 bis Referral* (15 November 2005) at para. 66

to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.
(iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.
(iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.
(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber to hear any appeal in that case.
(D) (i) No Judge shall sit on any appeal in a case in which that Judge sat as a member of the Trial Chamber.
(ii) No Judge shall sit on any State Request for Review pursuant to Rule 108 bis in a matter in which that Judge sat as a member of the Trial Chamber whose decision is to be reviewed.

administrative duties

The President or Vice President cannot be disqualified from their administrative duties of appointing judges to the bench of the Appeals Chamber to hear a particular case.[1971]

There was no ground for disqualifying a judge from presiding over a trial because he has become President of the Tribunal.[1972]

appearance of bias

A Judge is not impartial if it is shown that actual bias exists. There is an unacceptable appearance of bias if: (i) a Judge is a party to the case or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[1973]

An unacceptable appearance of bias exists where: (i) a Judge is a party to the case

[1971] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-AR11*bis*.1, *Decision on Motion to Disqualify President and Vice-President from Appointing Appeals Chamber and to Disqualify President Judge and Judge Meron from Sitting on Appeals Chamber* (4 May 2007)
[1972] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Motion for Disqualification* (12 January 2009) at para. 14
[1973] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 189

or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[1974]

A judge is disqualified if there is a showing of actual bias or an unacceptable appearance of bias. An unacceptable appearance of bias exists if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[1975]

The apprehension of bias test reflects the maxim that "justice should not only be done but should manifestly and undoubtedly be seen to be done" and is founded on the need to ensure public confidence in the judiciary.[1976]

The reasonable observer must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background. The pertinent factor is whether the reaction of the hypothetical fair-minded observer would be that the judge might not bring an impartial and unprejudiced mind to the issues arising in the case.[1977]

The reasonable observer test is not applied as a reasonable observer from the region or a reasonable observer from a particular ethnic group.[1978]

The fact that the judge rendered several procedural decisions in favor of the defence is irrelevant to the issue of apprehension of bias when convicting the accused on the substantive charges.[1979]

A reasonable observer is a hypothetical fair-minded person, acting in good faith, with sufficient knowledge of the relevant circumstances to make a reasonable judgement of whether a Judge might not bring an impartial and unprejudiced mind to the issues arising in the case.[1980]

Personal convictions and opinions of Judges are not in themselves a basis for inferring a lack of impartiality.[1981]

In the absence of evidence to the contrary, a reasonable observer properly

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[1974] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 43
[1975] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 683; *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 17; *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para 189
[1976] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 43
[1977] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 19; *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 190
[1978] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 45
[1979] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 47
[1980] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 48
[1981] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 54

informed of the circumstances would presume that the judge could disabuse his mind of any irrelevant personal beliefs or predispositions.[1982]

Disqualification of judge who wrote private letter criticizing recent acquittals and attributing them to improper influence of States on the President was not required as it would not lead a reasonable observer properly informed to conclude that he was predisposed to convicting accused persons before the Tribunal. [1983]

Judge's letter indicating approval of convicting military commanders for crimes committed with their knowledge and criticizing recent acquittals demonstrated appearance of bias in favor of conviction even without specific reference to case he was sitting on and required his disqualification from case in which evidence had concluded but judgement had not yet been rendered.[1984]

Statement of Judge in capacity as President of the Tribunal of the need to arrest and try the accused and that Tribunal was obligated to try persons most responsible for crimes in former Yugoslavia were not indications of bias, but statements of the mandate of the Tribunal.[1985]

burden of proof

It is the burden of the party seeking disqualification of a Judge to demonstrate a reasonable apprehension of bias.[1986]

contempt

There are situations in which the involvement of a Trial Chamber in both directing the investigation and prosecution of a complaint of contempt and adjudicating the contempt case could affect the impartiality of the Chamber or create the appearance of bias. Such circumstances should be determined on a case-by-case basis.[1987]

Given the extent of involvement of the Trial Chamber in directing the course and parameters of the case in the investigative stage, exceptional circumstances existed to refer the matter to another Chamber for trial.[1988]

[1982] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 55
[1983] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 56
[1984] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Defence Motion for Disqualification of Judge Harhoff…*(28 August 2013) at paras. 12-13
[1985] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Theodor Meron* (26 October 2016) at para. 21
[1986] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 33
[1987] *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer* (27 February 2009) at para. 38
[1988] *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer* (27 February 2009) at para. 53

Fact that judges sat on Trial Chamber which convicted the accused of an earlier contempt for disclosure of confidential information did not require their disqualification from current case.[1989]

Fact that the accused wrote derogatory things about judges in his book did not warrant disqualification where judges had not read the book and in any event a litigant cannot create grounds for disqualification by writing derogatory things about a judge and then seeking his or her disqualification.[1990]

decisions as source of bias

While the possibility is not ruled out that decisions rendered by a judge or a chamber could suffice to establish bias, this would be "truly extraordinary."[1991]

Issuing decision without waiting for reply was not evidence of bias against a party.[1992]

extrajudicial activities as source of bias

A judge may be considered impartial even when he or she might be called upon to consider acts of the State of which he is a national.[1993]

Appearance of bias not shown because of judge's representation of views of her government in United Nations Commission on the Status of Women.[1994]

Appearance of bias not shown by Judge's casual acquaintance with UN Civil Affairs Officer whose reports were admitted into evidence and whose credibility was in issue.[1995]

Appearance of bias not shown by judge's having questioned witness now appearing for prosecution in connection with work for NGO ten years earlier. Prosecution motion for disqualification denied.[1996]

[1989] *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Decision on Motion by Professor Vojislav Seselj for the Disqualification of Judges O-Gon Kwon and Kevin Parker* (22 June 2010) at para. 32
[1990] *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Decision on Motion by Professor Vojislav Seselj for the Disqualification of Judges O-Gon Kwon and Kevin Parker* (19 November 2010) at paras. 31,33
[1991] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Theodor Meron* (26 October 2016) at para. 22
[1992] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Theodor Meron* (26 October 2016) at para. 22
[1993] *Prosecutor v Martic*, No. IT-95-11-A, *Report to the Vice President Pursuant to Rule 15(b)(ii) Concerning Defence Motion to Disqualify Judge Schomburg from Sitting on Appeal* (19 October 2007)
[1994] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 199
[1995] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision of the President on Jadranko Prlic's Motion to Disqualify Judge Arpad Prandler* (4 October 2010)
[1996] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff* (14 January 2008)

Appeal Chamber Judge's support for creation of Bosnia War Crimes court as President did not disqualify him from sitting on appeal from decision to transfer an accused to that court.[1997]

Judge's service as President of Bosnia Human Rights Chamber and participation in decisions finding that Republika Srpska government was responsible for disappearance of Muslims from Srebrenica and failure to account to their families, as well as public statements in connection with that decision, did not amount to facts showing an appearance of bias.[1998]

fair trial

There is a fundamental human right of an accused to be tried before an independent and impartial tribunal is generally recognized as being an integral component of the requirement that an accused should have a fair trial.[1999]

multiple cases

Determinations of actual bias or unacceptable appearance of bias under Rule 15 should be made on a case-by-case basis.[2000]

A judge's disqualification in one case, does not automatically disqualify him from other cases. It must be shown that those actions of the judge which warranted disqualification in another case, impacted on his impartiality in the present case.[2001]

The circumstances of the present case differed from the other case in which the judge was disqualified because the judge's letter allegedly evidencing bias was sent while the other case was ongoing, but after the present case was completed.[2002]

nullification of decisions

Where the disqualification was based upon the need to prevent the appearance of bias in the adjudicative phase of the case, there was no error in failing to nullify the decisions of the Chamber reached during the investigative phase of contempt proceedings.[2003]

[1997] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-AR11*bis*.1, *Order on Second Motion to Disqualify President and Vice President from Appointing Judges to Appeal Bench and to Disqualify President and Judge Meron from Sitting on Appeal* (11 May 2007)
[1998] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion to Disqualify Judge Picard* (18 May 2009) at paras. 17-22; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion to Disqualify Judge Picard and Report to the Vice President Pursuant to Rule 15(B)(ii)* (22 July 2009)
[1999] *Prosecutor v Furundzija*, No.IT-95-17/1-A, *Judgement* (21 July 2000) at para. 177; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 42
[2000] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 32
[2001] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 32
[2002] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 33
[2003] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 26

The Trial Chamber has the discretion whether to nullify decisions of a Trial Chamber whose members have been disqualified for the appearance of bias. In this case, the Chamber determined that the earlier decisions could be maintained.[2004]

Appearance of bias of one Judge did not taint the remaining Judges and they would be allowed to continue to serve on the case.[2005]

panel of three judges

Where the President's decision against disqualification under Rule 15(B) is challenged, it becomes necessary to appoint a panel of three judges to review the matter.[2006]

There is no need to appoint a panel of three judges where the motion is patently unmeritorious, or an applicant fails to substantiate his claim.[2007]

The procedure set forth in Rule 15(B) is appropriate for determination of a motion to recuse a Judge on the basis that he does not meet the qualifications under Article 13 of the Statute.[2008]

The procedure set forth in Rule 15(B) is not appropriate for determination of a motion challenging the term of office of the judges, as the matter is one of jurisdiction and not of bias.[2009]

The procedure set forth in Rule 15(B) is appropriate for a determination to disqualify one of the panel of judges assigned to adjudicate a disqualification motion.[2010]

[2004] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on the Defence Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions* (19 May 2009) at para. 9
[2005] *Prosecutor v Seselj*, No. IT-03-67-AR15*bis*, *Decision on Appeal Against Decision on Continuation of Proceedings* (6 June 2014) at para. 57
[2006] *Prosecutor v Karadzic*, No. IT-95-5/18-AR15, *Decision on Appeal from Decision on Motion to Disqualify Judge Picard* (26 June 2009) at para. 8; *Prosecutor v Stanisic & Zupljanin*, No. 08-91-A, *Decision on Zupljanin Defence Request for Appointment of a Panel to Adjudicate the Request for Disqualification of Judge Liu Daqun* (7 February 2014)
[2007] *Prosecutor v Seselj*, No. IT-03-67-AR77.3, *Decision on Vojislav Seselj's Motion to Disqualify Judge Alphons Orie* (7 October 2010) at para.28; *Prosecutor v Mladic*, No. IT-09-92-PT, *Order Denying Defence Motion Pursuant to Rule 15(B) Seeking Disqualification of Presiding Judge Alphons Orie and for a Stay of Proceedings* (15 May 2012) at p. 3; *Prosecutor v Seselj*, No. IT-03-67-R77.4-A, *Decision on Vojislav Seselj's Motion to Disqualify Judges Arlette Ramoroson, Mehmet Guney, and Andresia Vaz* (10 January 2013) at para. 21; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Theodor Meron* (26 October 2016) at para. 23
[2008] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motion to Recuse Judge Melville Baird* (30 September 2009) at para. 11
[2009] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disqualification of Judges Kwon, Morrison, Baird and Lattanzi* (31 July 2014) at para. 8
[2010] *Prosecutor v Seselj*, No. IT-03-67-AR77.3, *Decision on Vojislav Seselj's Motion to Disqualify Judge Alphons Orie* (7 October 2010) at para. 15

The panel of three Judges is under no obligation to consider the report of the presiding judge to the President made under this Rule.[2011]

presiding judge

A motion for disqualification of a judge must first be made to the Presiding Judge of the Trial Chamber, not the Presiding Judge of the specific case.[2012]

presumption of impartiality

There is a presumption of impartiality of a judge.[2013]

There is a strong presumption of impartiality attached to a Judge which cannot be easily rebutted.[2014]

There is a high threshold to overcome the presumption of impartiality. It is as much a threat to the interests of an impartial and fair administration of justice for judges to disqualify themselves based on unfounded and unsupported allegations of apparent bias, as the real appearance of bias itself.[2015]

The reason for this high threshold is that, just as any real appearance of bias on the part of a Judge undermines confidence in the administration of justice, it is equally important that judicial officers "do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour".[2016]

The reasonable apprehension of bias must be firmly established to rebut the presumption of impartiality of a judge.[2017]

[2011] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Reconsideration on Decision for Disqualification, Requests for Clarification, and Motion on Behalf of Stanisic and Zupljanin* (7 October 2013) at para. 19

[2012] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision of the President on Jadranko Prlic's Motion to Disqualify Judge Arpad Prandler* (16 September 2010) at para. 6

[2013] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 700; *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para 182; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 41

[2014] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 44

[2015] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion to Disqualify Judge Picard and Report to the Vice President Pursuant to Rule 15(B)(ii)* (22 July 2009) at para. 17; *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Decision on Motion by Professor Vojislav Seselj for the Disqualification of Judges O-Gon Kwon and Kevin Parker* (19 November 2010) at para. 17; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Motion Requesting Recusal of Judge Liu from Adjudication of Motion to Vacate Trial Judgement* (24 February 2014) at para. 11

[2016] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 44

[2017] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 19; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 44

prior involvement with same or related matter

A judge's previous participation in convictions or acquittals are not relevant when considering bias or the appearance of bias.[2018]

Judge's service as Presiding Judge in trial in which findings were made that the current accused was responsible for the same events for which he is being tried did not disqualify Judge from serving on interlocutory appeal of decision unrelated to the merits and involving only fair trial rights.[2019]

Fact that judges rejected accused's appeal on the merits does not disqualify them from hearing his request for review.[2020]

Appearance of bias not shown from judge's administrative communications to UN Security Council while serving as Tribunal President concerning extension of term of ad litem judges—the issue presented in the instant appeal.[2021]

Bias not shown where judges authorized contempt investigation of defence counsel during trial but found insufficient evidence of misconduct.[2022]

Judge's confirmation of indictment of another accused whose case was related to that of this accused did not require his disqualification.[2023]

Judges' conduct of trial and prior service on related cases did not provide a reasonable apprehension of bias.[2024]

Fact that judges participated in earlier contempt case against the accused does not warrant their disqualification.[2025]

[2018] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Reconsideration on Decision for Disqualification, Requests for Clarification, and Motion on Behalf of Stanisic and Zupljanin* (7 October 2013) at para. 14

[2019] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Carmel Agius* (26 October 2016) at para. 23; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Motion for Disqualification of Judge Fausto Pocar* (26 October 2016) at para. 23

[2020] *Prosecutor v Blagojevic*, No. IT-02-60-R, *Decision on Motion for Disqualification* (2 July 2008) at para. 8

[2021] *Prosecutor v Krajisnik*, No. IT-00-39-AR73.2, *Order on Defence Motion that His Honour Judge Meron Not Sit on an Appeal* (1 September 2006)

[2022] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Motion for Disqualification* (12 January 2009) at para. 10

[2023] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at paras. 42, 44

[2024] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 184; *Prosecutor v Mladic*, No. IT-09-91-T, *Decision Concerning…Defence Motion…Seeking Disqualification of Presiding Judge Alfons Orie* (22 January 2014) at p. 4; *Prosecutor v Mladic*, No. IT-09-91-T, *Decision Concerning…Defence Motion…Seeking Disqualification of Judge Christoph Flugge* (22 January 2014) at p. 4; *Prosecutor v Mladic*, No. IT-09-91-T, *Decision on Defence Motion Seeking to Disqualify the Honourable Judge Alfons Orie and the Honourable Judge Christoph Flugge* (26 August 2016), p. 4

[2025] *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Decision on Motion by Professor Vojislav Seselj for the Disqualification of Judges O-Gon Kwon and Kevin Parker* (19 November 2010) at para. 29

Fact that judge dissented from disqualification of same Judge on same issue in another case did not overcome the presumption in favor of impartiality and therefore disqualification of that judge was not warranted.[2026]

replacement judge

The provisions of Rule 15 *bis* should be applied *mutatis mutandus* to the decision whether to replace a judge who has been disqualified for bias under Rule 15(A).[2027]

When deciding whether to continue trial with a replacement judge, the Trial Chamber should consult the accused.[2028]

Replacement judge authorized where one member of the Trial Chamber was disqualified for appearance of bias during deliberations. Replacement judge to review the record, view videos of testimony where necessary, and recall witnesses if necessary. Once the replacement judge certified his familiarity with the case, deliberations would begin anew.[2029]

review

The lack of an interlocutory appeal from a decision on disqualification of a Judge pursuant to Rule 15(B) of the Rules does not violate an accused's right to a fair trial.[2030]

Upon a motion to disqualify a judge, pursuant to Rule 15(B), the presiding judge of the Trial Chamber is required to submit the matter to the Bureau if the moving party objects to his decision.[2031]

A party waives his right to raise the issue of disqualification of a judge by raising it for the first time on appeal.[2032]

staff

Legal officers assisting Judges at the Tribunal are not subject to the same

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[2026] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Motion Requesting Recusal* (3 December 2013) at para. 23; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Motion Requesting Recusal of Judge Liu from Adjudication of Motion to Vacate Trial Judgement* (24 February 2014) at para. 16

[2027] *Prosecutor v Seselj*, No. 03-67-T, *Order Following Decision of the Panel to Disqualify Judge Fredrik Harhoff* (3 September 2013)

[2028] *Prosecutor v Seselj*, No. 03-67-T, *Order Assigning a Judge Pursuant to Rule 15* (31 October 2013)

[2029] *Prosecutor v Seselj*, No. 03-67-T, *Decision on Continuation of Proceedings* (13 December 2013) at paras. 53-55 aff'd *Prosecutor v Seselj*, No. IT-03-67-AR15*bis*, *Decision on Appeal Against Decision on Continuation of Proceedings* (6 June 2014) at para. 44

[2030] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 31

[2031] *Prosecutor v Galic*, No. IT-98-29-AR54, *Decision on Appeal from Refusal of Application for Disqualification and Withdrawal of Judge* (13 March 2003)

[2032] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 174

standards of impartiality as the Judges of the Tribunal.[2033]

Legal officers merely help the Judges in legal research and preparing draft decisions, judgements, opinions, and orders in conformity with the instructions given to them by the Judges.[2034]

However, in some cases, a prospective staff member's statements or activities may be so problematic as to either impugn the perceived impartiality of the Judges or the appearance thereof, or, even if this were not the case, the Tribunal's fundamental guarantees of fair trial.[2035]

Rule 15 does not apply to disqualification of Chamber staff, nor does working with staff who worked on related cases create the appearance of bias on the part of the judges.[2036]

Argument that the staff may have reached conclusions on the evidence tendered in the Karadzic case and may rely on these conclusions in assisting in the judgement drafting of the related Mladic case falls short of demonstrating that Mladic's fair trial rights were not violated, given the limited role played by staff.[2037]

A staff's previous work on an overlapping case is, in and of itself, sufficient to impugn the Judges' impartiality or the appearance thereof.[2038]

stay of proceedings

Stay of proceedings granted pending determination of motion for disqualification of judge.[2039]

Stay of decision to appoint replacement judge granted pending determination of the consent of accused and if not, determination of remaining judges.[2040]

[2033] *Prosecutor v Mladic*, No. IT-09-92-AR73.6, *Decision on Interlocutory Appeal from Decision on Defence Motion for a Fair Trial and the Presumption of Innocence* (27 February 2017) at para. 9
[2034] *Prosecutor v Mladic*, No. IT-09-92-AR73.6, *Decision on Interlocutory Appeal from Decision on Defence Motion for a Fair Trial and the Presumption of Innocence* (27 February 2017) at para. 9
[2035] *Prosecutor v Mladic*, No. IT-09-92-AR73.6, *Decision on Interlocutory Appeal from Decision on Defence Motion for a Fair Trial and the Presumption of Innocence* (27 February 2017) at para. 10
[2036] *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Report of Decision on Defence Motion for Disqualification of Two Members of the Trial Chamber and of Senior Legal Officer* (27 February 2009) at para. 54; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for a Fair Trial and the Presumption of Innocence, or, in the Alternative, a Mistrial* (4 July 2016) at para. 26
[2037] *Prosecutor v Mladic*, No. IT-09-92-AR73.6, *Decision on Interlocutory Appeal from Decision on Defence Motion for a Fair Trial and the Presumption of Innocence* (27 February 2017) at para. 30
[2038] *Prosecutor v Mladic*, No. IT-09-92-AR73.6, *Decision on Interlocutory Appeal from Decision on Defence Motion for a Fair Trial and the Presumption of Innocence* (27 February 2017) at para. 39
[2039] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prlic Defence Motion to Stay the Proceedings* (20 September 2010)
[2040] *Prosecutor v Seselj*, No. 03-67-T, *Order Following Decision of the Panel to Disqualify Judge Fredrik Harhoff* (3 September 2013)

waiver

Failure to raise issue of judicial bias at trial does not waive the issue on appeal.[2041]

It would not be unduly burdensome for an accused to find out the qualifications of the Presiding Judge of his trial. If he finds out the qualifications and does not raise the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial, the Appeals Chamber could find that the accused has waived his right to raise the matter.[2042]

Rule 15 *bis*—absence of a judge

(A) If (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.
(B) If (i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then (a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and (b) the remaining Judges of the Chamber may adjourn the proceedings.
(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).
(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge

[2041] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 182
[2042] *Prosecutor v Furundzija*, No.IT-95-17/1-A, *Judgement* (21 July 2000) at para. 174

or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.
(E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute.
(F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or (ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.
(G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 ter, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.
(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Rule 15 *ter*—reserve judges

(A) The President may, in the interests of justice, assign a reserve Judge to sit with a Trial Chamber in a trial.
(B) A reserve Judge shall be present at each stage of a trial to which that Judge has been assigned.
(C) A reserve Judge may pose questions which are necessary to the reserve Judge's understanding of the trial.
(D) A reserve Judge shall be present, but shall not vote, during any deliberations in a trial.

Rule 16—resignation

A Judge who decides to resign shall communicate the resignation in writing to the President who shall transmit it to the Secretary-General of the United Nations.

Rule 17—precedence

(A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.
(B) The Presiding Judges of the Trial Chambers shall take precedence according to age after the President and the Vice-President.
(C) Permanent Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected

or appointed on the same date shall take precedence according to age.
(D) In case of re-election, the total period of service as a Judge of the Tribunal shall be considered.
(E) Ad litem Judges shall take precedence after the permanent Judges according to the dates of their appointment. Ad litem Judges appointed on the same date shall take precedence according to age.

Rule 18—election of the President

(A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a Judge. The President may be re-elected once.
(B) If the President ceases to be a member of the Tribunal or resigns from office before the expiration of his or her term, the permanent Judges shall elect from among their number a successor for the remainder of the term.
(C) The President shall be elected by a majority of the votes of the permanent Judges composing the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected.

Rule 19—functions of the President

(A) The President shall preside at all plenary meetings of the Tribunal. The President shall coordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on the President by the Statute and the Rules.
(B) The President may from time to time, and in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal.

While the President has the authority to supervise the activities of the Registrar, his decisions are not binding on Trial Chambers.[2043]

The President has no authority to act on a motion claiming that the Trial Chamber could not provide a fair trial because of disagreements among its Judges.[2044]

Issues raising matters of the condition of detention must first be raised with the Commanding Officer and then the Registrar before being brought before the President.

[2043] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.7, *Decision on Appeal from Decision on Further Postponement of the Trial* (31 March 2010) at para. 19
[2044] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision of the President on Prlic Motion for the President to Convene an Independent Panel of Judges or to Consult with the Bureau* (16 December 2010)

However, as the Registrar responded to the issue in pleadings with the President, the President would exceptionally entertain the issues.[2045]

Word limits in practice direction apply to proceedings before the President.[2046]

Rule 20—vice-president

(A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a permanent Judge. The Vice President may be re-elected once.
(B) The Vice-President may sit as a member of a Trial Chamber or of the Appeals Chamber.
(C) Rules 18 (B) and (C) shall apply mutatis mutandis to the Vice-President.

Rule 21—functions of vice-president

Subject to Rule 22 (B), the Vice-President shall exercise the functions of the President in case of the latter's absence or inability to act.

Rule 22—replacements

(A) If neither the President nor the Vice-President remains in office or is able to carry out the functions of the President, these shall be assumed by the senior permanent Judge, determined in accordance with Rule 17 (C).
(B) If the President is unable to exercise the functions of Presiding Judge of the Appeals Chamber, that Chamber shall elect a Presiding Judge from among its number.
(C) The President and the Vice-President, if still permanent Judges, shall continue to discharge their functions after the expiration of their terms until the election of the President and the Vice-President has taken place.

Rule 23—the bureau

(**A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.**
(B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.
(C) The President may consult with the ad litem Judges on matters to be discussed in the Bureau and may invite a representative of the ad litem Judges to attend Bureau meetings
(D) A Judge may draw the attention of any member of the Bureau to issues that the Judge considers ought to be discussed by the Bureau or submitted to a plenary

[2045] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Three Defence Motions* (13 November 2017) at paras. 33-34
[2046] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 30

meeting of the Tribunal.
(E) If any member of the Bureau is unable to carry out any of the functions of the Bureau, these shall be assumed by the senior available Judge determined in accordance with Rule 17.

Rule 23 *bis*—the coordination council

(A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.
(B) To achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures, having due regard for the responsibilities and the independence of any member, the coordination of the activities of the three organs of the Tribunal.
(C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.
(D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may ex officio represent respectively, the President, the Prosecutor and the Registrar.

Rule 24—plenary meetings

Subject to the restrictions on the voting rights of ad litem Judges set out in Article 13 quater of the Statute, the Judges shall meet in plenary to:
(i) elect the President and Vice-President;
(ii) adopt and amend the Rules;
(iii) adopt the Annual Report provided for in Article 34 of the Statute;
(iv) decide upon matters relating to the internal functioning of the Chambers and the Tribunal;
(v) determine or supervise the conditions of detention;
(vi) exercise any other functions provided for in the Statute or in the Rules.

Rule 25—dates of plenary sessions

(A) The dates of the plenary sessions of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.
(B) Other plenary meetings shall be convened by the President if so requested by at least nine permanent Judges, and may be convened whenever the exercise of the President's functions under the Statute or the Rules so requires.

Rule 26—quorum and vote

(A) The quorum for each plenary meeting of the Tribunal shall be ten permanent Judges.
(B) Subject to Rules 6 (A), (B) and 18 (C), the decisions of the plenary meetings of the Tribunal shall be taken by the majority of the Judges present. In the event

of an equality of votes, the President or the Judge acting in the place of the President shall have a casting vote.

Rule 27—rotation

(A) Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall consider the efficient disposal of cases.
(B) The Judges shall take their places in their new Chamber as soon as the President thinks it convenient, having regard to the disposal of part-heard cases.
(C) The President may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber.

Rule 28—reviewing and duty judges

(A) On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor
(B) The President, in consultation with the Judges, shall maintain a roster designating one Judge as duty Judge for the assigned period of seven days. The duty Judge shall be available at all times, including out of normal Registry hours, for dealing with applications pursuant to paragraphs (C) and (D) but may refuse to deal with any application out of normal Registry hours if not satisfied as to its urgency. The roster of duty Judges shall be published by the Registrar.
(C) All applications in a case not otherwise assigned to a Chamber, other than the review of indictments, shall be transmitted to the duty Judge. Where accused are jointly indicted, a submission relating only to an accused who is not in the custody of the Tribunal, other than an application to amend or withdraw part of the indictment pursuant to Rule 50 or Rule 51, shall be transmitted to the duty Judge, notwithstanding that the case has already been assigned to a Chamber in respect of some or all of the co-accused of that accused. The duty Judge shall act pursuant to Rule 54 in dealing with applications under this Rule.
(D) Where a case has already been assigned to a Trial Chamber:
(i) where the application is made out of normal Registry hours, the application shall be dealt with by the duty Judge if satisfied as to its urgency;

(ii) where the application is made within the normal Registry hours and the Trial Chamber is unavailable, it shall be dealt with by the duty Judge if satisfied as to its urgency or that it is otherwise appropriate to do so in the absence of the Trial Chamber.
In such case, the Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned.
(E) During periods of court recess, regardless of the Chamber to which he or she is assigned, in addition to applications made pursuant to paragraph (D) above, the duty Judge may:
(i) take decisions on provisional detention pursuant to Rule 40 bis;
(ii) conduct the initial appearance of an accused pursuant to Rule 62.
The Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned.
(F) The provisions of this Rule shall apply mutatis mutandis to applications before the Appeals Chamber.

A duty judge has the power to stay a decision on provisional release if she is satisfied of its urgency and appropriateness.[2047]

A duty judge has the power to rule on matters in the absence of the Trial Chamber, even if the absence is during working hours.[2048]

Duty Judge erred in determining that there was no urgency to motion for provisional release filed on Friday afternoon to attend funeral of accused father on Tuesday. The matter had to be dealt with on the weekend to give adequate time to arrange transportation.[2049]

Rule 29—deliberations

The deliberations of the Chambers shall take place in private and remain secret.

Rule 30—appointment of the Registrar

The President shall seek the opinion of the permanent Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 17, paragraph 3, of the Statute.

[2047] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.1, *Decision on Motions for Reconsideration, Clarification, Request for Release, and Applications for Leave to Appeal* (8 September 2004) at para. 8
[2048] *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39-AR73.2, *Decision on Interlocutory Appeal by Momcilo Krajisnik* (26 February 2002) at para. 11
[2049] *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39-AR73.2, *Decision on Interlocutory Appeal by Momcilo Krajisnik* (26 February 2002) at para. 17

Rule 31—deputy Registrar and staff

The Registrar, after consultation with the Bureau, shall make recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.

Rule 32—solemn declaration

(A) Before taking up duties, the Registrar shall make the following declaration before the President:
"I solemnly declare that I will perform the duties incumbent upon me as Registrar 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 in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal".
(B) Before taking up duties, the Deputy Registrar shall make a similar declaration before the President.
(C) Every staff member of the Registry shall make a similar declaration before the Registrar.

Rule 33—functions of the Registrar

(A) The Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.
(B) The Registrar, in the execution of his or her functions, may make oral and written representations 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, including that of implementing judicial decisions, with notice to the parties where necessary.
(C) The Registrar shall report regularly on his or her activities to the Judges meeting in plenary and to the Prosecutor

The Appeals Chamber requests that the Registry make any Rule 33(B) submissions in response to motions within ten days of the filing of the English translation of such motions.[2050]

[2050] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 23; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Praljak Motions for Stay of Procedure and Assignment of Counsel in the Interests of Justice* (4 April 2014) at para. 15

Where a party seeks judicial review of a Registry determination, it is appropriate to allow that party a right of reply to a Rule 33(B) submission, with the timeline for the reply to be the same as the timeline for replies made to responses.[2051]

The submission of the Registrar pursuant to this Rule has no word count limitations, but a reply to the Registrar's submission may include an equal number of words. [2052]

Registry submissions on issue where its decision is being appealed were proper and necessary for Chamber to have complete picture on remuneration scheme.[2053]

The Registry is allowed to appeal decisions by Trial Chambers where the decision is directed at the Registry.[2054]

Rule 33 *bis*—functions of the deputy Registrar

(A) The Deputy Registrar shall exercise the functions of the Registrar in the event of the latter's absence from duty or inability to act or upon the Registrar's delegation.
(B) The Deputy Registrar shall in particular:
(i) take all appropriate measures so that the decisions rendered by the Chambers and Judges are executed, especially sentences and penalties;
(ii) make recommendations regarding the missions of the Registry which affect the judicial activity of the Tribunal.

Rule 33 *ter*—function of the head of chambers

The Head of Chambers shall, under the authority of the President, administer the Chambers Legal Support Section. In particular, in conjunction with the administrative services of the Registry, the Head of Chambers shall oversee the assignment of appropriate resources to the Chambers with a view to enabling them to accomplish their mission.

Rule 34—victims and witnesses section

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:
(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and

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[2051] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 24
[2052] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Krajisnik Request and on Prosecution Motion* (12 September 2007) at para. 25
[2053] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Motion for Adequate Facilities and Equality of Arms: Legal Associates* (28 January 2009) at para. 26
[2054] *Prosecutor v Seselj*, No. IT-03-67-R33B, *Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence Rendered on 8 April 2011* (17 May 2011) at para. 16

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.
(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

Rule 35—minutes

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by the Registrar, shall take minutes of the plenary meetings of the Tribunal and of the sittings of the Chambers, other than private deliberations.

Rule 36—record book

The Registrar shall keep a Record Book which shall list, subject to any Practice Direction under Rule 19 or any order of a Judge or Chamber providing for the non-disclosure of any document or information, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.

Rule 37—functions of the prosecutor

(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.
(B) The Prosecutor's powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor's direction

Rule 38—deputy prosecutor

(A) The Prosecutor shall make recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor.
(B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of the latter's absence from duty or inability to act or upon the Prosecutor's express instructions.

Rule 39—conduct of investigations

In the conduct of an investigation, the Prosecutor may:
(i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;
(ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;

(iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and
(iv) request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 40—provisional measures

In case of urgency, the Prosecutor may request any State:
(i) to arrest a suspect or an accused provisionally;
(ii) to seize physical evidence;
(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.
The State concerned shall comply forthwith, in accordance with Article 29 of the Statute.

Rule 40 *bis*—transfer and provisional detention of suspects

(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and provisional detention of a suspect in the premises of the detention unit of the Tribunal. This request shall indicate the grounds upon which the request is made and, unless the Prosecutor wishes only to question the suspect, shall include a provisional charge and a summary of the material upon which the Prosecutor relies.
(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:
(i) the Prosecutor has requested a State to arrest the suspect provisionally, in accordance with Rule 40, or the suspect is otherwise detained by State authorities;
(ii) after hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and
(iii) the Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.
(C) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the application made by the Prosecutor under paragraph (A), including the provisional charge, and shall state the Judge's grounds for making the order, having regard to paragraph (B). The order shall also specify the initial time-limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.
(D) The provisional detention of a suspect shall be ordered for a period not exceeding thirty days from the date of the transfer of the suspect to the seat of the Tribunal. At the end of that period, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may

decide, subsequent to an inter partes hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a period not exceeding thirty days, if warranted by the needs of the investigation. At the end of that extension, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a further period not exceeding thirty days, if warranted by special circumstances. The total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State.
(E) The provisions in Rules 55 (B) to 59 bis shall apply mutatis mutandis to the execution of the transfer order and the provisional detention order relative to a suspect.
(F) After being transferred to the seat of the Tribunal, the suspect, assisted by counsel, shall be brought, without delay, before the Judge who made the order, or another permanent Judge of the same Trial Chamber, who shall ensure that the rights of the suspect are respected.
(G) During detention, the Prosecutor and the suspect or the suspect's counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release.
(H) Without prejudice to paragraph (D), the Rules relating to the detention on remand of accused persons shall apply mutatis mutandis to the provisional detention of persons under this Rule.

Rule 41—retention of information

Subject to Rule 81, the Prosecutor shall be responsible for the retention, storage and security of information and physical material obtained during the Prosecutor's investigations until formally tendered into evidence.

Rule 42—rights of suspects

The prosecution was not obliged to advise a suspect of the crimes of which he was suspected or of his right to stop the interview at any time.[2055]

Rule 43—rights of suspects during investigation

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:
(i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for

[2055] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 ter Exhibit List* (25 October 2007) at para. 35

it;
(ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and
(iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence.
(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

Failure to clarify on the record the discussions held during a break in the recording of the interview of the accused raised sufficient doubts about whether the accused relied upon an inducement discussed during the break that the Trial Chamber should have held a hearing on the voluntariness of the statement before admitting it.[2056]

The appropriate test to determine whether a suspect has in fact voluntarily waived the right to be assisted during questioning by counsel of his or her choice is objective, not subjective. Provided the suspect manifests all the indicia of understanding and voluntarily waiving his right, the waiver will be valid. The suspect's cultural background and personal knowledge of the jurisdiction is irrelevant.[2057]

The prosecution or another competent authority who is obliged to inform a suspect or accused about his right to counsel must do so in an unambiguous way and in a language which the accused or suspect understands.[2058]

Accused failed to establish that his counsel rendered ineffective assistance to him such as to justify exclusion of his post-arrest statement.[2059]

A suspect should be informed of the nature of the investigation prior to an interview to make an informed decision about the waiver of his rights. In this case, he was so informed.[2060]

Failure of interview of the accused conducted by Serbian authorities to comply with requirements of interviews of suspects of ICTY did not preclude the use of the statement for impeachment of the accused's testimony, as the Serbian authorities were not acting under the direction of the ICTY.[2061]

[2056] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 45
[2057] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at paras 549 – 554.
[2058] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.1, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning* (14 December 2007) at para. 34
[2059] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.1, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning* (14 December 2007) at para 35
[2060] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4A, *Judgement* (23 July 2009) at para. 37
[2061] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision Concerning the Use of Statements Given by the Accused* (9 October 2006)

Rule 43—recording of questioning

Whenever the Prosecutor questions a suspect, the questioning shall be audio recorded or video-recorded, in accordance with the following procedure:
(i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;
(ii) in the event of a break during the questioning, the fact and the time of the break shall be recorded before audio-recording or videorecording ends and the time of resumption of the questioning shall also be recorded;
(iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
(iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;
(v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and
(vi) the tape shall be transcribed if the suspect becomes an accused.

Statement of accused which was not video recorded would not be admitted.[2062]

Rules 42 and 43 do not apply in situations where questioning of a suspect by national authorities is not for the purpose of an investigation by the ICTY Prosecutor.[2063]

Proceedings by commission investigating same events as ICTY were independent of ICTY and statements which did not comply with Rules 42 and 43 were not per se inadmissible.[2064]

Rule 44—appointment, qualifications and duties of counsel

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:
(i) is admitted to the practice of law in a State, or is a university professor of law;
(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);

[2062] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Exclusion of Statement of the Accused* (8 July 2005)
[2063] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents…*(7 December 2007) at para. 15
[2064] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents…*(7 December 2007) at para. 33

(iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar;
(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
(v) has not been found guilty in relevant criminal proceedings;
(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and
(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.
(B) At the request of the suspect or accused and where the interests of justice so demand, 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. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision.
(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Registrar and approved by the permanent Judges.
(D) An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel.

Registrar's decision to strike from list of counsel a lawyer convicted of contempt was upheld.[2065]

A defence counsel's duties do not cease until the judgement is rendered.[2066]

[2065] *Prosecutor v Tadic*, No. IT-94-1-A, *Decision on Milan Vujin's Request for the Review of the Registrar's Decision Pursuant to Article 14(D) of the Directive on Assignment of Defence Counsel* (11 September 2001)

Rule 45—assignment of counsel

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges.
(B) For this purpose, the Registrar shall maintain a list of counsel who: (i) fulfil all the requirements of Rule 44, although the language requirement of Rule 44 (A)(ii) may be waived by the Registrar as provided for in the Directive;
(ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law;
(iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and
(iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive.
(C) The Registrar shall maintain a separate list of counsel who, in addition to fulfilling the qualification requirements set out in paragraph (B), are readily available as "duty counsel" for assignment to an accused for the purposes of the initial appearance, in accordance with Rule 62.
(D) The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel.
(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel.
(F) A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing at the first opportunity.

appeal

Review of a decision concerning assignment of counsel by the Registrar lies with the President. A Chamber has no authority to review such a decision except where necessary to ensure that its proceedings are fair.[2067]

The standard of review by the President of the Registrar's decision requires a showing that the Registrar has (1) failed to comply with the Directive; (2) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (3) considered irrelevant material or failed to consider

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[2066] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 36
[2067] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Motion Seeking Review of the Decisions of the Registry in Relation to Assignment of Counsel* (29 January 2007); *Decision on Request for Review of the Decision of the Registry in Relation to Assignment of Counsel* (1 February 2007) at para. 10

relevant material; or (4) reached a conclusion which no sensible person could have reached.[2068]

choice of counsel

An accused who lacks means to retain his own counsel does not have a right to choice of counsel. While the Registrar normally takes account of the accused's preferences, it is within the Registrar's discretion to override those preferences in the interests of justice.[2069]

co-counsel

Although there is no absolute right to counsel of one's choice, it is always desirable for the fairness of the trial to consider the preferences of the accused for co-counsel, especially when they coincide with lead counsel's preferences.[2070]

Lack of proficiency in English or French by co-counsel would not impede the efficiency of the proceedings.[2071]

In a complex case of seven accused, a co-counsel for each accused is an absolute necessity.[2072]

Registry decision to deny co-counsel who did not speak working languages of the Tribunal overturned by Trial Chamber.[2073], but upheld by the Trial Chamber in a different case.[2074]

cooperation

An accused is obligated to cooperate with his assigned counsel and cannot base a claim for a new trial on breakdown of communication with counsel when he unilaterally refused to cooperate with his counsel.[2075]

[2068] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Request for Review of the Decision of the Registry in Relation to Assignment of Counsel* (1 February 2007) at para. 11
[2069] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 17
[2070] *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007) at p. 4; *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Review of Registrar's Decision Re: Co-Counsel for Mico Stanisic* (24 April 2007) at para. 12
[2071] *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007) at p. 4
[2072] *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007) at p. 5
[2073] *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007)
[2074] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Review of Registrar's Decision Re: Co-Counsel for Mico Stanisic* (24 April 2007)
[2075] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 21

effective assistance

An assigned counsel is presumed to be competent unless rebutted by evidence to the contrary.[2076]

An appellant must demonstrate gross incompetence on the part of assigned counsel, among other things.[2077]

As a general principle, an accused's right to a fair trial is infringed when counsel admittedly does not understand the case of his client and fails to prepare a proper defence strategy.[2078]

indigence

Counsel would be assigned to accused in the interest of justice despite his not satisfying Registrar of his indigence given the fact that trial of case was complex, would last more than two years, and the interests of the co-accused must be considered.[2079]

Where the accused had the ability to pay counsel but chose not to do so, he would be required to represent himself.[2080]

Only Chamber and not the Registrar could order an accused to repay the costs of his defence to the Tribunal under Rule 45(E).[2081]

Order requiring contribution of accused to repay legal aid issued and Registrar ordered to take all steps to enforce it where accused found to have means to fund his own defence.[2082]

legal associates

The Registry has the right to require legal associates of an accused who is representing himself to meet the requirements of counsel under Rule 44 before allowing

[2076] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 23
[2077] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 23
[2078] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Motion to Present Additional Evidence* (20 August 2008) at para. 19
[2079] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Assignment of Defence Counsel* (15 February 2006)
[2080] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on the Motions on Fair Trial and Extensions of Time* (19 May 2006)
[2081] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 39
[2082] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Order on the Registrar's Application Pursuant to Rule 45(E) of the Rules* (13 May 2014) at para. 22

them privileges such as UNDU visits with the accused and access to areas of the Tribunal.[2083]

Rule 45 *bis*—detained persons

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

Rule 45 *ter*—assignment of counsel in the interests of justice

The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 45 *ter* was enacted to codify, not modify, existing jurisprudence on restricting the right to self-representation. Therefore, a single act of contempt is not sufficient to revoke self-representation.[2084]

Rule 45 *ter* does not justify assignment of counsel where accused was found to have funds with which to retain counsel and had not requested to represent himself.[2085]

Appeals Chamber ordered assignment of counsel to appellant who had been found able to remunerate counsel where self-representation would result in delays due to need to translate voluminous documents and delays would violate right of co-appellants to expeditious resolution of appeal.[2086]

Rule 46—misconduct of counsel

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:
(i) refuse audience to that counsel; and/or
(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.
(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university

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[2083] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Appeal Against Decision of the Registry of 20 January 2006* (7 April 2006) at para. 5
[2084] *Prosecutor v Seselj*, No. IT-03-67-T, *Consolidated Decision on Assignment of Counsel, Adjournment, and Prosecution Motion for Additional Time* (24 November 2009) at para. 63
[2085] *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39-AR73.2, *Decision on Interlocutory Appeal by Momcilo Krajisnik* (26 February 2002) at para. 19
[2086] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Praljak's Request for Stay of Proceedings* (27 June 2014) at para. 16

professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University.
(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel.

defence counsel

Inadvertent publication of confidential documents on accused's web site for the second time warranted a warning to defence counsel, who had a duty not only to refrain from disclosure of confidential documents, but to protect them from disclosure.[2087]

Simultaneous filing of motions before a Trial Chamber and the President constituted an abuse of process and defence counsel was warned to refrain from that practice in the future.[2088]

prosecution

Rule 46 does not strictly apply to prosecution counsel, as well as defence counsel, but the Trial Chamber has inherent power to sanction prosecution counsel and can use Rule 46 as a guideline in doing so.[2089]

Warning issued to prosecution under Rule 54 for walking out of court without explanation or apology.[2090]

Warning issued to prosecution for not disclosing existence of statements required to be disclosed to the accused until after the trial had concluded.[2091]

Prosecutor's comments to a journalist concerning the guilt of the accused and threats to witnesses did not rise to the level of affecting the fairness or expeditiousness of the trial and did not warrant an evidentiary hearing or the imposition of sanctions.[2092]

Rule 47—submission of indictment by prosecutor

(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.

[2087] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision Warning Counsel for the Accused Praljak and the Accused Praljak* (12 November 2010)
[2088] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Three Defence Motions* (13 November 2017) at para. 29
[2089] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Idriz Balaj's Request for Evidentiary Hearing Regarding Interview of Carla del Ponte* (28 January 2008) at para. 5
[2090] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order Issuing a Warning to the Prosecution* (5 February 2009)
[2091] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution's Request for Non-Disclosure of Three Witness Statements to the Accused* (18 October 2012)
[2092] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Idriz Balaj's Request for Evidentiary Hearing Regarding Interview of Carla del Ponte* (28 January 2008) at paras. 8-9

(B) The Prosecutor, if satisfied during an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.
(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.
(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the date fixed for review of the indictment.
(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect.
(F) The reviewing Judge may:
(i) request the Prosecutor to present additional material in support of any or all counts;
(ii) confirm each count;
(iii) dismiss each count; or
(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.
(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and shall be included as part of each certified copy of the indictment.
(H) Upon confirmation of any or all counts in the indictment,
(i) the Judge may issue an arrest warrant, in accordance with Rule 55 (A), and any orders as provided in Article 19 of the Statute, and
(ii) the suspect shall have the status of an accused.
(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

Rule 48—joinder of accused

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

completion strategy

It would be improper for a Trial Chamber to consider the completion strategy in its decision on joinder of cases.[2093]

discretion

The Trial Chamber's decision to order joinder is one in which it has considerable discretion.[2094]

factors

The factors to be considered include (1) protection of the rights of the accused; (2) avoidance of any conflict of interest which may prejudice an accused and (3) protection of the interests of justice.[2095]

The factors to be considered concerning joinder of cases include: (1) avoiding the duplication of evidence; (2) promoting judicial economy; (3) minimizing hardship to witnesses; (4) ensuring the consistency of verdicts; (5) avoiding conflicts of interest that might cause serious prejudice to an accused; and (6) protecting the interests of justice.[2096]

Where there was only one common witnesses to three cases sought to be joined, and joinder would delay the commencement of trial for an accused who had been in custody for 3 years, the interests of justice required that joinder be denied.[2097]

Where the majority of the evidence offered at a joint trial would be admissible against the accused at his separate trial and considering the ability of professional judges to disregard evidence at a joint trial not admissible against a particular accused, joinder was not an abuse of discretion in a case where the accused was not charged with all the crimes of the co-accused.[2098]

[2093] *Prosecutor v Popovic et al*, No. IT-02-57-PT, *Decision on Motion for Joinder* (21 September 2005), *Separate Opinion of Judge Robinson*

[2094] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para. 5

[2095] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006); *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on .Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder* (25 October 2006) at para. 17

[2096] *Prosecutor v Popovic et al*, No. IT-02-57-PT, *Decision on Motion for Joinder* (21 September 2005) at para. 8; *Prosecutor v Martic*, No. IT-95-11-PT, *Decision on Prosecution Motion for Joinder* (10 November 2005) at para. 35; *Prosecutor v Seselj et al*, No. IT-95-14-R77, *Decision on Motion for Joinder* (31 May 2006) at paras. 35, 38-39; *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on .Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder* (25 October 2006) at para. 17; *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments* (23 September 2008) at para. 26

[2097] *Prosecutor v Martic*, No. IT-95-11-PT, *Decision on Prosecution Motion for Joinder* (10 November 2005) at para. 58

[2098] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Radivoje Miletic's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of the Accused* (27 January 2006) at paras. 22-23

Joinder was not in the interest of justice where a large amount of evidence would be relevant to only one of the accused and the commencement and completion of the trial for an accused arrested earlier than the others would be delayed by joinder.[2099]

Prejudice from joinder would exist where evidence against one accused would not be admissible against a co-accused or where exculpatory evidence would be unavailable at a joint trial.[2100]

The fact that two accused may seek to blame each other is not grounds against joinder.[2101]

same transaction

The same transaction test requires that the alleged acts or omissions in the indictment formed part of a common scheme, strategy, or plan.[2102]

The same transaction test of Rule 48 was satisfied where the accused acted with the same common purpose of removing non-Serbs from certain areas through commission of crimes, even though there were differences in the times and places of the acts and the modes of liability charged against each accused.[2103]

The same transaction test was satisfied where the same common plan was alleged even though one accused was charged with crimes in more localities over a greater period.[2104]

The same transaction test was satisfied where the indictment alleged a common plan to ethnically cleanse the enclaves of Srebrenica and Zepa.[2105]

The same transaction test was satisfied by participation in the same military operation at the same time in the same geographical area.[2106]

The same transaction test was satisfied where journalists published the same information about a protected witness at around the same time. However, as to a

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[2099] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Stojan Zupljanin's Motion for Joinder* (6 January 2009) at paras. 22-26
[2100] *Prosecutor v Seselj et al*, No. IT-95-14-R77, *Decision on Motion for Joinder* (31 May 2006) at para. 41
[2101] *Prosecutor v Cermak & Markac*, No. IT-01-45-PT, *Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder* (14 July 2006) at para. 68
[2102] *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on .Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder* (25 October 2006) at para. 21
[2103] *Prosecutor v Martic*, No. IT-95-11-PT, *Decision on Prosecution Motion for Joinder* (10 November 2005) at para. 33
[2104] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Stojan Zupljanin's Motion for Joinder* (6 January 2009) at para. 17
[2105] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para.17
[2106] *Prosecutor v Gotovina et al*, No. IT-03-73-AR73.1, *Decision on .Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder* (25 October 2006) at para. 21

journalist who had published the information four years earlier in a different publication, the same transaction test was not satisfied.[2107]

There is no requirement that the events constituting the "same transaction" take place at the same time or be committed together.[2108]

The particular role that an accused played in the same transaction is not determinative.[2109]

standing

An accused, as well as the prosecutor, has standing to request joinder of cases.[2110]

time to prepare

Sufficient time to prepare for trial should be allowed for each accused, irrespectively of whether he is tried separately or joined with another accused for trial.[2111]

Rule 49—joinder of crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

factors

The test for severance of charges against a single accused is the same as for joinder of charges. The Chamber should consider (1) prejudice to the accused from severance; (2) the interests of justice, particularly the effect of severance on the length of the proceedings; (3) whether separate trials would be personally onerous to the accused; and (4) the possible prejudice to the accused of trying certain crimes and not others.[2112]

Severance of charges against a single accused denied where accused would be prejudiced by having to participate in pre-trial and appeal proceedings at the same time,

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[2107] *Prosecutor v Seselj et al*, No. IT-95-14-R77, *Decision on Motion for Joinder* (31 May 2006) at paras. 29-30

[2108] *Prosecutor v Popovic et al*, No. IT-05-86-73.1, *Decision on Vinko Pandurevic's Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para. 7, 17; *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments* (23 September 2008) at para. 23

[2109] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments* (23 September 2008) at para. 23

[2110] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Stojan Zupljanin's Motion for Joinder* (6 January 2009) at para. 8

[2111] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments* (23 September 2008) at para. 32

[2112] *Prosecutor v Mladic*, No. IT-09-92-PT, *Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment* (13 October 2011) at para. 25

where two trials would take longer than a single trial, and where some witnesses may have to testify twice.[2113]

It is not necessary that crimes be "committed together" to be joined under Rule 49.[2114]

Severance of count reinstated after appeal from judgement of acquittal was not in the interests of justice where a separate trial of that count would require recalling prosecution witnesses and would lengthen the overall proceedings.[2115]

same transaction

It is not necessary that the crimes be overlapping in time if common plan or strategy has a long-term aim. Crimes in Kosovo beginning in 1998 were part of common strategy with crimes in Bosnia and Croatia beginning in 1992—that strategy being the forcible removal of non-Serb populations from areas which Serbia wished to control. Thus, they could be said to be part of the "same transaction." [2116]

Crimes in Srebrenica and Zepa in 1995 were sufficiently related to justify their joinder in the same indictment.[2117]

standing

A Trial Chamber has the authority to order severance of counts against a single accused, either on its own motion or upon motion of a party.[2118]

Rule 50—amendment of indictment

(A) (i) The Prosecutor may amend an indictment:
(a) at any time before its confirmation, without leave;
(b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

[2113] *Prosecutor v Mladic*, No. IT-09-92-PT, *Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment* (13 October 2011) at paras. 31-37
[2114] *Prosecutor v Milosevic*, No. IT-99-37-PT, *Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder* (18 April 2002) at para. 18
[2115] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motions to Sever Count One and for Suspension of Defence Case* (2 August 2013) at para. 16-17
[2116] *Prosecutor v Milosevic*, No. IT-99-37-PT, *Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder* (18 April 2002) at para. 20-21
[2117] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules of Procedure and Evidence* (14 December 2007) at paras. 66- 67
[2118] *Prosecutor v Mladic*, No. IT-09-92-PT, *Decision on Consolidated Prosecution Motion to Sever the Indictment, to Conduct Separate Trials, and to Amend the Indictment* (13 October 2011) at para. 24

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
(iii) Further confirmation is not required where an indictment is amended by leave.
(iv) Rule 47 (G) and Rule 53 bis apply mutatis mutandis to the amended indictment.
(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

during trial

Amendment of indictment to identify two victims who had previously been unidentified, did not prejudice the accused nor add new charges which might result in undue delay and therefore amendment would be granted.[2119]

In instances in criminal trials where the evidence turns out differently than expected it may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment. [2120]

new charges

An amendment includes "new charges" if it introduces a new basis for conviction not previously reflected in the indictment that is factually or legally distinct from any

[2119] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution Motion Seeking Leave to Amend the Revised Second Amended Indictment* (5 September 2007)
[2120] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 132

already alleged.[2121] Adding a new form of liability constitutes new charges .[2122] This is true whether the form of liability is cumulative or alternative.[2123]

Since the addition of new charges will result in a new plea and opportunity to challenge the indictment through new preliminary motions, proposed amendments which constitute new charges are likely to cause delay.[2124]

Expanding the dates of an incident in the indictment and adding an allegation of destruction of cultural and religious institutions constituted new charges for which a new initial appearance was required.[2125]

Expansion of the time frame of the armed conflict constituted new charges.[2126]

Adding new groups of persons for whose conduct the accused can be liable constitutes new charges.[2127]

Adding an allegation of destruction of houses to an existing persecution count, and an allegation of home invasion to a count of inhumane acts constituted new charges.[2128]

[2121] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution Motion for Leave to Amend the Amended Indictment* (16 December 2005) at p. 4; *Prosecutor v Beara*, No. IT-02-58-PT, *Decision on Prosecution Motion to Amend the Indictment* (24 March 2005) at page 3; *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution's Motions to Amend the Indictment* (7 October 2005) at para. 29; *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Further Amendments and Challenges to the Indictment* (13 July 2006) at para. 11; *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 12; *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment* (25 October 2006) at para. 13

[2122] *Prosecutor v Beara*, No. IT-02-58-PT, *Decision on Prosecution Motion to Amend the Indictment* (24 March 2005) at page 3; *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution's Motions to Amend the Indictment* (7 October 2005) at para. 29; *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Further Amendments and Challenges to the Indictment* (13 July 2006) at para. 11

[2123] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution's Motions to Amend the Indictment* (7 October 2005) at para. 34

[2124] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 22; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91PT, *Decision on Motion and Supplementary Motion for Leave to Amend the Indictment* (28 April 2009) at para. 41

[2125] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Prosecution's Motion for Leave to Amend the Indictment* (27 May 2005) at para. 17

[2126] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para.10

[2127] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 36

[2128] *Prosecutor v Lukic et al*, No. IT-98-32/1-PT, *Decision Granting Prosecution's Motion to Amend Indictment and Scheduling Further Appearance* (1 February 2006) at paras. 17-18

Adding torture as a means for the crime of persecution and additional kinds of crimes against humanity for the same incident constitute new charges.[2129]

The inclusion of three new factual situations resulted in a new charge.[2130]

The addition of liability under Article 7(1) to the same events for which liability under Article 7(3) was previously charged amounts to new charges.[2131]

An amendment which alleges a different crime or a different underlying offence, even without additional factual allegations, is a new charge because it could be the sole legal basis for the accused's conviction.[2132]

A new factual allegation which does not in itself expose the accused to additional risk of conviction does not qualify as a new charge.[2133]

prejudice

The basic principle in relation to whether to grant leave to amend an indictment is whether the amendments result in unfair prejudice to the accused.[2134]

Where amendment did not add new charges and sought to include in the indictment those matters which had been contained in the pre-trial brief, amendment on eve of trial would be granted as there was no prejudice to the accused.[2135]

Two factors are primarily considered when evaluating prejudice: (1) whether the accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendment will result in undue delay.[2136]

[2129] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Motion to Amend the Amended Indictment* (12 January 2007) at para. 18

[2130] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 55

[2131] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 56; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment…*(8 July 2008) at para. 49

[2132] *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 12

[2133] *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 12

[2134] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 7

[2135] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on the Prosecutor's Motion to Amend the Revised Second Amended Indictment* (4 July 2008)

[2136] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Prosecution Motion for Leave to Amend the Original Indictment and Defence Motions Challenging the Form of the Amended Indictment* (1 November 2005) at para. 7

Addition of two additional instances of publication of confidential information would prejudice the accused, as for contempt, each publication is a separate violation.[2137]

Addition of five new counts on eve of trial denied where prosecution had not been diligent in moving to amend indictment.[2138]

Although prejudice to accused could be cured by the fact that there was no set trial date yet, the amendments would be denied because by adding new charges the prosecution would complicate the trial and thus delay its completion.[2139]

Amendment which simply clarified existing charges did not prejudice accused.[2140]

The risk of delay is greater when a proposed amendment involves new charges as it requires a new arraignment and an opportunity for additional preliminary motions.[2141]

Addition of five incidents to schedules in the indictment would constitute new charges and require investigation which would prejudice the accused given that the trial was imminent.[2142]

Adding of new charges on eve of trial permitted. Fact that trial would have to be postponed for two months or more was outweighed by need to ensure a full consideration of the relevant issues in the case.[2143]

***prima facie* case**

Only if a particular amendment amounts to a new charge must the Trial Chamber satisfy itself that a prima facie case for that amendment is established.[2144]

Amendments which allege material facts, even those not amounting to new charges, must be supported by prima facie evidence to support the allegations.[2145]

[2137] *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 26

[2138] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment…*(8 July 2008)

[2139] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution's Submission of Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment* (30 June 2006) at para. 74

[2140] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Prosecution's Motion for Leave to File an Amended Indictment* (14 September 2007)

[2141] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Motion to Amend the Amended Indictment* (12 January 2007) at para. 15

[2142] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91PT, *Decision on Motion and Supplementary Motion for Leave to Amend the Indictment* (28 April 2009) at para. 41

[2143] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Written Reasons for Decision on Prosecution Motion to Amend the Second Amended Indictment* (17 December 2009) at para. 29

[2144] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution's Motions to Amend the Indictment* (7 October 2005) at para. 19

[2145] *Prosecutor v Milutinovic et al*, No. IT-05-88-PT, *Decision on Defence Motions Alleging Defects in the Form of the Proposed Amended Joinder Indictment* (22 March 2006) at para. 31; *Prosecutor v Seselj et al*, No. IT-95-14-R77.5, *Decision on Prosecution Motion to Amend the Indictments* (8 June 2006) at para. 13

scope of amendments

Wholesale restriction of an indictment is beyond the Trial Chamber's powers for leave to amend an indictment under Rule 50.[2146]

supporting material

Supporting material for an amended indictment is required to be disclosed to the accused so that he can respond to the issue of whether leave to amend the indictment would result in prejudice to the accused.[2147]

Rule 51—withdrawal of indictment

(A) The Prosecutor may withdraw an indictment:
(i) at any time before its confirmation, without leave;
(ii) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(iii) after the assignment of the case to a Trial Chamber, by motion before that Trial Chamber pursuant to Rule 73.
(B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

An agreement made by the prosecution to dismiss an indictment is not binding, as such agreements must be approved by a Judge.[2148]

Even if agreement made by diplomat had been made on behalf of the prosecution, it would not be valid since only a Judge could approval withdrawal of an indictment.[2149]

Leave of Trial Chamber not required to withdraw individual charges from scheduled incidents in indictment. Prosecution's statement that it is withdrawing those charges is sufficient.[2150]

Rule 52—public character of indictment

[2146] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution Motion to Amend the First Amended Indictment* (16 February 2009) at para. 37
[2147] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Motions for Access to Ex Parte Supporting Materials Related to the Prosecution Motion for Leave to Amend the Indictment* (15 June 2005)
[2148] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 41
[2149] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 41
[2150] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fourth Disclosure Violation Motion* (13 October 2014) at para. 18

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53—non-disclosure
(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.
(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.
(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.
(D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost.

While the balance between the rights of the accused to a fair trial and the rights of victims must favor the rights of the accused, non-disclosure of a victim's identity to the public can be accomplished without infringing on the rights of the accused to prepare his defence.[2151]

This rule could not be used to prevent the prosecution from disclosing information to the UN Security Council concerning the cooperation of Croatia in this case.[2152]

Rule 53 *bis*—service of indictment

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into custody or as soon as reasonably practicable thereafter.
(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).

Rule 54—general rule

At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such 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.

[2151] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Motion for Non-Disclosure* (2 September 2008) at para. 6
[2152] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz* (1 December 2009) at para. 7

Chamber witnesses

Personal notes of convicted person summoned to testify as a Chamber witness would be ordered to be produced by the witness.[2153]

discretion

The obligation vested in the Trial Chamber to ensure the proper administration of justice cumulatively entails that any steps which the Trial Chamber takes are discretionary and in its overarching interest and commitment to ensuring that in the case of the accused, justice is not only done, but justice is seen to be done, including by the accused himself.[2154]

dismissal

Trial Chamber declined to use its residual powers to dismiss case of accused found unable to stand trial for lack of mental competency, preferring to wait to see if his mental health was restored.[2155]

humanitarian workers

An employee of a humanitarian organization whose purpose is to document crimes and provide information to the Tribunal could not decline to testify as neither the war correspondent nor any other privilege applied.[2156]

Statements and documents of Red Cross officials admissible despite fact that it was not possible to have access to Red Cross material that might contradict or provide further information about the statements.[2157]

injunctions

Trial Chamber declined to enjoin Croatian prosecution of defence investigator where investigator had not exhausted his remedies in Croatian courts and where the fairness of the trial was not affected.[2158]

[2153] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic Motion for Reconsideration and Order for Issuance of Subpoena Duces Tecum* (2 April 2009)
[2154] *Prosecutor v Popovic*, No. IT-05-88-T, *Decision on the Third Request for Review of the Registry Decision on the Assignment of Co-Counsel for Radivoje Miletic* (20 February 2007) at p. 3
[2155] *Prosecutor v Kovacevic*, No. IT-01-42/2-I, *Decision on Defence Motion to Dismiss the Indictment* (1 September 2006)
[2156] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Motion by Witness 28 to Set Aside a Subpoena or Alternate Relief* (5 September 2007)
[2157] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Motion to Exclude Evidence* (23 April 2010) at T1502
[2158] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Defendant Ante Gotovina's Motion for a Restraining Order Against the Republic of Croatia* (23 July 2009)

If the exercise of domestic jurisdiction against defence team members is such that a trial before the Tribunal would be rendered unfair, this would constitute an exceptional circumstance warranting a significant intervention in the domestic jurisdiction.[2159]

Investigation of defence team members for the performance of their duties does not *per se* constitute an infringement of the right of the accused to a fair trial.[2160]

The factors to be considered are (1) whether the State is exercising its jurisdiction improperly with the substantial or foreseeable result of hindering the defence team 's performance of their functions; (2) whether the domestic proceedings impede or hinder the defence in the fulfilment of its tasks such that it would result in the infringement of a fair trial; and (3) whether the proceedings infringe the accused's procedural rights to equality of arms.[2161]

investigation

Trial Chamber ordered investigation into news reports that Seselj case discussed among Prime Minister Djindic, Prosecutor Del Ponte, and Judge May.[2162]

medical intervention

Trial Chamber ordered medical intervention to prevent accused on a hunger strike from committing suicide.[2163]

Parliament members

While immunities and privileges may protect parliamentary statements in domestic proceedings, this does not apply in international criminal proceedings.[2164]

peace negotiators

A person who served as a peace negotiator may be compelled to testify about the negotiations without calling into question the impartiality of peace negotiators.[2165]

[2159] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 64
[2160] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 65
[2161] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 66
[2162] *Prosecutor v Seselj*, No. IT-03-67-T, *Order Requesting Investigation into the Publication of Articles in the Press* (18 September 2008)
[2163] *Prosecutor v Seselj*, No. IT-03-67-T, *Urgent Order to the Dutch Authorities Regarding the Health and Welfare of the Accused* (6 December 2006)
[2164] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Accused's Motion to Preclude Questioning on Statements made in Parliament* (7 November 2013) at T43150
[2165] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Ambassador Jose Cutileiro* (19 December 2012) at para. 11

reconsideration

A Chamber has an inherent power to reconsider its own decisions if the existence of a clear error of reasoning has been demonstrated or if reconsideration is necessary to prevent an injustice.[2166]

The principle of finality dictates that the power to reconsider previous decisions should be exercised sparingly and a party must therefore meet a high threshold to succeed in its motion for reconsideration.[2167]

Reconsideration granted where prosecution failed to adequately explain reason for seeking judicial notice of duplicates in intercepted conversation exhibits since it was in the interest of justice to consider such a time-saving device despite the default.[2168]

However, there is no power to reconsider a final judgement.[2169]

Victims' interest in the success of a prosecution motion for reconsideration of a final judgement did not constitute a legal basis for reconsidering the judgement.[2170]

A decision authorizing withdrawal of an appeal is not a final judgement and may therefore be reconsidered by the Appeals Chamber.[2171]

Decision excluding testimony of prosecution witness would be reconsidered to prevent injustice to the prosecution where at a later stage of the trial, the admission of the evidence now seems appropriate.[2172]

[2166] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Urgent Motion for Reconsideration of Decision on Second Defence Motion to Enlarge Time for Filing of Replies Dated 1 April 2005* (6 April 2005) at page 4; *Prosecutor v Seselj*, No. IT-03-67-AR72.1, *Decision on Motion for Reconsideration of the "Decision on the Interlocutory Appeal Concerning Jurisdiction Dated 31 August 2004* (15 June 2006) at para. 9; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on the Prosecution Motion for Reconsideration* (23 August 2006) at pg. 3; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion Requesting Reconsideration of Trial Chamber "Decision on Evidence Tendered Through Witness K-82" Issued 3 October 2006 and Leave to Recall Witness K-82* (13 March 2007) at para. 14

[2167] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Motion Seeking Reconsideration of Decision on Stanisic's Motion for Declaration of Mistrial…*(24 July 2014) at para. 12

[2168] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Reconsideration of the Trial Chamber's Decision of 1 September 2008* (7 October 2008) at para. 8

[2169] *Prosecutor v Zigic*, No. IT-98-30/1-A, *Decision on Zoran Zigic's Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005* (26 June 2006) at para. 9; *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecutor's Request for Review or Reconsideration* (23 November 2006) at para. 79; *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Decision on Motion on Behalf of Veselin Sljivancanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamber on 5 May 2009—or an Alternative Remedy* (8 December 2009); *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Sredoje Lukic's Motion Seeking Reconsideration of the Appeals Judgement…*(30 August 2013) at p. 4; *Prosecutor v Perisic*, No. IT-04-81-A, *Decision on Motion for Reconsideration* (20 March 2014)

[2170] *Prosecutor v Perisic*, No. IT-04-81-A, *Decision on Motion for Reconsideration* (20 March 2014) at p. 4

[2171] *Prosecutor v Strugar*, No. IT-01-42-Misc.1*, Decision on Strugar's Request to Reopen Appeal Proceedings* (7 June 2007) at para. 25

Death of substituted prosecution witness was a new circumstance which justified reconsideration of the substitution of that witness and denial of admission of his testimony pursuant to Rule 92 *quater*.[2173]

Reconsideration of administrative decisions by the President are permitted.[2174]

A person who is not a party in the case has no standing to request reconsideration of a decision. This includes States, other accused persons, and Judges who are disqualified by virtue of the decision, and the remaining Judges of the bench.[2175]

review of administrative decisions

A Trial Chamber does not have the power to review administrative decisions where that review function has been explicitly assigned to another organ of the Tribunal.[2176]

A Trial Chamber may intervene in a matter which is within the primary competence of the Registry where the matter goes to the fairness of the trial.[2177]

safe conduct

International law permits the protection of witnesses appearing before the judicial authorities of a state other than their state of residence from prosecution, detention, or any other restrictions on their liberty in respect of acts or convictions committed or entered before their departure from the territory of the state of residence to the state where they are supposed to testify.[2178]

Safe conduct order issued directing the witness not be arrested, detained, prosecuted, or subjected to any other restriction, whether physical or legal, of his personal

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[2172] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion Requesting Reconsideration of Trial Chamber "Decision on Evidence Tendered Through Witness K-82" Issued 3 October 2006 and Leave to Recall Witness K-82* (13 March 2007)
[2173] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decisions on Prosecution Motion for Admission of Evidence of Witness KDZ595 pursuant to Rule 92 quarter and Accused's Motion for Reconsideration* (6 December 2011)
[2174] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Defence Team Funding* (31 January 2012) at para. 37
[2175] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Reconsideration on Decision for Disqualification, Requests for Clarification, and Motion on Behalf of Stanisic and Zupljanin* (7 October 2013) at paras. 4-6; *Prosecutor v Prlic*, No. IT-04-74-A, *Decision on Application of the Republic of Croatia for Reconsideration of the Decision of 18 July 2016 Denying Leave to Appear as Amicus Curiae* (4 July 2017)
[2176] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 25
[2177] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Appeal of the Registrar's Denial of In-Person Witness Interview: Momcilo Krajisnik* (29 October 2013) at para. 12
[2178] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution's Motion for Safe Conduct for Witness Momcilo Mandic* (16 June 2010) at para. 5

liberty in respect of any acts or convictions prior to his departure from his home country.[2179]

Safe conduct order applies from time witness leaves his residence until he returns to his residence, in all countries in which he stays or transits.[2180]

Safe conduct order was necessary for witness who was subject to European Union travel ban.[2181]

Safe conduct order granted for former Minister of Interior of Republika Srpska where it was not shown that he was under investigation for conduct during the war, but he had been interviewed by the ICTY as a suspect.[2182]

self-represented accused

The fair trial rights of the accused were not violated by the Registrar's refusal to bring potential defence witness for pre-trial motion to meet the accused in detention and in taking the position that it was not obligated to do so until the accused filed his witness list after the close of the prosecution case.[2183]

State officials

A State official who witnessed acts while employed by the State, as opposed to an official who is merely a custodian of records, may be subpoenaed to give evidence by the Tribunal.[2184]

The International Tribunal is empowered to issue binding orders to States for production of documents.[2185] While it may issue a subpoena to a private individual within a State[2186], the Tribunal may not issue a subpoena for a state official for documents in his control.[2187]

[2179] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution's Motion for Safe Conduct for Witness Momcilo Mandic* (16 June 2010) at para. 11
[2180] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution's Motion for Safe Conduct for Witness Momcilo Mandic* (16 June 2010) at para. 11; *Prosecutor v Seselj*, No. IT-03-67-R77.3, *Decision on Request for the Safe Transfer of Defence Witness Zoran Drazilovic* (1 June 2011)
[2181] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution's Motion for Safe Conduct for Witness Momcilo Mandic* (16 June 2010) at para. 7
[2182] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Order on the Accused's Motion for Safe Conduct Order or Subpoena: Dragan Kijac* (4 November 2013) at para. 13
[2183] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure* (9 April 2009) at para. 20
[2184] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 27
[2185] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) at para. 26
[2186] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) at para. 48
[2187] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997* (29 October 1997) at para. 43

An application for an interview with and testimony from a State official—as opposed to an application for information from a State which does not seek to summon a specific official as a witness—should be made for a subpoena ad testificandum rather than a binding order issued to the State.[2188]

Where a party wishes to question an employee of a State, as opposed to seeking documents from that state, a subpoena to the individual, as opposed to a binding order to that state is the appropriate mechanism.[2189]

A motion for subpoena under Rule 54, rather than a motion for binding order under Rule 54 *bis*, is the appropriate mechanism for seeking to compel an interview with an individual who was or is a state employee.[2190]

Where official had raised state secret privilege as an objection to submitting to interview by the defence, he would be required to apply to Croatia for waiver of that privilege, rather than the Chamber issuing an order to Croatia compelling it to waive the privilege.[2191]

If during the interview, the witness is asked about the events he saw or heard, which in turn makes him a prospective witness, he can be subpoenaed to submit to an interview despite the fact that he may have seen the events in question, or heard about them, during exercising his official functions as the director of the Croatian Intelligence Service.[2192]

The Tribunal has power to issue a subpoena to a person to give evidence as a witness or to produce documents where that person obtained the information of which evidence is to be given, or the documents which that person is to produce, as an individual acting in his or her private capacity.[2193]

stay of proceedings

A Trial Chamber possesses broad powers with which to assure the fairness of a trial. Under Rule 54 of the Rules, a Trial Chamber has the power to issue such orders, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial, which includes the power to:

[2188] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 27
[2189] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena for Douglas Lute and John Feeley* (8 July 2009) at para. 8
[2190] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena for Douglas Lute and John Feeley* (8 July 2009) at para. 8
[2191] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Subpoena to Interview Miroslav Tudjman* (14 July 2011) at para. 23
[2192] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Subpoena to Interview Miroslav Tudjman* (14 July 2011) at para. 27
[2193] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 19

adopt witness protection measures; take evidence by video-conference link or by way of deposition; and summon witnesses and order their attendance. In addition, if such measures fail, upon the request of a party or *proprio motu*, a Trial Chamber can order that proceedings be adjourned or stayed.[2194]

stay pending decision

A Trial Chamber has inherent right to stay its decisions pending appeal.[2195]

The Trial Chamber's decision to suspend a trial while a disqualification motion is pending is a discretionary decision. Where the Trial Chamber refuses to suspend the proceedings, the accused can petition the Bureau to do so upon its consideration of the application for disqualification.[2196]

The Appeals Chamber has the right to stay a Trial Chamber decision to preserve the status quo of the appeal.[2197]

Trial Chamber refused to suspend the trial where prosecutor filed motion for referral of case pursuant to Rule 11 *bis* on the eve of trial after Trial Chamber had ordered it to reduce scope of indictment.[2198]

A stay of proceedings is an exceptional measure. The Trial Chamber must consider whether the continuation of the trial would have an impact on the conduct of a fair and expeditious trial.[2199]

Appeals Chamber refused to stay proceedings pending resolution of funding dispute between counsel and the Registrar. The proper remedy is for administrative review of the Registrar's decision by the President.[2200]

Stay of four-day week trial schedule pending appeal denied as the prejudice from the decision if reversed, if any. would not be great.[2201]

[2194] *Prosecutor v Haradinaj et al*, No. IT-04-84-A, *Judgement* (19 July 2010) at para. 36
[2195] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*, *Stay of Trial Chamber Decision* (16 December 2005)
[2196] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 33
[2197] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Stay of Decision on Defence Motion of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005 (*16 December 2005)
[2198] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Suspension of the Commencement of Trial and all Related Proceedings* (5 July 2007)
[2199] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Notice of Verification of Alleged Victim Survivors and Application for Stay of Proceedings…*(12 March 2009) at para. 12
[2200] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Nebojsa Pavkovic's Motion for Stay of Proceedings* (2 March 2010)
[2201] *Prosecutor v Karadzic*, No. IT-05-95-5/18-T, *Decision on Accused's Application for Certification to Appeal the Trial Chamber's Order on Trial Schedule and for Stay* (4 June 2010) at para. 8

subpoenas

subpoena to accused persons

Where an accused in another case is sought to be subpoenaed as a witness, the Chamber hearing the trial of the party seeking the subpoena, and not the Chamber seised of the witness' case, has jurisdiction to rule on the subpoena request.[2202]

subpoena for defence interview

A Trial Chamber may issue a subpoena when it is necessary for the purposes of an investigation or for the preparation or conduct of the trial.[2203] This power includes the authority to require a prospective witness to attend at a nominated place and time to be interviewed by the defence where that attendance is necessary for the preparation or conduct of the trial.[2204]

An alternative for a witness has declined to meet with the defence is for the witness to be subpoenaed before the Trial Chamber where the Judge can explain to him the importance of his cooperation to assist in producing a just result in the trial and how he will be afforded protection by the Tribunal if required.[2205]

Subpoena for interview of potential defence witness denied where accused was a participant in conversations with the witness which would be the subject of his testimony and thus was already fully aware of the precise nature of the evidence that the witness could give if called to testify.[2206]

Subpoena for interview of potential defence witness denied where accused had transcript of witness' interview with prosecution and was therefore aware of his potential evidence. Where witness, when recently contacted, had claimed lack of memory, the need to refresh his memory was not a sufficient reason for issuance of a subpoena for interview.[2207]

[2202] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.11, *Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (13 November 2013) at para. 31; *Prosecutor v Mladic*, No. IT-05-92-T, *Decision on Urgent Defence Motion Seeking that the Trial Chamber Intervene to Protect the Rights of the Accused in Relation to the Subpoena Issued by the Karadzic Trial Chamber* (24 January 2014) at para. 8

[2203] *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 5

[2204] *Prosecutor* v. *Krstic*, IT-98-33-A, *Decision on Application for Subpoenas*, (1 July 2003) at para. 10; *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 5

[2205] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 12

[2206] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena to Interview President Karolos Papoulias* (20 March 2012) at para. 12

[2207] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena to Interview Edin Garapljia* (15 November 2012) at para. 11

The Trial Chamber erred in failing to examine whether the defence has presented reasons for the need to interview these witnesses which went beyond the need to prepare a more effective cross-examination. If such examination discloses a need for the defence to interview the witnesses, as mentioned above, subpoenas should issue.[2208]

In a situation where the defence is unaware of the precise nature of the evidence which a prospective witness can give, and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to seek a subpoena compelling his testimony at trial or at a deposition without first knowing what he would say. This would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty.[2209]

subpoena denied

Subpoena to former FRY Prime Minister Milan Panic denied where his proposed testimony related to statements of the accused recorded in written correspondence, which could be admitted through other witnesses or through the bar table.[2210]

Subpoena for police inspector at Omarska camp denied where 10 other inspectors worked at the camp and therefore the subpoena was not shown to be necessary.[2211]

Subpoena for member of Prijedor Crisis Staff denied where it was not shown that other members of the Crisis Staff could not provide the same evidence.[2212]

Subpoena denied for US Ambassador Tony Hall where information about his meetings with the accused and the successful passage of a food convoy into Sarajevo was available through other evidence.[2213]

Subpoena denied to Bosnian Muslim leader Hasan Cengic where information about arms smuggling, and population movement was available from other sources.[2214]

Subpoena to Bosnian Muslim leader Fikret Abdic denied where information about his activities and contacts with the accused and alleged JCE members was already admitted through documents.[2215]

[2208] *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 15
[2209] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 8
[2210] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Prime Minister Milan Panic* (13 December 2012) at para. 12
[2211] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Ranko Mijic* (11 January 2013) at para. 10
[2212] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Slavko Budimir* (22 January 2013) at para. 16
[2213] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Ambassador Hall* (16 January 2013) at para. 19
[2214] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Hasan Cengic* (6 May 2013) at para. 17

Subpoena to Bosnian Muslim commander Naser Oric denied where information about Muslim arms smuggling, appropriation of humanitarian aid, lack of demilitarization, and attacks from the safe area had already been introduced into evidence and therefore information sought from witness was available through other means.[2216]

Subpoena to battalion commander denied where the accused failed to show that other members of the battalion could not give the same evidence and therefore that the evidence was not available by other means.[2217]

Defence subpoena to Minister who gave speech which prosecution claimed showed genocidal intent unnecessary where text of speech was available.[2218]

Defence subpoena to Dutchbat commander denied where similar information as to the decision to evacuate the population of Srebrenica was admitted from other witnesses and therefore there was no necessity to compel the evidence by subpoena.[2219]

Defence subpoena to former chief of US CIA Balkans Task Force denied where similar information was available from other sources.[2220]

Defence subpoena to military judge denied where similar information as to why suspects in crimes against non-Serbs were released from detention was available in judicial records.[2221]

Defence subpoena to municipal official denied where other witnesses from the same municipality had already testified or were scheduled to testify and therefore the information was obtainable through other means.[2222]

subpoena factors

[2215] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Fikret Abdic* (26 February 2013) at para. 13
[2216] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion to Subpoena Naser Oric* (4 April 2013) at para. 15
[2217] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Dragos Milankovic* (18 January 2013) at para. 14; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Milos Tomovic* (28 January 2013) at para. 14
[2218] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Dragan Kalinic* (18 December 2013) at para. 11
[2219] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Thomas Karremans* (29 May 2013) at para. 14
[2220] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Subpoena to Norman Schindler* (19 February 2014) at para. 20
[2221] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Nikola Tomasevic* (11 December 2013) at paras.11-13; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Srdan Forca* (18 December 2013) at para. 12
[2222] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Witness KW540* (3 February 2014) at para. 13

In considering whether to issue a subpoena, the Trial Chamber must consider (1) whether the information in the possession of the prospective witness is necessary for the resolution of specific issues in the trial (the "legitimate forensic purpose" requirement) and (2) whether the information in the possession of the prospective witness is obtainable by other means (the "last resort" requirement)[2223]

Factors relevant to supporting the issuance of a subpoena include (1) the position held by the prospective witness in relation to the events in question; (2) any relationship the witness may have had with the accused which is relevant to the charges; (3) any opportunity the witness may have had to observe or to learn about those events: (4) and any statements the witness made to the Prosecution or others in relation to them.[2224]

Information sought through the issuance of a subpoena must be of "material assistance", rather than merely helpful or of some assistance. The information must be of "substantial or considerable assistance" to the party in relation to a clearly identified issue that is relevant to the trial.[2225]

The applicant seeking a subpoena must demonstrate a reasonable basis for his belief that the prospective witness is likely to give information that will materially assist the applicant with respect to clearly identified issues in the forthcoming trial.[2226]

subpoena granted

Subpoena issued to ABiH General and Croatian Intelligence Service Director where it was shown that he was likely to have information on arms smuggling to Tuzla and Srebrenica, where such information was relevant to the accused's case and could not be obtained from other sources, and where the General had declined to be interviewed.[2227]

Subpoena for interview issued to German national suspected of smuggling ammunition to Bosnian Muslims where evidence was relevant to charge that accused hindered passage of humanitarian convoys, where Germany had claimed it had no records pertaining to the matter, and where the witness failed to respond to request for interview.[2228]

[2223] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 36

[2224] *Prosecutor* v. *Krstic*, IT-98-33-A, *Decision on Application for Subpoenas,* (1 July 2003) at para. 11; *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 6

[2225] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena President Karolos Papoulias* (23 October 2012) at para. 15

[2226] *Prosecutor* v. *Krstic*, IT-98-33-A, *Decision on Application for Subpoenas,* (1 July 2003) at para. 10; *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 6

[2227] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena for Interview General Said Delic and Brigadier Refik Brdjanovic* (5 July 2011); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Subpoena to Interview Miroslav Tudjman* (14 July 2011)

[2228] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Subpoena to Interview Christoph von Bezold* (1 December 2011)

Subpoena for interview issued to Croatian General in charge of obtaining weapons during the war where evidence of arms smuggling was relevant to the accused's case and could not be obtained from other sources, and where the General had declined to be interviewed.[2229]

Subpoena to Bosnian Serb Army leader was necessary where he declined to testify and could testify to whether he informed the accused of the killings in Srebrenica.[2230]

Subpoena granted to former Bosnian Muslim security operative who stated in OTP interview that Muslims had staged some shellings in Sarajevo to blame the Bosnian Serbs as this would be of material assistance to the defence case and was not obtainable by other means.[2231]

Subpoena granted for Ambassador Jose Cutileiro where his contact with the accused during peace negotiations was relevant to the *mens rea* of the accused and he had sustained personal contact with the accused, making his evidence not obtainable by other means.[2232]

Subpoena granted to accused's political advisor who had relevant information about the accused's knowledge and state of mind concerning the events charged in the indictment.[2233]

Subpoena granted to Minister of Interior who was alleged to be member of JCE and who had personal conversations with the accused and therefore possessed information not available by other means.[2234]

Subpoena granted to assistant commander of Trnopolje Camp where commander was deceased and where testimony concerning establishment and operation of camp were relevant to defence.[2235]

[2229] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Subpoena to Interview Vladimir Zagorec* (12 March 2012)

[2230] *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Radislav Krstic* (23 October 2012) at paras. 9-11; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Milenko Zivanovic* (23 April 2013) at para. 16; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Zdravko Tolimir* (9 May 2013) at para. 19; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Ljubisa Beara* (9 May 2013) at para. 14; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Radivoje Miletic* (9 May 2013) at para. 14; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Ratko Mladic* (11 December 2013) at para. 22

[2231] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Second Motion for Subpoena: Edin Garaplija* (18 December 2012) at paras. 15-16

[2232] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Ambassador Jose Cutileiro* (19 December 2012) at paras. 13-15

[2233] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena John Zametica* (27 August 2013) at para. 12

[2234] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Mico Stanisic* (13 December 2013) at para. 14

Defence subpoena to brigade commander granted where he had authored documents used by the prosecution as evidence of a plan to expel Muslims and where witness is uniquely situated to explain what he meant in those documents.[2236]

necessity

Testimony about accused's statements to Greek President denying responsibility for marketplace shelling and claiming that UN personnel were detained as prisoners of war was obtainable from other persons and therefore subpoena to Greek President was not necessary.[2237]

Whether or not the legal arguments put forth by the accused are ultimately successful, he is entitled to make those arguments and gather evidence in support thereof, including by issuance of a subpoena where necessary.[2238]

Where accused had already interviewed three persons who attended the meeting in question, and where two witnesses sought to be subpoenaed averred through the US State Department that they had no information about an agreement made at that meeting, the accused failed to demonstrate a reasonable basis for his belief that there is a good chance that the witnesses, if subpoenaed, would be able to give information which would materially assist him in his case.[2239]

Declining to submit to an interview and refusing to testify are two different things. Where witness declined to be interviewed, motion for subpoena to testify denied absent showing that witness also refused to testify.[2240]

Where witness declined to be interviewed because of pending investigation against him, it was not established that he would decline to testify voluntarily and therefore motion for subpoena would be denied.[2241]

not issued lightly

Subpoenas should not be issued lightly for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.[2242]

[2235] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Slavko Puhalic* (20 March 2013) at paras. 14-16
[2236] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena Svetozar Andric* (28 May 2013) at para. 14
[2237] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Subpoena President Karolos Papoulias* (23 October 2012) at paras. 17-18
[2238] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Compel Interview: General Rupert Smith* (25 January 2011) at para. 10
[2239] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena for Douglas Lute and John Feeley* (8 July 2009) at para. 14
[2240] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena: Edin Garaplija* (26 November 2012) at para. 13
[2241] *Decision on Accused's Motion to Subpoena Naser Oric* (11 January 2013) at para. 15

subpoena for pretrial motion

A subpoena can be issued to obtain information necessary for a pre-trial motion.[2243]

subpoena for prosecution interview

Witnesses to a crime are the property of neither the Prosecution nor the Defence; both sides have an equal right to interview them. Where, however, a person for any reason declines to be interviewed, the Prosecution does not have the power to compel the person to attend an interview or to respond to questions posed by the Prosecution. If the Prosecution or the Defence wishes to compel an unwilling person to submit to a pre-trial interview, then it must seek the assistance of the Chamber pursuant to Rule 54.[2244]

relevance

The applications of the accused failed to identify with sufficient specificity the particular indictment-related issues to which the proposed testimony of Tony Blair and Gerhard Schroeder was relevant or how this testimony would materially assist the accused in his case.[2245]

waiver

Where a potential witness refuses to be interviewed by a party, the party is obligated to use all mechanisms of compulsion available to contact the witness. Failure to do so, a party cannot complain of error on appeal.[2246]

war correspondents

For a Trial Chamber to issue a subpoena to a war correspondent, (1) the evidence sought must be of direct and important value in determining a core issue in the case; and (2) the evidence sought cannot reasonably be obtained elsewhere.[2247]

An individual war correspondent can decide to waive this privilege.[2248]

[2242] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 399
[2243] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Subpoena for Douglas Lute and John Feeley* (8 July 2009) at para. 12
[2244] *Prosecutor v Mrksic et al*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party* (30 July 2003) at para. 15
[2245] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Assigned Counsel Application for Interview and Testimony of Tony Blair and Gerhard Schroeder* (9 December 2005) at para. 48
[2246] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 58
[2247] *Prosecutor v Brdjanin & Talic*, No. IT-99-36-AR73.9, *Decision on Interlocutory Appeal* (11 December 2002)
[2248] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion to Exclude Testimony of War Correspondents* (20 May 2009) at para. 3; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Exclude the Testimony of Aernout van Lynden* (17 May 2010)

witnesses of the opposing party

The mere fact that the person has agreed to testify for the Defence does not preclude the Prosecution from interviewing him provided of course that there is no interference with the course of justice. Particular caution is needed where the Prosecution is seeking to interview a witness who has declined to be interviewed by the Prosecution, since in such a case the witness may feel coerced or intimidated.[2249]

The prosecution may interview defence witnesses without permission of the Trial Chamber but must provide notice of the interview to the defence.[2250]

Where prosecution has the contact details of a defence witness, they are free to contact the defence witness directly, rather than going through the Victims and Witnesses Section, but should give advance notice of those witnesses they intended to contact.[2251]

Victims and Witness Section ordered to contact prosecution witnesses whom the defence wishes to interview and ascertain whether they agree to be interviewed by the defence and whether they wish a member of the prosecution to be present.[2252]

Defence allowed to interview witness with potential exculpatory information by telephone conference in presence of prosecution as a means of obtaining voluntary cooperation of the witness.[2253]

Prosecution has the unilateral right to contact persons on defence witness list, although Trial Chamber took note of its willingness to provide advance notice to defence of interviews with sensitive witnesses.[2254]

Prosecution would not be required to provide notice to the defence of defence witnesses it wishes to interview beyond providing a blanket list which included virtually every defence witness.[2255]

Subpoena could only be issued to submit to interview by opposing party only in the most extraordinary circumstances, such as where the potential witness was a

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[2249] *Prosecutor v Mrksic et al*, No. IT-95-13/1-AR73, *Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Other Party* (30 July 2003) at para. 16
[2250] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision on Prosecution Motion to Interview Defence Witnesses* (1 September 2006)
[2251] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interviews of Defence Witnesses by the Prosecution* (8 November 2012) at paras. 13-14
[2252] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses* (15 July 2009)
[2253] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness* (13 December 2006) at pg. 7
[2254] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Slobodan Praljak's Motion for Protective Measures* (20 March 2008)
[2255] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Clarification of Decision on Defence Witness Interviews* (8 January 2013) at para. 10

participant in or witness to the underlying crimes. Motion to subpoena amicus curiae for interview denied.[2256]

Where a witness whom a party seeks to subpoena is scheduled to testify during the trial, a Trial Chamber may refuse the request where its sole rationale is to prepare for a more effective cross-examination.[2257] However, given that during cross-examination the Defence can elicit from the Prosecution witness information which is relevant to its own case and goes beyond the scope of the Prosecution's examination-in-chief, the Defence may have a legitimate need to interview this witness prior to trial to properly prepare its case.[2258]

Taking a cautious approach to the issuance of a subpoena is particularly necessary when a party seeks to subpoena a witness who will testify for the opposing party and who had declined to be interviewed in advance of that testimony. Such a subpoena should be issued as a last resort.[2259]

Accused demonstrated that subject matter upon which he proposed to interview prosecution witness was relevant to his defence and that the witness was uniquely positioned to provide such information. Therefore, he showed a legitimate need to interview the prosecution witness to gather information that may materially assist his defence.[2260]

Subpoena to prosecution witness General Rupert Smith denied where witness agreed to be interviewed by defence team after motion for subpoena was filed.[2261]

Rule 54 bis—orders directed to States

(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall:
(i) identify as far as possible the documents or information to which the application relates;
(ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and
(iii) explain the steps that have been taken by the applicant to secure the State's

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[2256] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Urgent Defence Motion for Issuance of Subpoena to Amicus Curiae Prosecutor* (3 February 2009) at para. 14
[2257] *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 10
[2258] *Prosecutor v Halilovic*, No. IT-01-48-AR73, *Decision on the Issuance of Subpoenas* (21 June 2004) at para. 14
[2259] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Compel Interview: General Rupert Smith* (25 January 2011) at para. 9
[2260] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Compel Interview: General Rupert Smith* (25 January 2011) at para. 11
[2261] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Compel Interview: General Rupert Smith* (25 January 2011)

assistance.
(B) The Judge or Trial Chamber may reject an application under paragraph (A) in limine if satisfied that:
(i) the documents or information are not relevant to any matter in issue in the proceedings before them or are not necessary for a fair determination of any such matter; or
(ii) no reasonable steps have been taken by the applicant to obtain the documents or information from the State.
(C) (i) A decision by a Judge or a Trial Chamber under paragraph (B) or (E) shall be subject to:
(a) review under Rule 108 bis; or
(b) appeal.
(ii) An appeal under paragraph (i) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
(a) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(b) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.
(D) (i) Except in cases where a decision has been taken pursuant to paragraph (B) or paragraph (E), the State concerned shall be given notice of the application, and not less than fifteen days' notice of the hearing of the application, at which the State shall have an opportunity to be heard.
(ii) Except in cases where the Judge or Trial Chamber determines otherwise, only the party making the application and the State concerned shall have the right to be heard.
(E) If, having regard to all circumstances, the Judge or Trial Chamber has good reasons for so doing, the Judge or Trial Chamber may make an order to which this Rule applies without giving the State concerned notice or the opportunity to be heard under paragraph (D), and the following provisions shall apply to such an order:
(i) the order shall be served on the State concerned;
(ii) subject to paragraph (iv), the order shall not have effect until fifteen days after such service;
(iii) a State may, within fifteen days of service of the order, apply by notice to the Judge or Trial Chamber to have the order set aside, on the grounds that disclosure would prejudice national security interests. Paragraph (F) shall apply to such a notice as it does to a notice of objection;
(iv) where notice is given under paragraph (iii), the order shall thereupon be stayed until the decision on the application;
(v) paragraphs (F) and (G) shall apply to the determination of an application made pursuant to paragraph (iii) as they do to the determination of an application of which notice is given pursuant to paragraph (D);
(vi) the State and the party who applied for the order shall, subject to any special measures made pursuant to a request under paragraphs (F) or (G), have an

opportunity to be heard at the hearing of an application made pursuant to paragraph (E)(iii) of this Rule.
(F) The State, if it raises an objection pursuant to paragraph (D), on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection not less than five days before the date fixed for the hearing, specifying the grounds of objection. In its notice of objection the State:
(i) shall identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced; and
(ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the objection, including in particular:
(a) hearing the objection in camera and ex parte;
(b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;
(c) ordering that no transcripts be made of the hearing and that documents not further required by the Tribunal be returned directly to the State without being filed with the Registry or otherwise retained.
(G) With regard to the procedure under paragraph (F) above, the Judge or Trial Chamber may order the following protective measures for the hearing of the objection:
(i) the designation of a single Judge from a Chamber to examine the documents or hear submissions; and/or
(ii) that the State be allowed to provide its own interpreters for the hearing and its own translations of sensitive documents.
(H) Rejection of an application made under this Rule shall not preclude a subsequent application by the requesting party in respect of the same documents or information if new circumstances arise.
(I) An order under this Rule may provide for the documents or information in question to be produced by the State under appropriate arrangements to protect its interests, which may include those arrangements specified in paragraphs (F)(ii) or (G).

appeal

Direct appeal did not lie from decision of Trial Chamber denying binding order to European Union where decision was not *in limine* denial of binding order but was decision on merits after full consideration by Trial Chamber in consultation with parties and European Union.[2262]

In cases where the judgement is on appeal, the Appeals Chamber will only compel material pursuant to Rule 54 *bis* in exceptional circumstances. Such circumstances arise if a failure to compel production has the potential to result in a miscarriage of justice. The Appeals Chamber will also consider whether the information

[2262] *Prosecutor v Gotovina et al*, No. IT-06-90-AR54*bis*.1, *Decision on Prosecution Motion to Strike Gotovina Defence's Appeal Pursuant to Rule 54 bis…*(6 July 2010) at para. 12

sought could have been discovered by the moving party at trial through the exercise of due diligence.[2263]

compliance

Inviting a party to search through immense archives while giving no indication whether the documents exist at all is not satisfactory compliance with a request to a State for production of documents.[2264]

Government of Croatia ordered to intensify search for documents requested by the prosecution and to provide detailed reports of its efforts where its claim that it could not find the requested documents was not conclusive.[2265]

existence

Where the creation, continued existence, and current whereabouts of the requested documents was uncertain, the Trial Chamber declined to issue a binding order for the documents.[2266]

efforts to obtain voluntary compliance

Implicit in the Rule's requirement that a party explain the steps he has taken to obtain voluntary compliance is that an applicant must have made a reasonable effort to obtain the materials voluntarily before seeking a binding order.[2267]

Only after a State declines to lend the requested support should a party make a request to a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.[2268]

Rule 54 *bis* motion dismissed as premature where State indicated a willingness to provide some documents. It is not necessary that an accused have all documents he seeks from a State before his trial commences.[2269]

[2263] *Prosecutor v Gotovina & Markac, No. IT-06-90-A, Decision on Ante Gotovina's Renewed Application for an Order Pursuant to Rule 54 bis Directing the Government of the Republic of Serbia to Produce Documents* (16 November 2011) at para. 7

[2264] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sreten Lukic's Amended Rule 54 bis Application* (29 September 2006) at para. 10

[2265] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Order in Relation to Prosecution's Application for an Order Pursuant to Rule 54 bis* (16 September 2008)

[2266] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Prosecution's Application for an Order Pursuant to Rule 54 bis Directing the Government of the Republic of Croatia to Produce Documents or Information* (26 July 2010) at para. 137

[2267] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sreten Lukic's Amended Rule 54 bis Application* (29 September 2006) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (United States of America)* at para. 10; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 16

[2268] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (United States of America)* at para. 10

Rule 54 *bis* motion dismissed as premature where, despite passage of 18 month since the request, the State indicated that it was cooperating in the process by seeking review by a third and fourth state to declassify the requested document.[2270]

Rule 54 *bis* motion dismissed as premature where motion was filed 37 days after request to the State, as the State was not given enough time to voluntarily provide the documents.[2271]

An applicant may not be found to have met the reasonable steps requirement under Rule 54 bis where he refused the same requested documents or information when they were volunteered by a State under Rule 70.[2272]

A party may not bypass a State's cooperative efforts to assist it with gaining access to certain confidential information simply because that party does not want the State to be able to utilize the protections afforded to it through Rule 70.[2273]

Where a State refused to allow use of exculpatory material at trial pursuant to Rule 70, while the State could not be compelled to so consent, the applicant could apply to the Trial Chamber for other relief.[2274]

Request for documents served on government and failure of government to respond to that request within a reasonable time constituted sufficient evidence of reasonable steps to obtain compliance.[2275]

Where government's cooperation in producing requested documents was slow and sometimes problematic, it was incumbent upon the accused to apply for the Trial Chamber's assistance to assure that the documents were received in a timely manner.[2276]

Interpol

[2269] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Binding Order Pursuant to Rule 54 bis (United States of America)* at para. 12
[2270] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third Application for Binding Order (United States of America)*(17 February 2011) at para. 9
[2271] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Decision on Ante Gotovina's Application for an Order Pursuant to Rule 15 bis Directing the Government of the Republic of Serbia to Produce Documents* (19 July 2011)
[2272] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 31
[2273] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 37
[2274] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 38, fn. 91
[2275] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (The Islamic Republic of Iran)* (9 June 2010) at para. 19
[2276] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 93

Registrar requested to request Interpol to publish "red notice" to facilitate the arrest of three persons charged with contempt for whom Serbia declined to execute ICTY arrest warrants.[2277]

national security interests

States cannot refuse to produce documents on the ground of national security interests but must seek protective measures from the Chamber to protect those interests.[2278]

After examination *in camera* at the United Kingdom Embassy of documents subject to national security concerns, Trial Chamber was satisfied that summaries offered to the accused would constitute *bona fide* compliance with his request, such as to justify Rule 70 conditions were not being used as a blanket refusal to provide the material in question.[2279]

necessity

The necessity requirement does not require a showing that the material in fact exists. All that is required is that an applicant make a reasonable effort to demonstrate their existence.[2280]

The necessity requirement does not require that an applicant demonstrate that he has exhausted all other sources for the information. However, it is reasonable for the applicant to demonstrate that he has been unable to obtain the material from other sources through due diligence or that the information received from other sources is insufficiently probative for a fair determination of the matter.[2281]

[2277] *Prosecutor v Jojic et al*, No. IT-03-67-R77.5, *Order in Relation to Interpol Red Notice* (14 February 2017)

[2278] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at paras. 41.43; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (French Republic)*(30 June 2010) at para. 27

[2279]*Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion to Compel Production of Seven Documents* (28 March 2013) at para. 15

[2280] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 15

[2281] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 25; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 15

It is for the Trial Chamber alone to determine whether the requirements of Rule 54 *bis* are met. It is not for a State to unilaterally determine which documents are necessary for a fair hearing.[2282]

A State cannot unilaterally narrow the request. It is for the applicant to determine what information he needs. However, Rule 54 bis orders are reserved for cases in which they are really necessary.[2283]

Where prosecution had provided disclosure of some of the documents on the same topic as those sought by the binding order application, the accused did not show that a binding order was necessary.[2284]

Binding order would not issue for production of raw data for 14 DNA cases from International Commission on Missing Persons where sufficient cases were provided voluntarily by organization for accused to test the accuracy of the results.[2285]

Trial Chamber declined to order European Union to interview persons to determine whereabouts of logbook where it was not convinced that log books existed and that such interviews were necessary.[2286]

originator principle

A State cannot be required to produce material which originated with another State.[2287]

In such a case, the State should indicate to the Chamber which particular documents are owned by third states and thus cannot be disclosed to the party without that state's permission.[2288]

The identity of the originator State need not be disclosed to the party where the receiving State was willing to disclose the material and the Trial Chamber, after *in*

[2282] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sreten Lukic's Amended Rule 54 bis Application* (29 September 2006) at para. 7

[2283] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 27

[2284] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (The Islamic Republic of Iran)* (9 June 2010) at para. 23

[2285] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Binding Order to International Commission on Missing Persons* (4 March 2013) at para.26

[2286] *Prosecutor v Gotovina*, No. IT-06-90-T, *Decision on the Gotovina Defence's Request to Order the European Union to Carry out Further Investigations on the Whereabouts of the RC-Knin Log Book* (3 June 2010)

[2287] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 45; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.1*, *Decision on Request of NATO for Review* (12 May 2006) at para. 20

[2288] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 43

camera inspection of the material, was satisfied that the accused would not be prejudiced.[2289]

protective measures

Protective measures granted under Rule 54 *bis* do not apply *mutatis mutandis* in other proceedings before the Tribunal.[2290]

A State bears the burden of demonstrating national security interests to warrant protective measures under Rule 54 *bis*.[2291]

Republic of Serbia failed to meet its burden of showing that national security interests warranted protective measures.[2292]

Identity of employees of state security services in 1990s, and identities of entities receiving the state security information would not be redacted as the State had not shown a national security interest that would be affected by disclosure. Identity of the sources of the information would be redacted.[2293] Contacts with intelligence agencies of other countries would also be redacted.[2294]

While protective measures would be granted for documents containing the name of current state security operatives, documents containing the names of former operatives would not be redacted.[2295]

No compelling reason existed to redact the names of persons not involved in the ICTY proceedings and such a request made on behalf of a State was denied.[2296]

[2289] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion to Compel Production of Seven Documents* (28 March 2013) at para. 16

[2290] *Prosecutor v Perisic*, No. IT-04-81-AR108*bis*.4, *Decision on the Republic of Serbia's Request for Review of the Trial Chamber's Decision of 15 February 2010* (15 April 2010) at para. 14; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Republic of Serbia's Request for Protective Measures for Four Documents* (12 April 2012) at para. 9

[2291] *Prosecutor v Perisic*, No. IT-04-81-AR108*bis*.4, *Decision on the Republic of Serbia's Request for Review of the Trial Chamber's Decision of 15 February 2010* (15 April 2010) at para. 21

[2292] *Prosecutor v Perisic*, No. IT-04-81-AR108*bis*.4, *Decision on the Republic of Serbia's Request for Review of the Trial Chamber's Decision of 15 February 2010* (15 April 2010) at paras. 16,22

[2293] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Republic of Serbia's Request for Protective Measures for Four Documents* (12 April 2012) at paras. 12-14; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Republic of Serbia's Request for Protective Measures for Three Witnesses* (17 April 2012) at paras. 21-22; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Serbia's Request for Protective Measures in Relation to Defence Documents* (18 July 2012) at paras. 23-24

[2294] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Republic of Serbia's Request for Protective Measures for Three Witnesses* (17 April 2012) at para. 25

[2295] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Republic of Serbia's Motion for Protective Measures* (15 July 2014) at paras. 14-15

[2296] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Serbia's Request for Protective Measures in Relation to Defence Documents* (18 July 2012) at para. 28

State had not demonstrated that disclosure of means and methods of security services 20 years ago would damage its national security interests.[2297]

relevance

Binding order to Bosnia granted for records of criminal convictions of prosecution witnesses and list of pending indictments against those witnesses.[2298]

The applicant must set out succinctly the reasons why documents are deemed relevant to the trial. If the party considers that setting forth the reasons for the request might jeopardize its prosecutorial or defence strategy it should say so and at least indicate the general grounds on which the request rests.[2299]

While documents which may impeach certain international witnesses may be relevant, failure of the accused to specify which witnesses would have their testimony impacted by the documents and why justified denial of the request for binding order.[2300]

Request for documents related to arms smuggling to Bosnian Muslims by government of Iran and Saudi Arabia failed to meet the relevance requirement where it was not shown that the arms were connected to the attack on Srebrenica or involvement of UN personnel in arms smuggling.[2301]

Request for documents related to responsibility of Bosnian Muslims for shelling and sniping events in Sarajevo were relevant and necessary and French government was ordered to produce them to the defence.[2302]

Request for production of UN or NATO legal opinions on whether air strikes would make their forces combatants was not relevant to the accused's *mens rea* where there was no evidence that he was aware of those legal opinions and was not necessary

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[2297] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Serbia's Request for Protective Measures in Relation to Defence Documents* (18 July 2012) at para. 25

[2298] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Addendum to Further Defence Report re Access to Foss Material and Additional Motions re Criminal Record of Prosecution Witnesses Filed on 5 January 2005 and 11 February 2005* (18 March 2005)

[2299] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Requests by the Accused for Trial Chamber II to Issue Subpoena Orders* (3 June 2005)

[2300] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (French Republic)*(30 June 2010) at paras. 19,24

[2301] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (The Islamic Republic of Iran)* (9 June 2010) at paras. 20-23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Second Motion for Binding Order (The Islamic Republic of Iran) and Motion for Subpoena to Interview General Director Sadeghi* (10 May 2011) at para. 14; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Binding Order (The Kingdom of Saudi Arabia)* (30 June 2011) at paras. 14,18

[2302] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Binding Order (French Republic)*(30 June 2010) at para. 20

for determination of the actual status of the forces, which would be a legal issue to be determined by the Chamber.[2303]

Request for documentation of US meetings with Bosnian President denied where it was irrelevant who started the war in Bosnia and whether the United States encouraged the Bosnian government not to accept a peace agreement.[2304]

Request for subpoena to President Clinton denied where US encouragement of arms shipments to Bosnian government in violation of UN arms embargo was irrelevant.[2305]

requirements

A party seeking an order that a State produce documents or information must (1) identify as far as possible the documents or information to which the application relates; (2) indicate how they are relevant to any matter in issue and necessary for a fair determination of that matter; and (3) explain the steps that have been taken by the applicant to secure the State's assistance.[2306]

specificity

The underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requested party.[2307]

A request for intercepted conversations was insufficiently specific where it was not limited to those conversations concerning issues relevant to the case and did not specify where and when the conversations took place. The accused was ordered to reformulate his request.[2308]

[2303] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Binding Order (United Nations and NATO)* at paras. 15-16

[2304] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Fifth Motion for Binding Order (United States of America)*(22 August 2012) at para, 10

[2305] *Prosecutor v Karadzic*, No, IT-95-5/18-T, *Decision on Accused's Second Motion for Subpoena to Interview President Bill Clinton* (21 August 2012) at para. 12

[2306] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (17 November 2005) at para.18; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 11

[2307] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 38; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15

[2308] *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis* (23 March 2005) at page 5

The requirement of specificity clearly prohibits the use of broad categories but does not prohibit the use of categories as such. A requested category of documents, defined with sufficient clarity to enable ready identification will suffice.[2309]

The applicant must identify specific documents and not broad categories. Documents must be identified as far as possible and in addition be limited in number. The Trial Chamber may, considering the need for a fair trial, allowing the omission of those details if it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing these particulars.[2310]

If the requesting party is unable to specify the title, date, and author of the requested documents, but provides an explanation and is able to identify the requested documents in some appropriate manner, a Trial Chamber may, in consideration of the need to ensure a fair trial, allow the omission of those details if it is satisfied that the party requesting the order, acting *bona fide*, has no means of providing those particulars.[2311]

standard of review

The Trial Chamber's decision on a Rule 54 bis request is a discretionary one. It must be demonstrated that the Trial Chamber committed a discernible error causing prejudice to a party. The decision will be overturned only where it has been found to be (1) based upon an incorrect application of governing law; (2) based upon a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of discretion. The Appeals Chamber will also consider whether the Trial Chamber gave weight to extraneous or irrelevant considerations or failed to give sufficient weight to relevant considerations.[2312]

standing

A State against whom a binding order is sought does not have a right to be heard before the issuance of the order. It is sufficient if it is heard on petition for review of that order.[2313]

[2309] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para.39; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 15

[2310] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Requests by the Accused for Trial Chamber II to Issue Subpoena Orders* (3 June 2005); *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 17

[2311] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 14

[2312] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 6

[2313] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 17

A State does not have the locus standi to challenge the determination of whether requested documents are necessary to a fair determination of the matter.[2314]

A State to which a binding order is addressed does not have standing to challenge the order on relevance grounds.[2315]

Rule 54bis(D)(ii) provision that "except in cases where a Judge or Trial Chamber determines otherwise, only the party making the application and the State concerned shall have the right to be heard", applies to oral hearings and not to written pleadings.[2316]

A State may seek protective measures for documents not produced by that State where its security interests are involved.[2317]

State has standing to request protective measures for documents it provided voluntarily to prosecution.[2318]

unduly onerous

A request for a binding order must not be unduly onerous. This does not automatically exclude all requests that call for the production of hundreds of documents. The difficulty of producing the evidence must not be disproportionate to the exigencies of the trial.[2319]

The requirement that the request not be unduly onerous is not concerned with protecting the confidentiality concerns of a state or an organisation but with the "identification, collection and scrutiny" of the material requested. In other words, it is concerned with the burden placed on states in cases where the requesting party is seeking a large volume of material, requiring extensive effort on behalf of the states to identify and collect such material.[2320]

[2314] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 21

[2315] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 40; *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 21

[2316] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Decision on Prosecution Request for Leave to Respond to Gotovina's Application Pursuant to Rule 54 bis* (28 June 2011)

[2317] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Serbia's Requests for Provisional Protective Measures in Relation to Defence Documents* (19 October 2012) at para. 15

[2318] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Republic of Serbia's Motion for Protective Measures* (15 July 2014) at para. 9

[2319] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-AR108*bis, Decision on Request of the Republic of Croatia for Review of a Binding Order* (9 September 1999) at para. 41; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis* (*Federal Republic of Germany)* (19 May 2010) at para. 17

[2320] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Binding Order to International Commission on Missing Persons* (4 March 2013) at para.25, fn. 72

Rule 55—execution of arrest warrants

(A) A warrant of arrest shall be signed by a permanent Judge. It shall include an order for the prompt transfer of the accused to the Tribunal upon the arrest of the accused.

(B) The original warrant shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal.

(C) Each certified copy shall be accompanied by a copy of the indictment certified in accordance with Rule 47 (G) and a statement of the rights of the accused set forth in Article 21 of the Statute, and in Rules 42 and 43 mutatis mutandis. If the accused does not understand either of the official languages of the Tribunal and if the language understood by the accused is known to the Registrar, each certified copy of the warrant of arrest shall also be accompanied by a translation of the statement of the rights of the accused in that language.

(D) Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed, including the national authorities of a State in whose territory or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found.

(E) The Registrar shall instruct the person or authorities to which a warrant is transmitted that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language that he or she understands and that the accused be cautioned in that language that the accused has the right to remain silent, and that any statement he or she makes shall be recorded and may be used in evidence.

(F) Notwithstanding paragraph (E), if at the time of arrest the accused is served with, or with a translation of, the indictment and the statement of rights of the accused in a language that the accused understands and is able to read, these need not be read to the accused at the time of arrest.

(G) When an arrest warrant issued by the Tribunal is executed by the authorities of a State, or an appropriate authority or international body, a member of the Office of the Prosecutor may be present as from the time of the arrest.

Rule 56—cooperation of States

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.

Rule 57—procedure after arrest

Upon arrest, the accused shall be detained by the State concerned which shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned, the authorities of the host country and the Registrar.

Rule 58—national extradition proceedings

The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59—failure to execute a warrant or transfer order
(A) Where the 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 therefor.
(B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

Rule 59 *bis*—transmission of arrest warrants

(A) Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody by that authority or international body or the Prosecutor.
(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language.
(C) Notwithstanding paragraph (B), the indictment and statement of rights of the accused need not be read to the accused if the accused is served with these, or with a translation of these, in a language the accused understands and is able to read.

Rule 60—advertisement of indictment

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio and television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

Rule 61—procedure in case of failure to execute a warrant

(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge

who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:
(i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and (ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60, the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member.
(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge.
(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above.
(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or proprio motu, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.
(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit.

Rule 62—initial appearance of accused

(A) Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:
(i) satisfy itself, himself or herself that the right of the accused to counsel is respected;
(ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment;
(iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that,

should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count;
(iv) if the accused fails to enter a plea at the initial or any further appearance, enter a plea of not guilty on the accused's behalf;
(v) in case of a plea of not guilty, instruct the Registrar to set a date for trial;
(vi) in case of a plea of guilty:
(a) if before the Trial Chamber, act in accordance with Rule 62 bis, or
(b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 bis; (vii) instruct the Registrar to set such other dates as appropriate.
(B) Where the interests of justice so require, the Registrar may assign a duty counsel as within Rule 45 (C) to represent the accused at the initial appearance. Such assignments shall be treated in accordance with the relevant provisions of the Directive referred to in Rule 45 (A).
(C) Within 30 days of the initial appearance, if the accused has not retained permanent counsel or has not yet elected in writing to conduct his or her own defence in accordance with Rule 45 (F), permanent counsel shall be assigned by the Registrar. Should the Registrar be unable to appoint permanent counsel within the time-limit, he will seek an extension from the Trial Chamber.

Rule 62 *bis*—guilty pleas

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:
(i) the guilty plea has been made voluntarily;
(ii) the guilty plea is informed;
(iii) the guilty plea is not equivocal; and
(iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case, the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.

Rule 62 *ter*—plea agreement procedure

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:
(i) apply to amend the indictment accordingly;
(ii) submit that a specific sentence or sentencing range is appropriate;
(iii) not oppose a request by the accused for a particular sentence or sentencing range.
(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).
(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with

Rule 62 (vi), or requests to change his or her plea to guilty.

Following a plea agreement, Trial Chambers shall give due consideration to the recommendation of the parties and should the sentence diverge substantially from that recommendation, give reasons for the departure.[2321]

Although there can be exceptions, Trial Chambers in general are limited to the factual basis of the guilty plea set forth in such documents as the plea agreement, indictment, and written statement of facts.[2322]

Rule 63—questioning of accused

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.
(B) The questioning, including any waiver of the right to counsel, shall be audio recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

Rule 64—detention on remand

Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

rules of detention

The Rules of Detention also apply to locations outside of the UN Detention Unit, such as the Tribunal Main Building, where a detainee is temporarily held.[2323]

communication

Registrar's decision to cut off communication by detainee for 2 weeks was excessive where it was not shown detainee's calls intended to cause harm and he was not warned.[2324]

[2321] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 89; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 30
[2322] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 12
[2323] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Decision on Limitations on Contact with Journalist: Suddeustche Zeitung Magazin* (7 October 2013) at para. 14
[2324] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Appeal Against the Registrar's Decision of 18 November 2008* (28 November 2008)

Appeal of Registrar's decision to terminate privileged communication with legal associates was to President and not to the Trial Chamber.[2325]

Appeal of Trial Chamber's decision concerning restrictions on communication must be made to the Appeals Chamber, not the President.[2326]

Registrar acted reasonably in terminating privileged calls between self-represented accused and his legal associates where the associates disclosed confidential information.[2327]

Registrar is allowed to monitor all privileged telephone calls of all inmates without specific reason to believe that a particular detainee will escape, interfere with, or intimidate a witness, interfere with the administration, disturb the security and good order of the detention unit, or disclose confidential information.[2328]

contacts with media

Registrar's total ban on all interactive contacts between detainee and news media was unreasonable and violated procedural fairness.[2329]

It is possible for a detainee to have contact with a member of the news media in ways which do not disturb the good order of the detention unit.[2330]

Monitoring of conversation and warning to journalist are sufficient safeguards to prevent disclosure of confidential information by an accused in his contacts with the media.[2331]

Remote, monitored contact between detainee and journalist permitted.[2332]

[2325] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Accused's Submission 479 on the Monitoring of his Privileged Communications* (10 November 2011)
[2326] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Urgent Registry Submission Pursuant to Rule 33(B) Seeking Direction from the President on the Trial Chamber's Decision of 27 November 2008* (17 December 2008)
[2327] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Vojislav Seselj's Request for Review of Registrar's Decision of 10 September 2009* (21 October 2009) at para. 21
[2328] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Decision to Monitor Telephone Calls* (21 April 2011)
[2329] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Denial of Contact with Journalist* (12 February 2009) at para. 18
[2330] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Denial of Contact with Journalist* (12 February 2009) at para. 19
[2331] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Denial of Contact with Journalist* (12 February 2009) at para. 21
[2332] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Denial of Contact with Journalist* (12 February 2009)

Registrar was not unreasonable in limiting communication with journalists to written communication where it did not have the ability to delay transmission of oral communications such as to prevent unauthorized disclosure of confidential information.[2333]

Registrar's decision to limit communication between a detainee and the media to written communication was not unreasonable.[2334]

Given the relatively large number of protected witnesses appearing in proceedings before the Tribunal, as well as the high volume of confidential information generated in those proceedings, there is a considerable risk that confidential information could be inadvertently disclosed during a telephone conversation.[2335]

When assessing a detainee's request for access to the media, the Registrar must respect the detainee's right to freedom of expression and balance it carefully against the interests of the prison authorities.[2336]

Any decision limiting a detainee's right of freedom of expression must follow the general provisions of proportionality.[2337]

Registrar's refusal to approve release of pre-recorded, screened audio-visual answers to broadcast journalists' questions was reasonable considering the administrative burden on the Registrar to review the contents of the audio-visual material.[2338]

Registrar's refusal to approve communication from accused in which he accused UNPROFOR of smuggling weapons to Bosnian Muslims was reasonable. The accused cannot use the media to discuss issues which are the subject of his trial, as it strips the other party of the right to immediately react to those contentions. The courtroom is the only place for such communications.[2339]

Three months taken by Registrar to review proposed communication with the news media was inordinate delay. Such review should be conducted within ten days.[2340]

[2333] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Request for Reversal of Limitations on Contact with Journalist* (21 April 2009) at para. 21
[2334] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Decision on Limitations on Contact with Journalist: Suddeustche Zeitung Magazin* (7 October 2013) at paras. 15-16
[2335] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Request for Reversal of Limitations on Contact with Journalist* (21 April 2009) at para. 24
[2336] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Request for Reversal of Limitations on Contact with Journalist: Russia Today* (6 November 2009) at para. 23
[2337] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Request for Reversal of Limitations on Contact with Journalist: Russia Today* (6 November 2009) at para. 23
[2338] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Request for Reversal of Limitations on Contact with Journalist: Russia Today* (6 November 2009) at para. 23
[2339] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Reversal of Limitations on Contact with Journalist: LeMonde* (28 October 2009) at para. 17
[2340] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Limitations on Contact with Journalist: Profil Magazine* (11 October 2010) at paras. 19-20

The Registrar is obliged to respect the detainee's right to freedom of expression, and to carefully balance it against the interests of the prison authorities.[2341]

No reasonable person could conclude that detainee's subjective opinion alleging bias on the part of the prosecution and a general lack of impartiality in the conduct of its investigations could interfere with the administration of justice or undermine the Tribunal's mandate. Registrar's refusal to authorize this communication was reversed.[2342]

medical issues

Issue of Registrar's failure to provide detainee with his full medical records should be appealed to the President and not the Trial Chamber.[2343]

Registrar was not shown to have denied detainee access to his medical records and was only obligated to obtain medical records held by an external provider upon a specific request by the detainee.[2344]

privileged communications

Refusal of Registrar to allow privileged calls to mobile phones was unreasonable.[2345]

visits

The Registrar was reasonable in determining that visitor who had revealed the identity of a protected visit and the state of the health of the accused after a visit should not be allowed to visit the accused again as his purpose was to disclose information to the news media.[2346]

Registrar's decision to prohibit visit by leader of accused's political party who had previously made statements to media was upheld as reasonable, although it was noted

[2341] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Limitations on Contact with Journalist: Profil Magazine* (11 October 2010) at para. 21
[2342] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Reversal of Limitations on Contact with Journalist: Profil Magazine* (11 October 2010) at para. 23
[2343] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Defence Motion to Compel Registrar and United Nations Detention Unit to Provide Medical Records* (20 October 2017)
[2344] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Three Defence Motions* (13 November 2017) at paras. 39-43
[2345] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Privileged Telephone Calls* (23 March 2012) at para. 15
[2346] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Appeal Against Decisions of the Registry of 20 August 2004 and 30 January 2006* (11 April 2006)

that it would not be reasonable to make a blanket prohibition on visits by any member of the accused's party.[2347]

Ban on face-to-face meetings with journalists is reasonable so long as other means of communication exist.[2348]

Registrar violated self-represented accused's right to procedural fairness by refusing his request to interview former detainee testifying as defence witness without providing adequate reasons.[2349]

Registrar's decision to refuse self-represented accused in-person meeting with former detainee for witness proofing constituted a blanket ban on meetings with former detainees not allowed by Rule 61(C) and was unreasonable.[2350]

Rule 65—provisional release

(A) Once detained, an accused may not be released except upon an order of a Chamber.
(B) Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.
(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.
(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the appeal shall be filed within seven days of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.
(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to

[2347] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Seselj's Appeal Against Decision of the Registrar of 14 June 2006* (25 August 2006)
[2348] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Request for Denial of Contact with Journalist* (12 February 2009) at para. 16
[2349] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Appeal of the Registrar's Denial of In-Person Witness Interview: Momcilo Krajisnik* (29 October 2013) at para. 16
[2350] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Appeal of the Registrar's Denial of In-Person Witness Interview: Momcilo Krajisnik* (29 October 2013) at paras. 22-23

release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.
(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.
(G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:
(i) the time-limit for the filing of an appeal by the Prosecutor has expired, and no such appeal is filed;
(ii) the Appeals Chamber dismisses the appeal; or
(iii) the Appeals Chamber otherwise orders.
(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply mutatis mutandis.
(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:
(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;
(ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and
(iii) special circumstances exist warranting such release.
The provisions of paragraphs (C) and (H) shall apply mutatis mutandis.

advanced stage of the trial

A Trial Chamber is no longer required to consider compelling humanitarian circumstances when deciding on provisional release of an accused at an advanced stage of the trial.[2351]

The recent amendment of Rule 65(B) has converted the requirement of showing compelling humanitarian grounds from a *conditio sine qua non* when granting provisional release at advanced stages of proceedings to a discretionary consideration in granting such release.[2352]

When considering release of an accused at an advanced stage of the proceedings, the Trial Chamber should consider the possible negative effect on victims and witnesses.[2353]

[2351] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.26, *Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic* (15 December 2011) at para. 12
[2352] *Prosecutor v Stanisic & Zupljanin*, No. IT-06-91-T, *Decision Granting Mico Stanisic's Request for Provisional Release* (18 November 2011) at para. 14; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Motion for Provisional Release* (13 December 2011)
[2353] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.26, *Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic* (15 December 2011) at para. 10

Imposing strict security conditions on accused adequately addressed the possible negative effect on victims and witnesses by provisional release.[2354]

Provisional release between last witness and closing argument granted.[2355]

appeal of provisional release decision

"Good cause" requires that the party seeking leave to appeal demonstrate that the Trial Chamber "may have erred" in the impugned decision. No such showing was made in this case where accused had been fugitive for several years and his earlier provisional release was for a few days and under stringent conditions.[2356]

Decision denying modification of conditions of appeal is appealable as of right under Rule 65(D) and does not require leave to appeal.[2357]

The Appeals Chamber will only overturn a Trial Chamber's decision on provisional release where it is found to be (1) based upon 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.[2358]

The party challenging the Trial Chamber's decision concerning provisional release bears the burden of showing that the Trial Chamber committed a discernible error in that it (1) misdirected itself as to the principle applied; (2) misdirected itself as to the law which is relevant to the exercise of discretion; (3) gave weight to extraneous or irrelevant considerations; (4) failed to give weight or sufficient weight to relevant considerations; (5) made an error as to the facts upon which it has exercised its discretion; or (6) rendered a decision so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[2359]

[2354] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.26, *Decision on Prosecution Appeal on the Decision on Further Extension of Jadranko Prlic's Provisional Release* (23 April 2012) at para. 20; *Prosecutor v Prlic et al*, No. IT-04-74-AR65.26, *Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlic* (15 December 2011) at para. 10; *Prosecutor v Prlic et al*, No. IT-04-74-AR65.33, *Decision on the Prosecution's Appeal of the Decision on Further Extension of Bruno Stojic's Provisional Release* (16 May 2012) at para. 20

[2355] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Stanisic Defence Request for Provisional Release* (16 July 2012)

[2356] *Prosecutor v Mrksic et al*, No. IT-95-13/1-AR65.2, *Decision on Application for Leave to Appeal* (19 April 2005)

[2357] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Request for Leave to Appeal Decision on Motion to Modify Terms of Provisional Release* (19 January 2016)

[2358] *Prosecutor v Stanisic*, No. IT-04-79-AR65.1, *Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release* (17 October 2005) at para. 6

[2359] *Prosecutor v Mejakic et al*, No. IT-02-65-AR65.2, *Decision on Dusan Fustar's Request for Interlocutory and Expedited Appeal* (16 December 2005) at para. 7; *Prosecutor v Popovic et al*, No. IT-05-88-AR65.1, *Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release* (24 January 2006)

Appeal of denial of temporary provisional release during court recess denied by Duty Judge, subject to reconsideration of full Appeals Chamber at end of recess.[2360]

awaiting appeal

Provisional release pending appeal granted where accused had served 2/3 of sentence or more.[2361]

Provisional release pending appeal denied where accused had served considerable period, but not yet 2/3 of sentence.[2362]

Where convicted person awaiting appeal had spent considerably less than 2/3 of his sentence in detention, no special circumstances existed to warrant his release pending appeal.[2363]

A person convicted and awaiting appeal is a greater flight risk than a person awaiting trial.[2364]

Temporary provisional release granted to convicted person awaiting appeal to visit his sister who was critically ill.[2365]

Where a convicted person seeks provisional release pending appeal, the Appeals Chamber has only found special circumstances where there is an acute justification, such as a medical need, or a memorial service for a near family member. Where a convicted person simply wishes to spend time with his family or visit a close relative in poor health, such special circumstances do not exist.[2366]

Special circumstances did not exist for provisional release on appeal to attend wedding of only daughter.[2367]

[2360] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR65.3, *Decision on Pavkovic Appeal Pursuant to Rule 116 bis Against the Decision on Pavkovic Motion for Temporary Provisional Release Dated 12 December 2007* (18 December 2007)

[2361] *Prosecutor v Mrksic et al*, No. IT-95-13/1-A, *Decision on the Motion of Veselin Sljivancanin* (11 December 2007); *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4-A, *Decision on Motion of Bajrush Morina for Provisional Release* (9 February 2009); *Prosecutor v Delic*, No. IT-04-83-A, *Decision on Motion of Rasim Delic for Provisional Release* (11 May 2009)

[2362] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Valentin Coric's Request for Provisional Release…*(1 December 2016) at p. 3

[2363] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Valentin Coric's Motion Seeking Provisional Release…*(14 May 2015) at para. 11

[2364] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Second Defence Request for Provisional Release of Stanislas Galic*, (31 October 2005) at para. 16

[2365] *Prosecutor v Strugar*, No. IT-01-42-A, *Decision on the Renewed Defence Request Seeking Provisional Release on Compassionate Grounds* (15 April 2008)

[2366] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Radoslav Brdjanin's Motion for Provisional Release* (23 February 2007)

[2367] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Motion on Behalf of Vinko Pandurevic for Provisional Release* (6 June 2012)

Special circumstances did not exist for provisional release on appeal to attend surgery of 4-year-old son.[2368]

Motion for provisional release by person who had waived his right to appeal was assessed under Rule 65(I) even though the rule by its terms only applies to cases pending appeal.[2369]

In situations where an application for temporary release is made pending appellate proceedings, special circumstances exist where there is an acute justification, such as medical need, a memorial service for a close family member, or a visit to a close family member who is believed to be in very poor health and whose death may be imminent. However, request to visit elderly siblings whose death was not imminent denied.[2370]

Temporary release of accused awaiting appeal to attend 10-year memorial for deceased father denied.[2371]

Temporary release of accused with heart condition denied where treatment could be adequately carried out in The Netherlands.[2372]

An accused who has been convicted and is awaiting appeal may obtain provisional release under Rule 65(I), but the fact that he has been convicted may be considered when balancing the probabilities of flight. Accused granted provisional release to attend memorial service for his father.[2373] , his mother[2374], his brother[2375], and his daughter.[2376]

awaiting judgement

[2368] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Nebojsa Pavkovic's Motion for Provisional Release on Compassionate Grounds* (14 June 2012)
[2369] *Prosecutor v Borovcanin*, No. IT-05-88-AR65.12, *Decision on Appeal from Decision on Ljubomir Borovcanin's Request for Provisional Release* (1 March 2011) at para. 8
[2370] *Prosecutor v Strugar*, No. IT-01-42-A, *Decision on Decision on the Defence Request Seeking Provisional Release on the Grounds of Compassion* (2 April 2008) at para. 12
[2371] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Decision on Tarculovski Motion for Provisional Release on Compassionate Grounds* (22 July 2009)
[2372] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Valentin Coric's Motion Seeking Provisional Release…*(14 May 2015) at para. 12
[2373] *Prosecutor v Simic et al*, No. IT-95-9-A, *Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father* (21 October 2004); *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Sreten Lukic's Third Motion for Provisional Release on Compassionate Grounds* (3 September 2010)
[2374] *Prosecutor v Simic et al*, No. IT-95-9-A, *Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Mother* (5 May 2006)
[2375] *Prosecutor v Limaj et al*, No. IT-03-66-A, *Decision Granting Provisional Release to Haradin Bala to Attend his Brother's Memorial Service and to Observe the Traditional Period of Mourning* (1 September 2006)
[2376] *Prosecutor v Limaj et al*, No. IT-03-66-A, *Decision Granting Provisional Release to Haradin Bala to Attend His Daughter's Memorial Service* (20 April 2006)

Temporary provisional release granted to accused during the period between conclusion of the closing arguments and the judgement.[2377]

Temporary provisional release for medical reasons while awaiting judgement granted[2378], and denied.[2379]

Temporary provisional release granted after trial and before judgement to accused charged with contempt.[2380]

Temporary provisional release for 9 days granted for person awaiting judgement to attend funeral of father-in-law and to support family during bereavement.[2381]

Where the accused had compiled with all the conditions of pre-trial release, there was no reason to require him to remain in detention for the period between closing argument and delivery of the judgement, especially since the presumption of innocence continued.[2382]

Release between closing argument and judgement granted. Prosecution argument that accused has incentive to flee given the strength of the evidence against him dismissed as inconsistent with the presumption of innocence.[2383]

Provisional release pending judgement extended and prosecution request for Chamber to indicate whether it has found accused guilty when assessing continued provisional release rejected.[2384]

Considering that the trial was concluded, there would be no danger to witnesses from provisional release of the accused awaiting judgement.[2385]

[2377] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic's Request for Provisional Release After Closing Arguments and Until Entry of Trial Judgement* (12 February 2013)
[2378] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Milutinovic Motion for Temporary Provisional Release* (5 September 2008)
[2379] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sainovic Motion for Temporary Provisional Release* (5 September 2008); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Appeal from Decision on Lazarevic Motion for Temporary Provisional Release dated 26 September 2008* (23 October 2008); *Decision on Sreten Lukic's Motion for Provisional Release* (3 April 2003)
[2380] *Prosecutor v Haraqija & Morina*, IT-04-84-R77.4, *Decision on Defence Application for Provisional Release of the Accused* (15 September 2008)
[2381] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion for Provisional Release…*(10 February 2011)
[2382] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Provisional Release* (1 September 2005); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Motion for Provisional Release of the Accused Milivoj Petkovic* (30 November 2011)
[2383] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting Mico Stanisic's Motion for Provisional Release* (6 June 2012) at para. 22
[2384] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order on Jadranko Prlic's Motion to Extend his Provisional Release* (1 March 2012)
[2385] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Jadranko Prlic's Motion for Provisional Release* (24 November 2011)

Accused who failed to provide State or personal guarantees, who did not cooperate during his trial, who had several contempt cases, and whose length of detention was not unreasonable was denied provisional release awaiting judgement.[2386]

awaiting transfer or serving sentence

Sentenced prisoner awaiting transfer to serve his sentence posed a flight risk, and his guilty plea and cooperation with the prosecution did not constitute special circumstances warranting provisional release.[2387]

Visit to ailing mother constituted special circumstances warranting 4 days of provisional release for person whose conviction and 20-year sentence were final where he would be in custody of local authorities during his release.[2388]

Temporary release to attend memorial service for cousin by sentenced prisoner whose appeal was affirmed denied based on insufficient reasons and risk of flight now that conviction was final.[2389]

Accused serving 25-year sentence denied provisional release to see his dying mother.[2390]

Accused who had served two-thirds of his sentence granted provisional release on appeal.[2391]

Provisional release denied to convicted person who did not appeal. Fact that once transferred to a State to serve his sentenced, the convicted person would not likely see his elderly father again did not constitute a special circumstance warranting temporary provisional release.[2392]

[2386] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Accused Vojislav Seselj's Request for Provisional Release* (23 March 2012)
[2387] *Prosecutor v Zelenovic*, No. IT-96-23/2-ES, *Decision on Motion for Provisional Release* (21 February 2008)
[2388] *Prosecutor v Krajisnik*, No. IT-00-39-ES, *Decision on Krajisnik's Application for a Custodial Visit* (17 June 2009)
[2389] *Prosecutor v Limaj et al*, No. IT-03-66-A, *Decision on Motion on Behalf of Haradin Bala for Temporary Provisional Release* (14 February 2008)
[2390] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Decision on Dario Kordic's Request for Provisional Release* (19 April 2004)
[2391] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Decision on Motion on Behalf of Enver Hadzihasanovic for Provisional Release* (20 June 2007)
[2392] *Prosecutor v Borovcanin*, No. IT-05-88-ES.1, *Decision on Borovcanin's Request for a Custodial Visit* (7 October 2010) at para. 31

Fact that person convicted of contempt had served her sentence was a special circumstance justifying provisional release while the prosecution appealed the sentence.[2393]

Special circumstances did not exist to warrant provisional release for accused who had served 2/3 of his sentence and whose appeal was pending. Possibility of increase in sentence due to prosecution's appeal mitigated against release.[2394]

burden of proof

Trial Chamber did not err in placing the burden on the accused of satisfying it that he was not a flight risk or danger.[2395]

It is irrelevant whether provisional release is the exception or the rule.[2396]

Trial Chamber was not required to consider a presumption in favor of detention. The proper inquiry for provisional release is whether the criteria in Rule 65(B) are met.[2397]

conditions of release

Accused would be allowed to make public appearances and be involved in political life as condition of provisional release where UNMIK contended that his involvement would have a positive effect on political affairs in Kosovo.[2398]

Tribunal can delegate to States the power to vary conditions of provisional release,[2399] as well as international bodies such as UNMIK.[2400]

[2393] *Prosecutor v Rasic*, No. IT-98-32/1-R77.2A, *Decision on Jelena Rasic's Urgent Motion for Provisional Release…*(4 April 2012) at para. 12

[2394] *Prosecutor v Popovic et al*, No. IT-02-88-A, *Decision on Vinko Pandurevic's Motion for Provisional Release* (14 March 2014) at para. 19

[2395] *Prosecutor v Limaj et al*, No. IT-03-66-AR15, *Decision on Fatmir Limaj's Request for Provisional Release* (31 October 2003) at para. 40; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR65.3, *Decision on Ljube Boskoski's Interlocutory Appeal on Second Motion for Provisional Release* (28 August 2006) at para. 11

[2396] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.1, *Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release* (24 January 2006)

[2397] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.26, *Decision on Prosecution Appeal on the Decision on Further Extension of Jadranko Prlic's Provisional Release* (23 April 2012) at para. 11; *Prosecutor v Prlic et al*, No. IT-04-74-AR65.33, *Decision on the Prosecution's Appeal of the Decision on Further Extension of Bruno Stojic's Provisional Release* (16 May 2012) at para. 12

[2398] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005* (12 October 2005)

[2399] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 76

[2400] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 80

Equality of arms requires that the prosecution be allowed to be heard before UNMIK approves participation by the accused in political events or activities.[2401]

Insofar as the release of the accused was ordered strictly on humanitarian grounds, the Trial Chamber would not impose any condition other than not to influence witnesses and victims, and to appear before the Chamber as soon as it so orders.[2402]

Accused would not be allowed to have contact with defence witnesses, past or future, given that there was a possibility that the trial would resume if the accused regained his health.[2403]

Where the trial was suspended due to the terminal illness of the accused, social visits with witnesses would not be detrimental to the integrity of the process or the administration of justice and would be allowed.[2404]

confidential status

There was no need for Trial Chamber decision granting provisional release which included dates and place of release to be made confidential, as an insufficient showing of danger to the accused or his escort was made.[2405]

contempt

Witnesses charged with contempt would be provisionally released where they voluntarily surrendered and did not constitute a flight risk or danger.[2406]

cooperation with prosecution

The lack of value of information provided by the accused in an interview with the prosecution by itself does not disprove cooperation by the accused.[2407] Being willing to be interviewed is itself a measure of cooperation.[2408]

[2401] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 103

[2402] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on the Provisional Release of the Accused Proprio Motu* (6 November 2014) at p.4

[2403] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Motion to Modify Terms of Provisional Release* (15 December 2015) at p. 4

[2404] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Request for Reconsideration of Decision Continuing Prohibition of Social Contacts During Provisional Release* (19 April 2016) at p. 3

[2405] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Prosecution Motion for Reconsideration of Filing Status of the Appeals Chamber's Decision on Vinko Pandurevic's Pandurevic of 11 January 2012* (17 January 2012) at p. 4

[2406] *Prosecutor v Haraqija & Morina*, No. IT-04-74-R77.4, *Decision on Application for Provisional Release* (13 May 2008); *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Decision on Provisional Release of Baton Haxhiu* (23 May 2008)

[2407] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Defence Request for Provisional Release* (6 May 2005)

"To restate a first principle of the International Tribunal, an accused is not required to assist the prosecution in proving its case against them."[2409]

The prosecution's argument that, as a matter of discretion, an accused person should not be released until the prosecution has been able to interview him fully is misconceived. An accused person is not, while in the custody of the Tribunal, at the disposal of the prosecution. An accused person may, if he decides to do so, co-operate with the prosecution, *inter alia*, by accepting to be interviewed, but he does not have to do so and his provisional release is not conditioned, all other conditions being met, upon his giving such an interview while still in custody.[2410]

Trial Chamber did not err in granting provisional release to accused despite fact that he made surrender conditional on obtaining state guarantee and had not agreed to be interviewed by the prosecution. A Trial Chamber may not penalize an accused for exercising the right not to incriminate oneself by drawing an adverse inference from the accused's lack of cooperation with the prosecution or by conditioning provisional release on such cooperation.[2411]

Trial Chamber erred in according insufficient weight to accused's cooperation with the prosecution when it denied provisional release. Cooperation with the prosecution, while not required, may show a general attitude of cooperation with the Tribunal relevant to the issue of whether an accused will appear for trial.[2412]

The Trial Chamber was within its discretion to conclude that submitting to interviews by the prosecution while the accused was a suspect was not indicative of whether the accused would appear for trial.[2413]

The fact that the prosecution does not accept that the information provided by an accused to be credible or as extensive as the accused could provide is irrelevant.[2414]

custodial visits

[2408] *Prosecutor v Simatovic*, No. IT-03-69-AR65.2, *Decision on Prosecution's Appeal Against Decision on Provisional Release* (3 December 2004) at para. 9
[2409] *Prosecutor v Simatovic*, No. IT-03-69-AR65.2, *Decision on Prosecution's Appeal Against Decision on Provisional Release* (3 December 2004) at para. 9
[2410] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 8
[2411] *Prosecutor v Stanisic*, No. IT-04-79-AR65.1, *Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release* (17 October 2005) at para. 24
[2412] *Prosecutor v Cermak & Markac*, No. IT-03-73-AR65.1, *Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release* (2 December 2004) at para. 23
[2413] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.2, *Decision on Defence's Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovcanin Provisional Release* (30 June 2006) at para. 30
[2414] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release* (9 March 2006) at para. 18

Custodial visits, such as those to an Embassy in The Hague to obtain a biometric passport, are not provisional release and therefore the Chamber does not have the power to authorize them. Such visits should be sought under the Rules of Detention, with a possible appeal to the President.[2415]

danger to others

Given the volatile situation in Kosovo, Trial Chamber had to be cautious in determining whether the accused would pose a danger if released. Although no proof of threats could be established against the accused, he had not discharged his burden of proving he would not pose a danger if released.[2416]

Accused would not be released pending retrial where the earlier trial was marred by allegations of witness intimidation in Kosovo, although the accused did not himself pose a danger to any witness.[2417]

Disclosure to the accused of identities of protected witnesses did not establish that accused would be a danger to those witnesses if released.[2418]

Prosecution allegations of interference with witness by third party not connected to accused, while not thoroughly investigated, were enough to tip the scales against provisional release.[2419]

Evidence of threats by the accused against a witness and other information led to conclusion that accused KLA leader would pose a danger to others if released.[2420]

Subjective witness fear is not per se a reason to refuse provisional release. If it were it is doubtful provisional release would ever be granted.[2421]

Releasing the accused to the community where he was alleged to have committed the crimes and where victims and witnesses still reside would be unacceptable.[2422]

[2415] *Prosecutor v. Popovic et al*. No IT-05-88-A, *Decision on Vinko Pandurevic's Motion for Temporary Alteration of the Conditions of his Detention* (9 November 2011) at p. 3, fn. 21
[2416] *Prosecutor v Haradinaj et al,* No. IT-04-84-PT, *Decision on Lahi Brahimaj's Motion for Provisional Release* (3 November 2005)
[2417] *Prosecutor v Haradinaj,* No. IT-04-84*bis*-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (10 September 2010) at para. 38
[2418] *Prosecutor v Stanisic & Simatovic,* No. IT-03-69-AR65.4, *Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115* (26 June 2008) at para. 55
[2419] *Prosecutor v Stanisic & Simatovic,* No. IT-03-69-T, *Decision on Simatovic Defence Motion Requesting Provisional Release During the Adjournment* (12 May 2010) at para. 34
[2420] *Prosecutor v Haradinaj et al,* No. IT-04-84-PT, *Further Decision on Lahi Brahimaj's Motion for Provisional Release* (3 May 2006)
[2421] *Prosecutor v Haradinaj et al,* No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 46
[2422] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Sredoje Lukic's Motion for Provisional Release* (13 December 2006) at para. 30

When considering provisional release, the accused's conduct, past and likely, is the key issue, not the possible, unproven effects of the decision.[2423]

factors

Factors to be considered for provisional release include (1) the fact that the applicants are charged with serious criminal offences; (2) the fact that, if convicted, they are likely to face long prison terms;(3) the circumstances in which they surrendered; (4) the degree of co-operation given by the authorities of the state providing the guarantees ; (5) the fact that the government gave guarantees that they would ensure the presence of the accused for trial and guaranteed the observance of the conditions set by the Trial Chamber upon their provisional release; (6) the senior positions held by the accused, so far as it is relevant to the weight of governmental guarantees; (7) the fact that the State recently passed a Law on Co-operation with the International Tribunal; (8) the personal guarantees of the accused in which they undertook to abide by the conditions set by the Trial Chamber should they be released; (9) the likelihood that, considering the circumstances prevailing at the time of the decision and, as far as foreseeable , the circumstances as they may turn out to be at the time when the accused will be expected to return for trial, the relevant authorities will re-arrest the accused should he decline to surrender; and (10) the fact that the showed some degree of co-operation with the Prosecution.[2424]

The length of detention is a factor to be considered in the exercise of the Trial Chamber's discretion but cannot be a factor in determining whether the accused is a flight risk.[2425]

Provisional release decisions are fact-intensive, and they are discretionary. The fact that other trial chambers reached different conclusions in different cases, having considered similar factors, has no bearing on the reasonableness of the finding of the Trial Chamber in a particular case[2426]

host country

Failure to give the host country an opportunity to be heard before granting provisional release constituted an error of law.[2427]

[2423] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 50
[2424] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 6
[2425] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release* (9 March 2006) at para. 23
[2426] *Prosecutor v Mladic*, No. IT-09-92-AR65.1, *Decision on Interlocutory Appeal against Urgent Defence Motion for Provisional Release* (30 June 2017) at para. 25
[2427] *Prosecutor v. Milutinovic et al*, No. IT-05-87-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Application for Provisional Release* (1 November 2005) at para. 12

A Trial Chamber is only obligated to give the State and opportunity to be heard before granting provisional release. It can deny provisional release without hearing from the State.[2428]

length of detention

Three years of pretrial detention is proportional to the circumstances of the case brought against him in the indictment.[2429]

Fact that pretrial period was not expected to be lengthy was a factor which led the Trial Chamber to exercise its discretion not to grant provisional release.[2430]

The time at which the trial is likely to commence is a relevant factor in determining whether to grant provisional release.[2431] However, where accused had spent 18 months in detention and it was hoped his trial would commence soon, this factor did not weigh in favor of provisional release.[2432]

The length of provisional detention of an accused is a factor to be considered when considering provisional release. Accused ordered released after delay in judgement due to disqualification of judge, combined with deteriorating health.[2433]

The prospect of further delay of the trial is a factor which weighs in the exercise of the Trial Chamber's discretion in determining whether to grant provisional release to a person who is neither a fight risk nor danger.[2434]

length of expected sentence

The gravity of the offences cannot, by itself, justify long periods of detention.[2435]

[2428] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.1, *Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release* (24 January 2006)
[2429] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Motion for Provisional Release* (9 March 2005) at para. 25
[2430] *Prosecutor v Haradinaj*, No. IT-04-84*bis*-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (10 September 2010) at para. 40
[2431] *Prosecutor v Haradinaj*, No. IT-04-84-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (6 June 2005) at para. 29; *Prosecutor v Popovic et al*, No. IT-05-88-AR65.2, *Decision on Defence's Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovcanin Provisional Release* (30 June 2006) at para. 46
[2432] *Prosecutor v Milosevic*, No. IT-98-29/1-PT, *Decision on Second Defence Motion for Provisional Release* (9 February 2006)
[2433] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on the Provisional Release of the Accused Proprio Motu* (6 November 2014) at p.3
[2434] *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Applications for Provisional Release* (14 April 2005) at para. 32; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Defence Request for Provisional Release* (6 May 2005)
[2435] *Prosecutor v Pavkovic et al*, No. IT-04-70-PT, *Decision on Defence Request for Provisional Release* (14 April 2005) at page 4; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Defence Request for Provisional Release* (6 May 2005); *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Momcilo Perisic's*

The expectation of a lengthy sentence cannot be held against the accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences.[2436]

Trial Chamber erred in regarding length of expected sentence as determinative in justifying denial of provisional release.[2437]

medical reasons

An application for provisional release for medical reasons cannot be granted unless it can be demonstrated that the medical care is not available in The Netherlands.[2438]

Medical reasons can be a salient and relevant factor in assessing whether to grant the discretion to order provisional release.[2439]

Where the accused was in fragile health, the risk of disruption of the trial were the accused unable to return from provisional release outweighed the benefits that provisional release might have on his health.[2440]

Provisional release may be considered on humanitarian grounds, including the health of the accused. Provisional release ordered for accused whose health had deteriorated allow the Accused to receive treatment in the most suitable environment.[2441]

Trial Chamber failed to sufficiently address the issue of whether an accused with a limited life expectancy may, as a humanitarian matter, be provisionally released to his family while his trial remains adjourned, irrespective of the sufficiency of the treatment received at the Detention Unit.[2442]

Motion for Provisional Release (9 June 2005); *Prosecutor v Popovic et al*, No. IT-05-88-AR65.1, *Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release* (24 January 2006)

[2436] *Prosecutor v Haradinaj*, No. IT-04-84-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (6 June 2005) at para. 24

[2437] *Prosecutor v Cermak & Markac*, No. IT-03-73-AR65.1, *Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release* (2 December 2004) at para.27

[2438] *Prosecutor v Milosevic*, No. IT-04-54-T, *Decision on Assigned Counsel Request for Provisional Release* (23 February 2006); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR65.4, *Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115* (26 June 2008) at para. 68

[2439] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Provisional Release* (26 May 2008) at para. 41

[2440] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Urgent Stanisic Defence Motion for Provisional Release* (31 March 2010) at para. 33; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Urgent Stanisic Defence Motion for Provisional Release* (22 July 2010)

[2441] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on the Provisional Release of the Accused Proprio Motu* (6 November 2014) at p.3

[2442] *Prosecutor v Hadzic*, No. IT-04-75-AR65.1, *Decision on Urgent Interlocutory Appeal from Decision on Defence Urgent Request for Provisional Release* (13 April 2015) at para. 16

Trial Chamber also failed to sufficiently consider and assess whether the accused's recovery from the side-effects of his medical treatment could be alleviated by the close support of his family members and his general well-being could be improved by his provisional release to his family environment.[2443]

Trial Chamber erred in considering its obligation to ensure the expeditiousness of the proceedings without explaining how this interest is served by denying the request for a short period of provisional release during which time, in all likelihood, the accused will not be able to attend the proceedings.[2444]

Appeals Chamber ordered the provisional release of the accused for a limited period (approximately one month) and until the date of his MRI scan in The Hague.[2445]

Trial Chamber continued provisional release of terminally ill accused, requiring him to return to The Hague periodically for medical examinations.[2446]

Where adequate treatment was available at the UNDU, the medical condition of the accused was not incompatible with continued detention.[2447]

oral hearing

A Trial Chamber is not required to hold an oral hearing on an application for provisional release.[2448]

An accused and his counsel do not have a right to be present at the provisional release hearing of a co-accused.[2449]

reasoned opinion

[2443] *Prosecutor v Hadzic*, No. IT-04-75-AR65.1, *Decision on Urgent Interlocutory Appeal from Decision on Defence Urgent Request for Provisional Release* (13 April 2015) at para. 17
[2444] *Prosecutor v Hadzic*, No. IT-04-75-AR65.1, *Decision on Urgent Interlocutory Appeal from Decision on Defence Urgent Request for Provisional Release* (13 April 2015) at para. 18
[2445] *Prosecutor v Hadzic*, No. IT-04-75-AR65.1, *Decision on Urgent Interlocutory Appeal from Decision on Defence Urgent Request for Provisional Release* (13 April 2015) at para. 22
[2446] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Urgent Motion for Provisional Release…*(21 May 2015) at para. 33
[2447] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Defence Motion for Provisional Release* (11 May 2017) at para. 18
[2448] *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todovic's Application for Provisional Release* (7 October 2005) at para. 29; *Prosecutor v Limaj et al*, No. IT-03-66-AR15, *Decision on Fatmir Limaj's Request for Provisional Release* (31 October 2003) at para. 17; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR65.3, *Decision on Ljube Boskoski's Interlocutory Appeal on Second Motion for Provisional Release* (28 August 2006) at para. 12
[2449] *Prosecutor v Krajisnik & Plavsic*, No. IT-00-39-AR73.3, *Decision on Interlocutory Appeal by Momcilo Krajisnik* (14 February 2002)

A Trial Chamber is not obliged to deal with all possible factors which it can consider when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion. This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to consider before coming to a decision [2450]

The right to a reasoned opinion requires that the Trial Chamber expressly state its reasons for concluding that the factors relevant to provisional release have not been met by the accused.[2451]

Trial Chamber erred in finding that vague plans of the accused upon release and inability to earn a living created risk of flight without providing detailed reasons for such a finding.[2452]

release after trial has begun

Rule 65(B) also governs release after trial has begun.[2453]

Where trial began but the decision to begin the trial was reversed due to ill health of the accused, it would be considered that trial had not commenced, and that case was still at pre-trial stage.[2454]

risk of flight—release denied

Pending application for transfer of case pursuant to Rule 11 *bis* may be a factor against provisional release.[2455]

Accused with no concrete plans or demonstrated means to earn a living while on provisional release, and who did not fully cooperate with the prosecution in his interview did not discharge his burden of establishing that he was not a flight risk.[2456]

[2450] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 6; *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Ramush Haradinaj's Modified Provisional Release* (10 March 2006) at para. 23

[2451] *Prosecutor v Popovic*, No. IT-05-88-AR65.3, *Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release* (7 March 2007) at para. 13

[2452] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release* (9 March 2006) at para. 10

[2453] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR65.2, *Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess* (14 December 2006) at para. 10

[2454] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Provisional Release* (26 May 2008) at para. 63

[2455] *Prosecutor v Mejakic et* al, No. IT-02-65-AR65.2, *Decision on Dusan Fustar's Request for Interlocutory and Expedited Appeal* (16 December 2005) at para. 9; *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Motion for Provisional Release* (9 March 2005) at para. 15; *Prosecutor v Rasevic & Todovic*, No. IT-97-25/1-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Denying Savo Todovic's Application for Provisional Release* (7 October 2005) at para. 21; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Sredoje Lukic's Motion for Provisional Release* (13 December 2006) at para. 28

The fact that an accused complied with provisional release on emergency, limited basis does not mean that he is not a flight risk for longer term provisional release in which he would not be accompanied by a 24 hour a day escort.[2457]

Trial Chamber did not err in concluding that former Interior Minister of Macedonia was flight risk where he had fled to Croatia and was incarcerated there at the time of his transfer to the Tribunal.[2458]

Trial Chamber did not err in denying provisional release to accused who had been fugitive and actively fled to avoid arrest, despite his claims of a change in attitude, insufficiency of the evidence against him, and the guarantees of Croatia.[2459]

Provisional release to attend mother's memorial service denied where accused had actively evaded arrest in seven years as a fugitive.[2460]

Trial Chamber did not err in concluding that accused from Macedonia was flight risk where he had evaded interview by prosecution and faced a lengthy sentence if convicted. The fact that other accused who faced more serious charges had been granted provisional release was not determinative since provisional release applications are fact intensive.[2461]

Trial Chamber did not err in denying provisional release to accused who surrendered after being a fugitive for three years and who faced a long sentence if convicted.[2462]

Accused failed to establish that he was not a flight risk where he failed to surrender for 1-2 years after his indictment .[2463]

[2456] *Prosecutor v Haradinaj et al,* No. IT-04-84-PT, *Decision on Lahi Brahimaj's Motion for Provisional Release* (3 November 2005)
[2457] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Second Defence Request for Provisional Release of Stanislas Galic,* (31 October 2005) at para. 15
[2458] *Prosecutor v Boskoski*, No. IT-04-82-AR65.2, *Decision on Ljube Boskoski's Interlocutory Appeal on Provisional Release* (28 September 2005)
[2459] *Prosecutor v Gotovina et al*, No. IT-06-90-AR65.1, *Decision on Ante Gotovina's Appeal Against Denial of Provisional Release* (17 January 2008)
[2460] *Prosecutor v Hadzic,* No. IT-04-75-T, *Decision on Adzic's Urgent Request for Provisional Release* (31 October 2012) at para. 9
[2461] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR65.1, *Decision on Johan Tarkovsky's Interlocutory Appeal on Provisional Release* (4 October 2005)
[2462] *Prosecutor v Pandurevic & Trbic*, No. IT-05-86-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vinko Pandurevic's Application for Provisional Release* (3 October 2005); *Prosecutor v Popovic et al,* No. IT-05-88-AR65.1, *Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release* (24 January 2006); *Prosecutor v Popovic et al,* No. IT-05-88-AR65.2, *Decision on Defence's Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovcanin Provisional Release* (30 June 2006); *Prosecutor v Popovic et al,* No. IT-05-88-AR65.7, *Decision on Vujadin Popovic's Interlocutory Appeal Against the Decision on Popovic's Motion for Provisional Release* (1 July 2008)

Trial Chamber did not err in denying provisional release where accused had remained a fugitive for several years and was reported to have fled to Russia in the interim.[2464]

Accused who had failed to surrender and demonstrated determination and ability to avoid arrest would not be given provisional release.[2465]

Where accused had been in hiding for 16 years, the Chamber was not convinced that the accused would return if granted provisional release for medical treatment in Russia.[2466]

Whether an accused has voluntarily surrendered to the Tribunal or has absconded justice for several years is a factor frequently considered when assessing whether an accused is at risk of flight.[2467]

risk of flight—release granted

Explanation of accused that he failed to surrender for almost 2 years due to directive of government of Serbia that surrender of the accused would be detrimental to national security interests was sufficient, when combined with guarantees of government, to warrant his provisional release.[2468]

Trial Chamber did not err in granting provisional release to high-ranking officers even where co-accused remained a fugitive, since provisional release involves an individual assessment of the particular accused's risk of flight and danger to victims and witnesses.[2469]

Provisional release granted to former Prime Minister of Kosovo where he surrendered voluntarily immediately upon learning of his indictment and where UNMIK provided strong guarantees in support of his provisional release.[2470]

[2463] *Prosecutor v Milosevic*, No. IT-98-29/1-PT, *Decision on Defence Motion for Provisional Release* (13 July 2005); *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Drago Nikolic's Request for Provisional Release* (9 November 2005)
[2464] *Prosecutor v. Popovic*, IT-02-57-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Denying Vujadin Popovic's Application for Provisional Release* (28 October 2005)
[2465] *Prosecutor v. Gotovina et al*, No. IT-06-90-PT, *Decision on Defendant Ante Gotovina's Motion for Provisional Release* (28 November 2007)
[2466] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Defence Motion for Provisional Release* (11 May 2017) at para. 17
[2467] *Prosecutor v Mladic*, No. IT-09-92-AR65.1, *Decision on Interlocutory Appeal against Urgent Defence Motion for Provisional Release* (30 June 2017) at para. 15
[2468] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Sreten Lukic's Provisional Release* (3 October 2005)
[2469] *Prosecutor v Tolimir et al*, No. IT-04-80-AR65.1, *Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release* (19 October 2005)
[2470] *Prosecutor v Haradinaj*, No. IT-04-84-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (6 June 2005)

Provisional release granted to former Yugoslavian Army Chief of Staff who had surrendered immediately after his indictment and been interviewed extensively by the prosecution.[2471]

State guarantees

The ICTY has relied successfully in the past upon the guarantees of the government of Republika Srpska for provisional release.[2472]

UNMIK is the guarantor of public safety in Kosovo and its guarantees, and not that of other entities, is controlling.[2473]

The Trial Chamber requires fresh guarantees for subsequent applications for provisional release.[2474]

The general level of cooperation by the State with the international tribunal is relevant in determining whether it would arrest the accused in question. Its guarantee must be evaluated on the balance of probabilities.[2475]

It appears that the policy of the government of Serbia to encourage all indictees to surrender voluntarily, failing which they will be arrested and transferred, is working in practice.[2476]

Instability of Serbian government is speculative and insufficient reason for rejecting their guarantees.[2477]

The Trial Chamber erred in determining that the accused's senior position was irrelevant because it was in a country other than the one offering the guarantees.

[2471] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Momcilo Perisic's Motion for Provisional Release* (9 June 2005)
[2472] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Request for Provisional Release of Stanislav Galic* (23 March 2005) at para. 17
[2473] *Prosecutor v Limaj et al*, No. IT-03-66-AR15, *Decision on Fatmir Limaj's Request for Provisional Release* (31 October 2003) at para. 25
[2474] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Motion for Provisional Release* (9 March 2005) at para. 14
[2475] *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Applications for Provisional Release* (14 April 2005) at para. 20; *Prosecutor v Cermak & Markac*, No. IT-03-73-AR65.1, *Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release* (2 December 2004) at para. 32
[2476] *Prosecutor v Milutinovic et al*, No. IT-99-37-PT, *Decision on Applications for Provisional Release* (14 April 2005) at para. 21
[2477] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR65.4, *Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115* (26 June 2008) at para.50

Nevertheless, there was no evidence that the accused possessed information such that the surrendering state would be unwilling to arrest him for the Tribunal.[2478]

Trial Chamber erred in failing to consider accused's senior position in Yugoslavian army as it affected the state's guarantees.[2479]

The position of an accused in the hierarchy and the consequence thereof upon the weight of governmental guarantees are indeed significant factors which the Trial Chamber is expected to address as they could have an important bearing upon a State's willingness and readiness to arrest that person if he refuses to surrender himself; those factors therefore reduce the likelihood of his appearing at trial. In failing to address these factors, the Trial Chamber committed an error of law.[2480]

Failure to arrest fugitive Gotovina is not a justification for refusing to accept the State's guarantees offered on behalf of other accused.[2481]

The Trial Chamber was not compelled to give weight to the state guarantees just because they had been offered by governments with power to arrest the accused and to enforce conditions for provisional release, where the accused had been a fugitive for a long time. State guarantees are not dispositive of provisional release determinations.[2482]

statements of accused

Trial Chamber erred in not giving adequate weight to prior statements of accused that he would not surrender.[2483]

stay of decision to release pending appeal

Where prosecution failed to seek a stay in its response to the motion for provisional release, it was not error for the Trial Chamber to refuse a stay in the absence of exceptional circumstances.[2484]

[2478] *Prosecutor v Stanisic*, No. IT-04-79-AR65.1*, Decision on Prosecution's Interlocutory Appeal of Mico Stanisic's Provisional Release* (17 October 2005) at paras. 19, 22

[2479] *Prosecutor v. Milutinovic et al*, No. IT-05-87-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Application for Provisional Release* (1 November 2005) at para. 8

[2480] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 9

[2481] *Prosecutor v Cermak & Markac*, No. IT-03-73-AR65.1, *Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release* (2 December 2004) at para. 33

[2482] *Prosecutor v Mladic*, No. IT-09-92-AR65.1, *Decision on Interlocutory Appeal against Urgent Defence Motion for Provisional Release* (30 June 2017) at para. 16

[2483] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para. 10; *Prosecutor v. Milutinovic et al*, No. IT-05-87-AR65.1, *Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Application for Provisional Release* (1 November 2005) at para. 7

[2484] *Prosecutor v Stanisic*, No. IT-04-79-AR65.1*, Decision on Prosecution's Motion to Stay Decision on Provisional Release Concerning the Accused Mico Stanisic* (22 July 2005)

Where provisional release motion was made orally, the prosecution was required to request a stay of the release orally and its failure to do so relinquished its right to appeal the release.[2485]

Trial Chamber declined to stay provisional release pending appeal where 20 days remained before the release for the prosecution to seek a stay from the Appeals Chamber.[2486]

subsequent motions

Where a request for provisional release has already been denied, the accused must show a material change in circumstances to justify reconsideration of the previous decision.[2487]

Accused failed to show material change in circumstances warranting reconsideration of provisional release decision.[2488]

An accused who has previously applied for provisional release must show a material change in circumstance. While additional guarantees of Macedonia and its status as a candidate for EU membership were positive developments, the evasion of the accused of arrest and the imminence of the trial weighed against provisional release.[2489]

Fact that trial had now commenced, period of provisional release sought was only temporary, and government guarantees were stronger were not such material changes in circumstances such as to warrant granting of provisional release.[2490]

temporary release in general

Where sufficient humanitarian reasons exist for temporary provisional release, the period of release should be proportional to those circumstances.[2491]

[2485] *Prosecutor v Haraqija and Morina*, No. IT-04-84-R77.4, *Decision on Prosecution's Urgent Motions for Stay of Decisions Granting Applications for Provisional Release* (16 September 2008)
[2486] *Prosecutor v Stanisic & Zupljanin*, No. IT-06-91-T, *Decision Granting Mico Stanisic's Request for Provisional Release* (18 November 2011) at para. 25
[2487] *Prosecutor v Martic*, No. IT-95-11-PT, *Decision on Second Motion for Provisional Release* (12 September 2005) at para. 16
[2488] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Pandurevic's Renewed Application for Provisional Release* (6 June 2006)
[2489] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision Concerning Renewed Motion for Provisional Release of Johan Tarculovski* (17 January 2007)
[2490] *Prosecutor v Popovic*, No. IT-05-88-AR65.3, *Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release* (7 March 2007)
[2491] *Prosecutor v Prlic et al*, No. IT-04-74-AR65, *Decision on Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de la Accuse Petkovic Dated 31 March 2008* (21 April 2008) at para. 17

The duration of provisional release to visit an ailing family member can be no longer than it would take to visit the family member.[2492]

Matter remanded to Trial Chamber to determine whether severe depression of accused's wife and deteriorating health of accused's mother were sufficiently compelling humanitarian reasons justifying temporary provisional release.[2493]

While illness of relative, birth of grandchild, and attendance at 3rd memorial service of brother's death was each alone insufficient to constitute compelling humanitarian reasons for release, when considered cumulatively, provisional release was granted.[2494]

Ill health of wife of accused was not so serious as to constitute compelling humanitarian circumstance, alone, or in combination with attendance at 4th memorial service of brother's death.[2495]

Temporary provisional release granted to accused after Rule 98 bis motion denied, and even after conviction, to attend memorial service for his parent, who had recently died.[2496]

The memorial service on the 40-day anniversary of the death of the accused's sister constitutes a special circumstance for which temporary provisional release may be ordered.[2497]

By granting provisional release to an accused when special circumstances exist, the Tribunal fulfils its obligation to respect his private and family life.[2498]

[2492] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution's Appeal From Décision Relative à la Demande de Mise en Liberté Provisoire de l'Accuse Prlic Dated 7 April 2008* (25 April 2008) at para. 18

[2493] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution's Appeal from Décision Relative à la Demande de Mise en Liberté Provisoire de la Accuse Petkovic Dated 31 March 2008* (21 April 2008) at para. 20

[2494] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Mr. Perisic's Motion for Provisional Release During the Summer Recess* (15 July 2010) at para. 21

[2495] *Prosecutor v Perisic*, No. IT-04-81-AR65.1, *Decision on Mr. Perisic's Appeal Against the Decision on Mr. Perisic's Motion for Provisional Release* (29 July 2011) at para. 21

[2496] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic Motion for Provisional Release* (21 July 2008); *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Urgent Motion Requesting Provisional Release of Nebojsa Pavkovic on Compassionate Grounds* (17 September 2009); *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Urgent Motion for Custodial Release on Compassionate Grounds* (30 January 2013) at p. 4

[2497] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Request for Provisional Release of Stanislav Galic* (23 March 2005) at para. 15; *Prosecutor v Sainovic et al*, No. IT-5-87-A, *Decision on Dragoljub Ojdanic's Motion for Temporary Provisional Release on Compassionate Grounds* (9 August 2010)

[2498] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Request for Provisional Release of Stanislav Galic* (23 March 2005) at para. 18; *Prosecutor v Simic et al*, No. IT-95-9-A, *Decision on Motion of Blagoje Simic Pursuant to Rule 65(I) for Provisional Release for a Fixed Period to Attend Memorial Services for his Father* (21 October 2004)

Temporary provisional release denied where father and wife of the accused were not shown to be unable to travel to The Hague to visit the accused.[2499]

Where relative was terminally ill but there was no suggestion of acute crisis, special circumstances did not exist to warrant provisional release.[2500]

Visit to ailing father constituted special circumstances to warrant provisional release, but duration limited to only that time necessary to accomplish visit.[2501] Portions of release to take care of personal matters reversed.[2502]

Attending the wedding of son not a special circumstance warranting provisional release.[2503]

Temporary provisional release granted for three days for accused to visit the gravesites of family members who had recently died.[2504]

Provisional release for hip replacement surgery in Montenegro granted.[2505]

temporary release—trial recesses

Accused detained for three years in lengthy trial failed to demonstrate compelling humanitarian circumstances for 10 days of provisional release during summer recess to recuperate from stress of testimony and detention and spend time with his family.[2506]

Temporary provisional release granted to accused during judicial recess where they had previously obeyed all conditions of release prior to trial.[2507]

[2499] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Lukic Motion for Temporary Provisional Release* (25 June 2007)
[2500] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Application for Provisional Release Pursuant to Rule 65(I)* (29 April 2008)
[2501] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Sreten Lukic's Second Motion for Provisional Release on Compassionate Grounds* (14 July 2010)
[2502] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.4, *Decision on Consolidated Appeal Against Decision on Borovcanin's Motion for a Custodial Visit and Decisions on Gvero and Miletic's Motions for Provisional Release During the Break in the Proceedings* (15 May 2008) at para. 17-18.
[2503] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Application for Provisional Release Pursuant to Rule 65(I)* (29 April 2008)
[2504] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.4, *Decision on Consolidated Appeal Against Decision on Borovcanin's Motion for a Custodial Visit and Decisions on Gvero and Miletic's Motions for Provisional Release During the Break in the Proceedings* (15 May 2008) at para. 32
[2505] *Prosecutor v Strugar*, No. IT-01-42-A, *Decision on Defence Motion: Defence Request for Provisional Release for Providing Medical Aid in the Republic of Montenegro* (16 December 2005)
[2506] *Prosecutor v Prlic et al*, No. IT-04-74-AR65.15, *Decision on Prosecution Appeal Against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release* (8 July 2009) at para. 20
[2507] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Joint Motion of the Accused Miletic and Gvero for Temporary Provisional Release from 15 July 2006 Until the Continuation of the Trial* (13 July 2006); *Decision on Joint Motion for Temporary Provisional Release During Summer Recess* (1 June 2006); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motion for Provisional Release from 21 July 2007 Until the Resumption of Trial* (13 July 2007); *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Defence*

Temporary provisional release during judicial recess denied where Chamber was not satisfied that accused's release would not pose a danger to witnesses.[2508]

Temporary provisional release denied to accused during winter recess where significant number of prosecution witness had been heard and Trial Chamber had obligation to prevent possible disruption to expeditious trial by risks inherent in provisional release.[2509]

Temporary provisional release granted for part of winter recess for accused to attend memorial service of deceased relatives.[2510]

Temporary provisional release granted during trial for accused to attend funeral of his nephew.[2511]

Temporary provisional release granted during winter judicial recess where accused needed to undergo a medical procedure.[2512]

Temporary provisional release granted during defence case where preparation of the defence case would benefit from the accused's presence in Belgrade.[2513]

Motion for Provisional Release (23 November 2007); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motions for Provisional Release During the Winter Judicial Recess* (7 December 2007); *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release* (14 December 2007); *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Motion on Behalf of Lahi Brahimaj for Provisional Release* (14 December 2007); *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Mr. Perisic's Motion for Provisional Release During Easter Recess* (6 April 2009); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Motion for Provisional Release During the Upcoming Court Recess* (10 July 2009); *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Perisic's Motion for Provisional Release During the Summer Court Recess* (17 July 2009); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Motion Requesting Provisional Release During the Summer Court Recess* (22 July 2010); *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-PT, *Decision on Ramush Haradinaj's Motion for Provisional Release* (8 December 2010); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Motion Requesting Provisional Release During the Winter Court Recess* (10 December 2010)

[2508] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-PT, *Decision on Application for Temporary Provisional Release filed by the Accused Lahi Brahimaj* (8 December 2010)

[2509] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR65.2, *Decision on Interlocutory Appeal of Denial of Provisional Release During the Winter Recess* (14 December 2006) at para. 15; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Joint Defence Motion for Provisional Release During Winter Recess* (5 December 2006)

[2510] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Defence Motions for Provisional Release of Radivoje Miletic and Milan Gvero* (7 December 2006); *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Pandurevic Request for Provisional Release on Compassionate Grounds* (11 December 2007)

[2511] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Defence Motion on Behalf of Ramush Haradinaj for Urgent Provisional Release* (3 October 2007)

[2512] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Milutinovic Motion for Temporary Provisional Release* (7 December 2007)

[2513] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Request for Provisional Release* (4 April 2012) at para. 8

Temporary provisional release during recess denied to accused whose trial had just commenced where interrupting medical treatment in detention would jeopardize the expeditiousness of the trial.[2514]

Temporary provisional release ordered after denial of Motion for Judgement of Acquittal and before defence case where accused needed medical treatment in Croatia.[2515]

Temporary provisional release granted to accused for two-month recess between prosecution and defence cases.[2516]

Temporary provisional release granted to accused after prosecution rested to visit his ailing father,[2517] mother[2518], and ailing wife.[2519]

Temporary provisional release for person whose trial was almost completed denied where no medical records supported contention that accused needed medical attention that could not be obtained in the detention unit.[2520]

Temporary provisional release granted to accused after prosecution rested to visit graves of recently deceased family members.[2521]

Temporary provisional release during short period between prosecution and defence cases denied in Chamber's discretion as not warranted by humanitarian reasons and because accused had recently returned from provisional release from winter recess.[2522]

[2514] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Urgent Stanisic Defence Motion for Provisional Release During the Upcoming Court Recess* (22 July 2009)
[2515] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Application for Provisional Release by the Accused Pusic* (19 March 2008); *Prosecutor v Prlic et al*, No. IT-04-74-AR65.16 *Decision on Prosecution's Appeal Against Decision on Pusic's Motion for Provisional Release* (20 July 2009)
[2516] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decisions on Motions for Provisional Release of the Accused* (19 February 2008)
[2517] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Borovcanin's Motion for Custodial Visit* (9 April 2008)
[2518] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Pandurevic's Motion for Provisional Release* (21 July 2008)
[2519] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Miletic's Motion for Provisional Release* (21 July 2008)
[2520] *Prosecutor v Popovic et al*, No. IT-05-88-AR65.8, *Decision on Prosecution's Appeal Against Decision on Gvero's Motion for Provisional Release* (20 July 2009)
[2521] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Miletic Request for Provisional Release During a Break in the Proceedings* (9 April 2008)
[2522] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Motion for Provisional Release of Ivan Cermak* (27 February 2009)

Trial Chamber erred in failing to consider accused's contact with potential witness on earlier provisional release. Temporary provisional release order over winter recess reversed by Appeals Chamber.[2523]

Special circumstances did not exist to release accused during three-week trial recess despite the fact he had been on pretrial release for over 2 years.[2524]

Temporary provisional release during summer recess granted where spouse of accused and accused's mother were suffering from mental health issues, and the presence of the accused would benefit them.[2525]

Accused's medical situation warranted three-week provisional release during recess before closing arguments.[2526]

Accused released to visit aging mother during recess in trial,[2527] and aging father,[2528] and ailing wife.[2529]

violations

Violations of conditions of release by attending social events warranted temporary revocation of provisional release but were not so serious as to refuse reinstatement of release where the accused had voluntarily surrendered and cooperated with all other conditions.[2530]

Violation of condition that accused not discuss his case with anyone warranted modification of provisional release so that accused was placed under house arrest for the remainder of his period of temporary provisional release.[2531]

Violation of condition of house arrest by going on a hunting trip warranted revocation of provisional release.[2532]

[2523] *Prosecutor v Prlic et al*, No. IT-04074-AR65.13, *Reasons for Decision on Prosecution's Appeal of the Trial Chamber's 10 December 2008 Decision on Prlic Provisional Release During Winter Recess…*(20 January 2009)
[2524] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Provisional Release* (21 April 2005)
[2525] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Accused Petkovic's Motion for Provisional Release* (17 June 2009)
[2526] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Provisional Release* (10 July 2008)
[2527] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sainovic Motion for Temporary Provisional Release* (7 June 2007)
[2528] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Pavkovic Motion for Temporary Provisional Release* (18 June 2007)
[2529] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Lazarevic Motion for Temporary Provisional Release* (18 June 2007)
[2530] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision to Reinstate the Provisional Release of Ivan Cermak* (15 February 2007)
[2531] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Prosecution Motion to Arrest the Accused Rasim Delic* (19 December 2007)

A Chamber granting provisional release must remain satisfied throughout the period of the accused's provisional release that the essential conditions of Rule 65(B) justifying the release are still fulfilled.[2533]

A Chamber has a duty to address any information brought to its attention that may constitute a change in circumstances that may call into question as to whether the pre-conditions set forth in Rule 65(B) remain fulfilled.[2534]

Considering the accused's public statements that he would not return for trial; no reasonable Trial Chamber could have concluded that the condition of Rule 65(B) that the accused would appear when required remained fulfilled. Therefore, the Trial Chamber erred in failing to revoke provisional release when those statements were called to its attention.[2535]

Where Trial Chamber erred in failing to revoke provisional release, matter was remanded for Trial Chamber to do so, and then provide parties, and States, to make further submissions on advisability of provisional release considering new information.[2536]

Accused's public statements calling prosecution witnesses traitors, while unfortunate, did not constitute an attempt to threaten or influence witnesses.[2537]

Rule 65 *bis*—status conferences

(A) A Trial Chamber or a Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference:
(i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;
(ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.
(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within one hundred and twenty days of the filing of a notice of appeal

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[2532] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Order for the Arrest and Transfer of the Accused Mladen Markac from Provisional Release* (28 December 2007)
[2533] *Prosecutor v Seselj*, No. IT-03-67-AR65.1, *Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused* (30 March 2015) at para. 16
[2534] *Prosecutor v Seselj*, No. IT-03-67-AR65.1, *Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused* (30 March 2015) at para. 17
[2535] *Prosecutor v Seselj*, No. IT-03-67-AR65.1, *Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused* (30 March 2015) at para. 19
[2536] *Prosecutor v Seselj*, No. IT-03-67-AR65.1, *Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused* (30 March 2015) at para. 20
[2537] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion to Revoke Provisional Release* (13 January 2015) at para. 13

and thereafter within one hundred and twenty days after the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person.
(C) With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted
(i) in his presence, but with his counsel participating either via teleconference or video-conference; or
(ii) in Chambers in his absence, but with his participation via teleconference if he so wishes and/or participation of his counsel via teleconference or video-conference.

Rule 65 *bis* (A), which requires a status conference to be held every 120 days, applies only to the pre-trial stage of a case, and not the trial stage.[2538]

Rule 65 *ter*—pre-trial Judge

(A) The Presiding Judge of the Trial Chamber shall, no later than seven days after the initial appearance of the accused, designate from among its members a Judge responsible for the pre-trial proceedings (hereinafter "pre-trial Judge").
(B) The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seised of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.
(C) The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, Rule 67, Rule 73 bis and Rule 73 ter, and with all or part of the functions set forth in Rule 73.
(D) (i) The pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.
(ii) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled.
(iii) Acting under the supervision of the pre-trial Judge, the Senior Legal Officer shall oversee the implementation of the work plan and shall keep the pre-trial Judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.
(iv) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case, in particular, so that the Prosecutor can meet his or her obligations pursuant to paragraphs (E)(i) to (iii) of this Rule and for the defence to meet its obligations pursuant to paragraph (G) of this Rule and of Rule 73 ter.
(v) Such meetings are held inter partes or, at his or her request, with the Senior Legal Officer and one or more of the parties. The Senior Legal Officer ensures that the obligations set out in paragraphs (E) (i) to (iii) of this Rule and, at the

[2538] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Request for Status Conference* (11 June 2014) at para. 4

appropriate time, that the obligations in paragraph (G) and Rule 73 ter, are satisfied in accordance with the work plan set by the pre-trial Judge.
(vi) The presence of the accused is not necessary for meetings convened by the Senior Legal Officer.
(vii) The Senior Legal Officer may be assisted by a representative of the Registry in the performance of his or her duties pursuant to this Rule and may require a transcript to be made.
(E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 bis, to file the following:
(i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;
(ii) the list of witnesses the Prosecutor intends to call with :
(a) the name or pseudonym of each witness;
(b) a summary of the facts on which each witness will testify;
(c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
(d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;
(e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis or Rule 92 quater by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
(f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.
(iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.
(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:
(i) in general terms, the nature of the accused's defence;
(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and
(iii) in the case of each such matter, the reason why the accused takes issue with it.
(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:
(i) a list of witnesses the defence intends to call with:
(a) the name or pseudonym of each witness;

(b) a summary of the facts on which each witness will testify;
(c) the points in the indictment as to which each witness will testify;
(d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;
(e) an indication of whether the witness will testify in person or pursuant to Rule 92 bis or Rule 92 quater by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and
(f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case; and
(ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed.
(H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.
(I) To perform his or her functions, the pre-trial Judge may proprio motu, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.
(J) The pre-trial Judge shall keep the Trial Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Trial Chamber.
(K) The pre-trial Judge may set a time for the making of pre-trial motions and, if required, any hearing thereon. A motion made before trial shall be determined before trial unless the Judge, for good cause, orders that it be deferred for determination at trial. Failure by a party to raise objections or to make requests which can be made prior to trial at the time set by the Judge shall constitute waiver thereof, but the Judge for cause may grant relief from the waiver.
(L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pretrial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.
(ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G).
(M) The Trial Chamber may proprio motu exercise any of the functions of the pre-trial Judge.
(N) Upon a report of the pre-trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence.

agreed facts

At the trial phase of the proceedings, the Trial Chamber may choose to note on the record any matters of fact or law which are agreed between the parties.[2539]

Agreed facts are not evidence but may be considered by the Chamber as facts in support of which no evidence need be brought. Therefore, the Chamber need not make any determination of the relevance of the agreed facts.[2540]

It is in the interests of justice and of the parties themselves to reach agreement on as many matters as possible to avoid the expenditure of valuable time in the courtroom bringing evidence to support facts which are not in dispute.[2541]

defence pre-trial brief

The defence pre-trial brief need not provide details of the evidence it intends to adduce during its case. It is primarily intended as a tool to set general boundaries for the trial prior to its commencement and to identify potential areas of agreement between the parties.[2542]

Defence pretrial brief which failed to provide the reasons why the defence took issue with facts presented in Prosecution pretrial brief was deficient. Supplemental briefs ordered.[2543]

Trial Chamber declined to order accused to specify which facts he disputed but indicated it would remedy any prejudice to the prosecution during the trial if necessary to rebut a challenge which was not anticipated.[2544]

exhibits

Where the prosecution wishes to offer a document not on its exhibit list, it must make a motion to amend the list, except for personal information sheets, Rule 92 *ter* statements, and other routine documents where the issue of adequate notice is not present.[2545]

[2539] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Response to Karadzic's Submission of Agreed Facts and Motion for Reconsideration* (26 August 2010) at para. 6; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Agreed Facts* (14 February 2013) at para. 4

[2540] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Response to Karadzic's Submission of Agreed Facts and Motion for Reconsideration* (26 August 2010) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Agreed Facts* (14 February 2013) at para. 5

[2541] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Response to Karadzic's Submission of Agreed Facts and Motion for Reconsideration* (26 August 2010) at para. 12

[2542] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Prosecution's Motion for Relief Pursuant to Rule 65 ter (F)* (10 October 2005) at para. 3

[2543] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-PT, *Order to the Defence to Supplement the Pre-Trial Briefs Pursuant to Rule 65 ter (F)*(9 July 2009)

[2544] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision Regarding the Accused's Pre-Trial Brief* (30 July 2009)

[2545] *Prosecutor v Perisic*, No. IT-04-81-T, *Trial Chamber's Ruling on Defence Motion to Clarify Whether the Prosecution Must Request Leave to Amend its Rule 65 ter Exhibit List* (17 November 2008)

Prosecution motion to vary exhibit list by adding additional exhibits granted where exhibits could be introduced at a late stage in the case to give the defence adequate time to examine them.[2546]

Prosecution motion to vary exhibit list denied where prosecution did not act with diligence and defence could have used the exhibits in its cross examination if they had been timely disclosed.[2547]

Prosecution motion to add document to its exhibit list denied where prosecution did not act with diligence and motion was not made until after case had closed.[2548]

Prosecution motion to add Mladic diaries to exhibit list required that prosecution specify which diary entries it wished to offer.[2549]

Prosecution motion to add Mladic diaries to exhibit list granted for 15 of 18 diaries where they did not come into possession of prosecution until after exhibit list had been filed and they were relevant to the case against the accused.[2550]

Trial Chamber did not abuse its discretion in allowing the prosecution to amend its exhibit list by adding statement of accused and related documents which had been inadvertently omitted from original list.[2551]

Motion to amend exhibit list and admit statement of deceased witness denied where prosecution failed to include statement in its original list or include witness on its original witness list and therefore were not diligent.[2552]

Motion to admit maps from bar table after witness testified denied where maps were not on the prosecution's exhibit list and no good cause existed for adding them.[2553]

prosecution pre-trial brief

[2546] *Prosecutor v Halilovic,* No. IT-01-48-T, *Decision on Prosecution's Application for Leave to Vary Its Exhibit List Filed Pursuant to Rule 65 ter (E)(iii)*(14 February 2005)
[2547] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Decision on Prosecution Motion to Admit One Document from the Bar Table Pursuant to the Testimony of Ramiz Dumanjic* (6 March 2012) at paras. 17-19
[2548] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-T, *Decision Denying Prosecution's Motion to Admit into Evidence MFI P171 and P911*(13 March 2012) at para. 16
[2549] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-T, *Order Requiring the Prosecution to Select the Relevant Portions of the Mladic Notebooks and to Provide English Translations Thereof* (29 June 2010)
[2550] *Prosecutor v Karadzic,* No. IT-95-5/18-T, *Decision on the Second Prosecution Motion for Leave to Amend its Rule 65 ter Exhibit List (Mladic Notebooks)*(22 July 2010)
[2551] *Prosecutor v Popovic et al,* No. IT-05-88-AR73.1, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning* (14 December 2007) at para. 39
[2552] *Prosecutor v Prlic,* No. IT-04-74-T, *Decision on Motion to Amend Witness and Exhibit Lists* (3 December 2007)
[2553] *Prosecutor v Karadzic,* No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of an Exhibit from the Bar Table Following Major Thomas' Testimony* (28 October 2010)

A Trial Chamber has the discretion to order the prosecution to amend its pre-trial brief after the amendment of the indictment. It was appropriate to order the prosecution to do so and include details as to the new events.[2554]

referral to Chamber

Pre-Appeal Judge granted request to refer his decision on extension of time and word limits for appeal brief to entire panel for review.[2555]

witness summaries

Witness summaries must be sufficiently detailed to allow the other parties to properly prepare cross-examination.[2556]

Witness summaries should include biographical information such as the name of the witness, his father's name, and his date of birth, as well as the occupation of the witness during the relevant period, the witness' rank and unit, and locations and specific events which the witness will discuss.[2557]

Witness' date of birth and father's name must be included in defence witness submissions to enable the prosecution to properly prepare for cross examination.[2558]

Where defence witness summaries were not sufficiently detailed to provide adequate notice to the prosecution, no defence witness would be allowed to testify until at least 14 days after disclosure of his draft witness statement to the prosecution.[2559]

Rule 65 *ter* does not require an accused to provide a summary of his own testimony.[2560]

There is no requirement for a party to take a statement from a witness who is to testify *viva voce*. The defence was put on notice of the expected testimony of the witness via the Rule 65 *ter* summary. No more was required.[2561]

[2554] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Accused's Preliminary Motion Pursuant to Rule 72(A)(ii)*(10 February 2010) at para. 17
[2555] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Motions for Referral to the Panel of Judges* (18 September 2014) at p. 3
[2556] *Prosecutor v Milosevic*, No. IT-29/1-T, *Decision on the Prosecution's Motion for Defence Compliance With Rule 65 ter (G)* (26 June 2007) at page 3
[2557] *Prosecutor v Milosevic*, No. IT-29/1-T, *Decision on the Prosecution's Motion for Defence Compliance With Rule 65 ter (G)* (26 June 2007) at page 4
[2558] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Request for Disclosure of Further Information Regarding Witnesses to be Called by Lazarevic and Lukic Defences* (5 October 2007)
[2559] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Relief from Defence Disclosure Violations* (26 March 2013) at para. 14
[2560] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Relief from Defence Disclosure Violations* (26 March 2013) at para. 15
[2561] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Urgent Defence Motion to Preclude GH-162's Appearance Until After Disclosure of a Proper Witness Statement* (17 May 2013) at para. 6

Rule 66—disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and
(ii) within the time-limit prescribed by the Trial Chamber or by the pretrial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 bis, Rule 92 ter, and Rule 92 quater; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.
(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

documents material to the defence

Request for inspection must be made to the prosecution first before the Trial Chamber will entertain it.[2562]

The disclosure of material and information by the prosecution is fundamental to the fairness of the proceedings before the Tribunal.[2563]

The defence must (1) specifically identify the items sought; (2) demonstrate prima facie that the requested items are material to the preparation of the defence; and (3) demonstrate prima facie that the requested items are in the custody and control of the prosecution.[2564]

[2562] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Inspection and Disclosure* (9 October 2008); *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 9
[2563] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses* (9 May 2005) at para. 12
[2564] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 10

Memoranda of discussions about the accused by the Prosecutor could not be ordered disclosed where the prosecution claimed it was not in possession of such documents.[2565]

An item will only be material to the preparation of the defence where it is used in an argument that has some prospect of success.[2566]

The prosecution must disclose to the accused at the earliest available opportunity and, at the latest, prior to cross-examination, any new material it wishes to submit to a defence witness in cross-examination.[2567]

Information falling within Rule 68 will also necessarily be material to the preparation of the defence under Rule 66(B).[2568]

Statements and prior testimony given in closed session which mention the accused from witnesses whom the prosecution does not intend to call may be material to the defence and should be disclosed under Rule 66(B).[2569]

Request for memoranda and correspondence related to a specific meeting was too broad and did not meet the specificity requirement.[2570]

Prosecution did not violate Rule 66(B) when it sought consent from Rule 70 provider to disclose Rule 66(B) material one month after the Rule 66(B) request was made, given the breadth of the Rule 66(B) request.[2571]

Prosecution did not violate Rule 66(B) by disclosing requested material after the deadline imposed by the Trial Chamber and after the defence witness to whom the material related had testified. Given the language of Rule 66(B), there can only be a violation of the Rule if the prosecution refused to permit the accused to inspect the requested material.[2572]

[2565] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on Vojislav Seselj's Motions for Disclosure of Documents by the Prosecution* (3 September 2010) at para. 35
[2566] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 23
[2567] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses* (9 May 2005) at para. 12
[2568] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 14
[2569] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Form of Disclosure* (4 July 2006) at para. 16, 18
[2570] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 20
[2571] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 35
[2572] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventy-Fourth Disclosure Violation Motion* (6 November 2012) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 102nd and 103rd Disclosure Violation Motions* (4 November 2015) at para. 37

While items relevant to the decision by the defence whether to call persons as defence witnesses may be material to the defence and disclosable pursuant to Rule 66(B), the defence request for broad categories of items for all potential defence witnesses lacked the specificity required under Rule 66(B).[2573]

Prosecution ordered to make questioned documents available to defence expert through the Registry for forensic examination.[2574]

Material from the International Commission on Missing Persons (ICMP) was not in the possession of the prosecution and thus, not within Rule 66(B). The fact that the prosecution has a good relationship with a third party is not relevant unless it can be established that the prosecution has some ability to direct and control the party.[2575]

Prosecution ordered to disclose the following material for prospective defence Army, UN, and Crisis Staff witnesses: (1) statements and reports of interviews; (2) documents authored by the witness; (3) judicial records pertaining to the witness; and (4) immigration records pertaining to the witness.[2576]

electronic disclosure suite

Prosecution is not required to provide hard copies of Rule 66 disclosure on the electronic disclosure suite (EDS) in hard copy.[2577]

The prosecution is not required to provide an index to the documents on the EDS.[2578]

Posting a document on the EDS is insufficient to comply with Rule 66(A)(ii).[2579]

expert witnesses

Disclosure of earlier drafts of the expert's report and e-mail communications with the prosecution was not required by Rules 94 *bis*, 66(B), or 68.[2580]

[2573] *Prosecutor v Boskoski and Tarculovski*, No. IT-04-82-T, *Decision on Boskoski Urgent Defence Motion for an Order to Disclose Material Pursuant to Rule 66(B)* (31 January 2008)
[2574] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Motion to Enable Document Examination by the Defence Forensic Document Examiner* (12 October 2005)
[2575] *Prosecutor v Popovic et al*, No, IT-05-88-T, *Decision on Popovic's Motion for Disclosure Pursuant to Rule 66(B)…*(6 October 2008) at para. 11
[2576] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion to Compel Inspection of Items Material to Sarajevo Defence Case* (8 February 2012) at paras. 14-17; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion to Compel Inspection of Items Material to the Municipalities Defence Case* (7 May 2012) at paras. 9-12
[2577] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Motion to Receive Hard Copies of Rule 66 Material* (11 March 2005)
[2578] *Prosecutor v Halilovic*, No.IT- 01-48-T, *Decision on Motion for Enforcement of Court Order re Electronic Disclosure Suite* (27 July 2005)
[2579] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Motion to Suppress Testimony for Failure of Timely Disclosure* (3 November 2008) at para. 17

post-indictment investigation

Investigation by the prosecution is not strictly limited to the stage preceding confirmation of the indictment. Remedies for disclosures resulting from investigation conducted after the indictment is confirmed are adequate without ordering the prosecution to stop investigating.[2581]

purpose

The purpose of Rule 66(A)(ii) is to enable the defence to confront witnesses with all their prior statements and transcripts. The provision is of fundamental importance to the accused's right to a fair trial.[2582]

It is an essential element of Rule 66(A)(ii) that the disclosures occur within a specific time limit to provide adequate time and resources for the accused to examine the material and prepare its case.[2583]

The size and complexity of the case is not an excuse for prosecution's failure to properly organise itself to ensure that disclosure is carried out in accordance with the Rules.[2584]

remedy

Late disclosure of Rule 66(A)(ii) material could give rise to exclusion of the material from evidence or a decision not to allow the affected witness give evidence at all. Prosecution ordered to provide explanation for late disclosure.[2585]

Late disclosure of items violated Rule 66(A)(ii) but did not warrant any remedy given lack of prejudice and large volume of disclosure in the case.[2586]

[2580] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Request for Order of Disclosure of Materials Related to the Admissibility of the Expert Report of Reynaud Theunens* (11 March 2011)
[2581] *Prosecutor v Boskoski and Tarculovski*, No. IT-04-82-T, *Reasons for Oral Decision Denying Boskoski Defence Motion to Stop Prosecution's Continued Investigation and Continued Disclosure* (10 May 2007)
[2582] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009) at para. 19
[2583] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010) at para. 8
[2584] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Accused's Twenty-Sixth Disclosure Violation Motion* (3 November 2010) at T8908
[2585] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009) at para. 19
[2586] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for Finding Disclosure Violation and for Remedial Measures* (17 June 2010) at paras. 12-18; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 41; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventh and Eighth Motions for Finding Disclosure Violation and for Remedial Measures* (18 August 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninth and*

In the absence of a "material issue" or prejudice to the accused from the prosecutor's repeated violations of Rule 66(A)(ii), the Trial Chamber declined to exclude the testimony of the witnesses whose statements were not timely disclosed.[2587]

Cumulative effect of multiple disclosure violations resulted in an order that the prosecution not be allowed to call any witness affected by late disclosure for period of approximately 90 days to give defence time to prepare.[2588]

The defence's failure to agree to stipulate to evidence or agreed facts is no excuse for the prosecution's failure to meet its disclosure obligations. The defence is in its full right to resist because the onus to prove the charges rests only and wholly upon the prosecution.[2589]

reserve witnesses

The provisions of Rule 66(A)(ii) apply to all persons who the prosecution has designated as "reserve witnesses".[2590]

Rule 92 bis witnesses

The prosecution's obligation under Rule 66(A)(ii) extends witnesses whose statements have been proposed for admittance pursuant to Rule 92 *bis*.[2591]

supporting material

Supporting material for previous inoperative indictments that has not been relied upon for confirmation of any charge which remains in the amended indictment does not come within Rule 66(A)(i) and need not be disclosed.[2592]

Tenth Motions for Finding Disclosure Violation and for Remedial Measures (26 August 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eleventh through Fifteenth Motions for Finding Disclosure Violation and for Remedial Measures* (24 September 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010) at para. 14; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Ninth Disclosure Violation Motion* (11 January 2011) at para. 16; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Forty-Eighth Disclosure Violation Motion* (30 May 2011) at para. 12

[2587] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Forty-Sixth Disclosure Violation Motion* (20 April 2011) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 102nd and 103rd Disclosure Violation Motions* (4 November 2015) at para. 35

[2588] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 43

[2589] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (31 August 2009) at fn. 19

[2590] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 35; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010) at para. 10

[2591] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 35

Redacted statement of witness used in supporting material need not be disclosed in unredacted form where witness was subject to protective measures of delayed disclosure of his identity.[2593]

Where accused was self-represented, transcripts of testimony included in supporting material required to be translated into B/C/S rather than provided to the accused in audio format.[2594]

Supporting material must be provided in a language the accused understands, not necessarily the language of the accused.[2595]

Obligation to translate supporting material was on the prosecution, not the Registry.[2596]

time limits

It is an essential element of Rule 66(A)((ii) that disclosure of material falling under this Rule must occur within a specific time limit.[2597]

Disclosure of witness statements during trial and several months after they had been in the possession of the prosecution violated Rule 66(A)(ii) and was unacceptable.[2598]

witness statements

A witness statement is an account of a person's knowledge of a crime which is recorded through due procedure during an investigation into the crime.[2599]

Interview notes concerning a witness' recollection of events is a witness statement which must be disclosed pursuant to Rule 66(A)(ii).[2600]

[2592] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Full Disclosure of Supporting Material* (25 November 2008) at para. 25
[2593] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Full Disclosure of Supporting Material* (25 November 2008) at para. 19
[2594] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Full Disclosure of Supporting Material* (25 November 2008) at para. 28
[2595] *In Re Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Defence Motion Requesting the Provision of Supporting Materials in the French Language* (1 December 2008) at para. 9
[2596] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Full Disclosure of Supporting Material* (25 November 2008) at para. 31
[2597] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Motion to Set Deadlines for Disclosure*(1 October 2009) at para. 13
[2598] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014) at para. 12
[2599] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 14

As with statements of the accused, the prosecution is under an obligation to disclose all statements of prosecution witnesses in its possession, regardless of who took the statement.[2601]

Rule 66(A)(ii) covers statements taken by national authorities during other judicial proceedings involving a witness.[2602]

The same definition of a "statement" of an accused applies to the definition of a "statement" of a witness.[2603]

Statements of prosecution witnesses taken by humanitarian organizations and furnished to the prosecution are witness statements pursuant to Rule 66(A)(ii) and must be disclosed prior to trial.[2604]

Statements made by prosecution witnesses to journalists in the possession of the prosecution are not witness statements pursuant to Rule 66(A)(ii).[2605]

The prosecutor's disclosure obligations are not only in his capacity as an organ of the Tribunal, but also as an organ of international criminal justice.[2606]

Notes taken by the Prosecution do not qualify as witness statements within the meaning of Rule 66(A)(ii). Rather, they qualify as internal documents prepared by the Prosecution in the sense of Rule 70(A).[2607]

[2600] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Motion to Suppress Testimony for Failure of Timely Disclosure* (3 November 2008) at para. 16; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 12; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 42; *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 32

[2601] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 15, fn. 17; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision on Postponement of Cross-Examination of the Testimony of Witness Milovanovic* (22 July 2010) at para. 8

[2602] *Prosecutor v. Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Order to Obtain Witness Statements and Testimony from National Courts* (12 January 2011) at para. 7

[2603] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at fn. 18

[2604] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 14

[2605] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 40

[2606] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)* (29 September 2006) at para. 13

[2607] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 164

Preliminary statements taken from witnesses must be disclosed as Rule 66(A) is not limited to final, official statements taken from a witness.[2608]

The prosecution is not obligated to take a statement from a witness when interviewing the witness.[2609]

Prosecution is not obligated to retain a list of questions it used in interviewing a witness.[2610]

Rule 67--additional disclosure

(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 bis, but not less than one week prior to the commencement of the Defence case, the Defence shall:
(i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial; and
(ii) provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 bis, Rule 92 ter, or Rule 92 quater, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.
(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter:
(i) the defence shall notify the Prosecutor of its intent to offer:
(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;
(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and
(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with paragraph (i) above.
(C) Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

[2608] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 27
[2609] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Urgent Defence Motion Requesting an Order to the Amicus Curiae to Take and Disclose Witness Statements* (29 January 2009) at para. 6; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision on Postponement of Cross-Examination of the Testimony of Witness Milovanovic* (22 July 2010) at para. 8
[2610] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009) at para. 9

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

continuing duty of disclosure

It is improper for the prosecution to provide non-exculpatory material directly to the Trial Chamber pursuant to Rule 67(C) without the consent of the defence. Direct provision of material pursuant to Rule 67(C) should be limited to material that may suggest the innocence or mitigate the guilt of the accused or affect the credibility of prosecution evidence.[2611]

notice of alibi

The prosecution has the burden of eliminate any reasonable possibility that the evidence of alibi is true.[2612]

The finding that an alibi is false does not itself establish the opposite of what it asserts. The prosecution must not only rebut the validity of the alibi, but also establish beyond reasonable doubt the guilt of the accused.[2613]

An alibi does not constitute a defence in its proper sense. Where an accused raises an alibi he is merely denying that he was in a position to commit the crime with which he was charged. An accused does not bear the burden of proof beyond reasonable doubt in relation to establishing an alibi, but only needs to produce evidence likely to raise a reasonable doubt in the Prosecution's case. If the alibi is reasonably possibly true, it must be accepted. Where the alibi evidence does prima facie account for the accused's activities at the relevant time of the commission of the crime, the onus remains on the Prosecution to eliminate any reasonable possibility that the alibi is true. The Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[2614]

Notice of alibi should be provided as soon as practicable so that prosecution can investigate alibi and present relevant evidence in its case-in-chief. Rule 67(A) does not contemplate that the alibi notice only serve to inform the prosecution so it can present evidence in the rebuttal phase.[2615]

[2611] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Trial Chamber's Order Clarifying Proper Late Disclosure Procedure Pursuant to Rule 67(C) and/or Other Appropriate Sanctions* (7 November 2007)
[2612] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 11; *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 63
[2613] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 11
[2614] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 343
[2615] *Prosecutor v Limaj et al*, No, IT-03-66-T, *Decision on Prosecution's Motion Pursuant to Rule 67(A)(1)(a)* (16 February 2005)

Notice of alibi ordered to be made more specific to cover whereabouts of accused within the town he specified and during certain hours of the specified day.[2616]

Alibi notice need not include address of alibi witnesses at the time of the event.[2617]

Accused ordered to indicate places within the town where he claimed to be at the time of the alleged offence if he intends to lead evidence on such places.[2618]

Accused was required to specify the documents he would rely on to support his alibi and it was not sufficient to simply indicate that such documents were already in possession of the prosecution.[2619]

Accused's failure to provide names and addresses of alibi witnesses, once he had given notice of intent to rely on alibi, could result in denial of right to lead evidence of the alibi or adverse inferences on the reliability of the alibi.[2620]

mental defences

The defence of *lack* of mental capacity is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong. Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal.[2621]

Diminished mental responsibility can be raised by the defendant as a matter in mitigation of sentence only. It cannot lead to acquittal of the accused.[2622]

reciprocal disclosure

Amendment adding Rule 67(A) during trial did not prejudice any right of the accused and therefore new reciprocal disclosure provisions could be applied to ongoing trial.[2623]

[2616] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on the Prosecution's Motion for an Order Requiring the Accused Sredoje Lukic to Clarify Alibi Notice* (15 May 2008)
[2617] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on the Prosecution's Motion for an Order Requiring the Accused Sredoje Lukic to Clarify Alibi Notice* (15 May 2008) at para. 11
[2618] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence* (1 December 2010) at para. 22
[2619] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence* (1 December 2010) at para. 26
[2620] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Order Requiring Particulars of Accused's Alibi Defence* (1 December 2010) at para. 29
[2621] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 582.
[2622] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 590.
[2623] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Slobodan Praljak's Motion on the Application of Rule 67(A) of the Rules* (4 April 2008)

Rule 67(A)(ii) requires the defence to disclose all statements of its prospective witnesses to the prosecution. This includes testimony or statements taken by third parties in the possession of the defence but does not include notes of interviews.[2624]

While the Defence's disclosure obligation does not attach to draft or non-finalised Rule 92 ter statements, the Chamber considers that a statement once reviewed and signed by a witness and in the possession of the Defence, becomes a finalised statement and subject to disclosure.[2625]

There was no rule which requires the defence to disclose its communications with its expert witnesses or earlier drafts of expert reports.[2626]

reprisals

The defence of reprisals is not a special defence for which notice pursuant to Rule 67(B) is required.[2627]

Rule 68—disclosure of exculpatory material

Subject to the provisions of Rule 70,
(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;
(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;
(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;
(iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that

[2624] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Urgent Motion Relating to Non-Compliance of Stanisic Defence with Rule 65 ter (G) and Rule 67 of the Rules* (12 October 2011) at paras. 29-30
[2625] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion Requesting the Defence to Submit a Revised 65 ter Witness List…*(25 July 2014) at para. 38
[2626] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Disclosure of Expert Materials* (27 August 2009) at para. 9
[2627] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Accused's Notice of Special Defence of Reprisals on Count Eleven* (14 March 2013) at T35475

is sought to be kept confidential;
(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

certificate

There is no requirement that the prosecution certify that it has met its disclosure obligations.[2628]

continuing obligation

The prosecution's duty to disclose exculpatory evidence is a continuing one, and extends to the post-trial stage, including appeals,[2629] and even after a final judgement.[2630]

The stage of a proceeding is not a factor to be considered when discharging the prosecution's disclosure obligations.[2631]

Counsel for convicted person failed to specify items which had not been disclosed to him in violation of Rule 68 and therefore motion for disclosure was denied.[2632]

cumulative documents

It is no excuse for failure to disclose an exculpatory document that the accused had the same information in other documents. The violation, however, did not prejudice the accused, and no remedy was warranted.[2633]

deference to prosecutor

[2628] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 182
[2629] *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 29; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 11
[2630] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012) at para. 10
[2631] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012) at para. 12
[2632] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion Seeking Disclosure of Rule 68 Material* (7 September 2012) at para. 11
[2633] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Seventh Disclosure Violation Motion* (10 March 2014) at paras. 13-14

The determination of what material meets Rule 68 disclosure obligations falls within the prosecution's discretion.[2634] In view of the imperative to provide a fair trial to an accused, considerations of fairness must be the overriding factor in making that determination.[2635] The Prosecution must exercise its Rule 68 discretion in good faith.[2636]

There exists a rebuttable presumption that the prosecution is operating in good faith in the fulfilment of its disclosure obligations.[2637]

While typically the decision about what material is potentially exculpatory and should be disclosed pursuant to Rule 68 is a fact-based assessment left within the discretion of the prosecution, the prosecution's view of what is not potentially exculpatory does not accord with the view of the Chamber.[2638]

electronic disclosure suite

It is well established that the EDS cannot be used as a substitute for positive disclosure.[2639]

The prosecution may satisfy its Rule 68 obligations by placing material on the EDS in a separate folder and notifying the accused of material posted on the EDS.[2640]

evidentiary hearing

Evidentiary hearing not warranted where there was nothing to suggest bad faith on the part of the Prosecution with respect to the error in failing to disclose the 1995 witness statement until 2015. Evidentiary hearing would not help shed any more light on the issue or be of assistance in ensuring full compliance by the prosecution with its disclosure obligations at this stage.[2641]

[2634] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183; *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 21; *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para 30

[2635] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 21

[2636] *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para 30

[2637] *Prosecutor v Mladic*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods* (28 November 2013) at para. 24

[2638] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 39

[2639] *Prosecutor v Mladic*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods* (28 November 2013) at para. 25

[2640] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motions for Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009) at para. 20; *Prosecutor v Mladic*, No. IT-09-92-AR73.2, *Decision on Defence Interlocutory Appeal Against the Trial Chamber's Decision on EDS Disclosure Methods* (28 November 2013) at para. 25

[2641] *Decision on Accused's One Hundredth Disclosure Violation Motion* (13 July 2015) at para. 18

exculpatory nature

standard

The standard for assessing whether material is considered to be exculpatory is whether there is any possibility, considering the submissions of the parties, that the given information could be relevant to the defence of the accused.[2642]

suggests innocence

The disclosure obligation under Rule 68 is not limited to material which is exculpatory on its face. For material to fall within the ambit of Rule 68, it is not required that it in fact suggests the innocence of the accused; it is sufficient that it *may* so suggest.[2643]

Evidence of Serb crimes against Croat civilians could aid in showing an alternative explanation to the prosecution allegation of a joint criminal enterprise by the Croatian forces and is therefore exculpatory.[2644]

Evidence of accused's denial of responsibility for barricades erected in Sarajevo was exculpatory and should have been disclosed.[2645]

Evidence that UN convoy contained arms being smuggled to the Muslims was exculpatory as it tended to show justification for the Serb searches of UN convoys.[2646]

Evidence supporting free movement of humanitarian convoys was exculpatory and should have been disclosed, but accused was not prejudiced because of other similar, available evidence.[2647]

Evidence of UN commander's statements about factories being used for military facilities in Sarajevo and protests of Muslim offensives, as well as copies of an analysis

[2642] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 14
[2643] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Motion on Rule 68 of the Rules of Procedure and Evidence* (2 June 2006) at para. 9 *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 11
[2644] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 11
[2645] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty –Sixth Motions for Disclosure Violation* (11 November 2010) at para. 29
[2646] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 47th Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings* (10 May 2011) at para. 14
[2647] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 107th Disclosure Violation Motion* (14 March 2016) at para. 17

of orders issued by the accused calling for obedience to humanitarian law, were of an exculpatory nature and should have been disclosed.[2648]

Evidence of investigation of Serbs for war crimes was exculpatory as it tended to refute the allegation that the accused failed to punish such crimes.[2649]

Evidence that movement of the population was pursuant to agreement of the parties rather than ethnic cleansing, appeal to protect citizens of all nationalities, smuggling of ammunition in UNHCR vehicles, and motive of Muslims to provoke international intervention was exculpatory in nature and should have been disclosed.[2650]

Evidence that young male prisoners from Srebrenica were put on buses with women and that soldiers were ordered to treat civilians properly during Srebrenica operation was exculpatory in nature and should have been disclosed.[2651]

Evidence that treatment at prison camp was correct was exculpatory where indictment charged mistreatment of prisoners at that camp during the period covered by the statement.[2652]

Evidence that events in Prijedor were in response to military activities by the Bosnian Muslims was potentially exculpatory and failure to disclose evidence in a timely manner violated the prosecution's disclosure obligations. However, no prejudice was shown where material was largely duplicative of material already disclosed.[2653]

Evidence of existence of Bosnian Muslim snipers firing into Serb areas was exculpatory and failure to disclose it violated Rule 68.[2654]

Evidence of correct treatment of prisoners was potentially exculpatory and failure to disclose it violated Rule 68.[2655]

[2648] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010) at paras. 22,26

[2649] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 47th Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings* (10 May 2011) at para. 15; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Sixth Disclosure Violation Motion* (21 January 2015) at para. 8

[2650] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Thirtieth and Thirty-First Disclosure Violation Motions* (3 February 2011) at paras. 9,11

[2651] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Eighth and Ninety-Ninth Disclosure Violation Motions* (6 June 2015) at paras. 11-12

[2652] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Second Disclosure Violation Motion* (7 November 2013) at para. 18

[2653] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Eighth Disclosure Violation Motion* (18 March 2014) at para. 10

[2654] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Fourth Disclosure Violation Motion* (16 January 2014) at para. 10

[2655] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Ninth and Ninetieth Disclosure Violation Motions* (16 April 2014) at paras. 17-19

Evidence that massacre was spontaneous and self-initiated, and that authorities exerted pressure to prosecute the perpetrators was exculpatory and failure to disclose it violated Rule 68.[2656]

Evidence that victims were killed trying to escape was exculpatory and the failure to disclose this information violated Rule 68.[2657]

contradicts prosecution evidence

Material will affect the credibility of the Prosecution's evidence if it undermines the case presented by the Prosecution at trial. [2658]

Notes of a prior statement which was inconsistent with later statement constituted exculpatory material which must be disclosed.[2659]

The prosecution has a general duty to make a record of any inconsistencies in a witness' account and to disclose it to the defence.[2660]

Statement of witness which contradicted testimony of other prosecution witnesses fell within Rule 68 and should have been disclosed.[2661]

Statements of witnesses which contradicted facts judicially noticed fell within Rule 68 and should have been disclosed.[2662]

Evidence that witness acknowledged recruiting a witness who falsely testified and confirmed his alibi at his own trial falls within Rule 68.[2663]

Memorandum of meeting in which no mention of ethnic cleansing was made did not contradict or affect the credibility of testimony of prosecution witness who testified that the accused frequently acknowledged ethnic cleansing.[2664]

[2656] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Fourth Disclosure Violation Motion* (16 January 2014) at para. 14
[2657] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-First Disclosure Violation Motion* (7 May 2014) at para. 17
[2658] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6
[2659] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 33
[2660] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 37
[2661] *Prosecutor v Oric*, No. 03-68-T, *Decision on Alleged Prosecution Non-Compliance With Disclosure Obligations Under Rule 66(B) and 68(i)* (29 September 2005)
[2662] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fourth Disclosure Violation Motion* (14 October 2014) at para. 14
[2663] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003) at para. 26
[2664] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 36

Prosecution violated Rule 68 by failing to timely disclose a document which contained post-conflict information which could have affected the credibility of a prosecution witness.[2665]

Prosecution violated Rule 68 by failing to timely disclose witness statement which contained material which could have affected his credibility. As a result, the Chamber decided not to rely on that witness' evidence on that subject. [2666]

The prosecution's failure to disclose that it had referred an investigation into a prosecution witness's potential criminal responsibility to State authorities, with no conclusion as to his culpability, did not violate Rule 68.[2667]

benefits to prosecution witnesses

Evidence that the prosecution has provided or may provide any objective form of assistance to a witness falls squarely within the purview of Rule 68.[2668]

Any material in the possession of the prosecution establishing that a witness requested and/or received a benefit from being a prosecution witness may affect the credibility of the said witness and therefore should be disclosed pursuant to Rule 68.[2669]

Prosecution's failure to disclose letter which assisted witness in his asylum application, as well as requests for such a letter, violated Rule 68.[2670]

Where it was not shown that witness' statements or testimony had materially changed after the promise or benefit relating to their immigration status, witnesses would not be recalled for cross examination after late disclosure of the promises or benefits.[2671]

[2665] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fifth Disclosure Violation Motion* (5 December 2014) at para. 10

[2666] *Decision on Accused's One Hundredth Disclosure Violation Motion* (13 July 2015) at paras. 15-17

[2667] *Decision on Accused 101st Disclosure Violation Motion* (20 July 2015) at para. 15

[2668] *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para. 45

[2669] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions* (22 November 2011) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Fifth Disclosure Violation Motion* (12 January 2012) at para. 16; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Sixth and Sixty-Seventh Disclosure Violation Motions* (1 March 2012) at para. 17

[2670] *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para.51; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions* (22 November 2011) at paras. 25,27,29,31; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Third Disclosure Violation Motion* (21 November 2013) at para. 10; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 102nd and 103rd Disclosure Violation Motions* (4 November 2015) at para. 33

[2671] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Fifth Disclosure Violation Motion* (12 January 2012) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Third Disclosure Violation Motion* (21 November 2013) at para. 11

form of disclosure

Rule 68 does not require the prosecution to identify the material being disclosed to the defense as exculpatory.[2672]

importance

The obligation to disclose under Rule 68 is as important as the obligation to prosecute.[2673]

In pursuit of justice, the disclosure of Rule 68 material to the defence is of paramount importance to ensure the fairness of proceedings before the Tribunal.[2674]

Rule 68 of the Rules has an important function as it requires the Prosecution to disclose exculpatory material because of its superior – and sometimes even sole – access to this material.[2675]

The disclosure of Rule 68 material is fundamental to the fairness of proceedings before the Tribunal, and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.[2676]

The prosecution's obligation to disclose exculpatory material is essential to a fair trial. This obligation has always been interpreted broadly.[2677]

The Appeals Chamber reminds the prosecution of the paramount importance of its disclosure obligations and expects the prosecution to take the necessary steps to prevent such disclosure violations from occurring in the future.[2678]

mitigation of sentence

[2672] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 190
[2673] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 183, 242; *Prosecutor v Brdjanin*, No. IT-99-36-A, *Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order the Registrar to Disclose Certain Materials* (7 December 2004); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 10
[2674] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 20
[2675] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 17
[2676] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 188
[2677] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 13
[2678] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 23

Recordings or notes of meetings at which accused claimed he was promised immunity if he resigned from public office may mitigate an eventual sentence and was within Rule 68.[2679]

possession

Rule 68 *prima facie* obliges the Prosecution to monitor the testimony of witnesses, and to disclose material relevant to the impeachment of the witness, during or after testimony. If the amount of material is extensive, the parties are entitled to request an adjournment to properly prepare themselves.[2680]

Testimony given in other trials is generally encompassed by the Prosecution's disclosure obligation pursuant to Rule 68.[2681]

Prosecution would not be required to obtain broad categories of material from Bosnian courts and disclose them to the defence—the defence could equally request, and if unsuccessful, compel production of the records from the State.[2682]

prejudice

If a newly disclosed document adds nothing new to the material already available to the accused, or he could use the document through another witness, he has suffered no prejudice from its late disclosure.[2683]

No prejudice from disclosure violation where the accused will have the opportunity to introduce the information in its defence case.[2684]

No prejudice from disclosure violation where material was duplicative of other material entered into evidence during the trial or otherwise disclosed to the accused.[2685]

[2679] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue* (17 December 2008) at para. 21

[2680] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 206; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 14

[2681] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules* (11 February 2004) at para. 20

[2682] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Slobodan Praljak's Request for the Production of Rule 68 Exculpatory Material in Relation to Domestic Proceedings* (10 May 2007)

[2683] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 48; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighty-Fifth Disclosure Violation Motion* (21 January 2014) at para. 22; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Sixth Disclosure Violation Motion* (21 January 2015) at para. 8

[2684] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Fifty Fifth Disclosure Violation Motion* (19 August 2011) at para. 12

[2685] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Third Disclosure Violation Motion* (20 March 2015) at para. 17; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 104th and 105th Disclosure Violation Motions* (18 February 2016) at paras. 27,33

No prejudice from disclosure violations where material consisted of "self-serving denials of crimes or involved the shifting of blame for certain events" which have little if any probative value.[2686]

privileged material

Where prosecution came upon potentially privileged material in items seized through the execution of a search warrant and applied to the Chamber for appointment of an independent counsel to review it and determine its privileged status, Chamber determined that it was more appropriate for a Judge of another Chamber to perform the review.[2687]

Psychological evaluation of prosecution witness whose testimony was admitted under Rule 92 *quarter* would be reviewed by the Trial Chamber *in camera* to determine if they contain material affecting the credibility of the witness. Review of the records themselves, and not a medical officer's summary of the records, was required.[2688]

public material

Prosecution is relieved of its obligation to disclose under Rule 68 when the material is already available on the Tribunal website.[2689]

relief from disclosure

The prosecution may be relieved of its obligation to disclose Rule 68 material if the exculpatory nature of the evidence is known, and the material is accessible to the accused.[2690]

remedy

Where prosecution breached its disclosure obligation under Rule 68, defence would be allowed to recall prosecution or defence witnesses affected by the non-disclosure.[2691]

[2686] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 104th and 105th Disclosure Violation Motions* (18 February 2016) at para. 27

[2687] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Prosecution Motion for the Appointment of Independent Counsel to Review Material Potentially Subject to Lawyer-Client Privilege* (10 July 2012) at para. 8

[2688] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Deputy Registrar's Further Submission on Medical Records Pertaining to Milan Babic* (19 April 2013) at paras. 2,15

[2689] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 12

[2690] *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 30

[2691] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Urgent Defence Motion Concerning Rule 68 Compliance by the Prosecution* (28 March 2008); *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision*

Trial Chamber would *proprio motu* not rely on evidence of prosecution witness on subject of statement which had not been timely disclosed to the defence and which could have affected the credibility of the witness.[2692]

Six-week suspension of trial warranted by prosecution's late disclosure of 32,000 pages of Rule 68 material. It is untenable to expect the defence to be able to review this material during an ongoing trial.[2693]

Suspension of proceedings for period of one month was warranted to allow defence to review 14,276 pages of documents disclosed by prosecution on 13 and 22 October 2010.[2694]

The one-month suspension of the trial [for the review of 14,276 pages of newly disclosed documents] is not premised on a calculation of the time necessary to conduct a detailed examination of all the documents, but rather, on the time required to assess the material, as a whole, and identify those which must be given the most immediate attention.[2695]

In determining the period of suspension, the Chamber also takes into consideration the significant number of violations by the Prosecution of its disclosure obligation under 66(A)(ii) and Rule 68 which have been found to date. While, individually, it may be said that the accused has not suffered prejudice by the late disclosure of certain documents, the Chamber is increasingly troubled by the potential cumulative effect of such late disclosure.[2696]

Six-week postponement of trial warranted where Rule 68 material was not timely disclosed by the prosecution. However, preparing a defence is not exclusively done at the pre-trial stage and the defence is expected to review new disclosures on an ongoing basis during the trial.[2697]

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on Milan Lukic's Motion to Suppress Testimony for Failure of Timely Disclosure (3 November 2008) at para. 18

[2692] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's One Hundredth Disclosure Violation Motion* (13 July 2015) at para. 17

[2693] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Fourth Suspension of Proceedings* (16 February 2011) at para. 11

[2694] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Interim Decision on Accused's Twenty-Sixth Disclosure Violation* (3 November 2010) at T8906-09

[2695] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Interim Decision on Accused's Twenty-Sixth Disclosure Violation* (3 November 2010) at T8907

[2696] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Interim Decision on Accused's Twenty-Sixth Disclosure Violation* (3 November 2010) at T8908

[2697] *Prosecutor v Mladic*, No. 09-92-T, *Reasons for Decision on Defence Motion for Reconsideration* (29 June 2012) at para. 23

Reduction of the scope of the case due to prosecution's disclosure violations not warranted where accused was not prejudiced by the violations.[2698]

Appointment of Special Master not warranted for multiple violations of Rule 68—instead prosecution would be required to submit detailed report explaining reasons for non-disclosure.[2699]

Allowing defence access to OTP database rejected as a remedy for multiple disclosure violations as neither realistic nor practical.[2700]

Where it is found on appeal that the accused has been prejudiced by a violation of Rule 68, that prejudice may be remedied through the application of Rule 115 and the admission of additional evidence on appeal.[2701]

Appeals Chamber made finding that prosecution had violated Rule 68 by failing to disclose materials showing that bodies of alleged victims were exhumed a considerable distance away from the crime.[2702]

Prosecution ordered to explain how the material was not identified in earlier searches; and to substantiate its assertion that it had remedied the problem which resulted in the disclosure violation. Citing to "human error" or similar explanations is not satisfactory.[2703]

New trial not warranted as remedy for cumulative disclosure violations where, despite a disclosure practice that reflected badly on the prosecution, the accused had not been prejudiced by the disclosure violations.[2704]

Dismissal of appeal would be disproportionate remedy where items not disclosed in violation of Rule 68 and contrary to prosecution's certification were not material to the appeal.[2705]

[2698] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 50
[2699] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions* (30 June 2011) at para. 52
[2700] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions* (11 March 2013) at para. 22
[2701] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 17
[2702] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution* (12 May 2011) at para. 20
[2703] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Fourth Disclosure Violation Motion* (13 October 2014) at para. 16
[2704] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for New Trial for Disclosure Violations* (3 September 2012) at paras. 17-19; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for New Trial for Disclosure Violations* (14 August 2014) at para. 17
[2705] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98 *bis*.1, *Decision on Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor* (4 July 2013) at p. 3

Appointment by Appeals Chamber of amicus curiae prosecutor for disclosure violations was not appropriate where violations occurred before Trial Chamber.[2706]

Where prosecution violated Rule 68 by failing to disclose UN report dealing with investigation of Sarajevo shelling incident, the report was admitted into evidence as a remedy for the Rule 68 violation but was not of such import as to require the recall of the witness.[2707]

request

A request for materials pursuant to Rule 68 must be specific as to the nature of the evidence sought and its being in the possession of the prosecution but need not precisely identify which documents should be disclosed.[2708]

Rule 70 material

Disclosure of the number of exculpatory documents provided pursuant to Rule 70(B) for which the provider has not yet authorized disclosure would not be required considering Rule 68(iii)'s protection of the fact of the existence of such documents.[2709]

Where the prosecution's confidentiality obligations under Rule 70(B) conflict with its disclosure obligations under Rule 68, it is for the prosecution to take measures to resolve these concerns without falling in breach of either provision, with the supervision of the Trial Chamber if necessary.[2710]

The prosecution cannot be relieved of its Rule 68 obligation by virtue of Rule 70 without taking steps to secure the consent of the provider to disclose the material.[2711]

The prosecution's delay in identifying exculpatory documents and requesting the consent of the provider to disclose them violated Rule 68.[2712]

Nothing in Rule 70(A) relieves the prosecution of its duty to disclose exculpatory material pursuant to Rule 68. Therefore, exculpatory parts of internal memorandum of

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[2706] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98 *bis*.1, *Decision on Motion to Dismiss Appeal and for Appointment of Amicus Curiae Prosecutor* (4 July 2013) at p. 4
[2707] *Prosecutor v Karadzic*, No. IT-95-5/18-T*, Oral Decision on Accused's Seventy-Sixth Disclosure Violation Motion* (29 January 2013) at T32882-83
[2708] *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 30
[2709] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Disclosure of Rule 68 Material Obtained Under Rule 70(B) and Order on Prosecution Disclosure Report* (15 January 2009) at p. 3
[2710] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Rule 70(B)* (12 February 2009) at para. 8
[2711] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 12
[2712] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third, Fourth, Fifth, and Sixth Motions for Finding of Disclosure Violations and for Remedial Measures* (20 July 2010) at para. 28

OTP must be disclosed to the defence, as well as those parts necessary to understand the context of the exculpatory parts.[2713]

Prosecution could not justify its failure to disclose correspondence in witness' asylum case on fact that State had requested that the material should be confidential where State did not invoke Rule 70 in its correspondence.[2714]

scope

Material to be disclosed under Rule 68 is not restricted to material which is in a form which would be admissible in evidence. Rather, it includes all information which in any way tends to suggest the innocence or mitigate the guilt of an accused or may affect the credibility of prosecution evidence, as well as material which may put an accused on notice that such material exists.[2715]

specificity

Despite finding that evidence of agreement that accused would not be prosecuted at ICTY was relevant to mitigation, request for any items in the possession of the prosecution supporting the accused's contention that such an agreement was made was insufficiently specific to require production pursuant to Rule 68.[2716]

Request for evidence of all crimes by Serb forces in South sector from 1991-95 was sufficiently specific under Rule 68.[2717]

stipulation

Prosecution's willingness to stipulate to crimes committed by Serb forces as claimed by the defence does not relieve it of the obligation to disclose the materials in its possession.[2718]

timing

[2713] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness* (13 December 2006) at pg. 4
[2714] *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para. 52
[2715] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 178; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 6; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Decision on Motion by Dario Kordic for Access to Unredacted Portions of October 2000 Interviews With Witness AT* (23 May 2003) at para. 24
[2716] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused Motion for Interview of Defence Witness and Third Motion for Disclosure* (9 April 2009) at para. 27
[2717] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 10
[2718] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's Motion Requesting the Trial Chamber to Order the Prosecution to Disclose Rule 68 Material to the Defence* (7 August 2009) at para. 13

The prosecution is required to disclose evidence of an exculpatory nature to the defence forthwith, notwithstanding the practical difficulties.[2719]

Regardless of the prosecution's internal practices, Rule 68 requires that disclosure be made as soon as practicable.[2720]

When coming into possession of a large collection of potentially exculpatory materials, the prosecution should inform the accused of the nature and existence of the material even if it will take time for the material to be processed and reviewed.[2721]

Prosecution's practice of conducting name searches for exculpatory material proximate to the time the witness will testify was unacceptable. Deadline given by Trial Chamber for disclosure of all remaining exculpatory material.[2722]

It is no excuse for the failure to make timely disclosure of exculpatory material that the accused had requested a large volume of disclosure under Rule 66(B).[2723]

It is no excuse for the failure to make timely disclosure that the prosecution did not know the nature of the accused's defence or that the defence was not set out in the pre-trial brief. The prosecution is required to make its own assessment of what material is potentially exculpatory of an accused person. This assessment should be made as early as the initial appearance, and on an ongoing basis, regardless of what the accused's ultimate defence strategy proves to be.[2724]

Where the prosecution had not provided information on the date when the document came into its possession, or when it had requested consent for disclosure under Rule 70, the Trial Chamber would presume the material had been in the possession of the prosecution for a considerable time.[2725]

[2719] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 243
[2720] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 11
[2721] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty –Sixth Motions for Disclosure Violation* (11 November 2010) at para. 38
[2722] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty –Sixth Motions for Disclosure Violation* (11 November 2010) at para. 33
[2723] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 30; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty –Sixth Motions for Disclosure Violation* (11 November 2010) at para. 31; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 14
[2724] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 13
[2725] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Eighteenth to Twenty-First Disclosure Violation Motions* (2 November 2010) at para. 30

The fact that the prosecution has a continuing duty to disclose exculpatory evidence does not suggest that the prosecution can delay disclosure of material already in its possession or identify and disclose exculpatory material on a "rolling basis".[2726]

videos

Because of copyright concerns, disclosure of videos to accused required that videos be viewed on the premises of the Tribunal and not copied or disseminated.[2727]

Rule 68 *bis*—failure to comply with disclosure obligations

The pre-trial Judge or the Trial Chamber may decide proprio motu, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

The defence can challenge at any time the prosecution's compliance with Rule 68 if it has reason to believe that the prosecution is failing to perform its duty and if it presents a *prima facie* case which would make probable the exculpatory nature of the materials sought.[2728]

If the defence believes that the prosecution has not complied with Rule 68, it must establish that additional evidence exists that might prove exculpatory or mitigating for the accused and is in the possession of the prosecution. It must show the probable exculpatory or mitigating nature of the items sought.[2729]

If an accused wishes to show that the prosecution is in breach of its disclosure obligations, it must identify specifically the items sought, present a prima facie showing of the exculpatory nature of the items, and prove the prosecutor's custody and control of the items.[2730]

The Rules do not require a showing of malice before sanctions may be imposed.[2731]

Prosecution failed to comply with Rule 68 in this case and its approach to Rule 68 was less than diligent. However, there was no prejudice to the accused considering the

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[2726] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Reconsideration of Trial Chamber's 11 November 2010 Decision* (10 December 2010) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's 47th Motion for Finding of Disclosure Violation and for Further Suspension of Proceedings* (10 May 2011) at para. 11
[2727] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Disclosure of Videos to the Accused* (12 May 2009)
[2728] *Prosecutor v Halilovic*, No. 01-48-T, *Decision on Urgent Motion for Immediate Disclosure* (11 March 2005) at page 5
[2729] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para 179
[2730] *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 31
[2731] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 190

Trial Chamber's finding that he should be sentenced to no more than the time he has already served.[2732]

The Trial Chamber reserves the right to draw adverse inferences against the prosecution as to evidence which is the subject of violations of Rule 68.[2733]

Where an accused has been prejudiced by a breach of Rule 68, that prejudice may be remedied where appropriate through the admission of additional evidence on appeal under Rule 115.[2734]

Even where a Rule 68 violation is shown, the accused must demonstrate that he is prejudiced before a remedy will be ordered.[2735]

Prosecution's violation of Rule 68 permitted the defence to recall witnesses called by the prosecution where its cross-examination was affected by the non-disclosure of the material.[2736] This is an adequate remedy to cure Rule 68 violations.[2737]

Prosecutor cannot personally be reprimanded as a sanction for violation of this section. The sanctions imposed under this section are intended to apply to the Office of the Prosecutor and individual sanctions for disclosure violation may only be imposed pursuant to Rule 46(A) after warning.[2738]

Rule 69—protection of victims and witnesses

(A) In exceptional circumstances, either party may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.
(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for preparation of the Prosecution or Defence

current address

[2732] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 77
[2733] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Ongoing Complaints About Prosecutorial Non-Compliance With Rule 68 of the Rules* (13 December 2005) at para. 35
[2734] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 187
[2735] *Prosecutor v Bralo*, No. IT-95-17-A, *Decision on Motions for Access to Ex-Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material* (30 August 2006) at para. 31
[2736] *Prosecutor v Oric*, No. 03-68-T, *Decision on Urgent Defence Motion Regarding Prosecutorial Non-Compliance With Rule 68* (27 October 2005)
[2737] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 192
[2738] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Prosecutor's Motion for Reconsideration of Relief Ordered Pursuant to Rule 68 bis* (27 March 2012) at paras. 40-41

An order withholding the current address of a witness from the accused requires a showing of "exceptional circumstances". The prosecution must establish that there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known to the accused and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties.[2739]

The likelihood of interference must be objective: while the witness may personally feel that he or she may be at risk, any subjective fears expressed by the witness are not in themselves sufficient to establish any real likelihood that they may be in danger or at risk. To warrant an interference with the rights of the accused, those fears must be well-founded in fact.[2740]

Prosecution failed to establish that there is a real likelihood of danger to the witness should his address be known to the Accused.[2741]

delayed disclosure

Nothing in Rule 69(C) requires that the identity of all witnesses be disclosed prior to trial. A Trial Chamber has the discretion to delay disclosure even after the trial has commenced so long as the accused is given adequate time for the preparation of his defence.[2742]

Delayed disclosure of the identity of witnesses even after the trial commences is permissible.[2743]

Two key factors in allowing early disclosure of some witness identities are the approaching trial date and the fact that the disclosure ordered is narrow—to the defence teams and the accused only.[2744]

Factors to consider when requested to delay disclosure to the accused include: (1) objective likelihood of interference from disclosure to the accused; (2) specific, rather than general basis for the request; and (3) length of time before the trial at which disclosure to the accused must take place.[2745]

[2739] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Further Protective Measures for Witness KDZ310…*(13 January 2015) at para. 11
[2740] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Further Protective Measures for Witness KDZ310…*(13 January 2015) at para. 11
[2741] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Further Protective Measures for Witness KDZ310…*(13 January 2015) at para. 12
[2742] *Prosecutor v Seselj*, No. IT-03-67-AR73.6, *Decisions on Vojislav Seselj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007* (24 January 2008) at para, 15
[2743] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Sixty-Sixth Disclosure Violation Motion* (8 February 2012) at para. 17
[2744] *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 23
[2745] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Motion for Delayed Disclosure…* (5 June 2009) at para. 11

Where witness for whom delayed disclosure had been ordered in another case consented to variation of the protective measures to allow disclosure of his identity at an earlier time in the present case, the Trial Chamber ordered his identity to be immediately disclosed to the accused.[2746]

Order in original case which provided that disclosure in subsequent proceedings should be delayed until the same time frame as disclosure to the defence in the original case would be respected as to those witnesses the prosecution intended to call in the subsequent proceedings. As for other witnesses, disclosure should be made forthwith in redacted form.[2747]

Delayed disclosure orders cannot be circumvented by a claim that the information is material to the preparation of the defence pursuant to Rule 66(B). Should the late disclosure reveal information that could have been used with a witness called before the disclosure is affected, the accused can move to recall the witness affected by the delayed disclosure.[2748]

requirements

The Trial Chamber will only issue an order for non-disclosure of witness identities where the prosecution demonstrates the existence of exceptional circumstances—specific evidence of an identifiable risk to the security and welfare of the particular witness or his family. Broad allegations of dangerous conditions for victims and witnesses in general will not suffice to justify the issuance of a non-disclosure order.[2749]

scope

Members of defence team of self-represented accused include the legal associates and investigator assigned by the Registry, but do not include *pro bono* advisors or others assisting the accused.[2750]

timing

Disclosure of identities of three witnesses 30 days prior to their testimony was not an abuse of discretion.[2751]

[2746] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision of the Accused's Motion for Modification of Delayed Disclosure: Witness KDZ320* (7 December 2011) at para. 12
[2747] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Mico Stanisic' Motion to rescind or Vary the Delayed Disclosure Orders in Prosecutor v Brdjanin* (31 January 2008)
[2748] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492* (25 March 2010) at paras. 18-19
[2749] *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 2
[2750] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motions for Rule 68 Material and Reconsideration of Decision on Adequate Facilities* (10 March 2009) at paras. 25-26

Disclosure of identities of protected witnesses need not occur until 30 days before trial commences in accordance with standard practices of ICTY trial chambers.[2752]

Rule 70—matters not subject to disclosure

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents to compel the production of such additional evidence.
(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.
(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).
(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply mutatis mutandis to specific information in the possession of the accused.
(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

conditions not accepted

The overall circumstances surrounding the witness do not justify the extraordinary

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[2751] *Prosecutor v Seselj*, No. IT-03-67-AR73.6, *Decisions on Vojislav Seselj's Appeal Against the Trial Chamber's Oral Decision of 7 November 2007* (24 January 2008) at para, 16
[2752] *Prosecution v. Mrksic et al*, No. IT-95-13/1-PT, *Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure* (9 March 2005) at page 4

level of protection that testimony in closed session affords. Allowing the witness to testify in closed session would result in substantial unfairness to the accused, and such unfairness outweighs the probative value of the witness' expected testimony. Therefore, testimony would not be allowed under current Rule 70 conditions imposed by provider.[2753]

confidential treatment

When directed to protect the Rule 70 provider's interests, private session testimony should only be granted sparsely.[2754]

There is nothing to suggest that the prosecution's explanation for its disclosure violation of Rule 70 material is inaccurate or that there is any inconsistency which would warrant an order requiring disclosure of its confidential communication with a Rule 70 provider.[2755]

defence use of Rule 70

The reference of Rule 70(F) to "specific information in the possession of an accused" does not require that the accused actually be in possession of such information before the guarantee of confidentiality can be given to a third party.[2756]

material subject to Rule 70

In addressing whether the material is subject to Rule 70(B), the Chamber only needs to be satisfied that it was provided on a confidential basis.[2757]

The protections of Rule 70 can apply to information received from a third party even if the sole purpose was not that it be used to generate new evidence. Therefore, a third party who makes a witness available to testify is entitled to the protections of Rule 70 including consent, closed sessions, and representation, regardless of whether the prosecution already knew of the witness or if the witness' information simply corroborated other evidence.[2758]

[2753] *Decision on Prosecution's Motion for Protective Measures for Witness KDZ487* (24 November 2009) at para. 18

[2754] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Motion for Protective Measures…*(18 October 2013) at para. 9

[2755] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Disclosure of Rule 70 Correspondence* (24 February 2015) at para. 7

[2756] *Prosecutor v Oric*, No. 03-68-AR73, *Decision on Interlocutory Appeal Concerning Rule 70* (26 March 2004)

[2757] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Second, Twenty-Fourth, and Twenty –Sixth Motions for Disclosure Violation* (11 November 2010) at para. 26, fn. 60; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Twenty-Seventh Disclosure Violation Motion* (17 November 2010) at para. 12, fn. 21

[2758] *Prosecutor v Milosevic*, No. IT-02-54-AR108 *bis, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70* (23 October 2002) at para. 21-25.

A Chamber has the authority to assess whether information has been provided in accordance with Rule 70, but such inquiries must be of limited nature and must extend only to an examination of whether the information was provided on a confidential basis. Where there is any doubt that the protections of Rule 70 are sought, the Chambers should invite the party which provided the information and the party to which the information was provided to supply evidence upon these issues before ruling on the application of Rule 70.[2759]

Prosecution should do its utmost to ensure that it has a reliable and efficient system for recording and disclosing Rule 70 material, and that the accused is informed of the Rule 70 status of documents in a timely and efficient manner.[2760]

Prosecution's failure to raise Rule 70 conditions when documents were admitted publicly throws into doubt whether such conditions existed at the time.[2761]

Prosecution ordered to provide communications with the Rule 70 provider to establish that Rule 70 conditions were placed upon the documents sought to be placed under seal.[2762]

Rule 70 does not apply to documents sent by the prosecution to a State.[2763]

obligation of States

Rule 70 should not be used by States as a blanket right to withhold, for security purposes, documents necessary for trial from being used as evidence at trial as this would jeopardize the very function of the Tribunal. Such an interpretation of Rule 70 would be a violation of a State's obligation under Article 29 to cooperate with the Tribunal.[2764]

opportunity to be heard

[2759] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Interim Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits* (11 July 2012) at para. 14

[2760] *Prosecutor v Karadzic*, No.IT-95-5/18-T, *Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits* (5 September 2012) at para. 28

[2761] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Interim Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits* (11 July 2012) at para. 16

[2762] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Interim Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits* (11 July 2012) at para. 21

[2763] *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis* (12 October 2011) at para. 52

[2764] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis*.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 38

The provider of information pursuant to Rule 70 should have the opportunity to be heard if there is an issue over disclosing that information, but that opportunity need not be at an oral hearing.[2765]

presence of provider representative in court

Rule 70 provider authorized to have legal representatives present in the courtroom when its witness testified.[2766]

public material

Documents previously filed as public exhibits would be reclassified as confidential where the Rule 70 provider had requested confidentiality, as the Chamber would limit itself to determining whether the information was provided on a confidential basis.[2767]

Rule 70 is not intended to apply to documents which are already in the public domain. However, where prosecution obtained public copies and disclosed them, there was no violation.[2768]

remedy for non-disclosure

The prosecution would not be allowed to adduce evidence from witnesses concerning information discussed in their interviews with the prosecution if the notes of those interviews are withheld from the defence pursuant to Rule 70(B).[2769]

Rule 70 allows the provider to set conditions on further disclosure of material to be disclosed to the defence. However, whether such conditions infringe upon the rights of the accused would be addressed in the context of admissibility of the testimony to which the Rule 70 material relates.[2770]

[2765] *Prosecutor v Milosevic*, No. IT-02-54-AR108 *bis, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70* (23 October 2002) at para. 31

[2766] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Application for Rule 70 Conditions for Testimony of Witness W-46* (12 March 2007) at p. 4; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Second Renewed Motion for Leave to Amend its Rule 65 ter List to Add Michael Phillips and Shaun Byrnes* (12 March 2007) at para. 35; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Urgent Motion for Protective Measures…*(18 October 2013) at para. 10

[2767] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Prosecution's Motion to Change the Status of ECMM Documents Pursuant to Rule 70* (14 April 2011)

[2768] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Seventeenth bis and Twenty-Eighth Disclosure Violation Motions* (16 December 2010) at para. 25

[2769] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 14

[2770] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Order of Non-Disclosure in Relation to Shaun Byrnes* (15 February 2007) at para. 7

Where the restrictions imposed by the Rule 70 provider impact upon the fair trial rights of the accused, the remedy is for the Trial Chamber to refuse to hear the witness.[2771]

restrictions on cross examination

Rule 70(G) allows the Trial Chamber to decline to hear testimony if the restrictions imposed would render the unfairness greater than the probative value of the testimony. It is not required to hear the testimony and then decide upon its exclusion.[2772]

Proposed restrictions on cross examination, limiting its scope and requiring advance permission of the provider before expanding scope, were patently unfair and warranted exclusion of testimony of Rule 70 witness.[2773]

There is no requirement that the defence indicate in advance the line of cross examination to be pursued. To require them to seek permission from the Rule 70 provider in advance for examination on a particular subject would oblige them to make disclosure not required by the rules.[2774]

Any neutral bystander would be bound to view as unfair a trial in which one of the parties to a conflict insisted upon controlling the cross examination of its citizen who commanded one force in the trial of an accused from the other, thus depriving them of their full right to confront the witnesses against them.[2775]

Cross examination of Rule 70 witness would be limited to the subjects set forth in his interview where the nature of the interview provided sufficient basis for the defence to conduct a thorough cross examination of the witness on matters relevant to the case.[2776]

Restriction on cross examination that precluded cross examination of Rule 70 witness on matters outside of his Rule 65 *ter* summary and issues of credibility did not

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[2771] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007) at para. 26; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion for and Notifications of Protective Measures* (26 May 2009) at para. 26

[2772] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR73.1, *Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 ter Witness List* (20 April 2007) at para. 17

[2773] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR73.1, *Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 ter Witness List* (20 April 2007) at para. 20

[2774] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007) at para. 27

[2775] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007) at para. 30

[2776] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Application for Rule 70 Conditions for Testimony of Witness W-46* (12 March 2007) at pp. 3-4

prejudice the defence because the scope of cross examination was already broad, and the defence could call the witness in its own case if necessary.[2777]

Restriction requiring advance notice to the provider, and hence, the witness, or cross-examination outside of the scope of the direct examination was not warranted since it would remove any advantage because the witness would be prepared for it.[2778]

work product

Rule 70(A) does not prohibit the Trial Chamber from ordering the prosecution to produce documents to the Trial Chamber for *in camera* review, particularly where the accused's right to counsel is implicated. Prosecution ordered to produce materials worked on by former OTP member now serving as defence counsel.[2779]

Once a question is put to a witness and is thus part of a witness statement, it is distinguished from internal documents prepared by a party under Rule 70(A) and is not imbued with the protection of that Rule.[2780]

Rule 71—depositions

(A) Where it is in the interests of justice to do so, a Trial Chamber may order, proprio motu or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence. The Trial Chamber shall appoint a Presiding Officer for that purpose.
(B) The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition.
(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.
(D) Deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of a video-conference.
(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross

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[2777] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Second Renewed Motion for Leave to Amend its Rule 65 ter List to Add Michael Phillips and Shaun Byrnes* (12 March 2007) at paras. 31-34
[2778] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR73.1, *Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 ter Witness List* (20 April 2007) at para. 22
[2779] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Motion for Clarification, Reconsideration, and Certification to Appeal* (18 September 2007)
[2780] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Haradinaj Motion for Disclosure of Exculpatory Materials in Relation to Witness 81* (18 November 2011) at para. 26

examination and objections raised by either party for decision by the Trial Chamber. The Presiding Officer shall transmit the record to the Trial Chamber.

It is in the context of a particular trial that the Chamber hearing that particular case is empowered to issue orders for the taking of depositions pursuant to Rule 71. Therefore, the Trial Chamber cannot issue a general order for a deposition to be taken from an accused who has pled guilty which does not relate to specific trial proceedings.[2781]

Two Judges of the Trial Chamber were without power to sit as presiding judges for a deposition when the third judge became unavailable due to illness. Given the preference for hearing oral testimony so that all three judges can observe the demeanour and put questions to the witness, the ruling to proceed by way of deposition was contrary to the Rules, and absent the consent of the accused, was error requiring the witnesses to be recalled.[2782]

Prosecution motion for deposition of ill witness denied where it was not shown witness could not testify at later time by video link, and the medical condition of the accused prevented him from giving instructions to his counsel.[2783]

Rule 72—Preliminary Motions

(A) Preliminary motions, being motions which
(i) challenge jurisdiction;
(ii) allege defects in the form of the indictment;
(iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or
(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)
shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. Subject to any order made by a Judge or the Trial Chamber, where permanent counsel has not yet been assigned to or retained by the accused, or where the accused has not yet elected in writing to conduct his or her defence in accordance with Rule 45 (F), the thirty-day time-limit under this Rule shall not run, notwithstanding the disclosure to the defence of the material and statements referred to in Rule 66 (A)(i), until permanent counsel has been assigned to the accused.

[2781] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 78
[2782] *Prosecutor v Kupreskic et al*, No. IT-96-16-AR73.3, *Decision on Appeal by Dragan Papic Against Ruling to Proceed by Deposition* (15 July 1999)
[2783] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution Motion for Deposition Pursuant to Rule 71* (26 May 2008)

(B) Decisions on preliminary motions are without interlocutory appeal save
(i) in the case of motions challenging jurisdiction;
(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such 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.
(C) Appeals under paragraph (B)(i) shall be filed within fifteen days and requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.
If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.
(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:
(i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
(ii) the territories indicated in Articles 1, 8 and 9 of the Statute;
(iii) the period indicated in Articles 1, 8 and 9 of the Statute;
(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

armed conflict

The Trial Chamber did not err in concluding that the decision as to whether a state of armed conflict existed is one of fact to be determined at trial, rather than by preliminary motion challenging jurisdiction.[2784]

appeals of right—jurisdiction issues

A Trial Chamber's power under Rule 54 to decide an issue of jurisdiction that should have been brought under Rule 72(A) within a prescribed period is questionable. However, any appeal from such a decision would be subject to certification rather than an appeal of right.[2785]

[2784] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR72.1, *Decision on Interlocutory Appeal on Jurisdiction* (22 July 2005) at para. 13
[2785] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-AR72.2, *Decision on Ljube Boskoski's Appeal on Jurisdiction* (9 January 2007) at para. 3

An issue whether a charge in an indictment falls within a statutory grant of jurisdiction meets the requirements of Rule 72(D) for an interlocutory appeal of right.[2786]

A claim that the supporting material fails to establish a *prima facie* case is not a matter of jurisdiction subject to an interlocutory appeal as of right.[2787]

A claim of illegal arrest is not a matter of jurisdiction within the meaning of Rule 72(D).[2788]

A claim that a commander could not be held responsible as a superior for the acts of his subordinates during an armed conflict which was not international in character is a jurisdictional one within Article 72(D) even though the internal character of the conflict was expressed in the alternative.[2789]

A claim of illegal establishment of the Tribunal is not a matter of jurisdiction within the meaning of Rule 72(D) and may therefore be brought at any time pursuant to Rule 73.[2790]

A claim that the accused is not a person subject to the jurisdiction of the Tribunal under Article 1 did not raise an issue of jurisdiction since it relied upon external factors, in this case, an agreement, as its basis.[2791]

The only issue to be determined when deciding the admissibility of an interlocutory appeal is whether the challenge goes to the jurisdiction of the Tribunal. Whether the challenge is meritorious is not relevant at the admissibility stage.[2792]

The issue of whether a perpetrator must be a member of the joint criminal enterprise is not a matter of jurisdiction, but a matter to be determined at trial.[2793]

[2786] *Prosecutor v Seselj*, No. IT-03-67-AR72.1, *Decision on Validity of Appeal of Vojislav Seselj Challenging Jurisdiction and Form of Indictment* (29 July 2004)

[2787] *Prosecutor v Delic*, No. IT-04-83-AR72, *Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal* (8 December 2005) at para. 11; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Motions Regarding Defects in the Form of the Second Amended Indictment* (12 April 2006) at para. 24

[2788] *Prosecutor v Nikolic*, No. IT-94-2-AR72, *Decision on Notice of Appeal* (9 January 2003); *Prosecutor v Tolimir*, No. IT-05-88-AR72.2, *Decision on Zdravko Tolimir's Appeal Against Decision on Submissions of the Accused Concerning Legality of Arrest* (12 March 2009)

[2789] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR72, *Decision Pursuant to Rule 72(E) as to Validity of Appeal* (21 February 2003) at para. 12

[2790] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Nebojsa Pavkovic's Motion for Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the former Yugoslavia* (21 February 2008) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion Challenging the Legal Validity and Legitimacy of the Tribunal* (7 December 2009) at para.10

[2791] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 43

[2792] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR72, *Decision Pursuant to Rule 72(E) as to Validity of Appeal* (21 February 2003) at para. 13

A jurisdictional challenge to the indirect co-perpetration form of liability could not be heard on direct appeal where it was not filed within the time limits of Rule 72.[2794]

Challenges to actus reus and mens rea for genocide did not raise jurisdictional issues to permit a direct appeal.[2795]

Challenge to whether omissions can be the basis of liability under Article 7(1) was not an issue of jurisdiction.[2796]

Challenge to whether superior liability extended to failure to prevent or punish a subordinate's failure to prevent or punish did not raise an issue of jurisdiction.[2797]

Challenge to whether *actus reus* of deportation or forcible transfer required that the crimes be committed in occupied territory was not jurisdictional under Rule 72.[2798]

Challenge to whether a victim of inhumane acts or cruel treatment under Articles 3 and 5 must be in the hands of a party to the conflict did not raise an issue of jurisdiction under Rule 72.[2799]

Challenge to whether a state of armed conflict existed at the time of some of the acts alleged in the indictment did not raise an issue of jurisdiction under Rule 72.[2800]

Challenge to foreseeability element of JCE was not an issue of jurisdiction under Rule 72.[2801]

[2793] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Ojdanic Motion Challenging Jurisdiction: Indirect Co-Perpetration* (22 March 2006) at para. 23; *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules* (31 May 2006) at para. 21

[2794] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.2, *Decision on Petkovic Appeal Against Decision on Defence Motion to Strike the Amended Indictment* (4 June 2007)

[2795] *Prosecutor v Tolimir*, No. IT-05-88/2-AR72.1, *Decision on Tolimir's Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal* (25 February 2009)

[2796] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motions Challenging Jurisdiction (Omission Liability, JCE III Special Intent, and Superior Responsibility)* (25 June 2009) at para. 37

[2797] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motions Challenging Jurisdiction (Omission Liability, JCE III Special Intent, and Superior Responsibility)* (25 June 2009) at para. 37

[2798] *Prosecutor v Gotovina et al*, No. IT-06-90-AR72.1, *Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction* (6 June 2007) at para. 15

[2799] *Prosecutor v Gotovina et al*, No. IT-06-90-AR72.1, *Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction* (6 June 2007) at para. 18

[2800] *Prosecutor v Gotovina et al*, No. IT-06-90-AR72.1, *Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction* (6 June 2007) at para. 21

[2801] *Prosecutor v Gotovina et al*, No. IT-06-90-AR72.1, *Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction* (6 June 2007) at para. 24; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motions Challenging Jurisdiction (Omission Liability, JCE III Special Intent, and Superior Responsibility)* (25 June 2009) at para. 37

The Appeals Chamber now focuses on whether the crime charged is envisioned by the statute and whether the mode of liability upholds the principle of individual criminal responsibility. The contours and elements of modes of liability are considered an issue of law which can properly be advanced and argued during the course of the trial.[2802]

An order granting disclosure by SFOR of material related to the arrest of the accused, ancillary to a motion to dismiss the indictment, cannot be appealed as of right under Rule 72.[2803]

deferring decision

Trial Chamber erred in deferring decision on jurisdiction over forms of liability such as indirect co-perpetration and aiding and abetting JCE until final judgement.[2804]

timeliness

Failure to challenge the form of the indictment until the trial had commenced warranted dismissal of the motion, as good cause was not shown by items in the pre-trial brief or opening statement, as such items cannot operate to make an indictment defective.[2805]

Motion challenging JCE was an attack on jurisdiction that would not be entertained after the time for filing preliminary motions had expired.[2806]

Rule 73—other motions

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.
(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such 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

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[2802] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Radovan Karadzic's Motions Challenging Jurisdiction (Omission Liability, JCE III Special Intent, and Superior Responsibility)* (25 June 2009) at para. 36
[2803] *Prosecutor v Simic et al*, No. IT-95-9-AR72.2, *Decision on Interlocutory Appeal Filed by Prosecutor on 26 October 2000 from Trial Chamber Decision of 18 October 2000* (4 December 2000)
[2804] *Prosecutor v Prlic et al*, No. IT-04-74-AR72.3, *Decision on Petkovic's Appeal on Jurisdiction* (23 April 2008)
[2805] *Prosecutor v Stanisic & Simatovic*, No.IT-03-69-T, *Decision on Stanisic Defence Motion on the form of the Indictment* (29 March 2010) at para. 10
[2806] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Jadranko Prlic Motion Against the Application of Joint Criminal Enterprise and in Favour of the Application of Joint Co-Perpetration* (17 May 2010)

of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
(C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.
If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.
(D) Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/ or costs thereof.

certification to appeal

in general

Certification will not be granted unless the Rule 73(B) criteria are met—there is no inherent power to grant certification for important issues.[2807]

It is not the practice of the Appeals Chamber to hear oral argument on interlocutory appeals. To depart from this practice, it must be demonstrated that there are reasons why matters cannot effectively be addressed in writing.[2808]

Decision on motions for access for confidential material in other cases are subject to certification regardless of whether the case of the party seeking the material is already before the Appeals Chamber.[2809]

Co-accused do not have standing to join an interlocutory appeal unless they too have been granted certification to appeal.[2810]

A witness has no right to certification to appeal a decision denying her challenge to a subpoena.[2811]

[2807] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Request for Certification of Rule 73 bis Issue for Appeal* (30 August 2006) at para. 5
[2808] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 4
[2809] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision on Nasser Oric's Request for Certification* (17 January 2007)
[2810] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-AR73.1, *Decision on Idriz Bala and Lahi Brahimaj's Requests for Standing before the Appeals Chamber…*(4 March 2011)
[2811] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Purported Motion for Certification to Appeal Trial Chamber Decision Concerning Subpoenaed Witness* (14 September 2007)

A witness has the right to certification to appeal a decision denying his challenge to a subpoena.[2812]

Application for certification to appeal filed outside 7-day time limit was treated as if validly filed when the interests of justice suggested that the decision should be subject to appeal.[2813]

No good cause was shown to extend time for application for certification to appeal where defence team didn't see the e-mail in their inbox setting forth reasons for impugned decision.[2814]

denied

Certification denied to appeal on issues of imposition of assigned counsel[2815], leave to amend the indictment[2816], challenges to the form of the indictment,[2817] challenges

[2812] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Tolimir Request for Certification to Appeal Subpoena Decision* (4 June 2013) at para. 7
[2813] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts* (27 June 2012) at para. 14
[2814] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Defence Motion for Variation of Time Limit for Motion for Certification to Appeal Decision on Protective Measures* (11 December 2014) at para. 10
[2815] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Decision on Appointment of Counsel and Order on Further Trial Proceedings* (23 November 2009)
[2816] *Prosecutor v Mejakic et al*, No. IT-02-65-PT, *Decision on Knezevic's Motion for Certification of Interlocutory Appeal of Decision on Prosecution's Motion to Amend Consolidated Indictment Schedules A through F, the Rule 65 ter Witness Summaries, and the Pretrial Brief Incident Summaries* (25 January 2005); *Prosecutor v Halilovic*, No. 01-48-T, *Decision on Prosecution Request for Certification for Interlocutory Appeal of Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment* (12 January 2005); *Prosecutor v Milutinovic et al*, No. IT-05-97-PT, *Decision on Prosecution's Request for Certification for Appeal of Decision on Vladimir Lazarevic's and Sreten Lukic's Preliminary Motions on Form of the Indictment* (19 August 2005); *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Request of the Accused Markica Rebic for Certification of Appeal to Challenge Decision on Amendment of the Indictment* (25 October 2005); *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution Motion to Request Certification of Appeal* (25 October 2005); *Prosecutor v Stanisic & Simatovic*, No. ICTR-03-69-PT, *Decision on Defence Requests for Certification to Appeal Decision Granting Prosecution Leave to Amend the Amended Indictment* (8 February 2006); *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Request for Certification to Appeal Trial Chamber Decision Denying Prosecution Application for Leave to Amend* (14 July 2006) ; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Amend the Second Amended Indictment* (19 August 2008); *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Tolimir's Motion for Leave to File an Appeal Against Decision Regarding Second Amended Indictment* (22 April 2009) *; Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Defence Motions for Certification* (22 April 2009)
[2817] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motions Alleging Defects in Form of Indictment* (19 September 2005); *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Milivoj Petkovic's Application for Certification to Appeal Decision on Motion for Leave to Amend the Indictment and Form of Proposed Indictment* (3 November 2005); *Prosecutor v Jovic*, No. IT-95-14-R77, *Decision on Defence Application for Certification on Interlocutory Appeal* (3 February 2006); *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-PT, *Decision*

to mandate of amicus curiae prosecuting contempt,[2818] requiring explanation from judge for association which might give rise to bias,[2819] order precluding prosecutor from commenting on cooperation of Croatia[2820], order to investigate for contempt,[2821] motion concerning allegations in Pre-Trial Brief[2822], allegations in indictment concerning joint criminal enterprise[2823], responsibility for omissions[2824], dismissal of indictment where accused is not mentally competent[2825], fitness of the accused to stand trial[2826], joinder and severance of accused[2827], translation issues,[2828] protective measures for prosecution witnesses[2829], transporting defence witness for interview by self-represented accused[2830],

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on Motion for Certification (17 November 2006); *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Tolimir's Request for Leave to File an Interlocutory Appeal* (19 February 2009); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Reconsideration of, or in the Alternative, Certification to Appeal the Decision on Defence Motion Alleging Defects in the Form of the Indictment* (23 February 2017)

[2818] *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Motion for Certification to Appeal Trial Chamber's Decision on Defence Motion for Reconsideration Dated 14 January 2009* (13 May 2009); *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Motion for Certification to Appeal Trial Chamber's Decision re Stay of Proceedings for Abuse of Process* (13 May 2009)

[2819] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prlic Defence Request for Certification to Appeal the Decision of 26 July 2010* (24 August 2010)

[2820] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Gotovina Request for Certification to Appeal the Trial Chamber's Decision on Motion for Non-Disclosure Order Directed to Prosecutor Serge Brammertz* (20 January 2010)

[2821] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution's Request for Certification to Appeal the Decision of 29 June 2010…*(3 December 2010)

[2822] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ante Gotovina's Request for Certification to Appeal the Decision on Rule 73 Motion to Strike Parts of Pre-Trial Brief* (10 April 2008); *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Motion for Certification to Appeal Decision on Accused's Pre-Trial Brief Requests* (19 January 2010)

[2823] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Request for Certification to Appeal Decision on Motions Challenging the Indictment Pursuant to Rule 72* (26 June 2006)

[2824] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98 bis Decision* (14 June 2007)

[2825] *Prosecutor v Kovacevic*, No. IT-01-42/2-I, *Decision on Defence Request for Certification for Interlocutory Appeal of Decision on Defence Motion to Dismiss the Indictment from 1 September 2006* (27 September 2006)

[2826] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Request for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion for Revocation of Jovica Stanisic's Provisional Release and Re-assessment of his Health* (29 May 2009); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion to Reconsider Decision on Urgent Defence Motions of 10 November 2017 or…Motion for Certification to Appeal* (21 November 2017) at para. 14

[2827] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Valentin Coric's Application for Certification to Appeal Decision on Motions for Separate Trials and Severance of Counts* (22 July 2005); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on Stojan Zupljanin's Motion for Certification* (13 February 2009)

[2828] *Prosecutor v Popovic et al*, No. IT-05-88-PT, *Decision on Joint Defence Motion Seeking Certification of the Trial Chamber's Decision on the Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with BCS Transcripts of Proceedings in Two Past Cases before the International Tribunal* (23 March 2006)

[2829] *Prosecutor v Seselj*, No. IT-02-67-PT, *Decision on Prosecution's Request for Certification to Appeal* (21 June 2006); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution Request for Certification on Ruling on Proposed Exhibits P438 and P473* (17 October 2006) ; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision on Protective Measures of 13 September 2007* (7 November 2007); *Prosecutor v*

order to specify alibi details[2831], order to supplement defence pre-trial brief[2832], disclosure of witness statements[2833], remedy for disclosure violation[2834], denial of subpoena[2835], time for response to Rule 92 bis motions[2836], Rule 70 disclosure[2837], varying the witness list[2838], admissibility of documents[2839], admissibility of intercepted conversations[2840],

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Karadzic, No. IT-95-5/18-T, *Reasons for Trial Chamber Decision on Defence Request for Certification to Appeal : Modification of Protective Measures for KDZ088* (14 September 2010)

[2830] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Motion for Interview of Defence Witness* (22 April 2009)

[2831] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-PT, *Decision on Sredoje Lukic's Request for Reconsideration, or in the Alternative, Certification to File an Interlocutory Appeal on the Trial Chamber's Decision of 15 May 2008* (26 May 2008)

[2832] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision to Deny the Joint Defence Motion for Certification to Appeal the Order to Supplement the Pre-Trial Briefs* (23 July 2009)

[2833] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Defence Motion for Leave to Appeal Trial Chamber's Decision Regarding Witness Statements* (19 May 2009); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Defence Motion for Certification of the Decision on Joint Defence Motion Requesting Preclusion of Prosecution's New Witnesses and Exhibits* (16 September 2009)

[2834] *Prosecutor v Karadzic*, No. I-95-5/18-T, *Decision on Prosecution Request for Certification to Appeal Decision on Accused's Thirty Seventh to Forty Second Disclosure Violation Motions* (8 April 2011)

[2835] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Beara Motion for Reconsideration and Beara and Nikolic Joint Motion for Certification of the Decision Denying Motion for a Subpoena Duces Tecum Compelling Momir Nikolic to Disclose his Personal Notes* (10 January 2008); *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Defence Motion for Certification to Appeal Trial Chamber's Decision Regarding the Issuance of a Subpoena to Amicus Curiae Prosecutor* (19 May 2009); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Mladic Request for Certification to Appeal Subpoena Decision* (23 December 2013); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Urgent Motions for Reconsideration of Decision on Mladic Request for Certification to Appeal Subpoena Decision* (22 January 2014); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal the Third Defence Case Omnibus Decision in relation to Tabeau and Clark* (1 December 2016)

[2836] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Motion for Extension of Time: Rule 92bis and Response Schedule* (8 July 2009)

[2837] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Rule 70(B)* (12 February 2009)

[2838] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Joint Beara and Nikolic Request for Certification to Appeal the Trial Chamber's Decision Denying Reconsideration of Two Decisions Related to Witness PW-108* (11 June 2007); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Motion for Certification of Decision Adding Eighteen Witnesses to Prosecution Witness List and Admitting their Written Statements Pursuant to Rule 92 bis* (11 March 2008)

[2839] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Certification* (6 April 2005); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Lukic Motion for Reconsideration of Trial Chamber's Decision on Motion for Admission of Documents from the Bar Table* (2 July 2008) at para. 43; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Sredoje Lukic Request for Certification to Appeal Decision of 13 November 2008* (1 December 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration, or, in the Alternative, Certification to Appeal the Order to Admit Evidence Regarding Witness 4D-AB* (3 February 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Petkovic Defence Request for Reconsideration, or, in the Alternative, Certification to Appeal the Order to Admit Evidence Regarding Witness Bozo Pavlovic* (17 February 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request for Certification to Appeal Against the Decision on Prlic Defence Motion to Reconsider the Rejection of a Number of Videos* (21 January 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Motion of the Petkovic Defence for Reconsideration, or, in the Alternative, Certification to Appeal the Order to Admit Evidence Regarding Witness Dragan Curcic* (21 January 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Request of the Stojic Defence for Reconsideration, or in the Alternative, for Certification to Appeal the Order Admitting Evidence Relating to the Testimony of Slobodan Praljak* (29 March 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision*

admission of *amicus curiae* report[2841], access to confidential material in a related case[2842], public access to exhibits[2843], admission of prior statements of a witness[2844], admission of evidence pursuant to Rule 92 *bis*,[2845] and 92 *quater*,[2846] admission of exhibits without

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on the Request of the Stojic Defence for Reconsideration, or in the Alternative, for Certification to Appeal the Order Admitting Evidence Relating to Witness Radmillo Jasak (21 April 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Praljak Defence Request for Clarification and or Reconsideration, or in the Alternative for Certification to Appeal the Order on the Admission of Evidence Relating to the Testimony of Slobodan Praljak* (13 May 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request of Prlic Defence for Certification to Appeal the Order Admitting Evidence of Zvonko Vidovic* (3 June 2010); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Request for Certification to Appeal the Trial Chamber's Guidance on Admission into Evidence on Documents Tendered by the Prosecution During the Defence Case…*(19 October 2011); *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Prosecution Motion for Reconsideration of Majority Decision Denying Admission of Document…*(27 February 2012); *Prosecutor v Haradinaj*, No. IT-04-84*bis*-T, *Decision on Prosecution Motion for Certification of Decision on Prosecution Motion to Admit Evidence from the Bar Table…*(15 March 2012); *Prosecutor v Stanislav & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Request for Certification to Appeal the Trial Chamber's Decision on Defence Motion for Exclusion of Specified Exhibits and Admission of Various Other Documents* (3 October 2012); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Reconsideration and Certification to Appeal Decision on Foca Municipality Bar Table Motion* (31 January 2014); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence's Motion for Partial Reconsideration or Certification to Appeal the Decision on Defence's Second Bar Table Motion* (6 July 2016); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal the Second Defence Case Omnibus Decision as to Exhibit P7782* (1 August 2016); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence's Motion for Certification to Appeal the Fifth Bar Table Decision…*(1 August 2016); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence's Motion for Certification to Appeal the Fifth Bar Table Decision…*(2 August 2016); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence's Motion for Certification to Appeal the Decision Denying the Admission into Evidence of the Documents…*(31 August 2016)

[2840] *Prosecutor v Stanisic & Zupljanin*, No. IT-06-91-T, *Decision Denying Defence Motion for Certification of the Decision Reconsidering in part and Providing Written Reasons for the Trial Chamber's Oral Decision of 26 March 2010* (16 December 2010); *Prosecution v Mladic*, No. 08-92-T, *Decision on Defence Motion for Certification to Appeal the Decision on Prosecution's Second Residual Bar Table Motion* (2 June 2014)

[2841] *Prosecutor v Seselj*, No. IT-02-67-T, *Decision on Prosecution Request for Certification to Appeal Decision of 22 December 2011* (25 January 2012)

[2842] *Prosecutor v Seselj*, No. IT-02-67-T, *Decision on Prosecution Motion for Certification to Appeal the Trial Chamber's Decision Denying Access to the Full Record of IT-03-67-R77.1* (27 February 2009)

[2843] *Prosecutor v Seselj*, No. IT-02-67-T, *Decision on Prosecution Motion for Certification to Appeal the Trial Chamber's Decision Regarding Public Access to Trial Exhibits* (6 November 2008)

[2844] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Motion for Certification to Appeal Decision Admitting PW-104 Interview Statements* (25 April 2007); *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Motion for Certification to Appeal Trial Chamber's Decision Concerning Admission of Prior Inconsistent Statements* (21 June 2013)

[2845] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 bis* (19 October 2006); *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008* (21 May 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Certification to Appeal the Order of 20 May 2010 (Franjo Lozic)* (22 June 2010); *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Defence Request for Certification to Appeal* (13 January 2012); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal Decision on Forty-Fifth Motion to Admit Evidence pursuant to Rule 92 bis* (30 June 2015)

[2846] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Rule 92 quater (Witness KDZ198)* (31 August 2009); *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on the Accused's Request for Leave to Appeal the Decision on Prosecution's Motion for*

confrontation[2847], admission of evidence of discussions between witness and defence counsel,[2848] admission of evidence of discussion between client and defence counsel,[2849] order for prosecution to produce internal documents[2850], the ability of an accused to retain documents after their trial[2851], taking of judicial notice,[2852] admission and exclusion of expert witness[2853], limitation on time for cross examination[2854], scope of cross examination[2855], exclusion of statement of accused[2856], exclusion of certain incidents

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Admission of Evidence Pursuant to Rule 92 quarter (18 January 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Reconsideration, Alternatively for Certification, of the Decision Concerning the Evidence of Miroslav Deronjic* (20 April 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Reconsideration and/or Certification, on Parts of the Decision on Prosecution's Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 quater* (3 June 2010); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Request for Certification to Appeal (Todorovic)* (31 January 2011); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Request for Certification to Appeal (Babic)* (17 February 2011); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Certification to Appeal Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazic Pursuant to Rule 92 quater* (3 February 2012)

[2847] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ante Gotovina Defence Request for Certification to Appeal the Trial Chamber Decision of 9 November 2009* (20 January 2010)

[2848] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic Request for Certification to Appeal Oral Decision on PW-165 and Request for Variation of Time Limits* (12 July 2007)

[2849] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Request for Certification to Appeal Oral Decision of 12 September 2013* (21 October 2013)

[2850] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Motion for Clarification, Reconsideration, and Certification to Appeal* (18 September 2007)

[2851] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Accused's Motion for Certification to Appeal the Oral Decision of 20 March 2008* (10 April 2008)

[2852] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Motion for Certification to Appeal Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (20 October 2006); *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Defence Motion for Certification* (16 January 2008); *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Request for Reconsideration or of Certification to Appeal the Decision on Prosecution's Motion for Notice of Adjudicated Facts* (31 October 2008) at para. 16; *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Request for Certification of Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (23 February 2010); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying the Prosecution's Request for Certification to Appeal the Decision Granting in Part Prosecution's Motions for Adjudicated Facts Pursuant to Rule 94(B)*(14 July 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Certification to Appeal Decision on Judicial Notice of Authenticity of Intercepts* (17 February 2011)

[2853] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Request for Certification of Interlocutory Appeal of Decision on Admission of Witness Philip Coo's Expert Report* (30 August 2006); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Miletic's Request for Certification of the Decision on Defence Objections to the Admission of the Expert Statement of General Rupert Smith* (15 April 2008); *Prosecutor v Djordjevic*, No. IT-05-87-T, *Decision on Vlastimir Djordjevic's Motion for Reconsideration of Certification to Appeal Regarding Proposed Expert Mr. Aleksander Pavic* (23 April 2010); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal Oral Decision Admitting Witness Van Der Weijden's Expert Report* (13 September 2013); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal the Decision on the Admission of the Evidence of Milan Tutoric* (15 July 2015)

[2854] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Application of the Petkovic Defence for Certification to Appeal the Decision Denying Additional Time for Cross-Examination* (6 December 2007)

[2855] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Borovcanin's Request for Certification of Decision on Borovcanin's Motion for Admission of Written Evidence Pursuant to Rule 92 bis* (21 October 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak and Petkovic Defence Request for*

pursuant to Rule 73 *bis* (D)[2857], allowing the prosecution leave to add exhibits to its exhibit list[2858] delay of trial[2859], denial of postponement of testimony[2860], denial of leave to allow the prosecution case to remain open[2861], denial of motion for judgement of acquittal[2862], protective measures for defence witness[2863], admission of defence exhibits [2864], representation by counsel rejected due to conflict of interest[2865], appointment of co-counsel[2866], scheduling of the defence case[2867], denying the prosecution voir dire to challenge the admission of defence evidence[2868], denial of protective measures for

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Certification to Appeal the Decision on Scope of Cross Examination Under Rule 90(H) of the Rules (9 January 2009); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Request for Certification to Appeal the Trial Chamber's Guidance on Rule 90(H)(ii) and Decision on Stanisic Defence Submissions on Rule 90(H)(ii)* (13 December 2011); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Request for Certification to Appeal the Trial Chamber's in-court Decisions on Stanisic Defence Submissions Regarding Rule 90(H)(ii)* (14 June 2012)

[2856] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Prosecution Request for Certification for Interlocutory Appeal of Decision on Motion for Exclusion of Statement of Accused* (25 July 2005)

[2857] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Request for Certification of Rule 73 bis Issue for Appeal* (30 August 2006)

[2858] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Certification* (30 March 2005); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Request for Certification to Appeal Decision to Grant Leave to Amend Prosecution's Rule 65 ter Witness and Exhibit Lists* (17 January 2007); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying Prosecution Motion Requesting Certification to Appeal Decision of 14 April 2010 (Amendment of Exhibit List)* (18 June 2010)

[2859] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Defence Request for Certification of An Interlocutory Appeal on Second Decision Denying Motion for Delay of Trial* (12 May 2006); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-PT, *Decision on the Motion for Mico Stanisic for Certification to Appeal the Decision Denying the Motion to Vary Trial Date and on Joint Motion for Postponement of the Start of the Trial* (14 September 2009)

[2860] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Reasons for Oral Decision Denying Certification of the Oral Decision Concerning the Postponement of the Testimony of Witness 128* (9 July 2007)

[2861] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Request for Certification to Appeal the Trial Chamber's Decision Concerning Shefqet Kabashi* (5 December 2007)

[2862] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motion for Certification of Rule 98 bis Decision* (15 April 2008)

[2863] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic's Motion for Certification to Appeal the Trial Chamber's Decision Denying the Protective Measures Requested for Defence Witness 3DW5* (9 October 2008)

[2864] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Certification Regarding Evidence of Defence Witness Barry Lituchy* (17 May 2005); *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Defence Request for Certification of Oral Decision of 23 July 2007*(21 August 2007); *Prosecutor v Prlic et al*, No. IT 04-74-T, *Decision on Petkovic Defence Motion for Reconsideration of or Certification to Appeal Two Orders Dated 1 September 2008* (1 October 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration or for Certification to Appeal the Order of 14 October 2008* (12 November 2008)

[2865] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Defence Motion Requesting Certification of Trial Chamber Decision and Request for an Interim Measure* (2 June 2005)

[2866] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Defence Motion for Certification* (14 June 2007)

[2867] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Defence Application for Certification of Appeal Pursuant to Rule 73(B) and Defence Motion for Stay of Proceedings* (23 June 2006); *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification to Appeal Against Trial Chamber's Decision of 23 May 2006* (2 June 2006)

[2868] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding* (20 June 2005)

defence witness[2869], adequacies of defence witness summaries[2870], allowing prosecution interviews of defence witnesses[2871], closing the defence case,[2872] reopening of prosecution case,[2873] admission of prosecution documents after the defence had rested[2874], calling defence evidence for sentencing[2875], admission of rebuttal evidence[2876], admission of rejoinder evidence[2877], reopening defence case,[2878] extension of time for final brief[2879], challenge to conditions of detention,[2880] request for status conference,[2881] standard for reconsideration of *ex parte* decisions,[2882] denial of mistrial.[2883]

[2869] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Urgent Defence Request for Certification for Appeal of the Trial Chamber's Confidential Decision on Second Defence Motion for Protective Measures for Witness D002* (28 September 2005)

[2870] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on the Defence Request for Leave to Appeal the Confidential Decision on the Rule 65 ter Summaries* (5 February 2010)

[2871] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision on Defence Motion for Certification* (21 September 2006)

[2872] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Reconsideration of, or Alternatively, Certification to Appeal the Decision on the Closure of the Defence Case* (26 September 2016)

[2873] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution's Request for Certification to Appeal Under Rule 73(B)* (18 January 2006); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Prosecution's Second Motion to Reopen its Case* (3 June 2009); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic Request for Certification to Appeal the Decision on the Prosecution's Second Motion to Reopen its Case* (3 June 2009); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Coric Defence Request for Certification to Appeal the Decision on Reopening the Prosecution Case* (27 October 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Petkovic Defence Request for Certification to Appeal the Decision on Reopening the Prosecution Case* (1 November 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prlic Defence Request for Certification to Appeal the Decision on Reopening the Prosecution Case…* (1 November 2010); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Praljak Defence Request for Certification to Appeal the Decision of 23 November 2010* (7 December 2010)

[2874] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Defence Request for Certification to Appeal Trial Chamber Decision of 9 May 2008* (21 May 2008); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal Defence Bar Table Submissions Decision* (17 May 2016)

[2875] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Reasons for Denying Defence Application for Certification to Appeal* (28 August 2006); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal Decision on Extension of Time to Tender Sentence-Related Information* (11 November 2006)

[2876] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses* (9 April 2009); *Prosecutor v Stanisic & Zupljanin*, No. IT-05-92-T, *Decision Denying the Prosecution Motion for Reconsideration or Certification of Decision Denying Prosecution's Fifth Motion Seeking Leave to Present Evidence in Rebuttal…*(11 April 2012); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Request for Certification to Appeal Three Trial Chamber Decisions on Prosecution Motions for Admission of Rebuttal Evidence* (6 December 2012)

[2877] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Request for Certification to Appeal Decision on Motion for Admission into Evidence of Rejoinder Material* (5 February 2013)

[2878] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Denial of Third Motion to Re-Open Defence Case* (15 January 2015)

[2879] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Gvero Motion Seeking Certification to Appeal the Decision on the Extension of Time for Filing the Final Trial Brief* (15 July 2009)

[2880] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on the Accused's Request for Leave to Appeal the Oral Ruling of the Chamber of 22 October 2009* (8 December 2009)

granted

Certification granted to appeal issue of alleged immunity agreement[2884], right to impartial Tribunal,[2885] fitness of accused to stand trial[2886], necessity of translation of pleadings into language of self-represented accused[2887], remuneration by accused of costs of his defence,[2888] adequacy of remuneration of defence team members[2889], request for order halting investigation of defence team members[2890], Rule 68 disclosure issues,[2891] denial of additional time for defence to prepare[2892], four-day per week trial schedule[2893], time limitations[2894], limitations on number of pages translated for the defence[2895],

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[2881] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Decision on Request for Status Conference* (24 June 2014)
[2882] *Prosecutor v Karadzic*, No. IT-95/5-18-T, *Decision on the Accused's Application for Certification to Appeal Decision on Reconsideration of Protective Measures* (16 August 2011)
[2883] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal Decision on Motion for a Stay of Proceedings or a Mistrial* (21 October 2016)
[2884] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Holbrooke Agreement* (17 July 2009)
[2885] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal Decision on Motion for a Fair Trial or Mistrial* (27 September 2016)
[2886] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Defence Motion Requesting Certification for Leave to Appeal* (16 April 2008); *Prosecutor v Hadzic* No. IT-04-75-T, *Decision on Prosecution Request for Certification to Appeal Consolidated Decision on the Continuation of Proceedings* (24 November 2015); *Prosecutor v Hadzic* No. IT-04-75-T, *Decision on Requests for Certification to Appeal Decision on Prosecution's Motion for Formal Termination of the Proceedings* (6 July 2016)
[2887] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Motion for Certification to Appeal the 11 December 2007 Decision* (15 January 2007); *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Languages* (22 April 2009)
[2888] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Chamber's Decision on Indigence* (10 April 2015)
[2889] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Adequate Facilities* (13 February 2009)
[2890] *Prosecution v Gotovina et al*, No. IT-06-90-T, *Decision on Defence Request for Certification to Appeal the Trial Chamber's Decision of 12 March 2010* (21 April 2010)
[2891] *Prosecutor v Mladic*, IT No. 09-92-T, *Decision on the Defence Motion for Certification to Appeal the Decision on Submissions Relative to the Proposed "EDS" Method of Disclosure* (13 August 2012)
[2892] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification on Interlocutory Appeal* (15 March 2005); *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Application for Certification to Appeal Decision on Commencement of Trial* (18 September 2009); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Request for Certification to Appeal Against the Scheduling Order…*(26 April 2011); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion to Appeal the Decision on Defence Request to Adopt Modality for Prosecution Re-Opening* (17 April 2015)
[2893] *Prosecutor v Karadzic*, No. IT-05-95-5/18-T, *Decision on Accused's Application for Certification to Appeal the Trial Chamber's Order on Trial Schedule and for Stay* (4 June 2010); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Request for Certification to Appeal the Trial Chamber's Decision Partially Granting its Motion for Suspension of Proceedings* (28 November 2011)
[2894] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Defence Request Filed Jointly by the Six Accused for Certification of Interlocutory Appeal Against the Oral Decision of 8 May on Time Allocated for Cross Examination by the Defence* (29 May 2006); *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Request for Certification to Appeal Trial Chamber's Decision on Defence Filings* (4 July 2005); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Request of Certification of Appeal Concerning the Trial Chamber's*

impeachment of one's own witness[2896], restrictions on accused putting questions to witnesses[2897], judicial notice,[2898] admission of interview of the accused[2899], admission of witness statements and testimony[2900], refusal to admit Rule 92 *bis* statements[2901], conflict of interest of defence counsel[2902], denial of self-representation[2903], exclusion of testimony due to Rule 70 conditions[2904], prosecution requirement to rebut alibi in case-in-chief[2905], joinder of cases[2906], severance of an accused[2907], admission of testimony of

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Decision of 1 March 2007 (22 March 2007); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision Allocating Time to the Defence to Present its Case* (25 April 2008) at para. 46; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Petkovic Defence Motion for Certification to Appeal the Decision of 24 April 2008* (29 May 2008); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Decision on Time for Defence Case* (5 October 2012); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motions for Reconsideration and Certification to Appeal the Decision on Defence Motion Seeking Adjustment of the Trial Schedule* (22 August 2013)

[2895] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration or for Certification to Appeal the Order of 16 May 2008* (11 June 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request for Reconsideration or for Certification to Appeal the Order of 13 October 2008* (4 November 2008)

[2896] *Prosecutor v Popovic*, No. ICTR-05-88-T, *Decision on Certification and Clarification of the Trial Chamber's Oral Decision on Impeachment of a Party's Own Witness* (21 November 2007) at para. 18

[2897] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Certification to Appeal the Decision on the Mode of Interrogating Witnesses* (28 June 2007); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Request for Certification to Appeal* (23 July 2008)

[2898] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Defence Motions for Certification to Appeal the Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts* (27 June 2012)

[2899] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Certification* (30 June 2005); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request for Reconsideration and Certification to Appeal the Decision for Admission of the Statement of Jadranko Prlic* (8 October 2007); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Admissibility of the Borovcanin Interview and the Amendment of the Rule 65 ter Exhibit List* (25 October 2007) at para. 82

[2900] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic and Beara Motions for Certification of the Rule 92 Quarter Decision* (19 May 2008)

[2901] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Praljak Requests for Certification to Appeal the Decisions of 16 February and 17 March 2010* (1 April 2010)

[2902] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Request for Certification for Appeal of Decision of 25 May 2006 on Lead Counsel's Assignment of Mr. Orsat Miljenic as Pro Bono Co-Counsel for the Accused Petkovic* (23 June 2006); *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Request to File Certification of Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest…*(13 March 2007); *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Request to File Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (27 April 2007)

[2903] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Request to Certify an Appeal Against Decision on Assignment of Counsel* (29 August 2006); *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel* (5 December 2006); *Prosecution v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Application for Certification to Appeal the Trial Chamber's Decision on Motion to Vacate Appointment of Richard Harvey* (13 January 2010)

[2904] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65 ter List* (14 March 2007)

[2905] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Reconsideration of, or in the Alternative, Certification to Appeal Oral Decision of the Trial Chamber* (27 August 2008)

[2906] *Prosecutor v Popovic et al*, No. IT-02-57-PT, *Decision on Motion for Certification of Joinder Decision for Interlocutory Appeal* (6 October 2005); *Prosecutor v Gotovina et al*, No. IT-01-45-PT, *Decision on Defence Applications for Certification to Appeal Decision on Prosecution's Consolidated Motion to Amend the Indictment and for Joinder* (14 August 2006)

witness who subsequently died[2908], exclusion of exhibits[2909], bias of expert witnesses[2910], subpoena of witness with pending charges,[2911] validity of extension of appointment of judge[2912], motion for judgement of acquittal,[2913] consultation between accused and counsel during testimony[2914], reopening of prosecution case,[2915] adequate time for prosecution reply,[2916] defence recall of prosecution witnesses,[2917] allowing prosecution to specify additional victims during trial.[2918], introduction of prosecution exhibits during the defence case[2919], time for closing submissions,[2920] scope of retrial or remand.[2921]

[2907] *Prosecutor v Trbic*, No. IT-05-88/1-PT, *Décision on Requete de la Defense en Certification d'Appel Suite à la Décision de la Chambre Datée du 26 Juin 2006*(14 July 2006)
[2908] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Defence Application for Certification to Appeal Pursuant to Rule 73(B)* (20 June 2006)
[2909] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Requests for Certification to Appeal Two Decisions Filed by the Prlic Defence Dated 6 and 9 October 2008 Respectively* (6 November 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Certification to Appeal Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence* (16 July 2009)
[2910] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motions for Certification of Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler* (30 October 2007)
[2911] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Tolimir Request for Certification to Appeal Subpoena Decision* (4 June 2013)
[2912] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Application for Certification to Appeal Against Trial Chamber's Decision of 16 June 2006* (23 June 2006)
[2913] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision Under Rule 98 bis* (16 May 2014)
[2914] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order on the Mode of Examining an Accused Pursuant to Rule 85(C) of the Rules* (1 July 2008)
[2915] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic's Motion for Certification of Decision on the Motion to Reopen the Prosecution's Case* (27 May 2008); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Cermak and Markac Defence Requests for Certification to Appeal the Trial Chamber Decision of 21 April 2010 to Reopen the Prosecution Case* (10 May 2010)
[2916] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution Motion for Reconsideration or Certification to Appeal Concerning Ordonnance Relative à la Demande de l'Accusation de Suspendre le Délai de Dépôt de se Demande de Réplique* (6 July 2010)
[2917] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motion on Behalf of Milan Gvero Seeking Reconsideration and, in the Alternative, Certification* (26 June 2009)
[2918] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Joint Defence Request for Certification to Appeal the Trial Chamber's Decision of 9 October 2008* (11 November 2008); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Joint Defence Request for Certificate to Appeal the Second Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims* (19 March 2009)
[2919] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Joint Motion for Certification to Appeal the Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (9 January 2009)
[2920] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Decision on Defence Motion for Reconsideration of and Certification to Appeal Scheduling Order* (28 September 2016)
[2921] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-PT, *Decision on Application on Behalf of Ramush Haradinaj for Certification Pursuant to Rule 73(B)* (3 February 2011); *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-PT, *Decision on Idriz Balaj's Application Pursuant to Rule 73(B) for Certification to Appeal the Trial Chamber's Decision of 8 February 2010* (24 February 2011); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Application for Certification to Appeal Decision on Remand of Count One* (3 September 2013)

Certification to appeal should ordinarily be granted for issues relating to the fitness of an accused to stand trial unless the submissions are frivolous or manifestly without merit.[2922]

decisions

Rule 73 should be understood as imposing a duty on a chamber to render an order or decision on every validly filed motion, even if the motion is considered frivolous or an abuse of process. The Trial Chamber erred in not clearly deciding the 25 October 2007 Motion.[2923]

evidentiary hearing

Where, as a matter of law, the accused cannot succeed on a motion even if the facts upon which he relies are proven, it is not necessary to hold and evidentiary hearing.[2924]

Trial Chamber erred in dismissing motion as a matter of law, but not accepting the facts of the moving party as true. If a Trial Chamber dismisses an argument as a matter of law only, it must accept the party's factual allegations as true.[2925]

sanctions

Defence counsel sanctioned for frivolous Rule 115 motion on appeal.[2926]

Defence counsel sanctioned for abuse of process.[2927]

An order imposing sanctions under this section is not appealable as of right.[2928]

timing

Trial Chamber erred in deciding motion without giving accused opportunity to present evidence supporting his case. Since motions under Rule 73 can be made at any

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[2922] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 34
[2923] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1952
[2924] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Accused's Holbrooke Agreement Motion* (8 July 2009) at para. 46
[2925] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 27
[2926] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Dragomir Milosevic's Third Motion to Present Additional Evidence* (8 September 2009) at para. 17
[2927] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlic's Defence* (1 February 2010)
[2928] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.18, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Trial Chamber's Decision on Motion for Reconsideration of Decision of 21 January 2010 and Application of Rule 73(D) of the Rules to Prlic's Defence* (20 October 2010)

time, it should have either held an evidentiary hearing or directed the accused to present his evidence during the trial.[2929]

Rule 73 *bis*—pre trial conference

(A) Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.
(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(i), the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses.
(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(i), the Trial Chamber, after having heard the Prosecutor, shall determine
(i) the number of witnesses the Prosecutor may call; and
(ii) the time available to the Prosecutor for presenting evidence.
(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.
(E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 ter, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party.
(F) After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice.

The Trial Chamber did not err in directing that the disclosure material be provided for its review prior to commencement of the trial.[2930]

limiting incidents

The Trial Chamber has the power to specify certain incidents upon which evidence should not be led by the prosecution at trial if it believes that the remaining

[2929] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 30
[2930] *Prosecutor v Blagojevic et al*, No. IT-03-60-AR73, *Decision* (8 April 2003)

incidents alleged in the indictment will be reasonably representative of the crimes charged.[2931]

The application of Rule 73 *bis* (D) would be unworkable if the prosecution were allowed to lead evidence of crimes not included in the indictment.[2932]

Prosecution ordered not to present evidence of 16 separate sniping incidents under the Trial Chamber's power under Rule 73 *bis* (D).[2933]

Prosecution ordered only to present evidence on certain scheduled incidents. A prosecution case lasting 3 years is unreasonable. A reasonable time for the prosecution case is 14 months.[2934]

Prosecution granted additional hours to present its case where Chamber required some witnesses to be led *viva voce* instead of pursuant to Rule 92 *ter* as proposed by the prosecution.[2935]

Prosecution ordered to eliminate 10 of 28 incidents from proof at trial after finding that remaining 18 incidents would provide representative proof of the allegations in the indictment.[2936]

Rules 92 *ter and quarter* and Rule 73 *bis* (D) are complimentary and the use of the time saving mechanisms of Rule 92 does not preclude application of Rule 73 *bis* (D).[2937]

The Tribunal was administered to administer justice, not create a historical record. Argument that indictment should not be reduced for that reason rejected.[2938]

Where removal of counts or incidents may result in an indictment which is no longer reasonably representative of the prosecution's case as a whole and may affect the ability of the prosecution to present evidence on the scope of the alleged widespread and

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[2931] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Application of Rule 73 bis* (11 July 2006)
[2932] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Witness K82* (3 October 2006) at para. 18
[2933] *Prosecutor v Milosevic*, No. IT-98-29/1-PT, *Decision on Amendment of the Indictment and Application of Rule 73 bis (D)* (12 December 2006)
[2934] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Application of Rule 73 bis and Amendment of Indictment* (15 May 2007)
[2935] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Additional Time for Completion of its Case in Chief* (24 April 2013)
[2936] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision Pursuant to Rule 73 bis (D)* (4 February 2008)
[2937] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision Pursuant to Rule 73 bis (D)* (4 February 2008) at para. 15
[2938] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision Pursuant to Rule 73 bis (D)* (4 February 2008) at para. 21

systematic attack and joint criminal enterprise, the Trial Chamber declined to exercise its discretion under Rule 73 *bis* (D).[2939]

Where certain crimes had been removed from the indictment, the prosecution is still allowed to lead evidence of those crimes to establish a pattern of conduct relevant to the remaining allegations in the indictment. However, the accused cannot be convicted of the crimes which had been removed.[2940]

Evidence tending to show a pattern of sniping and shelling in Sarajevo was admissible despite Chamber's order that evidence of "unscheduled incidents" not be led.[2941]

Where prosecution never sought to vary order under Rule 73 *bis* (F) during the trial, the incidents stricken pursuant to Rule 73 *bis* (D) would be dismissed.[2942]

Incidents stricken pursuant to Rule 73 *bis* (D) adequately withdrawn by prosecution by stating during closing argument that it did not intend to pursue any of those charges.[2943]

The removal of crime sites or incidents from the indictment cannot be said to constitute a completed trial of the accused with respect to those crime sites and incidents for purposes of the application of *non bis in idem*.[2944]

Fact that prosecution represented in related case that it was not necessary to lead evidence on all scheduled incidents did not warrant order prohibiting it from leading evidence in this case, given the different positions held by the accused.[2945]

The right of appeal in Rule 73 *bis* (E) does not confer upon the prosecution a general right to appeal decisions denying leave to amend the indictment. Such motions remain subject to certification by the Trial Chamber.[2946]

number of prosecution witnesses

[2939] *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision Pursuant to Rule 73 bis (D)* (22 February 2007) at para. 9
[2940] *Prosecutor v Seselj*, No. IT-03-67-AR73.7, *Decision on Appeal Against the Trial Chamber's Oral Decision of 9 January 2008* (11 March 2008) at para. 24
[2941] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Prosecution's Submission on Interpretation of the Trial Chamber's Decision of 15 May 2007 Regarding Unscheduled Incidents* (31 October 2008)
[2942] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Order Regarding Prosecution's Submission With Regard to Rule 73 bis* (D) (7 April 2009)
[2943] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Withdrawal of Charges* (13 October 2014) at para. 7
[2944] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Finding of Non Bis in Idem* (16 November 2009) at para. 13
[2945] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion to Strike Sarajevo Shelling and Sniping Incidents* (27 January 2012) at para. 8
[2946] *Prosecutor v Delic*, No. IT-04-83-Misc.1, *Decision on Prosecution's Appeal* (1 November 2006)

Trial Chamber may properly limit number of prosecution witnesses, and contingencies which later arise can be dealt with by a motion to vary the Chamber's order pursuant to Rule 73 *bis* (F).[2947]

time limits

Trial Chamber erred in reducing the time available for the prosecution to present its case by basing its decision on the need to conclude the trial in a fixed period, rather than on whether the time was sufficient to provide a fair opportunity for a party to present its case.[2948]

Trial Chamber acted within its discretion on remand in reducing prosecution's case from 400 to 107 hours despite the complexity and importance of the case.[2949]

Trial Chamber granted prosecution an additional 23 hours to present its case where it had made efforts to streamline the case through Rules 92 *bis* and *ter*.[2950]

Allocation of same time to prosecution for its cross examination as all accused consume during their direct examination was reasonable, where prosecution has burden of proving its case against all accused, while each accused has limited interests in its own defence, and where Trial Chamber allowed for flexibility in its time allocations.[2951]

varying witness list

When deciding whether it is in the interests of justice to allow the prosecution to add a witness not on its witness list, the Trial Chamber must balance the probative value of the proposed testimony against the need to insure a fair trial. The Trial Chamber should ensure that no prejudice will arise to the defence because of the late addition of witnesses.[2952]

The spirit of Rule 73 *bis* (E) is to prevent the prosecution from calling witnesses without sufficient notice to the defence while ensuring that the search for truth is

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[2947] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying Prosecution Motion for Reconsideration of the Order Limiting the Number of Witnesses it may Call at Trial* (21 October 2009)
[2948] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007)
[2949] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification* (11 May 2007)
[2950] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision Allocating Additional Time for Completion of Case-in-Chief* (22 August 2007)
[2951] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.8, *Decision on Petkovic and Praljak's Appeals Against the Trial Chamber's Decision Adopting Guidelines for the Presentation of Defence Evidence* (18 July 2008)
[2952] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 January 2007) at para. 5; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 7

guaranteed by allowing the prosecution to amend its witness list when it is in the interests of justice to do so.[2953]

Motion to add witness denied where prosecution failed to provide convincing explanation for not adding witness to list earlier, and prosecution case was about to be closed.[2954]

Motion to add witness denied where Trial Chamber was unable to determine if defence would be prejudiced by non-disclosure of portions of interview notes pursuant to Rule 70(B).[2955]

Motion to remove witness after defence raised issues concerning his credibility granted. It is for each party, subject to the Trial Chamber's control, to decide which witnesses to call to prove its case.[2956]

Motion to add witness denied where Trial Chamber was unable to determine if defence would be prejudiced by non-disclosure of portions of interview notes pursuant to Rule 70(B)[2957] or where restrictions on disclosure by third party operated to prejudice the defence.[2958]

Motion to add witness denied where restrictions placed on testimony by Rule 70 provider limiting cross examination to the scope of direct examination and requiring defence to seek permission of provider in advance to elicit evidence on other topics would operate to deny the defence a fair trial.[2959]

Motion to substitute witness granted where witness would not be called for a long time and no prejudice to the accused was shown.[2960]

Adding defence witnesses justified by decision of the accused not to testify.[2961]

[2953] *Prosecutor v Limaj et al*, No. 03-66-T, *Decision on Prosecution's Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (9 March 2005) at para. 4

[2954] *Prosecutor v Mrksic et al,* No. IT-95-13/1-T, *Decision on Prosecution Motion to Amend its Rule 65 ter List* (6 June 2006)

[2955] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at paras. 16-17

[2956] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution's Motion for Leave to Amend its Witness List and Exhibit List* (16 June 2008) at para. 18

[2957] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at paras. 16-17

[2958] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007) at para. 17

[2959] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007)

[2960] *Prosecutor v Karadzic*, No.IT-95-5/18-T, *Decision on Prosecution's Motion to Substitute Witness* (4 May 2010)

[2961] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Simatovic Defence Motion to Add Five Witnesses to its Rule 65 ter Witness List* (24 April 2012) at para. 10

Motion to add intercept operators as witnesses granted where at time of filing of witness list, defence believed that intercepts would be admitted by agreement of the parties.[2962]

Motion to add defence witnesses granted as accused should be given flexibility to call witnesses which would allow for efficient use of remainder of time allotted to him.[2963]

Motion to add witness denied where prosecution could not rely on non-binding negotiations on agreed facts which had not been consummated in leaving the witness off its witness list.[2964]

Rule 73 *ter*—pre-defence conference

(A) Prior to the commencement by the defence of its case the Trial Chamber may hold a Conference.
(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(ii), the Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some witnesses.
(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 ter (L)(ii), the Trial Chamber, after having heard the defence, shall set the number of witnesses the defence may call.
(D) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called.
(E) After having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence.
(F) During a trial, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice.

exhibits

The defence is not obligated to disclose to the prosecution copies of exhibits it intends to use in its cross-examination until it actually uses the exhibit in court.**[2965]**

[2962] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Vary Witness List* (21 February 2013)
[2963] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Vary List of Witnesses (Srebrenica Component)* (20 September 2013) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Vary List of Witnesses (Srebrenica and Municipality Components)* (4 November 2013) at para. 10
[2964] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65 ter Witness and Exhibit Lists, and Admit Evidence Pursuant to Rule 92 ter* (26 January 2012) at para. 33
[2965] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses* (9 May 2005) at para. 9

The defence is obligated to disclose the exhibits it intends to use in cross-examination as soon as the prosecution witness is sworn.[2966]

time limits

The Trial Chamber retains the authority to limit the time for presentation of a party's evidence at trial. However, it must take into consideration the complexity of the issues to be addressed and determine if the allocated amount of time provides a fair opportunity for a party to present its case.[2967]

Considerations of judicial economy should never impinge upon the rights of the parties to a fair trial.[2968]

The Trial Chamber erred in precluding the defence from offering evidence as to certain issues. The defence should be allowed to present evidence on relevant issues unless the Trial Chamber was prepared to grant a partial judgement of acquittal pursuant to Rule 98 *bis*.[2969]

Trial Chamber allotted twice the time of direct examination for cross examination of a witness in a single accused case.[2970]

Limiting cross examination to time of direct examination of *viva voce* witness was not disproportionate.[2971]

It was not unreasonable to count the time an accused spent cross examining evidence presented by a co-accused towards his allocation of time for his defence case where the time was spent eliciting evidence favourable to his case.[2972]

Trial Chambers are required to afford the accused proportional time to that of the prosecution to present their cases in accordance with the longstanding principle of equality of arms.[2973]

[2966] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Notification of Cross Examination Material* (31 May 2007); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence* (16 August 2006); *Prosecutor v Popovic et al*, No. IT-05-88-T, *Order on Production of Defence Documents Used During Cross Examination of Prosecution Witnesses* (24 August 2006); *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Time-Limits for Disclosure of Documents to be Used During a Witness' Testimony* (18 January 2007)

[2967] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case* (6 February 2007) at para. 14

[2968] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para. 16

[2969] *Prosecutor v Oric*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 6

[2970] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Admission of Written Statements, Transcripts, and Exhibits Pursuant to Rule 92 ter* (22 February 2007)

[2971] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 173

[2972] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 141

In multiple accused cases, the proportionality is affected by the amount of evidence directed at a particular accused. The Appeals Chamber defers to the judgement of the Trial Chamber unless it can be shown that the amount of time allowed to a given accused was unreasonably disproportionate.[2974]

Allocation of 80 hours to accused to present his defence in multi-accused case, and 240 hours to defence teams in general, where prosecution was granted 260 hours for its case, was not unreasonably disproportionate.[2975]

A Trial Chamber is required to justify its decision allocating the time for a party to present its case by indicating what documents and information it has considered, as well as the factors it has considered but it does have to address the specific testimony or pieces of evidence it considers unnecessary.[2976]

Trial Chamber did not err in determining that proposed evidence of the accused was repetitive based upon defence pre-defence filings, rather than waiting until evidence was presented in defence case.[2977]

Trial Chamber's decision granted deference where it indicated a willingness to consider extension of time for defence case during the trial.[2978]

In addition to assuring that the allocation to the defence of time and witnesses is proportional, the Trial Chamber must also consider whether the time is objectively adequate to permit the accused to set forth his case in a manner consistent with his rights.[2979]

Trial Chamber did not err in limiting the number of Rule 92 *bis* statements that an accused could tender after observing that the proposed statements were duplicative and covered matters which were either irrelevant or went to the acts and conduct of the

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[2973] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.4, *Decision on Prosecution Appeal Following Trial Chamber's Decision on Remand and Further Certification* (11 May 2007) at para. 38; *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para.16

[2974] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para. 39

[2975] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 132

[2976] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para. 56

[2977] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para. 25

[2978] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.7, *Decision on Defendants Appeal Against the Décision Portant Attribution du Temps a la Defense Pour la Présentation des Moyens à Décharge* (1 July 2008) at para. 59

[2979] *Prosecutor v Oric*, No. 03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 8

accused. However, the Trial Chamber erred in putting an arbitrary 30-page limit on the Rule 92 *bis* material.[2980]

Where the disparity between the time allocated to the prosecution and defence is great, no specific prejudice need be shown.[2981]

Considering that the prosecution bears the burden of proof, an allocation of time reasonably proportionate to that of the prosecution will often result in less time for the defence to present its case.[2982]

Defence allowed the same number of hours as the prosecution to present its case. The fact that 2300 adjudicated facts had also been admitted in the prosecution's case did not warrant the granting of additional time to the defence.[2983]

The Trial Chamber may consider the fact that the defence elicited evidence favourable to its case during cross examination of prosecution witnesses when allocating time for the defence case.[2984]

Additional 25 hours allowed for accused to present witnesses on count which had been dismissed at the close of the prosecution case, and then re-instated.[2985]

An accused subject to unreasonable restrictions on the time allowed to present its case would be allowed to begin its case anew so that it could fully examine the witnesses already called.[2986]

An accused may call a witness on his own behalf even if that witness has already testified in the case earlier.[2987]

Rule 74—amicus curiae

A Chamber may, if it considers it desirable for the proper determination of the

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[2980] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.17, *Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 bis* (1 July 2010)
[2981] *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para.9
[2982] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.10, *Decision on Appeal of Decision on Duration of Defence Case* (29 January 2013) at para. 16
[2983] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.10, *Decision on Appeal of Decision on Duration of Defence Case* (29 January 2013) at paras. 18-19; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Time Allocated to the Accused for Presentation of his Case* (19 September 2012) at paras. 10-12
[2984] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.10, *Decision on Appeal of Decision on Duration of Defence Case* (29 January 2013) at para. 22
[2985] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Request for Additional Hours to Present his Defence Case and on Motion to Recall Defence Witnesses* (29 October 2013) at para. 12
[2986] *Prosecutor v Oric*, No. IT-03-68-AR73.2, *Interlocutory Decision on Length of Defence Case* (20 July 2005) at para. 10
[2987] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Nikolic Motion Pursuant to Rule 92 bis* (28 July 2008) at para. 11

case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

association of defence counsel

Where the appellant is not motivated to contest an issue of general importance to the jurisprudence of the Tribunal, the Appeals Chamber would appoint the Association of Defence Counsel to file a brief representing the interests of the defence.[2988]

Appeals Chamber declined prosecution's request to appoint Association of Defence Counsel as *amicus curiae* where accused did not respond to grounds of appeal asserted by the prosecution to be of general significance to the jurisprudence of the Tribunal.[2989]

Application of Association of Defence Counsel to appear as amicus curiae in matter of defence investigator charged in Croatia denied where issue had been extensively briefed by parties and ADC had not shown how it could assist the Chamber with arguments not provided by the parties.[2990]

denied

Requests of survivor's groups to intervene in Hartmann contempt case concerning public interest in disclosure of Serbian archives denied.[2991]

Request of survivor's groups to intervene in appeal of acquittal for genocide in the municipalities denied where the prosecution brief would cover the same issues as those proposed by the groups.[2992]

Request of group of ballistics expert to appear as amicus curiae denied where the arguments were primarily of a factual nature and where the application failed to disclose the relationship of the experts to the defence team.[2993]

Request of Government of Croatia for *amicus curiae* participation rejected where proposed submissions related to matters of fact, and submissions of *amicus curiae* should be limited to questions of law.[2994]

[2988] *Prosecutor v Brdjanin*, No. IT-98-36-A, *Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal* (5 May 2005) at pg. 5
[2989] *Prosecutor v Oric*, No. IT-03-68-A, *Decision on Motion in Relation to Ground 5 of the Prosecution's Appeal* (12 September 2007)
[2990] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae* (9 June 2009)
[2991] *In the case against Florence Hartmann*, No. IT-02-54-R77.5, *Decision on Requests Pursuant to Rule 74* (6 May 2009)
[2992] *Prosecutor v. Karadzic*, No. IT-95-5/18-AR98*bis*, *Decision on Application for Leave to Submit an Amicus Curiae Brief* (21 September 2012)
[2993] *Prosecutor v Gotovina & Markac, No. IT-06-90-A, Decision on Application and Proposed Amicus Curiae Brief* (14 February 2012) at paras. 11-12

Request by Croatia to intervene in appeal against its military officers denied where the findings subject to the appeal dealt with the individual criminal responsibility of the officers and not the responsibility of the State, and where briefing on the issue of State responsibility would not assist the Appeals Chamber.[2995]

Request by Croatia to intervene in appeal where findings were made concerning the conduct of its leaders denied where the findings were not binding on the three men, who maintained the presumption of innocence, nor Croatia's State responsibility, which is a subject not determined at a criminal tribunal.[2996]

granted

Request of free-speech organization to file submissions in Hartmann contempt appeal granted on legal standard but not on application of facts of case to that standard.[2997]

Request of former American Ambassador who negotiated ICC statute to file *amicus curiae* brief in appeal on issue of customary international law status of ICC statute granted.[2998]

The Appeals Chamber can ask the amicus curiae to argue in the interests of a particular party where this approach will serve the interests of justice.[2999]

Rule 74 *bis*—medical examination of the accused

A Trial Chamber may, proprio motu or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

Medical examination of the accused by two independent experts at the request of

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[2994] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Request by the Government of the Republic of Croatia for Leave to Appear as Amicus Curiae* (11 October 2006); *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Requests of the Republic of Croatia for Leave to Appear as Amicus Curiae* (18 October 2006)

[2995] *Prosecutor v Gotovina & Markac, No. IT-06-90-A, Decision on Motion to Intervene and Statement of Interest by the Republic of Croatia* (8 February 2012)

[2996] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Application by the Government of the Republic of Croatia for Leave to Appear as Amicus Curiae and to file Amicus Curiae Brief* (18 July 2016) at para. 9

[2997] *In the case against Florence Hartmann*, No. IT-02-54-R77.5-A, *Decision on Application for Leave to File Amicus Curiae Brief* (5 February 2010)

[2998] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on David J. Scheffer's Application to File an Amicus Curiae Brief* (7 September 2010)

[2999] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Right 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) at para. 17

the prosecution granted after extensive delay in the trial due to accused's illness to advise on feasibility and modalities of resuming the trial.[3000]

To discharge its statutory function of ensuring a fair and expeditious trial, it is within the Trial Chamber's power to order more frequent reporting on the accused's medical condition.[3001]

The Defence has a role in ensuring that the accused is receiving adequate and appropriate medical care while detained in the UNDU.[3002]

Trial Chamber declined to order daily medical reports of accused who was unfit to stand trial at the present time but ordered that the weekly reports be augmented with additional information.[3003]

Rule 75—protection of victims and witnesses

(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.
(B) A Chamber may hold an in camera proceeding to determine whether to order:
(i) 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:
(a) expunging names and identifying information from the Tribunal's public records;
(b) non-disclosure to the public of any records identifying the victim or witness;
(c) giving of testimony through image- or voice- altering devices or closed circuit television; and
(d) assignment of a pseudonym;
(ii) closed sessions, in accordance with Rule 79;
(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.
(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).
(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.
(E) When making an order under paragraph (A) above, a Judge or Chamber shall

[3000] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Request for a Medical Examination of the Accused pursuant to Rule 74 bis* (22 January 2015)
[3001] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadzic's Health Condition* (10 April 2015) at para. 18
[3002] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadzic's Health Condition* (10 April 2015) at para. 18
[3003] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Urgent Motion for Daily Detailed Medical Monitoring and Reporting of Mr. Hadzic's Health Condition* (10 April 2015) at paras. 20

wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal or another jurisdiction.
(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:
(i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but
(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:
(i) to any Chamber, however constituted, remaining seised of the first proceedings; or
(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.
(H) A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application:
(i) to any Chamber, however constituted, remaining seised of the first proceedings;
(ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or,
(iii) if no Chamber remains seised, to a newly constituted Chamber.
(I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.
(J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order proprio motu the rescission, variation, or augmentation of protective measures in the absence of such consent.
(K) An application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber"

access to material from other cases

Parties before the MICT will be considered parties before the ICTY when considering a motion for access to confidential information.[3004]

Access to confidential material from another case is granted where the party can establish that it may be of material assistance to its case.[3005] It is sufficient if there is a good chance that access to the material sought would materially assist the applicant's case.[3006]

A party is always entitled to seek material from any source, including confidential material from another case before the International Tribunal. The test for granting access to such material is whether the party seeking access has identified or described it by general nature and has established that it may be of material assistance to its case or that there is at least a good chance that it would – namely, whether a legitimate forensic purpose for such access has been shown.[3007]

The relevance of the material sought can be established by showing that the events in the case from which the material is sought occurred in the same geographical area and during the same time as the events in the case against the accused.[3008]

Where Rule 73 *bis* (D) motion had removed crimes for which there was overlap between the two cases, the earlier decision granting access would be rescinded.[3009]

[3004] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Karadzic's Motion for Access to Prosecution's Sixth Protective Measures Motion* (27 June 2016) at p.2; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion by Stanislav Galic for Access to Confidential Materials in the Mladic Case* (20 July 2016) at para 5

[3005] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i)* (11 March 2005) at p. 3

[3006] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i)* (11 March 2005) at page 3; *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motion for Access to Confidential Material* (9 March 2005) at page 3; *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Motion by Radivoje Miletic for Access to Confidential Information* (9 September 2005)

[3007] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214; *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion of Boskoski Defence for Access to Registry Minutes of a Meeting Between the Chamber and the Office of the Prosecutor on 10 September 2002 in Case No. IT-02-55-MISC-6* (1 October 2007) at para. 4

[3008] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i)* (11 March 2005) at page 3; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Motion of Assigned Counsel in Milosevic for Variance of Protective Measures Pursuant to Rule 75* (14 April 2005); *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 214

[3009] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on the Prosecution's Motion for Reconsideration and Recission of the Order to Disclose Issued in Trial Chamber's Decision on Motion of Radovan Karadzic for Access to Confidential Materials in the Lukic & Lukic Case of 10 July 2009* (7 December 2009) at para 11

Accused made a showing of legitimate forensic purpose for disclosure of medical reports of his former co-accused who was testifying against him.[3010] However, given the availability of information from public sources, the accused failed to show that denial of the material had an impact upon the verdict.[3011]

Ex parte filings from other cases will not be disclosed to an applicant absent a particularized showing of legitimate forensic purpose greater than geographical and temporal overlap between the two cases.[3012]

Where the accused had the opportunity to obtain equivalent information from the prosecution, the disclosure of *ex parte* filings in another case was not necessary.[3013]

Accused failed to show how Registry minutes of meeting between Chambers and OTP in which request for deferral of Macedonia investigation was denied were likely to materially assist its case.[3014]

A Chamber has the discretion to refer a motion for access to materials from the first case to the Chamber seized of the second proceedings.[3015]

Chamber which provided protective measures of pseudonym and image distortion is properly seized of request from subsequent case to augment protective measures by ordering closed session.[3016]

Enhanced protective measures of closed session warranted for prosecution witness where there were Serbian nationalists in his community and the community where his relatives lived, there could be repercussions from supporters of the accused, and the accused's case had a higher profile than the previous case where the witness testified in public session.[3017]

[3010] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 217
[3011] *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 221
[3012] *Prosecutor v Simic*, No. IT-95-9-A, *Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motions filed by the Parties in the Simic et al Case* (12 April 2005); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Access to the Ex Parte Filings in the Slobodan Milosevic Case (Srebrenica Intercepts)*(28 February 2011) at para. 9
[3013] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Access to the Ex Parte Filings in the Slobodan Milosevic Case (Srebrenica Intercepts)*(28 February 2011) at para. 13
[3014] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion of Boskoski Defence for Access to Registry Minutes of a Meeting Between the Chamber and the Office of the Prosecutor on 10 September 2002 in Case No. IT-02-55-MISC-6* (1 October 2007) at para. 9
[3015] *Prosecutor v Krajisnik*, No. IT-00-39-A, *Order Regarding Rule 75 Motion by Stojan Zupljanin* (25 February 2009)
[3016] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084* (10 May 2012) at p. 2
[3017] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Urgent Prosecution Motion for Additional Protective Measures for Witness KDZ084* (10 May 2012) at p. 3

A motion to alter the access of the defence to confidential records of a case which had since been appealed was properly made to the Appeals Chamber even though the Trial Chamber had been the one to grant access.[3018]

Where the Trial Chamber which granted access is no longer seized of the case, and the matter is pending before the Appeals Chamber, the appropriate method for obtaining access to material previously denied is a fresh application to the Appeals Chamber rather than a request to the Appeals Chamber to reconsider a decision of the Trial Chamber.[3019]

However, a blanket referral of a determination of protective measures to the Chamber seized of the second proceedings would frustrate the purpose of Rule 75(G)(i).[3020]

Access to confidential filings in enforcement proceedings require a greater showing than geographical and temporal overlap before a legitimate forensic purpose is established.[3021]

Convicted person seeking access for the purposes of filing motion for review based on new facts would be granted access to transcripts, exhibits, and filings related to issues on which there was factual overlap between the cases.[3022]

The threshold for access by a person whose case has concluded is higher than that of a person with a pending case. A mere nexus between cases is insufficient. The person must explain how the materials sought would be of assistance to establish a new fact.[3023]

[3018] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on the Prosecution's Motion for Reconsideration and Recission of the Order to Disclose Issued in Trial Chamber's Decision on Motion of Radovan Karadzic for Access to Confidential Materials in the Lukic & Lukic Case of 10 July 2009* (7 December 2009) at para. 4

[3019] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Decision on Motion by Radovan Karadzic for Reconsideration of Decision on Motion for Access to Confidential Material in the Stanisic & Simatovic Case* (16 February 2015) at p. 3

[3020] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Radovan Karadzic Motion for Variation of Protective Measures* (25 September 2009) at para. 8; *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Radovan Karadzic's Motion for Variance of Protective Measures* (8 October 2009) at para. 9; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Motion by Radovan Karadzic on Motion for Protective Measures* (12 October 2009); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying Radovan Karadzic's Motion for Variance of Protective Measures* (13 October 2009)

[3021] *Prosecutor v Karadzic*, No. 95-5/18-T, *Decision on Motion for Access to Confidential Filings and Decisions in Enforcement Proceedings* (17 April 2012)

[3022] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion by Stanislav Galic for Access to Confidential Materials in the Mladic Case* (20 July 2016) at para. 10

[3023] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Vujadin Popovic's Defence Request for Access to Confidential Materials in the Mladic Case* (11 May 2017) at para. 8

Motion for disclosure of closed session testimony from a case which has been completed should be served on the accused in that case.[3024]

burden of proof

The burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted.[3025]

If protective measures are sought with respect to particular witnesses or victims, the prosecution has the burden of demonstrating that the measures are justified in that particular case.[3026]

death

Death of the witness justifies recission of protective measures.[3027]

Consent of a family member or relative of a deceased protected witness to variation of protective measures to allow disclosure to national authorities, even if it were given on behalf of the family, is not valid under Rule 75(J). However, the importance of the testimony to the case of the national authorities constituted a compelling showing of exceptional circumstances such as to allow disclosure to the authorities in the absence of consent.[3028]

disclosure material

Documents disclosed to the defence on a confidential basis and not admitted into evidence cannot be disclosed generally to members of the public by defence counsel.[3029]

Prosecution motion for order to accused not to make public the contents of disclosure provided by the prosecution was unnecessary where the protective measures order and practice direction for EDS disclosed material already prohibited such disclosure except when directly and specifically necessary for the defence of the case.[3030]

[3024] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Order to Serve Momir Nikolic With Defence Motion on Behalf of Drago Nikolic Seeking Access to Confidential Material in Case No. IT-02-6/1* (11 September 2007)
[3025] *Prosecutor v Gotovina*, No. IT-01-45-PT, *Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68* (14 July 2006) at pg. 6
[3026] *Prosecutor v Gotovina*, No. IT-01-45-PT, *Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68* (14 July 2006) at pg. 7
[3027] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Steven Todorovic Pursuant to Rule 92 quarter* (29 October 2010) at para. 5
[3028] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application of the Prosecutor of the Tribunal for Variation of Protective Measures* (27 January 2010) at paras. 18-19
[3029] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Jadranko Prlic's Request for the Trial Chamber to Issue an Order Lifting the Confidentiality of the Mladic Diary…*(6 October 2010)
[3030] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on Prosecution's Motion to Prohibit Accused from Publicizing Information Disclosed Solely for Purposes of his Defence* (5 July 2010) at p.4

disclosure to other courts

Disclosure of testimony authorized to Bosnian War Crimes Court for disclosure to parties in accordance with protective measures in case related to one tried at ICTY.[3031]

Trial Chamber would not recuse itself from ruling on application for disclosure of protected witness testimony to national authorities because it was capable of distinguishing evidence in the trial record from the summary of facts provided by the national authorities and it had always been transparent by promptly lifting the *ex parte* status of Rule 75 applications and inviting the parties to file submissions.[3032]

Prosecution was appropriate party to request permission to disclose confidential information for use in prosecution of Category II cases in Bosnia. However, disclosure denied for materials of two witnesses who declined to consent to the disclosure.[3033]

Nature of protective measures was disclosed to national authorities where witness consented.[3034]

Protective measures granted to a witness by the ICTY continue automatically to proceedings in national courts and no order is required continuing those protective measures prior to the witness' testimony in national proceedings.[3035]

Consent of witness not required to disclose the nature of the protective measures granted to the witness by the ICTY to a national court where the witness' confidential testimony was not being disclosed.[3036]

Exigent circumstances existed to disclose closed session testimony to national authorities in the absence of the witness' consent where the witness' testimony was unique.[3037]

[3031] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Request of the Court of Bosnia and Herzegovina for Variation of Protective Measures Pursuant to Rule 75(H)* (13 December 2007)
[3032] *Prosecutor v Mladic*, No. IT-09-92-R75H.19, *Decision on Application pursuant to Rule 75(H) and on Motion to Strike and Request for Recusal* (9 June 2017) at paras. 7-8; *Prosecutor v Mladic*, No. IT-09-92-R75F.4, *Decision on Application pursuant to Rule 75(F)* (4 July 2017) at para. 9
[3033] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application of the Prosecutor of the Tribunal for Variation of Protective Measures* (10 November 2009)
[3034] *Prosecutor v Mladic*, No. IT-09-92-R75F.1, *Decision on Application pursuant to Rule 75(F)* (19 October 2016)
[3035] *Prosecutor v Mladic*, No. IT-09-92-R75H.5, *Decision on Application pursuant to Rule 75(H)* (18 December 2015) at paras. 9-10
[3036] *Prosecutor v Prlic et al*, No. IT-04-74-R75H.2, *Order on Application from [REDACTED]of 25 February 2011* (2 March 2011) at p. 3; *Prosecutor v Prlic et al*, No. IT-04-74-R75H.3, *Order on Application from the [REDACTED]of 10 March 2011* (15 March 2011) at p. 3
[3037] *Prosecutor v Mladic*, No. IT-09-92-R75H.6, *Decision on Application pursuant to Rule 75(H)* (10 March 2016) at para. 12

Closed session transcripts would not be disclosed to national authorities where witness refused to consent to disclosure and no exigent circumstances existed to order disclosure over the objection of the witness.[3038]

Where witness refused to consent, Trial Chamber would not order disclosure of the witness' contact details to national authorities, nor authorise the Tribunal to serve as the focal point between the witness and the national authorities.[3039]

Witnesses are entitled to provide information to the Victims and Witnesses Support Section on a confidential basis and such information would not be disclosed to the prosecution, whose role in Rule 75 proceedings is simply to provide relevant information to the Chamber.[3040]

exhibits

Rule 75 does not require that if an exhibit is placed under seal in one case, it must necessarily be placed under seal in a subsequent case.[3041]

Documents only marked for identification or marked as not admitted do not form part of the trial record and therefore are not subject to a motion for access under Rule 75. Rather, the prosecution should disclose such documents consistent with its obligations under Rule 66(B) and Rule 68.[3042]

hierarchy

[3038] *Prosecutor v Mladic*, No. IT-09-92-R75H.1, *Decision on Application pursuant to Rule 75(H)* (13 August 2014) at paras. 8-9; *Prosecutor v Mladic*, No. IT-09-92-R75H.2&3, *Decision on Applications pursuant to Rule 75(H)* (8 June 2015) at paras. 10-11; *Prosecutor v Mladic*, No. IT-09-92-R75H.4, *Decision on Application pursuant to Rule 75(H)* (29 September 2015) at para. 13; *Prosecutor v Mladic*, No. IT-09-92-R75H.7, *Decision on Application pursuant to Rule 75(H)* (13 May 2016) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-R75H.8, *Decision on Application pursuant to Rule 75(H)* (18 August 2016) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-R75H.12, *Decision on Application pursuant to Rule 75(H)* (30 January 2017) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-R75H.14, *Decision on Application pursuant to Rule 75(H)* (1 March 2017) at para. 10; *Prosecutor v Mladic*, No. IT-09-92-R75H.10, *Decision on Application pursuant to Rule 75(H)* (10 March 2017) at para. 10; *Prosecutor v Mladic*, No. IT-09-92-R75H.16, *Decision on Application pursuant to Rule 75(H)* (24 March 2017) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-R75H.13, *Decision on Application pursuant to Rule 75(H)* (25 May 2017) at para. 12; *Prosecutor v Mladic*, No. IT-09-92-R75H.18, *Decision on Application pursuant to Rule 75(H)* (25 May 2017) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-R75H.17, *Decision on Application pursuant to Rule 75(H)* (14 June 2017) at para. 12; *Prosecutor v Mladic*, No. IT-09-92-R75F.4, *Decision on Application pursuant to Rule 75(F)* (4 July 2017) at para. 11

[3039] *Prosecutor v Mladic*, No. IT-09-92-R75H.7, *Decision on Application pursuant to Rule 75(H)* (13 May 2016) at para. 12

[3040] *Prosecutor v Mladic*, No. IT-09-92-R75H.9&10, *Decision on Prosecutor's Requests for Access to Deputy Registrar's Further Submissions of 12 December 2016* (24 January 2017) at p. 3

[3041] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Unseal ICMP Exhibits* (25 April 2012) at para. 8

[3042] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Motion for Access to MFI and MNA Documents* (18 January 2012) at p. 3

The ordering of closed session is the most extreme protective measure.[3043] With respect to the most extreme measure sought, the proceedings must be in public unless good cause is shown to the contrary.[3044] Other methods designed to conceal a witness's identity from the public (such as face and voice distortion) are considered less of an infringement on the public nature of proceedings.[3045]

The more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted.[3046]

The minimum measure required to protect the witness's legitimate fears should be utilised.[3047]

protective measures denied

Protective measure of image distortion granted where witness travelled through Serb areas of Bosnia and Serbia and where case was a high profile one in the media. However, no pseudonym would be afforded to the witness.[3048]

Fear that testimony would be used against him in state court and that he was more likely to be prosecuted if he testified as a defence witness was speculative and insufficient to warrant a pseudonym.[3049]

Defence failed to substantiate an objective fear on the part of the witness to his security or welfare, or that of his family.[3050]

[3043] *Prosecutor v. Slobodan Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)* (30 July 2002) at para. 6.
[3044] *Prosecutor v. Radoslav Brdanin & Momir Talic*, No. IT-99-36-PT, *Decision on Motion by Prosecution for Protective Measures* (3 July 2000) at para. 53.
[3045] *Prosecutor v. Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)* (30 July 2002) at para. 7.
[3046] *Prosecutor v. Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)* (30 July 2002) at para. 5; *Prosecutor v. Milan Milutinovic et al.*, No. IT-05-87-T, *Decision on Lazarevic Motion for Protective Measures for Witness SD3* (28 November 2007) at para. 3; *Prosecutor v. Dragomir Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Protective Measures* (12 February 2007) at para. 11.
[3047] *Prosecutor v. Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Protective Measures* (12 February 2007) at para. 11; *Prosecutor v. Slobodan Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)* (30 July 2002) at para. 5.
[3048] *Prosecutor v Karadzic*, No. 95-5/18-T, *Decision on Prosecution Motion for Protective Measure for Witness Bogdan Vidovic* (21 September 2010)
[3049] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Protective Measures for Witness KW392* (14 February 2013) at para. 7
[3050] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Protective Measures for Witness KW456* (12 October 2012) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Protective Measures for Witness KW428* (9 July 2013) at para. 7

Defence witness who sought protective measures sue to fear of media campaign against him provided no objective basis for such fear and therefore protective measures were denied.[3051]

Defence witness who expressed fear of personal safety due to public knowledge of his former occupation provided no objective basis for such fear since his former occupation was already publicly known and therefore protective measures were denied.[3052]

Defence witness who feared retaliation from Muslims and who did business with customers in Muslim areas would be granted image distortion, but not a pseudonym or voice distortion.[3053]

Bosnian Muslim witness who lived in border area near Serb villages failed to substantiate fear for security such as to warrant protective measures.[3054]

Threat to witness made at the time of the conflict does not justify protective measures for testimony many years later.[3055]

Protective measures denied for former Serbian State Security employees as Serbia failed to show any danger to its interests or those of the former employee from public disclosure of that information.[3056]

relatives

A relative of a suspected victim does not become a "witness" for purposes of protective measures by donating their genetic material for DNA identification. However, their genetic material may be kept confidential pursuant to Rule 54.[3057]

Information relating to the genetic material of the alleged victims, including the genetic material of family members, should be kept confidential under Rule 75 to protect their privacy.[3058]

[3051] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Denial of Protective Measures for Witness DST-32* (20 July 2011) at para. 8
[3052] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Protective Measures for Witness DST-051 for Personal Reasons* (20 July 2011) at para. 6
[3053] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Protective Measures for Witness KW402* (8 January 2013) at paras. 7-8
[3054] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion for Protective Measures for Witness RM-151* (13 March 2013) at para. 5
[3055] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Protective Measures for Witness KW007* (19 December 2012)
[3056] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Republic of Serbia's Motion for Protective Measures for Witness DST-074* (19 January 2012)
[3057] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Unseal ICMP Exhibits* (25 April 2012) at paras. 6, 9
[3058] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Unseal ICMP Exhibits* (25 April 2012) at para. 9

List of victims identified by DNA shall be made public, except for victims who have been recently identified and whose families may not have yet been notified, and with any genetic material redacted.[3059]

requirements

A real fear for the security of the witness or his family must be shown to exist. Subjective fears of the potential witness that he or she may be in danger or at risk are not sufficient.[3060]

Grounds for the fear of a witness can be demonstrated to the Trial Chamber by the submission to the Trial Chamber of a document setting out the personal circumstances of the witness, including whether he still resides in the area where the alleged events occurred, any family or business connections, or need to return to the area, ethnicity, and any specific threats that have been made to the witness or his or her family.[3061]

Factual considerations relevant to a request for protective measures include (1) the identity of the witness; (2) the nationality and ethnicity of the witness; (3) the role, duties performed, and positions occupied by the witness during the course of the conflict; (4) the nature of the evidence the witness will give before this Trial Chamber; and (5) the events upon which the witness will testify in relation to the accused before this Trial Chamber.[3062]

An objectively grounded risk to the security or welfare of a witness or his family exists when, *inter alia*, the prosecution informs the Chamber that a witness has expressed fears based on his place of residence or of the prospect that individuals sympathetic to the accused will recognise him. The defence has no right to *voir dire* the witness on these representations.[3063]

rescission

Where witness had spoken publicly about the same information to which he was to testify, recission of protective measures was not warranted absent consent of witness.[3064]

[3059] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Unseal ICMP Exhibits* (25 April 2012) at paras. 9-11
[3060] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Order on Milan Lukic's Request for Protective Measures* (23 July 2008) at pp. 3-4
[3061] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Order on Milan Lukic's Request for Protective Measures* (23 July 2008) at p. 4
[3062] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Motion for Delayed Disclosure…* (5 June 2009) at para. 14
[3063] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution Motions for Protective Measures for Witnesses KDZ601 and KDZ605* (19 August 2011) at paras. 10-11
[3064] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Accused's Motion to Modify Protective Measures: Witness KDZ071* (10 April 2012) at T27207-09

Exceptional circumstances existed to warrant recission of prosecution witness' protective measures where witness had revealed in news media interviews that she had testified in this case, and provided details of her testimony, rendering the protective measures ineffective.[3065]

rights of accused

The balance of rights of the accused and protection of witnesses favours the rights of the accused.[3066]

While due regard must be had for the protection of victims and witnesses, this is a secondary consideration to the rights of the accused.[3067]

The Trial Chamber will refuse to grant any order for non-disclosure where such order would infringe the rights of the accused, even where the prosecution has shown exceptional circumstances justifying non-disclosure.[3068]

The determination of protective measures requires the Chamber to consider, on the one hand, the rights of the accused to a fair and public trial, and to cross-examine witnesses against him, and, on the other hand, the rights of victims to protection and privacy. The hierarchy between these interests is clearly reflected in Article 20 of the Statute, which provides expressly that the rights of the accused take precedence over the protection of the victims, as they are to be given "full respect," while the protection of the victims is to be given "due regard." This priority is further confirmed by the wording of Rule 75(A) of the Rules, which allows a Chamber to order protective measures, "provided that [they] are consistent with the rights of the accused."[3069]

The established practice of the Tribunal to publish redacted versions of documents that contain information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness also extends to judgements.[3070]

By issuing a public redacted version of the Trial Judgement, the Trial Chamber ensured the accused's right to a public judgement, after balancing his rights with the need

[3065] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Public Redacted Decision on Accused's Motion to Recall KDZ080 and for Recission of Protective Measures* (12 March 2015) at paras. 14-16
[3066] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Motion for Delayed Disclosure…* (5 June 2009) at para. 12; *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 3
[3067] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Motion for Delayed Disclosure…* (5 June 2009) at para. 12
[3068] *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 3
[3069] *Prosecutor v. Slobodan Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Croatia)* (30 July 2002) at para. 4.
[3070] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1957

to protect the identity of witnesses and victims in the interests of justice. Additionally, the public redacted version sufficiently allows for public scrutiny of the Trial Judgement to safeguard the right to a fair trial.[3071]

Rule 70 conditions

Rule 75 does not require that orders concerning restrictions on disclosure pursuant to Rule 70 apply to future cases in which the same witness gives evidence.[3072]

Where the applicant has made a showing that he is entitled to the closed session material, it will only be disclosed to him after the prosecution has obtained the consent of the witness or Rule 70 provider. Otherwise, the transcripts must be redacted to prevent disclosure of the witness' identity.[3073]

The disclosure of material from another case would be limited by the fact that "sensitive witnesses" whose identity was not disclosed in the first proceeding until shortly before the testimony would not be disclosed to the accused and Rule 70 material would not be disclosed absent the consent of the provider.[3074]

scope

Protective measures are not limited to victims and can be ordered for witnesses who are not victims.[3075]

standing

A witness does not have standing to challenge protective measures adopted in a case.[3076]

subpoenas

Trial Chamber's denial of protective measures did not exhaust accused's avenues to obtain the attendance of the witness. The accused failed to show that he did not have legal recourse to a subpoena to compel the witness to testify. Therefore, he would not be

[3071] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1958
[3072] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* (15 February 2007) at para. 24; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion for and Notifications of Protective Measures* (26 May 2009) at para. 22
[3073] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i)* (11 March 2005) at page 4
[3074] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motion for Access to Confidential Material* (9 March 2005); *Prosecution v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Accused Slobodan Praljak's Motion for Access to Confidential Testimony and Documents* (11 April 2005)
[3075] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Vojislav Seselj's Motion for Reconsideration of the Decision of 30 August 2007 on Adopting Protective Measures* (11 January 2008) at para. 14
[3076] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Motion by Witness 28 to Set Aside a Subpoena or Alternate Relief* (5 September 2007) at para. 9

heard on appeal to complain about the denial of protective measures.[3077]

transfer cases

Because the Prosecution's obligation to disclose to the authorities of the State to which a case is referred under Rule 11 *bis* encompasses "all appropriate evidentiary materials relating to the case", a variation of protective measures is not required for disclosure of protected witness information to the authorities of the State.[3078]

Where disclosing protected witness material to a State to whom a case has been referred pursuant to Rule 11 *bis*, the referral chamber should order that its protective measures continue.[3079]

varying protective measures

Protective measures for prosecution witness lifted where no reasons existed to maintain original protective measures considering (1) lapse of time since the testimony; (2) willingness of witness to lift protective measures; and (3) need for use of protected information in upcoming trial of contempt for disclosure of protected information.[3080]

To vary a protective order, the defence must demonstrate that their right to adequately investigate and prepare their cases dictates that the protective measures be lifted immediately, rather than receiving disclosure 30 days before the testimony.[3081]

The inadvertent disclosure to a party of the identity of a witness does not justify removal of the protective measures.[3082]

Where protective measures have been modified or rescinded by a second Trial Chamber, any subsequent inquiry into protective measures should begin with the measures in force after that decision, not the original protective measures.[3083]

Trial Chamber declined to order Victims and Witnesses Unit to contact witnesses who testified in closed session after the trial concluded to determine if they would consent to revelation of the substance of their testimony while protecting their identity where the accused did not present any information that the witnesses would likely

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[3077] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 82
[3078] *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v Ljubicic Case* (13 July 2006) at p. 5
[3079] *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v Ljubicic Case* (13 July 2006) at p. 6
[3080] *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecution's Motion for Variance of Protective Measures in the Prosecutor v Seselj and Margetic Case* (24 January 2006)
[3081] *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 16
[3082] *Prosecutor v Haradinaj et al*, No. 04-84-PT, *Decision on Second Haradinaj Motion to Lift Redactions of Protected Witness Statements* (22 November 2006) at para. 20
[3083] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevqn Todorovic Pursuant to Rule 92 quarter* (29 October 2010) at para. 33

consent to vary their protective measures and failed to show any exigent circumstances or that a miscarriage of justice would result if the Chamber did not vary the protective measures.[3084]

An accused is not entitled to obtaining a list of prosecution witnesses who testified in his case for whom *ex parte* motions to vary protective measures have been filed to enable disclosure to national authorities, as his interest in knowing if witnesses have subsequently made statements or testified in domestic proceedings are outweighed by the need for information related to domestic proceedings to remain *ex parte*.[3085]

victims

As a matter of general practice, the public disclosure of the identity of victims of crimes is a frequent and accepted occurrence in international criminal trials. The Chamber was not convinced of the need to keep the identities of murder victims private.[3086]

violation

Any deliberate conduct which creates a real risk that confidence in the Tribunal's ability to grant effective protective measures would be undermined amounts to a serious interference with the administration of justice. Public confidence in the effectiveness of such orders is absolutely vital to the success of the work of the Tribunal.[3087]

Rule 75 *bis*—requests for assistance in obtaining testimony

(A) A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority ("Requesting Authority") may request the assistance of the Tribunal in obtaining the testimony of a person under the authority of the Tribunal in ongoing proceedings in the jurisdiction of the Requesting Authority involving violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.
(B) Requests pursuant to paragraph (A) shall be submitted to the President of the Tribunal, who shall refer the application to a specially appointed Chamber composed of three Judges of the Tribunal ("Specially Appointed Chamber").
(C) Requests under paragraph (A) shall not be granted if granting the request may prejudice ongoing investigations or proceedings before the Tribunal.
(D) The Specially Appointed Chamber, having heard the parties to the proceedings before the Tribunal, may grant a request pursuant to paragraph (A) after having verified that:

[3084] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Variation of Protective Measures for Witnesses who Testified in Closed Session* (16 March 2015)
[3085] *Prosecution v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Disclosure of Information on Variation of Protective Measures* (18 February 2016) at p. 3
[3086] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Serbia's Request for Protective Measures in Relation to Defence Documents* (18 July 2012) at para. 27
[3087] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 44

(i) granting the request will not prejudice the rights of the person under the authority of the Tribunal;
(ii) provisions and assurances are in place for observing any protective measures granted by the Tribunal to the person under its authority;
(iii) granting the request will not pose a danger or risk to any victim, witness, or other person; and
(iv) no overriding grounds oppose granting the request.
(E) The assistance will be rendered by way of video-conference link. If legal provisions in the jurisdiction of the Requesting Authority do not allow for the testimony to be received by way of video-conference link, the Specially Appointed Chamber may consider to render the assistance by way of granting the Requesting Authority access to the person to be heard on the premises of the Tribunal or the transfer of the person under Rule 75 ter.
(F) Upon order of the Specially Appointed Chamber, the Registrar shall coordinate the arrangements for the video-conference link and be present during the hearing.
(G) A Judge of the Specially Appointed Chamber shall be present during the hearing and shall ensure that Rule 75 bis (D)(i)–(iii) is respected.
(H) The questioning of the person to be heard shall be conducted directly by, or under the direction of, the Requesting Authority in accordance with its own laws.
(I) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.
(J) No decision taken under this Rule or Rule 75 ter is subject to appeal.
(K) The President may in all cases request any document or additional information from the Requesting Authority.

Where the testimony sought from the accused directly related to his own case at the ICTY, which had not been concluded, the accused would not be required to give testimony before the national court in Bosnia.[3088]

Rule 75 *ter*—transfer of person for testimony

(A) The Specially Appointed Chamber, considering the transfer of a person under Rule 75 bis (E), shall not grant such transfer unless:
(i) the person under the authority of the Tribunal has been duly summoned to testify;
(ii) the person under the authority of the Tribunal has provided his consent to the transfer;
(iii) the host country and the State to which the person under the authority of the Tribunal is to be transferred have been given the opportunity to be heard;
(iv) the State to where the person is to be transferred ("Requesting State") has provided written guarantees to the Tribunal as to the return of the transferred

[3088] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Assistance of the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis* (9 August 2011) at p.3; *Prosecutor v Mladic*, No IT-09-92R75 *bis, Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis* (21 December 2011) at para. 12

person within a stipulated period; the nontransfer of the person to a third State; the appropriate location of detention; and immunities from prosecution and service of process for acts, omissions, or convictions prior to the person's arrival in the territory of the Requesting State;
(v) the transfer of such person will not extend the period of the person's detention as foreseen by the Tribunal; and
(vi) there are no overriding grounds for not transferring the person to the territory of the Requesting State.
(B) The Specially Appointed Chamber may impose such conditions upon the transfer of the person under the authority of the Tribunal as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the person for trial thereafter and the protection of others.
(C) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.
(D) If necessary, the Specially Appointed Chamber may issue a warrant of arrest to secure the presence of a person who has been transferred under this Rule.
The provisions of Section 2 of Part Five shall apply mutatis mutandis.
(E) At any time after an order has been issued pursuant to this Rule, the Specially Appointed Chamber may revoke the order and make a formal request for the return of the transferred person.

Rule 76—solemn declaration by interpreters

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

An interpreter should only ever be called to give evidence if one of the following three conditions are filled: (1) there should be a legal duty on the interpreter to make a record of the interpretation between the parties; (2) in the interest of justice, there should be no other way of obtaining the evidence sought other than through the testimony of the interpreter; or (3) the determination of the issue should depend entirely on the evidence to be given by the interpreter.[3089]

Rule 77—contempt of the Tribunal

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who
(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

[3089] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at paras 562 – 563.

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.
(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.
(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
(iii) initiate proceedings itself.
(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:
(i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or
(ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct amicus curiae to prosecute the matter or prosecute the matter itself.
(E) The rules of procedure and evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule. The time limit for entering a plea pursuant to Rule 62(A), disclosure pursuant to Rule 66(A)(i), or filing of preliminary motions pursuant to Rule 72(A) shall each not exceed ten days.
(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.
(G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.
(H) Payment of a fine shall be made to the Registrar to be held in a separate account.
(I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.
(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.
(K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President.
Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

adequate time and facilities

A Trial Chamber must afford adequate facilities to an accused charged with contempt even if the principle of equality of arms is inapplicable since the Trial Chamber is prosecuting the case itself.[3090]

Trial Chamber erred in denying right to case manager without sufficient explanation, but the accused was not prejudiced by this error.[3091]

amicus curiae

There is nothing which prohibits an amicus investigator from being appointed as an amicus prosecutor in the same case.[3092]

appeal

An accused cannot appeal a denial of his motion to initiate contempt proceedings under this section.[3093]

A notice of appeal for a judgement of contempt must be filed within 15 days. Appeal filed outside of this period dismissed.[3094]

[3090] *Contempt Proceedings Against Vojislav Seselj*, No. IT-03-67-R77.4-A, *Judgement* (30 May 2013) at para. 37
[3091] *Contempt Proceedings Against Vojislav Seselj*, No. IT-03-67-R77.4-A, *Judgement* (30 May 2013) at paras. 42,45
[3092] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir Dire Hearing and Termination of Mandate of the Amicus Prosecutor* (29 January 2009) at para. 23
[3093] *Prosecutor v Seselj*, No. IT-03-67-AR77.1, *Decision on Vojislav Seselj's Appeal Against the Trial Chamber's Decision of 19 July 2007* (14 December 2007)

A decision dismissing a request to initiate contempt proceedings may be appealed as of right under Rule 77(J).[3095] Failure to appeal such a decision waives one's right to raise the issue in an appeal from the final judgement.[3096]

disclosure

Disclosure of the identity of a protected witness does not require a *mens rea* other than knowledge of the protected status of the witness. Therefore, disclosure of the identity of protected witnesses by the accused in his book constituted contempt.[3097]

The *actus reus* of unlawful disclosure is the physical act of disclosure of information relating to proceedings before the Tribunal, where such disclosure breaches an order of the Chamber.[3098]

Disclosure of confidential decision cannot be justified by the right to freedom of expression. Restricting a person's freedom of expression through issuance of a confidential decision is proportional and necessary to protect the public order by encouraging sovereign states to cooperate with the Tribunal.[3099]

Disclosure is to be understood as the revelation of information that was previously confidential to a third party or to the public.[3100]

It is not necessary to prove actual interference with the Tribunal's administration of justice. A violation of court order as such constitutes an interference with the administration of justice.[3101]

Disclosure of legal reasoning of the Tribunal is covered by the contempt statute.[3102]

[3094] *Prosecutor v Haxhiu*, No. IT-04-84-R77.5-A, *Decision on Admissibility of Notice of Appeal Against Trial Judgement (*4 September 2008)
[3095] *Prosecutor v Seselj*, No. IT-03-67-AR77.2, *Decision on the Prosecution's Appeal Against the Trial Chamber Decision of 10 June 2008* (25 July 2008) at para. 12
[3096] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 56
[3097] *Prosecutor v Seselj*, No. IT-03-67-R77.2, *Judgement on Allegations of Contempt* (24 July 2009)
[3098] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 20
[3099] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at paras. 161-62
[3100] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 20
[3101] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 21; *In the case against Vojislav Seselj*, No.IT-03-67-R77.2-A, *Judgement* (19 May 2010) at para. 20
[3102] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at paras. 34-35

A confidential document remains confidential until a Chamber orders otherwise. A person is not entitled to disclose confidential information simply because the information may otherwise have been made public by others.[3103]

Termination of the case does not operate to terminate the confidentiality of decisions.[3104]

Disclosure of a protected witness' involvement with the case was sufficient to violate the protective measures, even if it was not specified that the person was a prosecution witness or implied that he was a witness for the defence.[3105]

Special Chamber appointed to determine if former Prosecutor Carla Del Ponte violated Rule 77 by disclosing defence witness list of Milosevic to USA.[3106]

incitement

A person may be convicted of incitement to commit contempt. Any person who knowingly and wilfully encourages and/or persuades another person to commit an act punishable under Rule 77 is guilty of incitement.[3107]

indictment

The orders that the accused are charged with violating must be specified in the indictment for contempt.[3108]

The means by which the accused "otherwise interfered with the witness" must be specified in the indictment.[3109]

initiating

A party has the right to request that the Trial Chamber use its discretionary power to initiate contempt proceedings for alleged conduct that, if proven, would harm that party's right to a fair trial.[3110]

[3103] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 91; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 46; *In the case against Vojislav Seselj*, No.IT-03-67-R77.2-A, *Judgement* (19 May 2010) at para. 29; *Prosecutor v Seselj*, No. IT-03-67=R77.3, *Judgement* (31 October 2011) at para.69

[3104] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 113

[3105] *Prosecutor v Seselj*, No. IT-03-67=R77.3, *Judgement* (31 October 2011) at para. 49

[3106] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order Assigning Specially Appointed Chamber* (1 October 2013)

[3107] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 20

[3108] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-PT, *Decision on Motions to Dismiss the Indictment and Order on Motions to Amend the Indictment* (6 September 2005)

[3109] *Prosecutor v Jovic*, No. IT-95-14-R77, *Decision to Deny the Accused Josip Jovic's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment* (21 December 2005) at para. 26

Trial Chamber applied wrong standard for initiating contempt proceedings. Standard requires existence of a prima facie case, not proof beyond a reasonable doubt.[3111]

Investigation by *amicus curiae* into allegations of improper prosecution tactics with respect to witnesses ordered by the Trial Chamber.[3112]

Trial Chamber refused to initiate contempt proceedings against UNDU Commander who disclosed confidential information on Milosevic to US government because information disclosed did not interfere with Tribunal's administration of justice.[3113]

interfering with a witness

Rule 77 includes, but is not limited to, conduct that deters a witness from giving full and truthful evidence.[3114]

Publishing the testimony of a protected witness could constitute interference with that witness and fall within Rule 77.[3115]

Any conduct which is likely to expose witnesses to threats, intimidation, or injury by a third party constitutes "otherwise interfering with a witness" as provided by Rule 77(A)(iv). It is not necessary that the conduct actually produced this result.[3116]

The conduct punishable pursuant to Rule 77(A)(iv) includes threatening, intimidating, causing injury, offering a bribe to, or otherwise interfering with a witness.[3117]

[3110] *Prosecutor v Seselj*, No. IT-03-67-AR77.2, *Decision on the Prosecution's Appeal Against the Trial Chamber Decision of 10 June 2008* (25 July 2008) at para. 13
[3111] *Prosecutor v Seselj*, No. IT-03-67-AR77.2, *Decision on the Prosecution's Appeal Against the Trial Chamber Decision of 10 June 2008* (25 July 2008) at para. 16
[3112] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Seselj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff, and Daniel Saxon* (29 June 2010)
[3113] *Prosecutor v Milosevic*, No. IT-02-54-Misc.5 & Misc.6, *Decision on the Initiation of Contempt Investigations* (18 July 2011) at para. 12
[3114] *Prosecutor v Jovic*, No. IT-95-14-R77, *Decision to Deny the Accused Josip Jovic's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment* (21 December 2005) at para. 25
[3115] *Prosecutor v Jovic*, No. IT-95-14-R77, *Decision to Deny the Accused Josip Jovic's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment* (21 December 2005) at para. 25
[3116] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 64
[3117] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 18

A threat is defined as a communicated attempt to inflict harm or damage of some kind to a witness and/or to the witness' property or to a third person and/or his property to influence or overcome the will of the witness to whom the threat is addressed.[3118]

Intimidation consists of acts or culpable omissions likely to constitute direct, indirect, or potential threats to a witness, which may interfere with or influence the witness' testimony.[3119]

Otherwise interfering with a witness is an open-ended provision which encompasses acts or omissions, other than threatening, intimidating, causing injury, or offering a bribe, capable of and likely to deter a witness from giving full and truthful testimony or in any other way influence the nature of the witness' evidence.[3120]

It is immaterial whether the witness actually felt threatened or intimidated or was deterred or influenced.[3121]

Mens rea for a violation of Rule 77(A)(iv) requires proof that the accused acted willingly and with the knowledge that his conduct was likely to deter or influence the witness.[3122]

It must be shown that the conduct was intended to interfere with witnesses.[3123]

The absence of motive cannot disprove facts establish through reliable evidence. The absence of motive may, however, call for further examination of the convincing potential of the evidence before establishing that the crime was committed, and the accused committed it.[3124]

journalists

A journalist has no right to violate the Trial Chambers' orders.[3125]

[3118] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 18
[3119] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 18
[3120] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 18
[3121] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 18
[3122] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 19
[3123] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 66
[3124] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 59
[3125] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 81

jurisdiction

The Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded.[3126]

Residual mechanism, and not ICTY, has jurisdiction over motions for contempt proceedings brought after 1 July 2013.[3127]

Contempt case returned to President for referral to MICT where accused had not been apprehended by the time of ICTY closure.[3128]

medical care

No reasons to believe that UN Detention Unit medical officer committed contempt of court by recommending against medical visits prior to delivery of judgement.[3129]

mens rea

The *mens rea* element of contempt, when charged under Rule 77(A)(ii), is the knowledge of the alleged contemnor of the fact that his disclosure of particular information is done in violation of an order of a Chamber.[3130]

Journalists had requisite *mens rea* when they disclosed the identity of a witness who testified in closed session as they knew that the information was given by a witness with protective measures in place.[3131]

Actual knowledge may be inferred from a variety of circumstances. In addition, wilful blindness to the existence of an order is sufficient. However, to demonstrate wilful blindness it must first be shown that the alleged contemnor had a suspicion or realisation of the order's existence.[3132]

[3126] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 23; *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 34; *In the case against Vojislav Seselj*, No.IT-03-67-R77.2-A, *Judgement* (19 May 2010) at para. 17
[3127] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Appointment of Amicus Curiae Prosecutor to Investigate Officials of the United States of America* (17 January 2014)
[3128] *In the case against Jojic & Radeta*, No. IT-03-67-R77.5, *Decision Returning Case to President* (2 November 2017) at paras. 10-11
[3129] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion to Reconsider Decision on Urgent Defence Motions of 10 November 2017 or…Motion for Certification to Appeal* (21 November 2017) at para. 13
[3130] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 18; *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 11; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 22; *In the case against Vojislav Seselj*, No.IT-03-67-R77.2-A, *Judgement* (19 May 2010) at para. 26
[3131] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 43
[3132] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 18

Mere negligence in failing to ascertain whether the witness was subject to protective measures does not amount to contempt.[3133]

Knowing and wilful interference with the administration of justice is a consequence of the disclosure of information relating to Tribunal proceedings in knowing violation of an order of a Chamber. There is therefore no additional requirement for the Prosecution to prove that such interference actually occurred.[3134]

The knowledge requirement can be fulfilled by proof of actual knowledge, reckless indifference, or wilful blindness.[3135]

Knowledge of the legality of the Trial Chamber's order is not an element of the *mens rea* of contempt. An accused may not raise a mistake of law as a defence to his knowing breach of an order of the International Tribunal on the ground that the mistake was founded on legal advice.[3136]

Intent to interfere with the administration of justice is automatic when there is a knowing and intentional violation of an order of the Chamber.[3137]

There was no reason to believe that contempt may have been committed by members of the Prosecution in connection with the multiple disclosure violations in this case.[3138]

A person's mistake of law is not an excuse for violation of it.[3139]

motions

Rule 72(D) is inapplicable to contempt proceedings. Therefore, the accused has no right to make preliminary motions on matters of jurisdiction before the hearing on contempt.[3140]

[3133] *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 11; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 22

[3134] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 19; *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 10

[3135] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 37; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para.22

[3136] *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007) at para. 27

[3137] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 128; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 52

[3138] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Invitation from the Single Judge of the Mechanism for International Tribunals* (6 August 2014) at p. 3

[3139] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 147; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 65

parties

Neither the prosecution nor the accused in the underlying case is a party to the proceedings against a witness for contempt by failing to appear pursuant to a subpoena and neither has a right to be present at the hearing on the contempt.[3141]

refusal to testify

The elements of contempt for refusing to testify are knowing and wilful interference with the Tribunal's administration of justice by contumaciously refusing or failing to answer a question while being a witness before the Tribunal.[3142]

Rule 77(A)(i) imposes criminal liability where a witness knowingly and wilfully interferes with the Chamber's administration of justice by persistently refusing or failing to answer a question without reasonable excuse while being a witness before the Chamber.[3143]

Rule 77(A) is violated not when a witness refuses to answer a question, but when he or she maintains the refusal in the face of the Chamber's request to answer the question.[3144]

Witnesses are under a duty to testify. This ensures that evidence required for the proper administration of justice is available; therefore, the duty is subject to very few exceptions.[3145]

Protective measures are the appropriate remedy for security concerns, not a refusal to testify.[3146]

Unwillingness or fear of implicating others is not a valid excuse not to testify.[3147]

[3140] *Prosecutor v Milosevic*, No. IT-01-54-A, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 35; *Prosecutor v Marijacic & Rebic*, No. IT-95-14-PT, *Decision on Motions to Dismiss the Indictment and Order on Motions to Amend the Indictment* (6 September 2005); *Prosecutor v Jovic*, No. IT-95-14-R77, *Decision to Deny the Accused Josip Jovic's Preliminary Motion to Dismiss the Indictment on the Grounds of Lack of Jurisdiction and Defects in the Form of the Indictment* (21 December 2005) at para. 10; *Prosecutor v Krizic*, No. IT-95-14R77.4, *Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal* (2 March 2006)

[3141] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Accused's Motion to be Present During the Hearing Held in the Matter of Ljubisa Petkovic* (27 August 2008)

[3142] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 11

[3143] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 12

[3144] *Contempt proceedings against Dragan Jokic*, No. IT-05-88-R77.1-A, *Judgement on Allegations of Contempt* (25 June 2009) at para. 30

[3145] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 25

[3146] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 25

A witness is not privileged to refuse to answer questions because he believed the Trial Chamber was in error to proceed in the absence of the accused. The witness could not rely on a right that pertained to the accused in refusing to answer questions.[3148]

The Trial Chamber whose order was disobeyed by the witness was not disqualified from adjudicating the contempt.[3149]

Evidence demonstrated that refusal to answer questions was wilful. A witness cannot set his own conditions for answering questions in violation of a clear order.[3150]

Health reasons did not justify a refusal to testify.[3151]

Witness who suffered from PTSD had a reasonable excuse to refuse to testify and therefore was found not guilty of contempt.[3152]

The *mens rea* of refusing to testify is knowingly and wilfully interfering with the Tribunal's administration of justice by refusal to testify.[3153]

scope

The power of the Tribunal to prosecute individuals for interfering with the administration of justice is not limited to individuals who are parties to the proceedings , nor any other category of individuals. Rather, the Tribunal has the power to prosecute any person who knowingly and wilfully interferes with the administration of justice.[3154]

Disclosure is revelation of information which was previously confidential to a third party or to the public.[3155]

Aiding and abetting contempt is punishable within Rule 77.[3156]

[3147] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 30
[3148] *Prosecutor v Milosevic*, No. IT-01-54-A, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 11
[3149] *Prosecutor v Milosevic*, No. IT-01-54-A, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 22
[3150] *Prosecutor v Milosevic*, No. IT-01-54-A, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 41
[3151] *In the Contempt Case of Milan Tupajic*, No. IT-95-5/18-R77.2, *Judgement on Allegations of Contempt* (24 February 2012) at para. 21
[3152] *In the Contempt Case of Radislav Krstic*, No. IT-95-5/18-R77.3, *Judgement* (18 July 2013) at para. 30
[3153] *Contempt proceedings against Dragan Jokic,* No. IT-05-88-R77.1-A, *Judgement on Allegations of Contempt* (25 June 2009) at para. 31
[3154] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-PT, *Decision on Motions to Dismiss the Indictment due to Lack of Jurisdiction* (7 October 2005) at para. 18
[3155] *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 10
[3156] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution's Motions to Amend the Indictment* (7 October 2005) at para. 39

The *actus reus* of contempt through disclosure of confidential information is the physical act of disclosure of information relating to proceedings before the Tribunal, when such disclosure would breach an order of a Chamber.[3157]

Any defiance of an order of the Tribunal interferes with the administration of justice.[3158]

Publication of the identity of a protected witness, with knowledge of the existence of those measures and an intention to frustrate their effect, constitutes contempt under Rule 77(A).[3159]

For a protective order to be breached it must (1) apply to an accused; (2) protect the specific information disclosed by an accused; and (3) be in effect at the time of the disclosure.[3160]

The fact that the aforementioned information today is no longer confidential does not present an obstacle to a conviction for having published the information at a time when it was still under protection.[3161]

A person not a party to proceedings of the Tribunal may be subject to its jurisdiction. When a Chamber orders that testimony be given in closed session, rendering everything that transpires confidential, such an order applies to all persons coming into possession of the protected information.[3162]

The order for closed session made the identity of the witness confidential. Journalists properly punished for contempt for revealing identity of witness.[3163]

Whether or not a witness came to harm after confidential information about his identity and testimony was revealed is not relevant to the question of whether the party revealing that information should be found responsible for contempt, although it may have some relevance to the matter of penalty.[3164]

[3157] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 17; *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 10
[3158] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 44; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 107
[3159] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 15
[3160] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 36
[3161] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 45
[3162] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 24
[3163] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 42
[3164] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 44

Closed session orders apply to all persons coming into possession of the information.[3165]

Admission of document in evidence as an exhibit without a specific reference to it being admitted under seal did not render the document a public document and it remained subject to protective orders.[3166]

Editor knowingly and wilfully published confidential witness list and did not labour under a misconception that the witness list had been made public by its admission as an exhibit without a specific order that it be admitted under seal.[3167]

Individuals, including journalists, cannot decide to publish information covered by protective orders based on their own assessment of the public interest in that information.[3168]

A confidentiality order respecting a Chamber decision necessarily encompasses information concerning the purported effect of that decision and the confidential submissions of the parties regarding the application for protective measures.[3169]

Although the existence of the confidential decision that the accused was convicted of disclosing had already been made public, the accused revealed the legal reasoning of that decision had not been made public, and that is what the accused was convicted of revealing.[3170]

The fact that the information disclosed by the accused was already in the public domain is not a defence to violation of a court order of non-disclosure..[3171]

A violation of a court order *as such* constitutes an interference with the International Tribunal's administration of justice. Any defiance of an order of a Chamber *per se* interferes with the administration of justice for the purposes of a conviction for contempt. No additional proof of harm to the International Tribunal's administration of justice is required.[3172]

[3165] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 44; *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007) at para. 22
[3166] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 47
[3167] *Prosecutor v Margetic*, No. IT-95-14-R77.6, *Judgement on Allegations of Contempt* (7 February 2007) at para. 61
[3168] *Prosecutor v Haxhiu*, No. IT-04-84-R77.5, *Judgement on Allegations of Contempt* (24 July 2008) at para. 28
[3169] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 51
[3170] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Judgement* (19 July 2011) at para. 68
[3171] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Joint Decision on Defence Motion for Reconsideration and Defence Motion for Voir Dire Hearing and Termination of Mandate of the Amicus Prosecutor* (29 January 2009) at para. 17
[3172] *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007) at para. 30

Refusal to remove confidential information from website after being ordered to do so, where accused had power to determine what was on website, constituted contempt of the Tribunal under Rule 77(A).[3173]

The fact that some portions of the Witness's written statement or closed session testimony may have been disclosed by another third party does not mean that this information was no longer protected, that the court order had been *de facto* lifted or that its violation would not interfere with the Tribunal's administration of justice.[3174]

sentence

Failure of defence counsel to make presentation as to sentencing during the trial waived arguments on appeal as to sentence, but Appeals Chamber would allow payment of fine in instalments so as not to punish accused for the inadvertence of their counsel.[3175]

Four-month consecutive sentence imposed for convicted person's refusal to testify.[3176]

Two-month sentence for refusal to testify.[3177]

Two-year sentence for repeated refusal to remove confidential material from website.[3178]

subpoenas

Accused who was served with a subpoena and failed to appear was guilty of contempt. His health issues, need for waiver of State secrets requirement, and need for safe conduct order, did not constitute good cause for the accused's failure to appear.[3179]

Rule 77 *bis*—payment of fines

(A) In imposing a fine under Rule 77 or Rule 91, a Chamber shall specify the time for its payment.
(B) Where a fine imposed under Rule 77 or Rule 91 is not paid within the time specified, the Chamber imposing the fine may issue an order requiring the person on whom the fine is imposed to appear before, or to respond in writing to, the Tribunal to explain why the fine has not been paid.

[3173] *In the matter of Vojislav Seselj*, No. IT-03-67-R77.4, *Judgement* (28 June 2012) at para. 46
[3174] *Prosecutor v Jovic*, No. IT-95-14-R77-A, *Judgement* (15 March 2007) at para. 30
[3175] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-A, *Judgement* (27 September 2006) at para. 55
[3176] *Contempt Proceedings Against Dragan Jokic*, No. IT-05-88-R77.1, *Judgement on Allegations of Contempt* (27 March 2009) at para. 42
[3177] *In the Contempt Case of Milan Tupajic*, No. IT-95-5/18-R77.2, *Judgement on Allegations of Contempt* (24 February 2012) at para. 35
[3178] *In the matter of Vojislav Seselj*, No. IT-03-67-R77.4, *Judgement* (28 June 2012) at paras. 57-58
[3179] *Prosecutor v Pecanas*, No. IT-05-88/2-R77.2, *Judgement on Allegations of Contempt* (9 December 2011)

(C) After affording the person on whom the fine is imposed an opportunity to be heard, the Chamber may make a decision that appropriate measures be taken, including:
(i) extending the time for payment of the fine;
(ii) requiring the payment of the fine to be made in instalments;
(iii) in consultation with the Registrar, requiring that the moneys owed be deducted from any outstanding fees owing to the person by the Tribunal where the person is a counsel retained by the Tribunal pursuant to the Directive on the Assignment of Defence Counsel;
(iv) converting the whole or part of the fine to a term of imprisonment not exceeding twelve months.
(D) In addition to a decision under paragraph (C), the Chamber may find the person in contempt of the Tribunal and impose a new penalty applying Rule 77 (G), if that person was able to pay the fine within the specified time and has wilfully failed to do so. This penalty for contempt of the Tribunal shall be additional to the original fine imposed.
(E) The Chamber may, if necessary, issue an arrest warrant to secure the person's presence where he or she fails to appear before or respond in writing pursuant to an order under paragraph (B). A State or authority to whom such a warrant is addressed, in accordance with Article 29 of the Statute, shall act promptly and with all due diligence to ensure proper and effective execution thereof. Where an arrest warrant is issued under this Sub-rule, the provisions of Rules 45, 57, 58, 59, 59 bis, and 60 shall apply mutatis mutandis. Following the transfer of the person concerned to the Tribunal, the provisions of Rules 64, 65 and 99 shall apply mutatis mutandis.
(F) Where under this Rule a penalty of imprisonment is imposed, or a fine is converted to a term of imprisonment, the provisions of Rules 102, 103 and 104 and Part Nine shall apply mutatis mutandis.
(G) Any finding of contempt or penalty imposed under this Rule shall be subject to appeal as allowed for in Rule 77 (J).

Where contempt fine was not paid, Appeals Chamber converted sentence to 7 days imprisonment and issued warrant for arrest of contemnor.[3180]

Rule 78—open sessions

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Trial Chamber committed discernible error by holding hearing without prior notice to the public.[3181]

[3180] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5-A, *Second Order on Payment of Fine Pursuant to Rule 77 bis and Warrant for Arrest* (16 November 2011)
[3181] *Contempt proceedings against Dragan Jokic*, No. IT-05-88-R77.1-A, *Judgement on Allegations of Contempt* (25 June 2009) at para. 26

Documents should be admitted on a confidential basis only in exceptional circumstances, when they contain information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or witness.[3182]

Rule 79—closed sessions
(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
(i) public order or morality;
(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
(iii) the protection of the interests of justice.
(B) The Trial Chamber shall make public the reasons for its order.

closed sessions

Closed session not justified to allow the witness to make a full and honest expression of his views. Threat to the security of the witness required.[3183]

The trial should not only be fair but be seen to be fair. As such, it is of crucial importance that the proceedings are open to the public, and the measure of closed session is used exceptionally.[3184]

confidential exhibits

Where the content of a written witness statement is largely the same as the content of oral testimony given in closed session, that content must also be considered protected by the terms of the closed session order, or the protection granted would be ineffectual.[3185]

Exhibits admitted during the trial cannot be disclosed to the public until the judgement. However, parties and national authorities can obtain access by applying to the Trial Chamber.[3186]

confidential filings

Decisions containing mere references to confidential decisions are not required to be filed confidentially.[3187]

[3182] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Unseal ICMP Exhibits* (25 April 2012) at para. 6
[3183] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on Request for Closed Session for Yasushi Akashi* (17 April 2013) at para. 7
[3184] *Decision on Prosecution's Motion for Protective Measures for Witness KDZ487* (24 November 2009) at para. 18
[3185] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-T, *Judgement* (10 March 2006) at para. 27
[3186] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision Regarding Public Access to Trial Exhibits* (18 September 2008)

The filing of a confidential judgement, along with a public redacted version, does not violate the right to a public judgement.[3188]

Barring obscene or offensive language, an accused is entitled to challenge the credibility of prosecution witnesses. Pleading which related to alleged plagiarism of report by prosecution expert would not be reclassified as confidential.[3189]

DNA coded genetic information would be redacted, but names of victims included in list of missing persons whose remains were recovered would be public except for those victims whose families had not yet been notified.[3190]

Defence filing concerning difficulties in preparing final brief ordered filed confidentially as contents would place Tribunal's IT system at risk.[3191]

Parties can refer publicly to confidential documents in a way that does not reveal the protected information contained therein.[3192]

ex parte filings

Filings may be made *ex parte* in a case where they require a higher degree of confidentiality because of the security interests of a State , other public interests, or privacy interests of a person or an institution.[3193]

The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so—that is justice to everyone concerned—where disclosure would be likely to prejudice the party making the application or some other person.[3194]

[3187] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Judgement on Allegations of Contempt* (14 September 2009) at para. 38
[3188] *In the case against Vojislav Seselj*, No.IT-03-67-R77.2-A, *Judgement* (19 May 2010) at para. 32
[3189] *Prosecutor v Karadzic,* No.IT-95-5/18-T, *Decision on Accused's Motion to Compel Inspection of Witness Material (Christian Nielsen)…*(7 July 2011) at para. 7
[3190] *Prosecutor v Karadzic,* No.IT-95-5/18-T, *Decision on Prosecution's Motion for Partial Reconsideration or Clarification of the Chamber's Decision on the Accused's Motion to Unseal ICMP Exhibits* (5 September 2012) at paras. 19, 22-23
[3191] *Prosecutor v Mladic*, No. IT-09-92-T, *Fourth Defence Case Omnibus Decision* (2 August 2016) at para. 4
[3192] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion to Strike Public Redacted Version of Prosecution Final Brief* (29 June 2017) at para. 6
[3193] *Prosecutor v. Blaskic*, No.:IT-95-14-R, *Decision on Defence's Request for Relief with Regard to Ex Parte Filings* (20 November 2006) at p. 3
[3194] *Prosecutor v. Blaskic*, No.:IT-95-14-R, *Decision on Defence's Request for Relief with Regard to Ex Parte Filings* (20 November 2006) at p. 4

Ex parte materials, filed by prosecution in support of motion to withdraw right of self-representation would not be disclosed to the accused due to concerns of victim safety.[3195]

Ex parte filing by the prosecution was justified by fact that prosecution motion referred to confidential *ex parte* decision in another case and did not warrant review by the Chamber of all *ex parte* filings to determine if disclosure to the defence could be made.[3196]

Search warrants issued in the accused's case prior to his apprehension ordered disclosed to the accused.[3197]

reference to closed session testimony in judgements

In referring to closed session testimony in its final judgement, a Trial Chamber does not modify the protective measures awarded to a witness. Rather, having conducted a thorough analysis of the said evidence, the Chamber may consider it appropriate and consistent with the closed session awarded to the witness to refer to certain parts of the said evidence in its public judgement without compromising the said protective measure.[3198]

unsealing records

Original warrant and order of surrender unsealed where defence sought to examine the basis for his arrest.[3199]

The Trial Chamber did not err in refusing to allow the accused to examine the affidavit in support of the search warrant from which seized items were introduced at his trial. It was justified in concluding that providing access to the accused would jeopardize "ongoing investigations and trials."[3200]

The accused has a right to access to all *inter parties* filings in his own case, including confidential filings made before he was arrested.[3201]

[3195] *Prosecutor v Seselj*, No. IT-03-67-T, *Order on the Accused's Oral Motion to Obtain the Confidential and Ex Parte Version of the Motion to Impose Counsel* (27 August 2008)
[3196] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Review and Disclosure of Ex Parte Filings* (14 September 2011) at paras. 5-6
[3197] *Prosecutor v Karadzic*, No. IT-95-5/18-I, *Decision on the Accused's Requests for Copies of Search Warrants* (29 August 2008)
[3198] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Variation of Protective Measures for Witnesses who Testified in Closed Session* (16 March 2015) at para. 12
[3199] *Prosecutor v Beqaj*, No. IT-03-66-R77, *Decision on Defence's Motion to Lift Confidentiality of Warrant of Arrest and Order for Surrender* (11 March 2005)
[3200] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 233
[3201] *Bralo v Prosecutor*, No. IT-95-17-A, *Decision on Motion of Miroslav Bralo for Access to Certified Trial Record* (2 May 2006) at p. 4

Rule 80—control of proceedings

(A) The Trial Chamber may exclude a person from the courtroom to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.
(B) The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.

Rule 81—records of proceedings and evidence

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.
(B) The Trial Chamber, after giving due consideration to any matters relating to witness protection, may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering its non-disclosure no longer exist.
(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings subject to any Practice Direction or any order which a Chamber may at any time make with respect to the control or disposition of physical evidence offered during proceedings before that Chamber.
(D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registrar, may be authorised at the discretion of the Trial Chamber.

Motion for revision of trial transcripts denied where accused did not show that interpretation errors were so prevalent as to affect his right to a fair trial.[3202]

Rule 81 *bis*—proceedings by video conference link

At the request of a party or proprio motu, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.

cross examination

Request for defence counsel to cross examine witness from the location of the videoconference denied. The Chamber would not be able to satisfactorily supervise the interaction between those in the physical presence of the witness.[3203]

[3202] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on Motion for Revision of Trial Transcripts* (3 July 2013) at para. 16
[3203] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb…*(26 February 2009) at para. 26

denied

Video link denied without prejudice where motion failed to explain why witness who had testified live in previous cases could not testify in person in this case despite physical ailments.[3204]

Video link denied where medical evidence consisted of conclusory statement of physician.[3205]

Video link denied for defence witness who was unwilling to travel to The Hague because of his busy schedule. The witness should be subpoenaed if he declined to appear voluntarily.[3206]

Video link denied for defence witness who was unwilling to travel to The Hague because he was a university professor, and his travel would interfere with his teaching schedule.[3207]

A mere expression of a fear of flying, without supporting medical or psychiatric evidence is not sufficient to meet the requirement that a witness is unable, or for good reason unwilling, to come to the Tribunal.[3208]

Witness' fear of arrest on sealed indictment while in transit to The Hague is not sufficient to constitute a good reason for unwillingness to travel where a safe conduct order would suffice to prevent such an arrest.[3209]

granted

Fact that witness was a nursing mother justified testimony by video link.[3210]

Video link authorized for witness who needed to care for ailing spouse.[3211]

[3204] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link* (17 June 2010) at para. 11

[3205] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Video Link Testimony of Witness Cedomir Kljajic* (17 April 2013) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Video Link Testimony of Witness Nikola Poplasen* (13 August 2013) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Video Link Testimony of Witness Mile Dmicic* (27 August 2013) at paras. 7-8

[3206] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Reasons for Decision on Urgent Stanisic Defence Motion for Video Conference Link for Testimony of Witness DST-060* (15 November 2011) at paras. 7-8

[3207] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Motion for Testimony of DGH-042 to be Heard Via Video-Conference Link* (10 October 2014) at para. 6

[3208] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Motion for Testimony to be Heard Via Video-Conference Link (DGH-010)* (19 September 2014) at para. 14

[3209] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Motion for Testimony to be Heard Via Video-Conference Link (DGH-010)* (19 September 2014) at para. 15

[3210] *Prosecutor v Oric*, No. 03-68-T, *Decision on Prosecution Motion for the Testimony of a Witness Via Video-Conference Link* (16 March 2005)

[3211] *Prosecutor v Mladic*, No. IT-09-92-T, *Reasons for the Decision on Urgent Prosecution Motion for Testimony of Witness RM-015 to be heard via Video-Conference Link* (14 February 2013)

Witness who could not travel to The Hague due to health problems allowed to testify via video link.[3212]

It was not necessary to obtain detailed medical evidence when a witness represented he was too unwell to travel to The Hague.[3213]

Video link granted for witnesses who were unwilling to travel to The Hague, even where there were no good reasons for such unwillingness.[3214]

Video link of witnesses whose statements were admitted pursuant to Rule 92 *bis* but who were ordered to appear for cross-examination granted where the testimony would take less than one hour each and it was not necessary for the witnesses to travel to The Hague for such brief testimony.[3215]

prejudice

The use of video link is an extension of the courtroom and does not prejudice the accused.[3216]

Self-represented accused would not be prejudiced by inability to interview witness proposed for video link as such an interview can be conducted by his associates.[3217]

Self-represented accused suffers no greater prejudice that represented accused by evidence presented via videoconference.[3218]

[3212] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sainovic Motion for Video-Conference Link for Dusan Matkovic* (23 August 2007); *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Motion for Video link (Witness 30)* (14 September 2007); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb…*(26 February 2009) at para. 21; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link* (22 July 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Video-Conference Link and Protective Measures for Witness KDZ595* (18 August 2010)

[3213] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic's Motion Requesting Video Conference Link Testimony of Two Witnesses* (28 May 2008) at para. 13

[3214] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic's Motion Requesting Video Conference Link Testimony of Two Witnesses* (28 May 2008) at para. 11; *Prosecutor v Mladic*, No. 09-92-T, *Decision on Prosecution Motion for Testimony of Witness RM-088 to be heard via Video-Conference Link* (1 November 2012); *Prosecutor v Mladic*, No. 09-92-T, *Reasons for the Decision on Prosecution Motion for Testimony of Witness RM-284 via Video-Conference Link* (10 May 2013) at para. 10

[3215] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for Decision Granting Prosecution's Motion to Cross-Examine Four Proposed Rule 92 bis Witnesses and Reasons for Decision to Hear the Evidence of those Witnesses via Video Conference Link* (3 November 2009)

[3216] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion for Testimony of Witness RM-145 to be Heard via Video-Conference Link* (7 September 2012) at para. 6

[3217] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link* (17 June 2010) at para. 10

standard

Video link should be granted upon a showing that (1) the evidence is sufficiently important to make it unfair to proceed without it; and (2) the witness is unable or unwilling to travel to The Hague to give live testimony.[3219]

When considering video link testimony, the Trial Chamber evaluates (1) whether the witness is unable, or has good reasons to be unwilling, to come to the Tribunal; (2) whether the testimony of the witness is sufficiently important to make it unfair to the requesting party to proceed without it; and (3) whether the accused is prejudiced in his right to confront the witness.[3220]

Factors weighed in connection with whether to authorise testimony by video-link included the importance of the witness's testimony, the ability for the parties to cross-examine and directly confront the witness, the reasons for the witness's unwillingness to testify in The Hague, the parties' ability to prepare for the examination of the witness, the Trial Chamber's ability to assess the witness's demeanour, the impact on trial expediency due to possible technical delays, the witness's perception of the seriousness of the proceedings, and the parties' ability to present the witness's evidence.[3221]

weight

Testimony by video-link should be given the same probative value as that given in the courtroom.[3222]

Rule 82—joint and separate trials

(A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately.
(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

[3218] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Testimony to be Heard via Video-Conference Link* (22 July 2010) at para. 11
[3219] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Popovic's Motion Requesting Video Conference Link Testimony of Two Witnesses* (28 May 2008) at para. 8
[3220] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb…*(26 February 2009) at para. 17
[3221] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5254
[3222] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for Decision on Prosecution's Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb…*(26 February 2009) at para. 18

The possibility of mutually antagonistic defences does not constitute a conflict of interests capable of causing serious prejudice such as to warrant severance.[3223]

Severance not warranted where each accused was allocated one-sixth of the time taken in direct examination for his cross examination, subject to adjustment by the Trial Chamber.[3224]

So long as the accused has the opportunity of cross-examining witnesses called by his or her co-accused during his or her defence cases, the evidence of such a witness may be considered in relation to the accused. Severance is not required.[3225]

Rule 83—instruments of restraint

Instruments of restraint, such as handcuffs, shall be used only on the order of the Registrar as a precaution against escape during transfer or to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge.

Rule 84—opening statements

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence.

Rule 84 *bis*—statement of the accused

(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.
(B) The Trial Chamber shall decide on the probative value, if any, of the statement.

Where the accused made an unsworn statement, but did not testify, the Trial Chamber considered the unsworn statement as without probative value.[3226]

[3223] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Defence's Motions for Separate Trials and Severance of Counts* (1 July 2005) at para. 18
[3224] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Jadranko Prlic's Motion for Severance* (17 August 2007)
[3225] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Pavkovic Motion for Partial Severance* (27 September 2007) at para. 12
[3226] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 23

The assessment of unsworn statements under Rule 84*bis* of the Rules is a discretionary function of the Trial Chamber. Such a statement is generally given somewhat less weight than testimony given under oath, which is subject to cross-examination and inquiry from the Bench.[3227]The Appeals Chamber finds that the wording of Rule 84*bis* of the Rules leaves to the discretion of the Trial Chamber the determination of the probative value of an unsworn statement.[3228]

The purpose of Rule 84 bis is to give an accused the opportunity to be heard by the Trial Chamber without having to appear as a witness. A statement by the Accused under Rule 84 bis is a supplementary right, which can be exercised if the Accused so wishes, notwithstanding other rights under the Statute and the Rules. The Trial Chamber considered statements under Rule 84 bis as submissions[3229]

Chamber refused to admit supplemental written statement of accused after close of his case in which he purported to rebut prosecution expert testimony.[3230]

An unsworn statement by the accused should generally be given prior to the presentation of the prosecution's case.[3231]

The Trial Chamber has the discretion to allow the accused to make a supplement to his unsworn opening statement given at the beginning of the case when the defence case opens.[3232]

A statement of an accused pursuant to Rule 84 *bis* may be in writing.[3233]

An accused may take an oath prior to the making of his opening statement, and his statements may be considered by the Trial Chamber as evidence, although the probative value of such statements are low considering the lack of cross examination.[3234]

Rule 85—presentation of evidence

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:
(i) evidence for the prosecution;
(ii) evidence for the defence;

[3227] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 75
[3228] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 78
[3229] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement* (10 June 2010) at para. 25
[3230] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision Regarding Supplement to the Accused Prlic's Rule 84 bis Statement* (12 February 2009)
[3231] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.15, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision Regarding Supplement to the Accused Prlic's Rule 84 bis Statement* (20 April 2009) at para. 16
[3232] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.15, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision Regarding Supplement to the Accused Prlic's Rule 84 bis Statement* (20 April 2009) at para. 16; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Notice Concerning Opening Statements Under Rules 84 and 84 bis* (27 April 2009) at p. 5
[3233] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.15, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision Regarding Supplement to the Accused Prlic's Rule 84 bis Statement* (20 April 2009) at para. 14
[3234] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Notice Concerning Opening Statements Under Rules 84 and 84 bis* (27 April 2009) at p. 11

(iii) prosecution evidence in rebuttal;
(iv) defence evidence in rejoinder;
(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.
(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.
(C) If the accused so desires, the accused may appear as a witness in his or her own defence.

defence exhibits

Guideline that defence cannot offer exhibits from the bar table during prosecution case did not deny defence right to fair trial, as documents could be offered in defence case and defence documentary evidence would not be directly relevant to determination of sufficiency of prosecution evidence under Rule 98 *bis*.[3235]

prosecution exhibits

The prosecution may generally tender documents into evidence on cross-examination of defence witnesses, either to impeach the credibility of the witness or to advance its own case, unless the lack of notice or other factors make the admission of the evidence at that stage more prejudicial than probative.[3236]

There is no ban on the prosecution tendering evidence in the cross-examination of defence witnesses, nor is exceptional circumstances required. The Trial Chamber will determine, on a document-by-document basis, whether the prosecution should have introduced the document in its case-in-chief and whether the admission of the document would prejudice the accused in ways which cannot be redressed.[3237]

Prosecution's motion to admit documents closely related to those admitted from the bar table for the defence denied. The proper time to admit such documents would be in the prosecution's rebuttal case.[3238]

questioning by the Chamber

[3235] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Jadranko Prlic's Request for Reconsideration of the Decision of 29 November 2006* (30 August 2007)
[3236] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Guidance on the Admission into Evidence of Documents Tendered by the Prosecution During the Defence Case…*(26 August 2011) at paras.14-15
[3237] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motion for Admission of Documents Shown to Witness…*(8 July 2011) at paras. 47-49
[3238] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for the Admission of Documents from the Bar Table* (10 May 2016) at para. 23; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence's First Motion to Admit Documents from the Bar Table* (18 May 2016) at para.19

Rule 85(B), which provides the judges with the discretion to put questions to a witness at any stage of his/her examination, does not mean that the judges are under any obligation to put questions to witnesses or otherwise clarify any of the parties' case. A decision by the Trial Chamber not to use its discretion to question witnesses on a particular point does not violate the right of an accused to be informed promptly and in detail of the nature and cause of the charges against him.[3239]

rebuttal

Only highly probative evidence on a significant issue in response to defence evidence which could not reasonably have been foreseen, and not mere reinforcement of the prosecution's case-in-chief, will be permitted in rebuttal.[3240]

Rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated. [3241]

Rebuttal evidence will not be admissible where: (1) the evidence is itself evidence probative of the guilt of the accused, and it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it;[3242] (2) merely because the relevant party's case has been met by certain evidence to contradict it;[3243] or (3) it could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time.[3244]

The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies.[3245]

It is only if a new issue is raised during the defence case that the prosecution may lead evidence in rebuttal.[3246]

Rebuttal evidence denied where prosecution should have anticipated issue and led the evidence in its own case-in-chief.[3247]

[3239] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1351
[3240] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 220; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6; *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)* (9 February 2006); *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 258
[3241] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 273.
[3242] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 275.
[3243] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 275.
[3244] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 276.
[3245] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 276.
[3246] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6
[3247] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Prosecution Motion to Call Rebuttal Evidence* (21 July 2005); *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on the Prosecution Motion With Addendum and*

Admission of four documents in rebuttal granted where prosecution could not be expected to anticipate which scheduled incidents or events in the municipalities would be the subject of defence evidence.[3248]

Rebuttal evidence may not be called by the prosecution merely because its case has been met by contradicting evidence.[3249]

Rebuttal evidence to letters written by prosecution witness to defence counsel denied where the proposed evidence did not directly address the information contained in the letters.[3250]

The filing of a notice of alibi does not require that the prosecution lead evidence to contradict the alibi in its case-in-chief. The alibi evidence is a matter arising out of the defence case and is properly met by evidence offered in rebuttal.[3251]

Although it was error to admit diary in rebuttal, where defence had notice of diary from pre-trial disclosure and an opportunity to cross examine witnesses through whom diary was authenticated, and to call a witness in rejoinder, the trial was not rendered unfair by erroneous admission of the diary as rebuttal evidence.[3252]

Prosecution rebuttal evidence refused where prosecution should have anticipated that defence would lead evidence to rebut adjudicated facts and included its bolstering evidence in its case-in-chief.[3253]

It is not appropriate to call a prosecution witness in rebuttal whose evidence has already been admitted pursuant to Rule 92 *bis*.[3254]

Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii) (9 February 2006); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion to Present Rebuttal Evidence* (21 March 2014) at paras. 20, 25, 30

[3248] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Admit Evidence in Rebuttal* (16 August 2016) at paras. 20,23,26

[3249] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 6; *Prosecutor v. Oric*, No. IT-03-68-T, *Decision on the Prosecution Motion With Addendum and Urgent Addendum to Present Rebuttal Evidence Pursuant to Rule 85(A)(iii)* (9 February 2006); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution's First and Second Motions to Present Evidence in Rebuttal* (15 December 2011) at para. 48

[3250] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Bar Table Motion for Admission of Rebuttal Evidence regarding Witness JF-057* (20 September 2012) at para. 8

[3251] *Prosecutor v Lukic & Lukic*, No. IT-98/32.1-AR73.1, *Decision on the Prosecution's Appeal Against the Trial Chamber's Order to Call Alibi Rebuttal Evidence During the Prosecution's Case-in-Chief* (16 October 2008)

[3252] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 264

[3253] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Motion for Reconsideration or Certification to Appeal the Decision on Rebuttal Witnesses* (9 April 2009); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion to Present Rebuttal Evidence* (21 March 2014) at para. 11

[3254] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion to Present Rebuttal Evidence* (21 March 2014) at para. 56

Prosecution rebuttal evidence concerning events in Doboj municipality allowed where it arose from the testimony of a defence witness and could not have been anticipated by the prosecution.[3255]

Mladic notebook entries and Serbian DB records admitted on rebuttal where prosecution could not have reasonably anticipated that defence would tender evidence from these sources in its defence case.[3256]

recalling a witness

The defence may not simply put a person who has testified as a prosecution witness on its own witness list and call him as a defence witness. It must satisfy the requirements for recalling a witness before the witness would be allowed to testify.[3257]

Factors to be considered when a request to recall a witness is made are (1) the purpose of the evidence that the requesting party expects to elicit from the witness; and (2) the party's justification for not eliciting that evidence when the witness testified.[3258]

A witness will be recalled only when the evidence in question has considerable probative value and is not cumulative in nature.[3259]

The right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness should not be granted lightly and only when the evidence is of significant probative value and not cumulative in nature.[3260]

Considerations when determining whether to recall a witness based upon failure of the prosecution to disclose material which could have been used in cross examination

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[3255] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution's First and Second Motions to Present Evidence in Rebuttal* (15 December 2011) at para. 39

[3256] *Prosecutor v Stanisic and Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Rebuttal Evidence: Serbian DB Personnel Records* (31 October 2012); *Prosecutor v Stanisic and Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Rebuttal Evidence: Mladic Notebooks* (31 October 2012)

[3257] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion to Strike DGH-080 from the Defence's Rule 65 ter (G) list…*(8 June 2015) at para. 11

[3258] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Harry Konings for Further Cross Examination* (11 February 2011) at para. 8; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal* (17 February 2011) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Eleven Sarajevo Witnesses* (5 October 2011) at para. 7; *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Recall Johannes Rutten* (26 April 2012) at para. 8

[3259] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Harry Konings for Further Cross Examination* (11 February 2011) at para. 8; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal* (17 February 2011) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Eleven Sarajevo Witnesses* (5 October 2011) at para. 7

[3260] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Recall Johannes Rutten* (26 April 2012) at para. 8

of the witness include the content of the documents, the questions asked of the witnesses during cross examination, the availability of documents containing similar information at the time of cross examination, and any previous assessment of prejudice from the late disclosure.[3261]

If the witness is to be recalled to show an inconsistency between the testimony and his or her subsequent statements, there must be a demonstration of prejudice from not having put those questions to the witness. A minor inconsistency or self-evident explanation will not warrant recalling the witness.[3262]

Subsequent disclosure of witness' notes which failed to reflect statements he claimed were made at a meeting did not warrant recall where witness had already testified that he did not write everything down. However, notes would be admitted from the bar table so that Chamber could evaluate them in connection with witness' credibility.[3263]

Subsequent disclosure of witness' notes did not warrant recall where the items in the notes were not necessary to a fair consideration of the witness' credibility.[3264]

Grounds did not exist for recalling witness where accused failed to ask witness about inconsistencies in prior statement in the time allotted, and the time allotted for cross examination was reasonable.[3265]

Recall of prosecution witness granted where at time of original testimony, defence was not in possession of, or did not have time to examine, material related to his testimony.[3266]

Disclosure of exculpatory material after witnesses had testify did not warrant recall of witnesses where the accused retained the ability to have the documents admitted from the bar table.[3267]

[3261] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Twelve Municipalities Witnesses* (20 January 2012) at para. 11

[3262] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Harry Konings for Further Cross Examination* (11 February 2011) at para. 8; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal* (17 February 2011) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Eleven Sarajevo Witnesses* (5 October 2011) at para. 7; *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Recall Johannes Rutten* (26 April 2012) at para. 8

[3263] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Requests in Relation to Notes Taken by Witness Adrianus Van Baal* (17 February 2011) at paras. 11-12

[3264] *Prosecutor v Karadzic*, No. It-95-5/18-T, *Decision on the Accused's Motion to Recall Johannes Rutten* (26 April 2012)

[3265] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Harry Konings for Further Cross Examination* (11 February 2011) at paras. 11-13

[3266] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Motion Requesting the Recall of Manoljo Milovanovic* (22 November 2011) at paras. 9-10

[3267] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Recall Eleven Sarajevo Witnesses* (5 October 2011) at paras. 10-13,15-17, 19-20.

rejoinder

The defence may lead rejoinder evidence only with respect to what directly arises out of rebuttal evidence and could not be expected to have been addressed during the defence case.[3268]

According to the principles enshrined in the Statute on the rights of an accused – in particular in Article 21(4)(b) and (e) – when evidence is tendered by the Prosecution there must be a fair opportunity for the accused to challenge it. This is even more true if evidence is tendered after the close of the Prosecution case.[3269]

reopening the case

standard

A party will only be allowed to reopen its case to offer fresh evidence when it is shown that the evidence could not have, with reasonable diligence, been identified and presented in the case in chief. Once that criterion is met, the Trial Chamber must weigh the probative value of the evidence against the prejudice to the accused in admitting the evidence late in the proceedings.[3270]

If it is shown that the material could not have been obtained through the exercise of due diligence, the Trial Chamber must weigh the probative value of the evidence against the prejudice to the accused. Factors to be considered are: (1) stage of the trial at the time the application is made: (2) delay likely to be caused by re-opening the case: (3) probative value of the evidence must be such that it outweighs prejudice to the accused; and (4) effect of re-opening on any co-accused.[3271]

If the evidence was obtained before the prosecution closed its case, it will not be allowed to re-open.[3272] If the evidence was not so obtained, it will not be allowed to reopen unless it can show that the evidence could not have been obtained with reasonable

[3268] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Joint Defence Motion to Admit Rejoinder Statement via Rule 92 bis* (18 July 2005) at para. 3
[3269] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1314
[3270] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 283; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 222
[3271] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Prosecution's Application to Reopen its Case* (1 June 2005) at para. 45; *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 13; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Re-open its Case* (20 March 2014) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's First Motion to Re-open Defence Case* (12 September 2014) at para. 6
[3272] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 23

diligence. And even if it could not have been so obtained, the Trial Chamber may exercise its discretion under Rule 89(D) to deny re-opening.[3273]

To be able to re-open its case, a party must demonstrate that, despite reasonable diligence, it was unable to obtain the proposed evidence before the close of its case-in-chief.[3274]

To justify re-opening of the prosecution's case after all the defence cases had concluded, the evidence admitted must relate directly to the criminal responsibility of the accused. Therefore, only entries in the Mladic notebooks which relate to directly to the participation of the accused in the joint criminal enterprise would be admitted.[3275]

The primary determination in considering an application to reopen the prosecution's case is whether, with reasonable diligence, the evidence could have been identified and presented in the party's case-in-chief. The evidence must also meet the requirements of relevance and probative value under Rule 89(C).[3276]

The risk of prejudice caused by the admission of fresh evidence probative of guilt is potentially greater as opposed to fresh evidence for the sole purpose of impeaching a witness. However, admission of the fresh evidence should be decided on a case-by-case basis.[3277]

There is no legal basis applying a different standard to evidence which was not available to the defence during its case due to a violation of the prosecution's disclosure obligations. The admission of such evidence remains subject to the requirement that exceptional circumstances exist which would warrant the Chamber to exercise its discretion to re-open the case in the interests of justice.[3278]

The issue of whether there was a disclosure violation by the Prosecution is not relevant to the question of whether the defence ought to be allowed to re-open its case to admit the evidence.[3279]

[3273] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 14
[3274] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Prosecution's Application to Reopen its Case* (1 June 2005) at para. 35
[3275] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution's Motion to Reopen its Case* (6 October 2010) at paras. 58-59
[3276] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision on Motion to Reopen Prosecution Case* (23 February 2007) at paras, 4-5
[3277] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.14, *Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (26 February 2009) at para 28
[3278] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third Motion to Re-Open Defence Case* (17 December 2014) at para. 13
[3279] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Seventh Motion to Re-Open Defence Case* (20 April 2015) at para. 13

diligence

Due diligence requires that the party had identified questions of fact and law underlying the case, that it identified all potential sources of evidence, it attempted to obtain specific evidence about which it had concrete information, and it made every effort to obtain all the evidence it needs before commencement of its case. If during its case, it learns of additional evidence, it must further investigate without delay.[3280]

The burden of showing reasonable diligence rests on the party seeking to reopen its case.[3281]

Failure to discover book written before close of defence case precluded reopening the case to admit testimony from the author of the book.[3282]

Accused could have, with reasonable diligence, requested cable from United States of his meeting with U.S. Ambassador before his case closed, where meeting was mentioned in book authored by Ambassador that had been disclosed to him.[3283]

Defence exercised diligence where it sought document from State and filed motion for binding order before receiving document after its case had closed.[3284]

Although Rule 54 *bis* should not be the first or only method relied upon by parties seeking evidence from states, the prosecution's failure to take advantage of all the means available to it to obtain evidence, especially when confronted with what it viewed as the consistently obstructive behaviour of the authorities in question cannot be considered the exercise of reasonable diligence.[3285]

The prosecution will be allowed to adduce new evidence after it has closed its case-in-chief only under exceptional circumstances.[3286] The prosecution failed to meet

[3280] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Prosecution's Application to Reopen its Case* (1 June 2005) at paras. 38-42
[3281] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 24; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Re-open its Case* (20 March 2014) at para. 10
[3282] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prlic Defence Motion to Reopen its Case* (3 July 2009)
[3283] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Fifth Motion to Re-Open Defence Case: Zimmerman Cable* (9 March 2015) at para. 9
[3284] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's First Motion to Re-open Defence Case* (12 September 2014) at para. 7
[3285] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 30
[3286] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Prosecution's Application to Reopen its Case* (1 June 2005) at para. 47

this burden where it did not exercise due diligence in obtaining relevant documents from archives available to it.[3287]

Prosecution was reasonable in waiting until investigations and analysis into newly discovered mass grave were complete rather than bringing piecemeal motions to admit fresh evidence.[3288]

Prosecution exercised due diligence in the discovery of fresh evidence and the Trial Chamber's decision to allow it to reopen its case to offer evidence that an accused had ordered that a gun be planted next to a body was not error.[3289]

denied

Prosecution would not be allowed to reopen its case to call witness who previously refused to testify, since there was no showing that the witness was now willing to testify or that national contempt proceedings, if instituted, would lead to his giving testimony.[3290]

Although discovery of mass grave after prosecution rested its case was "fresh evidence", re-opening denied where connection of bodies to charges against the accused remained speculative, the motion was filed late in the proceedings, and re-opening the case was likely to delay its conclusion.[3291]

Prosecution not allowed to amend proof of death chart with new material after the close of its case.[3292]

Prosecution not allowed to admit new documents from the bar table after the close of all the evidence in the case.[3293]

Defence motion to re-open case to admit newly available document denied where delay caused by having to elicit testimony from document's author after closing arguments outweighed probative value of document.[3294]

[3287] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Prosecution's Application to Reopen its Case* (1 June 2005)
[3288] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Reopen its Case-in-Chief* (23 October 2014) at para. 9
[3289] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.6, *Decision on Ivan Cermak and Mladen Markac Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case* (1July 2010)
[3290] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Request to Reopen its Case to hear Evidence of Shefqet Kabashi and for a Judicial Representation to the United States of America* (21 December 2007)
[3291] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Re-open its Case* (20 March 2014) at para. 18
[3292] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motion to Reconsider the Trial Chamber's Decision…to Add Further Materials to the CAS* (29 March 2012)
[3293] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Consolidated Decision on Prosecution's Bar Table Motions and the Accused's Motion for Extension of Time* (14 May 2012) at para. 47

The potentially exculpatory portions are of such low probative value when read in the context of the full document, that the interests of justice would not demand that the case be re-opened to allow for its admission.[3295]

Absence of probative value in evaluating credibility of prosecution witness by post-trial statement in which she expressed her view that the accused should be harshly punished warranted not re-opening defence case to admit the statement.[3296]

Defence would not be allowed to re-open case to admit cable from U.S. Ambassador where the cable was not favourable to the accused and its admission would unjustifiably delay the proceedings.[3297]

Defence would not be allowed to re-open case to admit testimony of witness who claimed that Momir Nikolic told his subordinates that the Srebrenica prisoners would be exchanged, as this evidence did not contradict or even relate to the specific evidence of Momir Nikolić.[3298]

Defence would not be allowed to re-open case to admit testimony of witness who declined to testify while his own appeal was pending. Defence did not use due diligence to obtain his testimony at that time.[3299]

Defence would not be allowed to re-open case to admit testimony of ex-Vlasenica police chief of his efforts to aid Muslims where evidence was of minimal probative value to the case.[3300]

granted

Mladic notebooks found after the prosecution had rested its case constituted "fresh" evidence, and notebooks found earlier would also be considered "fresh" evidence

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[3294] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's First Motion to Re-open Defence Case* (12 September 2014) at para. 11; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third Motion to Re-Open Defence Case* (17 December 2014) at para. 14

[3295] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Ninety-Sixth Disclosure Violation Motion* (21 January 2015) at para. 9

[3296] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Fourth Motion to Re-Open Defence Case* (24 February 2015) at para. 10

[3297] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Fifth Motion to Re-Open Defence Case: Zimmerman Cable* (9 March 2015) at para. 10

[3298] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Seventh Motion to Re-Open Defence Case* (20 April 2015) at para. 14

[3299] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Tenth Motion to Re-Open Defence Case* (9 July 2015) at para. 12

[3300] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Ninth Motion to Re-Open Defence Case* (9 July 2015) at paras. 11-12

because their significance was not apparent until the subsequent notebooks were seized.[3301]

Prosecution allowed to re-open its case to admit Mladic notebooks where notebooks were found after the prosecution had rested its case and their contents were relevant.[3302]

Prosecution allowed to re-open its case to admit Ministry of Interior report first introduced by the defence in another case , where the prosecution had requested documents from Ministry of Interior and had not received it, and where it was probative and not unduly prejudicial.[3303]

The prosecution was allowed to introduce "fresh evidence" in cross examination of defence witness where the document rebutted the witness' assertion concerning an issue in the case, even though the prosecution had been in possession of the documents since the beginning of the trial.[3304]

Prosecution allowed to re-open its case to introduce evidence of newly discovered mass grave where defence would have an opportunity to rebut the evidence during its case and the delay from presenting the new evidence would not be unduly long.[3305]

rejoinder to reopening

If the prosecution were allowed to re-open its case, the accused would be entitled to cross-examine the prosecution witnesses as well as to lead evidence of his own.[3306]

Where prosecution was allowed to re-open its case, only evidence which directly addressed issues raised by new evidence would be admitted on behalf of the accused. Where proposed exhibits did not directly address those issues, their admission was denied.[3307]

[3301] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution's Motion to Reopen its Case* (6 October 2010) at paras. 40-41

[3302] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Motion to Reopen the Prosecution Case and Tender Documents Through the Bar Table* (4 November 2010)

[3303] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion to Reopen Prosecution Case and for Admission of a Document from the Bar Table* (1 September 2011) at paras. 17-18,22

[3304] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Oral Decisions of 15 and 16 July 2010 on Admission of Fresh Evidence* (17 September 2010) at para. 20

[3305] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Reopen its Case-in-Chief* (23 October 2014) at para. 10

[3306] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 36

[3307] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Motion to Reopen its Case* (25 November 2010) at para. 21

The Trial Chamber did not err when it decided to deny the Appellant the right to call other witnesses on the ground that the proposed testimony fell outside the scope of the re-opened proceedings.[3308]

timing

The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence.[3309]

The later in the trial that the application is made the less likely the Trial Chamber is to accede to the request to re-open the case.[3310]

sentencing

Material which is relevant to sentencing does not have to meet the criteria of Rules 89 or 92 *bis*.[3311]

Oral hearing of sentencing witnesses denied. Letters from witnesses admitted into evidence.[3312]

Written statements and documents relating to alleged agreement with Richard Holbrooke that accused would not be prosecuted at the ICTY in exchange for his resignation was relevant to potential sentencing and would be admitted.[3313]

Letter from UNDU Commander attesting to good behaviour of accused while in detention admitted into evidence.[3314]

Any defence evidence relevant to sentencing must be presented during the defence case in chief and within the 325 hours allocated.[3315]

Nine-day deadline for submitting sentencing information after the close of the defence case would not be extended where defence team should have prepared to submit

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[3308] *Prosecutor v Furundzija*, No.IT-95-17/1-T, *Judgement* (21 July 2000) at para. 78
[3309] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 290.
[3310] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Application for a Limited Re-Opening of the Bosnia and Kosovo Components of the Prosecution Case* (13 December 2005) at para. 13
[3311] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Motion Pursuant to Rule 85(a)(iv)*(24 August 2006) at para. 9 ; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Admission of Information Related to Sentencing* (26 February 2014) at para. 12
[3312] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Defence Motion Pursuant to Rule 85(a)(iv)*(24 August 2006)
[3313] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Admission of Information Related to Sentencing* (26 February 2014) at para. 12
[3314] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Admission of Information Related to Sentencing* (26 February 2014) at para. 14
[3315] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Allocation of Time for Presentation of Defence Case* (17 December 2013) at T45215

such evidence well in advance and where it had submitted evidence relevant to sentencing in its defence case.[3316]

Rule 86—closing arguments

(A) After the presentation of all the evidence, the Prosecutor may present a closing argument; whether or not the Prosecutor does so, the defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the defence may present a rejoinder.
(B) Not later than five days prior to presenting a closing argument, a party shall file a final trial brief.
(C) The parties shall also address matters of sentencing in closing arguments.

Rule 87—deliberations

(A) When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.
(B) The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.
(C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

burden of proof

The burden of proof remains with the prosecution throughout the trial.[3317]

It is not helpful to define the term "beyond a reasonable doubt" other than to say that the standard requires a finder of fact to be satisfied that there is no reasonable explanation for the evidence other than the guilt of the accused.[3318]

The prosecution must prove the guilt of the accused beyond a reasonable doubt. The Trial Chamber considers whether there is any reasonable interpretation of the evidence other than the guilt of the accused. Any ambiguity or doubt is resolved in favor

[3316] *Prosecutor v Mladic*, No, IT-09-92-T, *Decision on Defence Motion for an Extension of Time to Tender Sentencing-Related Information* (2 September 2016) at para. 8
[3317] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5250
[3318] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 61

of the accused under the principle of *in dubio pro reo*.[3319] If there is another conclusion which is reasonably open from the evidence, the accused must be acquitted.[3320]

While intent can be inferred from circumstantial evidence, it must be the only reasonable inference.[3321]

A trial chamber may draw inferences to establish a fact on which a conviction relies based on circumstantial evidence if it is the only reasonable inference that could be drawn from the evidence presented.[3322]

When based on circumstantial evidence, the finding that an accused had the requisite intent to be a member of a JCE must be the only reasonable inference from the evidence.[3323]

Whether an inference that the planning of one specific operation by an individual can support a finding that the individual was informed of a different operation can be made will ultimately depend on the context, including the similarities between the operations, as well as the position of the individual in question.[3324]

Trial Chamber erred in relying on notes of a meeting to show accused's knowledge where the accused was recorded as having left before the meeting started.[3325]

A reasonable trier of fact could conclude, as the only reasonable inference, that a subject must have been discussed at the meeting, notwithstanding the fact that the subject was not referred to in the text of the report of the meeting.[3326]

The principle of *in dubio pro reo*, as a corollary to the presumption of innocence, and the burden of proof beyond a reasonable doubt, applies to findings required for conviction, such as those which make up the elements of the crime charged.[3327]

The principle of *in dubio pro reo* is not applied to individual pieces of evidence and findings of fact on which the judgement does not rely.[3328]

[3319] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 18; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para. 12
[3320] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 21; *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para.15
[3321] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1369; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1994
[3322] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1709
[3323] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1385
[3324] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1694
[3325] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1747
[3326] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1994
[3327] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 21
[3328] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 21

A Trial Chamber must determine beyond a reasonable doubt whether every element of a crime and form of liability has been established beyond a reasonable doubt before it can enter a conviction.[3329]

If there is an inference reasonably open on the facts inconsistent with the guilt of the accused, the onus and the standard of proof would require an acquittal to be entered in respect of that count.[3330]

A trial chamber does not have to discuss other inferences it may have considered, if it is satisfied that the inference it retained was the only reasonable one.[3331]

In many instances the evidence suggested a conclusion which seemed to be very likely. However, in keeping with the applicable standard of proof the Trial Chamber strictly examined whether such conclusion was the only reasonable one.[3332]

Whereas the assessment of an evidentiary factor in a vacuum might fail to establish an essential matter, the weight of all relevant evidence taken together can conclusively prove the same matter beyond reasonable doubt.[3333]

The fact that the accused has not challenged a factual allegation does not require the Trial Chamber to accept that fact as proven. The burden of proof remains with the prosecution beyond a reasonable doubt.[3334]

The identification of the accused as the perpetrator must be established beyond a reasonable doubt.[3335]

Equation of proof beyond a reasonable doubt with "high degree of probability" was error but did not affect the verdict.[3336]

Not every factual finding in a Trial Judgement must be established beyond reasonable doubt. The standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.[3337]

[3329] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 10
[3330] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 5; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 10
[3331] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 867; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 967
[3332] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para. 7
[3333] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1150
[3334] *Prosecutor v Halilovic*, No. IT-01-48-T, *Judgement* (16 November 2005) at para.12, fn.24
[3335] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 20
[3336] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 60
[3337] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 325; *see also* para. 220; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 10

Even if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.[3338]

The 'material facts' which must be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.[3339]

The standard "beyond reasonable doubt" is met where the evidence establishes a particular point and demonstrates undisputedly that no reasonable alternative is possible. This doesn't mean that all doubt as to the guilt of the accused has been eliminated. Rather, "[t]he standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused."[3340]

Cumulative effect of taking judicial notice of 1500 adjudicated facts and admitting 144 statements without cross examination did not violate the presumption of innocence nor shift the burden of proof to the accused.[3341]

At the conclusion of the case, the Accused is entitled to the benefit of the doubt as to whether the crime has been proven.[3342]

sentencing procedure

There is no reason to depart from the settled procedure at the ICTY of issuing a single judgement for guilt and sentence, and the 2000 amendment of Rule 87(C) was not intended to change that practice. Motion for bifurcated judgement denied.[3343]

Rule 89—general provisions

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence.
(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
(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

[3338] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 10, fn. 18
[3339] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 10, fn. 18
[3340] *Prosecutor v Mrksic & Sljivancanin,* No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 220
[3341] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Stay of Proceedings* (8 April 2010)
[3342] *Prosecutor v Tolimir,* No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 30
[3343] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Bifurcated Judgement* (22 May 2014) at para. 4

outweighed by the need to ensure a fair trial.
(E) A Chamber may request verification of the authenticity of evidence obtained out of court.
(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form

advance rulings

Trial Chamber declined to preclude defence evidence on grounds of tu quoque and relevance in advance and said it would rule on objections as the evidence was presented.[3344]

anonymous sources

Trial Chamber refused to admit documents from anonymous sources as it could not properly evaluate the reliability and authenticity of the documents without knowing their source.[3345]

assessment of evidence

All evidence adduced at trial, irrespective of which party tendered it, should be analysed according to the same legal standard.[3346]

The fact that the prosecution acknowledged the probative value of the accused's interview when tendering it into evidence cannot be seen as limiting the Trial Chamber's discretion to evaluate its weight considering the entire trial record.[3347]

When considering the disparate dates, meetings, and purposes of the speeches and statements, it is important not to combine them to give a semblance of a collective intent where no such collective intent existed or to read individual statements and speeches in isolation and without context.[3348]

authentication

The Trial Chamber did not consider documents which were not signed, dated, or stamped to be *a priori* void of authenticity.[3349]

[3344] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution Motion to Limit Defence Evidence Relating to Principles of Tu Quoque and Provocation* (5 April 2007)
[3345] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prlic Defence Motion for Admission of Documentary Evidence* (6 March 2009) at para. 26
[3346] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 99
[3347] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 100
[3348] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 4235
[3349] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 29

A *prima facie* case of authenticity must be made out for a document to be reliable. However, absolute proof of authenticity is not required for admissibility, but is a matter for the weight of the evidence to be given by the Chamber in its deliberations.[3350]

When a challenge has been made to the authenticity or reliability of a document, the Trial Chamber will admit the document and decide what weight to give it during its deliberations.[3351]

Alleged audiotape of interview of accused by journalist would not be admitted without testimony from the journalist demonstrating that the tape is reliable.[3352]

Alleged videotapes of speech by the accused would not be admitted where it was not sufficiently established when the speech was made.[3353]

Statement of witness that parts of document were "probably correct" was not sufficient to allow for admission of the document.[3354]

bar table

documents authored by witnesses

While failure to put a document to a witness will not automatically exclude it from being admitted from the bar table, the Trial Chamber may conclude that the admission of such documents from the bar table at the end of the case is substantially outweighed by the need to ensure a fair trial. Documents would be reviewed on a case-by-case basis.[3355]

[3350] *Prosecutor v Prlic et al*, No. IT-04-AR73.16, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision on Prlic Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence* (3 November 2009) at para. 34

[3351] *Prosecutor Halilovic*, No. IT-01-48-T, *Decision on Defence Motion for Exclusion of Exhibits* (29 June 2005)

[3352] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision on Motion to Reopen Prosecution Case* (23 February 2007)

[3353] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Request for Admission Into Evidence of Documents…*(17 December 2010) at paras. 19,21

[3354] *Prosecutor v Stanisic & Zupljanin,* No. IT-08-91-T, *Decision Denying Prosecution's Motion to Admit into Evidence MFI P171 and P911*(13 March 2012) at para. 19

[3355] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component* (11 May 2012) at para. 12; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts* (14 May 2012) at para. 17; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for the Admission of Evidence from the Bar Table (Srebrenica)*(22 May 2012) at para. 17; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Documents from the Bar Table (Municipalities)*(25 May 2012) at para. 12; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Second Bar Table Motion for the Admission of Intercepts* (25 May 2012) at para. 12

Documents going to the credibility of a witness will not be admitted from the bar table without giving the witness a chance to comment on them unless the other party does not object.[3356]

Documents may be admitted from the bar table even if used as source documents by expert witnesses and not put to those witnesses during their testimony. However, the impact on the right to a fair trial would be assessed on a case-by-case basis.[3357]

The admission from the bar table of documents that could have been put to a witness is the exception and not the default position.[3358]

denied

Documents which do not bear a seal or some other indication that it was actually sent, as opposed to being a draft, would not be admitted from the bar table.[3359]

Admission of report of Special Rapporteur for Human Rights would not be admitted from the bar table where the accused would not have the opportunity to challenge the findings of the report.[3360]

Admission of entirety of "Mladic notebooks" and Republika Srpska Assembly Session transcripts from the bar table upon motion by the accused denied without prejudice where accused failed to specify the parts of the voluminous diaries which were relevant to the case.[3361]

granted

Bosnian Serb Assembly session minutes were admitted from the bar table with agreement of the parties.[3362]

in general

[3356] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on the Simatovic Defence First Bar Table Motion* (28 June 2012) at paras. 9-10

[3357] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Documents from the Bar Table (Municipalities)*(25 May 2012) at paras. 13,28

[3358] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts* (14 May 2012) at para. 16

[3359] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Prosecution Submission on the Admission of Documentary Evidence* (16 January 2008) at para. 18; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Lazarevic Motion for Admission of Documents from the Bar Table* (16 January 2008) at para. 6

[3360] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Documents from the Bar Table (Municipalities)*(25 May 2012) at para. 48

[3361] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *First Decision on Stanisic Defence Bar Table Motion of 12 February 2012* (23 May 2012) at paras. 21, 25

[3362] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Bar Table Motion for the Admission of Bosnian Serb Assembly Records* (22 July 2010)

It is desirable that a witness speak to the origins and/or content of a document to be tendered into evidence, to allow the Chamber to properly assess the relevance, authenticity, and reliability of that document in a meaningful way in its overall consideration of the evidence in the case.[3363]

Generally, documents will not be admitted except in connection with the testimony of witnesses. However, in some circumstances, the relevance and reliability of a document is sufficiently apparent to justify its admission without the need for any evidence relating to the document. Under this standard, some documents were admitted from the bar table, others were not.[3364]

The bar table should not generally be the first port of call for the admission of evidence. It is rather a supplementary method of introducing evidence which should be used sparingly to assist the requesting party to fill gaps in its case at a later stage in the proceedings.[3365]

Bar table motions should be kept to a minimum and should not be used for admission of source documents used by expert witnesses.[3366]

Admission from the bar table is a mechanism to be used on an exceptional basis since it does not necessarily allow for proper contextualisation of the evidence in question.[3367]

Documents authored by a prosecution witness may be tendered through a bar table motion, although it would be preferable to have been tendered during the testimony of the witness.[3368]

When documents are sought to be admitted from the bar table, the offering party must be able to demonstrate with clarity and specificity when and how each document fits into its case.[3369]

[3363] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Guidelines for the Admission of Evidence Through Witnesses* (19 May 2010) at para. 11

[3364] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution's Motion for Admission of Exhibits from the Bar Table* (14 May 2007) at paras 10,13

[3365] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Bar Table Motion* (13 April 2010) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Bar Table Motion Relating to Witness Dorothea Hanson* (26 June 2011) at para. 11

[3366] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Bar Table Motion Relating to Witness Dorothea Hanson* (26 June 2011) at para. 15

[3367] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table* (9 January 2012) at para. 6; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Admit Evidence from the Bar Table (Hostages)* (1 May 2012) at para. 4

[3368] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Admit Evidence from the Bar Table (Hostages)* (1 May 2012) at para. 11

[3369] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Prosecution Submission on the Admission of Documentary Evidence* (16 January 2008) at para. 9; *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Defence Motion for the Admission of Documentary Evidence* (5 March 2008) at para. 5

Tendering documents through bar table motions at the end of a party's case is a safety clause designed to ensure that documents, which for one reason or another could not be tendered through a witness, can still be included in the trial record.[3370]

news reports

News media reports will not generally be admitted from the bar table.[3371]

Written interviews with the accused by journalists not admissible from the bar table, but verbatim video recordings of interviews would be admitted.[3372]

statements

Statements of third parties not taken by one of the parties nor prepared for the litigation are not affected by Rule 92 *bis* and may be admitted from the bar table.[3373]

transcripts

Admission of transcripts of prior testimony is not appropriate through the bar table as such documents are governed by Rules 92 *bis* through *quinques*.[3374]

UN documents

United Nations documents admitted from the bar table, with the weight of the documents to be determined by the Trial Chamber at the end of the case.[3375]

[3370] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution's Bar Table Motion* (1 February 2011) at para. 12

[3371] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for Admission of Evidence from the Bar Table: General Michael Rose* (17 December 2010) at para. 10; *Prosecutor v Stanisic and Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution's Bar Table Motion* (1 February 2011) at para. 20; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying Prosecution's Motion to Admit into Evidence MFI P171 and P911*(13 March 2012) at para.17; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Bar Table Motion (Karadzic Statements)*(2 April 2014) at para. 10

[3372] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component* (11 May 2012) at paras. 19-20; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for the Admission of Evidence from the Bar Table (Srebrenica)*(22 May 2012) at para. 16; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Documents from the Bar Table (Municipalities)*(25 May 2012) at paras. 31,33

[3373] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Second Decision on Stanisic Defence Bar Table Motion of 12 February 2012* (23 May 2012) at para. 8

[3374] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table* (9 January 2012) at para. 6

[3375] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Admission of Documentary Evidence (UN Documents)* (23 August 2007); *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Second Motion to Admit United Nations Resolutions, Reports, and Code Cables from the Bar Table* (14 November 2013)

voluminous documents

Burden on accused resulting from admission of large numbers of documents from the bar table outweighed time savings of admitting documents from bar table. Prosecution ordered to admit documents through witnesses, when possible, and to renew bar table motion to fill in gaps at the end of the proceedings.[3376]

A *prima facie* showing of a document's reliability may be made without showing the document to a witness at trial.[3377] However, the Trial Chamber chose to require the prosecution to present its exhibits to a witness at trial, or show cause why it is not able to do so where the wholesale admission of exhibits without in court debate would make it difficult to assess the relevancy and context of the documents and would prejudice the accused, whose cross-examination time was dependent on the time of direct examination.[3378]

While there may be a perception that the admission of evidence from the bar table saves some in-court time, it can in fact lengthen the proceedings due to the sheer volume of evidence thereby admitted. This is particularly so if the parties tie bar table motions to particular witnesses and to regularly use them as a safety net when time runs out or as an additional means of admitting even more documents. [3379]

The fact that other exhibits may speak to the same or similar issues as the material before it does not require that a document be rejected for admission from the bar table. However, this does not mean that the prosecution can at the end of its case use bar table motions to tender documents which are plainly unnecessary given the extremely voluminous amount of other evidence on similar issues.[3380]

weight

A document may be admitted without an authenticating witness, but the party seeking the admission of a document without using a witness runs the risk that the probative value will be lessened, or the document will be excluded. Nevertheless, such documents would be admitted where there was no objection by the prosecution.[3381]

[3376] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Bar Table Motion* (13 April 2010) at paras. 8-9
[3377] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Admission of Evidence* (13 July 2006) at p. 5
[3378] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Admission of Evidence* (13 July 2006) at p. 6
[3379] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Documents Relevant to Witnesses KDZ490 and KDZ492 from the Bar Table* (9 January 2012) at para. 8
[3380] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Bar Table Motion for the Admission of Documents Related to the Sarajevo Component* (11 May 2012) at para. 11
[3381] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic* (22 June 2005) at paras. 33-35

It is not necessary that a document be authenticated by a witness for it to be admitted. However, an exhibit which has not been presented to a witness has less probative value than one which has.[3382]

In its deliberations, the Trial Chamber attached greater weight to contents of documents which were explained by the testimony of a witness, rather than introduced as exhibits in isolation. However, where the circumstances showed that the documents were part of a series of documents whose contents were not subject to question, the Trial Chamber relied on the contents of those documents.[3383]

books

Trial Chamber declined to admit entire book. It is up to the parties to highlight the passages that are important and is not for the Chamber to have to sort through a book to find what is important.[3384]

chain of custody

Proof of chain of custody is not a *sine que non* of admissibility, especially considering the difficulty of maintaining chain of custody in armed conflicts.[3385]

circumstantial evidence

Circumstantial evidence can often be sufficient to satisfy a fact finder beyond reasonable doubt. There is nothing to prevent a conviction being based upon such evidence.[3386]

computer files

Computer files may be admitted without a further showing of authenticity. The mere fact that computer files may be manipulated is insufficient to preclude their admission.[3387]

credibility of witnesses

accomplices

[3382] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 29; *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motion to Admit Exhibits from Bar Table* (28 April 2009) at para. 5
[3383] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at paras 297-98
[3384] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Request for Reconsideration or for Certification to Appeal the Order of 14 October 2008* (12 November 2008)
[3385] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 27
[3386] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para 303
[3387] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 31

Accomplice testimony is not *per se* unreliable. However, it must be carefully considered considering the circumstances in which it was given.[3388]

A trial chamber's discretion to rely on uncorroborated, but otherwise credible, witness testimony applies equally to the evidence of witnesses who may have motive to implicate the accused, such as accomplices, provided that appropriate caution is exercised in the evaluation of their testimonies.[3389]

A trial chamber has the discretion to rely upon evidence of accomplice witnesses. However, when weighing the probative value of such evidence, the trial chamber is bound to carefully consider the totality of the circumstances in which it was tendered. In particular, consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie.[3390]

ambiguity

Where a Prosecution witness whose evidence is vital can clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.[3391]

benefits

The fact that a witness expected that the prosecution would intervene in his favor with authorities prosecuting him did not mean that he was incapable of telling the truth.[3392]

Witness who pled guilty and testified against the accused with the expectation of benefits should be treated with caution and requires corroboration.[3393]

Witnesses who sought benefits concerning their relocation must be corroborated as there is a significant doubt concerning their credibility.[3394]

bias

The reliability of evidence originating from a party to the armed conflict may be of concern to the Trial Chamber.[3395]

[3388] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 82
[3389] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 135
[3390] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2690
[3391] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 452.
[3392] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 248
[3393] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 34
[3394] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 38

Evidence of witnesses who might have motives or incentives to implicate the accused is not per se unreliable, especially where such a witness may be thoroughly cross-examined; therefore, reliance upon this evidence does not, as such, constitute an error of law. A trial chamber must, however, explain the reasons for accepting the evidence of such a witness.[3396]

Trial Chamber failed to give reasoned opinion when it accepted reliability of three witnesses without discussing the impact of their association with a victim's group.[3397]

There is a tendency of witnesses associated with one party to the conflict to give testimony that supports its perceived interests. The testimony of persons involved in a bitter armed conflict is often coloured by experiences and attitudes arising from that conflict.[3398]

In evaluating the testimony of prosecution investigators, the Trial Chamber properly exercised caution in evaluating their evidence in view of their present or former association with a party to these proceedings. [3399]

The Trial Chamber did not err in holding that the fact that a witness was a current or former Prosecution investigators did not render their testimony and reports unreliable.[3400]

The accused's arguments that the Prosecution investigators lacked sufficient independence to provide reliable evidence or that their evidence fell outside the scope of their personal knowledge or expertise was properly rejected.[3401]

corroboration

There is no general requirement that the testimony of a witness be corroborated if deemed otherwise credible.[3402]

The testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration. Except for the testimony of a child not given under solemn declaration, the Trial Chamber is at liberty, in appropriate circumstances, to rely on the evidence of a single witness.[3403]

[3395] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Judgement* (29 November 2012) at para. 653
[3396] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 2690
[3397] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para.62
[3398] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Judgement* (12 December 2012) at para. 37
[3399] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 77
[3400] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 57
[3401] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 79
[3402] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 215
[3403] *Prosecutor v. Tadic*, No. IT-94-1-A, *Judgement* (15 July 1999) at para 65; *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 33

The testimony of a single witness on a material fact does not, as a matter of law, require corroboration. However, such evidence must be scrutinized with particular care before relying upon it.[3404]

A reasonable trial chamber could have accepted an eyewitness' testimony even without corroboration.[3405]

Nothing prohibits a trial chamber from relying on credible witness testimony uncorroborated by physical evidence.[3406]

Evidence which has not been cross-examined and which goes to acts and conduct of the accused or is pivotal to the prosecution case requires corroboration if used to establish a conviction.[3407]

A conviction may not be based solely or substantially upon the statement of a witness who has not been cross examined without sufficient corroboration.[3408]

Corroborating evidence may include pieces of evidence that, although originating from the same source, arose under different circumstances, at different times and for different purposes.[3409]

Generally, a person cannot corroborate his or her own testimony. However, evidence originating from the same person but at different times may be reflective of the consistency of the witness's testimony.[3410]

Corroboration of testimonies, even by many witnesses, does not automatically establish the credibility, reliability, or weight of those testimonies and that it is neither a condition nor a guarantee of reliability of a single piece of evidence.[3411]

cultural factors

Notions of loyalty and honour, particularly strong in the culture of Kosovo Albanians, had a bearing on the credibility of some witnesses in the case.[3412]

[3404] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 9; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 274; *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 21
[3405] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1119
[3406] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 904
[3407] *Prosecutor v Martic*, No.IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic* (14 September 2006) at para. 20
[3408] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 23
[3409] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Judgement on Allegations of Contempt* (17 December 2008) at para. 41
[3410] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 30
[3411] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 103
[3412] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 13

criminal activity

A witness' prior criminal record, criminal conduct, and personal drug use weigh very negatively in an assessment of the credibility of a witness.[3413]

factors

The assessment of a witness' credibility is based on a number of factors, including the witness's demeanour in court, his or her role in the events in question, the plausibility and clarity of the witness's testimony, whether there are contradictions or inconsistencies in his or her successive statements or between his or her testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination.[3414]

It is not unreasonable for a trial chamber to accept the substance of a witness's evidence notwithstanding the witness's inability to recall certain details, especially when a significant amount of time has elapsed since the events to which the witness's evidence relates.[3415]

There is no requirement for a witness to record his evidence in a contemporaneous document before his or her evidence can be relied on by a trial chamber.[3416]

mixed

It is not unreasonable for a trial chamber to accept some but reject other parts of a witness's testimony.[3417]

other Chambers

Two reasonable triers of facts may reach different but equally reasonable conclusions when assessing the reliability of a witness and determining the probative value of the evidence presented at trial. An error cannot be established by simply demonstrating that other trial chambers have exercised their discretion in a different way[3418]

[3413] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 28
[3414] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 200
[3415] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 201
[3416] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1648
[3417] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at paras. 201, 1621
[3418] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 396

prior statements

A prior inconsistent statement may, in the discretion of the Trial Chamber, be considered as substantive evidence, even when offered by the party calling the witness.[3419]

Prior inconsistent statement would not be admitted as an exhibit where cross-examination fully explored the prior statement, and the thrust was omissions, rather than inconsistencies of the prior statement.[3420]

A trial chamber has the discretion to accept a witness's evidence, notwithstanding inconsistencies between the said evidence and his previous statements. However, a trial chamber must consider any explanations offered for such inconsistencies when determining the probative value of the evidence.[3421]

Considering that minor inconsistencies commonly occur in witness testimony without rendering it unreliable, it is within the discretion of a trial chamber to evaluate discrepancies and to consider the credibility of the evidence as a whole, without explaining its decision in every detail.[3422]

It is normal for a witness in several trials about the same event or occurrence to focus on different aspects of the event, depending on the identity of the person on trial and the questions posed to the witness.[3423]

While prior inconsistent statements were introduced as substantive evidence, the Trial Chamber declined to rely on those statements as the sole or principal basis for establishing a fact where the witness recanted the statements during their testimony.[3424]

Because the party does not seek to admit the prior statement *in lieu of* oral testimony, but rather seeks only to elicit the oral testimony of the witness considering the inconsistency of the prior statement, the statement used to impeach the witness need not satisfy the requirements of Rule 92*bis* of the Rules.[3425]

In-court *viva voce* evidence is generally more reliable than prior statements. This is based on the indicia of reliability provided by cross-examination of in-court evidence.

[3419] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.3, *Decision on Appeals Against Decision on Impeachment of a Party's Own Witness* (1 February 2008) at paras. 31-32
[3420] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Submissions in Support of Admission of Prior Inconsistent Statements of a Witness for Purpose of Impeachment* (6 May 2012) at para. 8
[3421] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 136
[3422] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 137
[3423] *Prosecutor v Galic*, No. IT-98-29-A *Decision on First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005) at para 73
[3424] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 14
[3425] *Prosecutor v Simic et al*, No. IT-95-9-AR73.6, *Decision on Prosecution Interlocutory Appeals on the Use of Statements Not Admitted into Evidence Pursuant to Rule 92 bis as a Basis to Challenge Credibility and to Refresh Memory* (23 May 2003) at para. 18

A trial chamber preferring a witness's prior statement to his or her *viva voce* evidence should provide reasons for doing so. The Trial Chamber failed to provide such reasons.[3426]

While not attesting to parts of a Rule 92 *ter* statement may not always amount to giving inconsistent statements, the effect is the same in that the subsequent testimony in court differs in substance from the initial statement. Unattested portions of Rule 92 *ter* statements may therefore be treated the same as prior inconsistent statements.[3427]

reasons

It was open to the Trial Chamber to rely on the evidence of certain witnesses over that of other witnesses, without necessarily referring to the testimony of every witness who testified on a given topic.[3428]

cross examination

A complete absence of, or deficiency in, the cross examination of a witness, will not automatically lead to the exclusion of the evidence.[3429]

cumulative

When deciding on admissibility under Rule 89(C), the Chamber does not consider the fact that other admitted exhibits may speak to the same or similar issues as the material before it.[3430]

diaries

Admission of the diary of a non-witness would cause unfairness to the accused and was therefore refused.[3431]

discretion

A Trial Chamber has discretion to restrict or exclude otherwise admissible evidence, so long as such restrictions have a legitimate purpose.[3432]

[3426] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 614
[3427] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Judgement* (20 May 2013) at para.12
[3428] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 189
[3429] *Prosecutor v Martic*, No.IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic* (14 September 2006) at para. 20
[3430] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for the Admission of 68 Sarajevo Romanija Corps Documents from the Bar Table* (16 June 2011) at para. 11
[3431] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Prosecution Submission on the Admission of Documentary Evidence* (16 January 2008) at para. 14
[3432] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006) at para. 11

documentary evidence

To be admitted, a document must have some relevance and some probative value.[3433]

A party must demonstrate the relevance, probative value, and reliability of evidence it seeks to have admitted. It must admit United Nations documents into evidence through the trial process, not through judicial notice, where the documents contain conclusions and other material which are not facts of judicial notice.[3434]

Documents which challenge a witness' credibility may be admitted even where the witness states that he or she has no knowledge of the document or rejects its contents. In such a case, the fact that a document goes to the witness' credibility may constitute sufficient nexus between the witness and the document to make it admissible, assuming it is otherwise authentic and reliable.[3435]

A trial chamber has a broad discretion when deciding the weight to be accorded to an exhibit.[3436]

It is error for a Trial Chamber to rely on a document which was never admitted into evidence.[3437]

Documents shown to a witness on cross-examination will not be admitted unless adopted by the witness.[3438]

equality of arms

Trial Chamber erred in imposing higher standard on admission of defence videos than that it had imposed on the prosecution.[3439]

exclusion of evidence

[3433] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on the Admissibility of Documents of the Defence of Enver Hadzihasanovic* (22 June 2005) at para. 21
[3434] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Admission of Documentary Evidence Pursuant to Rules 94(A) and 89(C)* (3 February 2006)
[3435] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Guidelines for the Admission of Evidence Through Witnesses* (19 May 2010) at para. 11
[3436] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1681
[3437] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 865
[3438] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski* (17 May 2005) at para. 9; *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasovic* (26 August 2005) at para. 25
[3439] *Prosecutor v Prlic et al*, No. IT-04-AR73.16, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision on Prlic Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence* (3 November 2009) at para. 44

The factors to be considered when determining whether to exclude evidence despite an impediment to the accused's cross examination include (1) the importance of the evidence; (2) whether there was an adequate opportunity for cross examination and the stage of cross-examination that was reached; (3) whether the completed cross examination was sufficient to fairly judge the witness' credibility; (4) whether the interruption of cross examination could have been avoided or evidence of the same value was reasonably available some other way; (5) the presence of the witness before the accused and the Court; (6) defence counsel's opportunity to put prior inconsistent statements before the Court; (7) defence counsel's submissions on any areas of cross examination which were not pursued before the interruption; (8) a common sense realistic assessment of the likely impact cross examination would have if completed; (9) whether the limitations on cross examination could be remedied or ameliorated, such as by admitting prior testimony; and (10) the existence of evidence corroborating the witness' testimony.[3440]

Testimony of Milan Babic, who committed suicide after three days of cross-examination, would not be excluded, but the defence would be allowed to introduce contradictory evidence on areas in which it did not have the opportunity to cross examine.[3441]

expert witnesses

Source material for expert witnesses is not admitted for their substantive content, but simply to enable the Chamber to verify the basis upon which the expert reached his or her conclusions.[3442]

DNA evidence would not be excluded where ICMP refused to produce material on 14 out of 300 randomly selected cases where the material produced was sufficient to be adequately tested.[3443]

Portions of exhumation reports that included conclusions on the cause of death could not be admitted through the testimony of non-expert who participated in the exhumations.[3444]

[3440] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Defence Motion to Exclude the Testimony of Milan Babic, Together with Associated Exhibits, from Evidence* (9 June 2006) at para. 23

[3441] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Defence Motion to Exclude the Testimony of Milan Babic, Together with Associated Exhibits, from Evidence* (9 June 2006) aff'd *Prosecutor v Martic*, No.IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic* (14 September 2006)

[3442] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Submission on the Relevancy of Certain Documents Relating to the Testimony of Richard Phillips* (9 July 2010) at para. 10

[3443] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion to Exclude DNA Evidence* (16 April 2013) at paras. 6-8

[3444] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Objection to Admission of Expert Reports* (10 April 2012) at T27240

further investigation

Trial Chamber appointed expert to examine Mladic notebooks to determine if he was the author and whether they were written at intervals over several years before deciding whether to admit the notebooks.[3445]

Trial Chamber did not err in admitting Mladic notebooks into evidence considering the various indicia relied upon for admission. Trial Chamber was not required to ordering a graphological analysis of the notebooks.[3446]

hearsay

Hearsay evidence is admissible if it is of probative value. It may be relied upon by the Trial Chamber if reliable.[3447]

Hearsay evidence is only admissible when the Trial Chamber is satisfied that the evidence is reliable.[3448] Reliability of a hearsay statement is relevant to its admissibility, and not just its weight.[3449]

Trial Chambers have a wide discretion in admitting hearsay evidence although establishing the reliability of this type of evidence is of paramount importance when hearsay evidence is admitted as substantive evidence to prove the truth of its contents.[3450]

Since hearsay evidence, once admitted, constitutes substantive evidence, it is important that its reliability be established.[3451]

Whether the hearsay is first-hand or removed is relevant to determine the probative value of the evidence.[3452]

[3445] *Prosecutor v Seselj*, No. ICTR-03-67-T, *Decision on Prosecution's Motion for Admission of Evidence Relating to Mladic Notebooks* (22 October 2010) at para. 40
[3446] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 121
[3447] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 217; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para.493
[3448] *Prosecutor v Aleksovski*, No. IT- 95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para. 15; *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Testimony of Defence Witness Dragan Jasovic* (15 April 2005) at page 4
[3449] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 5
[3450] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.6, *Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence* (23 November 2007) at para. 52
[3451] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 516
[3452] *Prosecutor v Aleksovski*, No. IT- 95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para. 15; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 5

A trial chamber has the discretion to rely on hearsay evidence. The weight and probative value to be afforded to hearsay evidence will ultimately depend upon the infinitely variable circumstances that surround hearsay evidence.[3453]

In determining whether to admit a hearsay statement, the Trial Chamber may consider the content of the statement and the circumstances under which the evidence arose.[3454]

A trial chamber has wide discretion as to the assessment of the weight and probative value of hearsay evidence but must proceed with caution in the assessment of such evidence.[3455]

The probative value of hearsay evidence is usually less than the weight given to the testimony of a witness who testified under oath and was cross-examined.[3456]

Official reports of interviews and investigation by Serbian Ministry of Interior are sufficiently reliable to be admitted.[3457]

The Trial Chamber was entitled to take into consideration the stage of the trial, the length of time the accused had been in custody, and its finding that the witness was not immediately available when deciding to admit hearsay evidence.[3458]

The prosecution must establish the relevance and probative value of documentary hearsay evidence beyond a reasonable doubt, whereas the defence is only required to prove the relevance and probative value of such evidence on a balance of probabilities.[3459]

Trial Chamber erred in failing to consider the relevant criteria for assessing the weight and probative value of hearsay evidence. Accepting evidence that the witness was told by "others" that the accused was the person in question was error, albeit harmless.[3460]

identification evidence

Visual identification evidence is a category of evidence which is particularly liable to error. Errors may occur even with the most honest, confident, and apparently

[3453] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 126; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1307
[3454] *Prosecutor v Aleksovski*, No. IT- 95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para. 15; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1331
[3455] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1646
[3456] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.787
[3457] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasovic* (26 August 2005) at para. 18-19
[3458] *Prosecutor v Aleksovski*, No. IT- 95-14/1-AR73, *Decision on Prosecutor's Appeal on Admission of Evidence* (16 February 1999) at para. 19
[3459] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 23
[3460] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 387

impressive witnesses. Wrongful convictions based upon mistaken eyewitness identifications have been known to result. Therefore, visual identification evidence is treated with very special care.[3461]

An identification of an accused in a courtroom may well have been unduly and unconsciously influenced by the physical placement of the accused and other factors which make the accused the focus of attention in a courtroom.[3462]

Factors considered in evaluating identification of an accused from a photo spread include (1) whether the photograph was clear enough and matched the description of the accused at the time of the events; (2) whether the accused blended with or stood out among the foils; (3) whether a long time had elapsed between the sighting of the accused and the photo spread identification; (4) whether the identification was made immediately and with confidence; (5) whether there were opportunities for the witness to become familiar with the accused prior to his identification, be it in person or through the media; and (6) whether the procedure may in some way have encouraged the witness to make a positive identification despite some uncertainty or encouraged the witness to identify the accused rather than someone else.[3463]

Identification evidence can be particularly liable to error. Even where a witness appears to be honest, the Trial Chamber must be convinced that his or her evidence is objectively reliable before it will be sufficient to establish a positive identification. In assessing identification evidence, relevant factors include: (1)the circumstances in which each witness claimed to have observed the accused; (2) the length of the observation; the familiarity of the witness with the accused prior to the identification; and (3) the description given by the witness of his or her identification of the accused.[3464]

The Trial Chamber's treatment of the courtroom identification of the Appellant, was proper. In any event, there was other evidence of identity.[3465]

No probative weight should be attached to in-court identifications. In-court identifications are inherently unreliable because all the circumstances of a trial necessarily lead such a witness to identify the person on trial.[3466]

The Trial Chamber attached some weight to the in-court identifications and to the extent that it did, it was in error.[3467]

[3461] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 17
[3462] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 18
[3463] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 19; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 137
[3464] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement* (10 June 2010) at para.55
[3465] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 107
[3466] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 27; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para.120
[3467] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 28

The Appeals Chamber observes that identification evidence may be affected by the length of time between the crime and the confrontation.[3468]

Absolute conviction in witness' identification evidence was very much a reflection of her personality and not necessarily an indicator of her reliability. Trial Chamber erred in relying upon the identification. [3469]

Identification evidence *strict senso* concerns the identification of a person the witness had not previously known. Recognition evidence concerns the identification of a person whom the witness knew from before. Both types of evidence must be treated with caution as its quality may depend on many variables, such as the vagaries of human perception or recollection.[3470]

When weighing identification evidence, Trial Chamber considered that photo board identifications were not carried out in full compliance with OTP guidelines.[3471]

The failure of a witness to identify a perpetrator in the courtroom does not necessarily prevent a reasonable trier of fact from relying on that witness's testimony.[3472]

Where a finding of guilt is made based on identification evidence given by a witness under difficult circumstances, the Trial Chamber needs to "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence". This is required only when a witness's identification was made under difficult circumstances, such as in the dark or because of a fleeting glance. None of the challenged identifications here occurred under difficult circumstances.[3473]

A witness who has acquired sufficient knowledge of an accused may be considered a "recognition" witness, whereas someone to whom the accused was previously unknown by sight may be considered an "identification" witness. However, it was not incumbent on the Trial Chamber to distinguish between recognition and identification witnesses in the present case.[3474]

As part of its reasoned opinion, a Trial Chamber should articulate the basis on which it was satisfied that the witness had prior knowledge of an accused and was therefore able to recognize that individual at the crime scene.[3475]

[3468] *Prosecutor v. Limaj et al.,* No. IT-03-66-A, *Judgement (27 September 2007)* at para. 30
[3469] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para 154
[3470] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 29
[3471] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Judgement* (2 April 2008) at para. 31
[3472] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 503
[3473] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 382
[3474] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 384
[3475] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 118

illegally obtained evidence

Even if law enforcement's secret recording of accused's meeting with witness was not in accordance with the laws of the State, it would be admissible where the manner and circumstances demonstrated the evidence was reliable, and it was also relevant and had probative value.[3476]

intercepted conversations

Evidence of intercepted conversations was a reliable source of information.[3477]

Intercepted conversations were adequately authenticated with evidence from a witness who recognized the voices of the speakers.[3478]

Intercept evidence is a special category of evidence in that it does not bear any *prima facie* indication of authenticity or reliability. These requirements may generally be fulfilled by hearing from the relevant intercept operators or participants in the intercepted conversations. However, intercepts may be admitted from the bar table where other evidence in the case established the reliability and authenticity of the general collection of intercepts.[3479]

Reliability of intercepts were shown by the procedures employed in producing the intercepts and the methods used to promote reliability, including instructions issued to and practices followed by the intercept operators, as well as the fact that some of the intercepts were independently corroborated by other sources.[3480]

Summaries of intercepted conversations noted down by intercept operators were admissible. The lack of recordings or verbatim transcripts of the conversations were matters which went to the weight of the evidence, not its admissibility.[3481]

Intercepted conversations could be admitted even where both speakers are not identified.[3482]

[3476] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4, *Decision on Morina and Haraqija Second Request for a Declaration of Inadmissibility and Exclusion of Evidence* (24 November 2008) at para. 15

[3477] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 30; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Admissibility of Intercepted Conversations* (7 December 2007)

[3478] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying the Stanisic Motion for Exclusion of Recorded Transcripts* (6 December 2009) at para. 23

[3479] *Prosecutor v Tolimir*, No, IT-05-88/2-T, *Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table* (20 January 2012) at para. 14

[3480] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 59

[3481] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's First Bar Table Motion for the Admission of Intercepts* (14 May 2012) at para. 15; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Second Bar Table Motion for the Admission of Intercepts* (25 May 2012) at para. 11

[3482] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Third Motion for the Admission of Intercepts (Srebrenica)* (24 May 2012) at para. 20; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 919

Intercepted conversations would not be admitted from the bar table until the end of the defence case and upon a showing of authenticity.[3483]

investigator testimony

The Trial Chamber was entitled to decline to admit conclusions of a prosecution investigator on issues on which it was required to make its own findings. That determination did not require expertise beyond that which was within any capacity of a tribunal of fact.[3484]

Investigator could not testify as to summary of witness statements taken by OTP since the statements themselves were not in compliance with Rule 92 *bis* and thus were not admissible. The material being summarized must itself be admissible.[3485]

Testimony of OTP intelligence analyst accorded no weight as to his views, conclusions, and analysis of the documents he obtained.[3486]

Testimony of missing persons commission lawyer concerning statistics on missing persons was reliable and admissible, but statements about the underlying events were not.[3487]

not included in the indictment

There is no requirement that the actual evidence on which the Prosecutor relies must be included in the indictment. Where, during the trial, evidence is introduced which, in the view of the accused, does not fall within the scope of the indictment, or is within the scope but in relation to which there is no corresponding material fact in the indictment, the defence may challenge the admission of the evidence or request an adjournment.[3488]

Where an event is not heralded in an indictment, Rule 65 ter summary or pre-trial brief, it is open to a Trial Chamber not to admit such evidence, even if there are general averments in the indictment that may in some way encompass the unheralded event. Testimony of uncharged crimes excluded.[3489]

[3483] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Bar Table Motion (Sarajevo Intercepts)* (9 October 2012) at paras. 8-10
[3484] *Prosecutor v Milosevic*, No. IT-01-54-AR73.2, *Decision on Admissibility of Prosecution Investigator's Evidence* (30 September 2002) at para. 17
[3485] *Prosecutor v Milosevic*, No. IT-01-54-AR73.2, *Decision on Admissibility of Prosecution Investigator's Evidence* (30 September 2002) at para. 21
[3486] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 35
[3487] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on the Motion to Bar the Testimony and Statement of Amir Masovic* (12 November 2008) at para. 45
[3488] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 147
[3489] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Witness K82* (3 October 2006) at para. 12

Evidence regarding unscheduled incidents and the general situation can be used to support conclusions on the existence of a pattern of conduct [3490]

Defence expert evidence on unscheduled shelling and sniping incidents was relevant, as the alleged campaign of shelling and sniping was not limited to scheduled incidents and relates to challenges to the methodology used by the prosecution's witnesses as to scheduled incidents.[3491]

outside of the period charged

The Trial Chamber did not abuse its discretion by relying on evidence of acts committed outside of the period charged in the indictment insofar as it had probative value in defining the development of the Common Purpose which was in place during the relevant period of the Indictment as well as the role played by the accused during that period.[3492]

Evidence as to Bosnian Serb Army treatment of Muslim population around Srebrenica and shelling directed at civilians and peacekeepers in 1993 was irrelevant to massacres in Srebrenica in 1995 and would be excluded.[3493]

polygraph evidence

Without deciding on the admissibility of polygraph evidence, the Trial Chamber determined that the evidence did not go to a central feature of the witness' evidence and was therefore not of sufficient probative value to be admitted.[3494]

principle of orality

Prior statements of witnesses who are available to be cross-examined may be admitted into evidence even if they don't comply with Rule 92 *bis*, such as by touching on acts and conduct of the accused. The fact that the witness is present and can orally attest to the accuracy of the written statement is sufficient to place this application beyond the scope of Rule 92*bis*.[3495]

[3490] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 219
[3491] *Prosecutor v Mladic*, No. IT-09-92-T, *Interim Decision regarding the Expert Reports of Mile Poparic and Zorica Subotic* (17 September 2015) at paras. 6-7
[3492] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 123; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 295
[3493] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 73
[3494] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Admissibility of a Polygraph Report* (19 January 2016) at para. 8
[3495] *Prosecutor v Milosevic*, No. IT-01-54-AR73.4, *Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements* (30 September 2003) at para. 16

A determination of whether a written statement should be admitted in the interests of justice under Rule 89(F) must be made by the Trial Chamber in relation to each individual witness, considering not only the surrounding circumstances, but also the evidence to be given by the witness.[3496]

Written statement and related exhibits admitted pursuant to Rule 89(F) where witness' statement did not directly relate to the accused but contained information on the political developments in the territory.[3497]

An accused's prior statements may be introduced without the presence of a witness to authenticate them. The right to confront the witnesses against the accused does not apply to the accused's own statements.[3498]

prior statements

Prior inconsistent statements of witnesses may be admitted as substantive evidence pursuant to Rule 89(C).[3499]

Prior inconsistent statements of prosecution witness sought to be offered by the prosecution after the witness had testified would not be admitted where the witness was not provided the opportunity to explain the inconsistencies.[3500]

Prior inconsistent statements contained in unattested parts of Rule 92 *ter* material may be admitted as prior inconsistent statements when put to the witness. However, the Chamber declined to admit such statements *proprio motu* where the witness claimed forgetfulness and old age.[3501]

relevance

Evidence may be rejected for admission solely on the grounds of relevance. It must be considered whether the evidence relates to a material issue at the trial. The material issues are assessed by reference to the indictment.[3502]

[3496] *Prosecutor v Milosevic*, No. IT-01-54-AR73.4, *Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements* (30 September 2003) at para. 21
[3497] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motion for Admission of Statement of Witness Milan Babic Pursuant to Rule 89(F)* (10 February 2006)
[3498] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 17
[3499] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decisions on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence* (25 April 2005)
[3500] *Prosecutor v Halilovic*, No. IT-01-48-T, *Decision on Admission into Evidence of Prior Statement of Witness* (5 July 2005)
[3501] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Guidance on the Admissibility into Evidence of Unattested Parts of Rule 92 ter Statements as Previous Inconsistent Statements* (30 March 2010)
[3502] *Prosecutor v Prlic et al*, No. IT-04-AR73,13, *Decision on Jadranko Prlic's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence* (12 January 2009) at para. 17

Testimony of witnesses to show that Bosnian Muslims possessed modified air bombs of the kind used in shellings charged against the accused was not of sufficient relevance where the testimony dealt with an uncharged incident and was not based upon first-hand knowledge.[3503]

Although the Trial Chamber was not consistent by first labelling the issue of the 2nd Battalion's capacity to decode the telegrams as "important" when allowing it to be admitted in the prosecution's case, only to call it "peripheral" in its judgement, having had the benefit of lengthy deliberations after all the evidence had been presented, the Trial Chamber was best suited to determine the ultimate relevance of this issue.[3504]

reliability

A pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and it must be shown that the relevant evidence is reliable. There may be circumstances where a statement of an accused is taken in compliance with Rules 42 and 43 but should be excluded.[3505]

Statement of deceased witness was not sufficiently reliable to be admitted under Rule 89(C) where it was not made under oath, was not subject to cross-examination, was not corroborated by other evidence, was not based on first-hand information, and was taken through an interpreter.[3506]

Reliability is a prerequisite to a showing of probative value necessary for admission of evidence, particularly with respect to out of court written statements.[3507]

Relevance and probative value are the two prerequisites for admissibility under Rule 89(C). Reliability is a factor in the assessment of relevance and probative value but is not itself a separate requirement.[3508]

Definite proof of reliability is not necessarily required for a document to be admitted. *Prima facie* proof of reliability based on sufficient indicia is enough at the admissibility stage.[3509]

[3503] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 bis* (22 August 2012) at para. 8
[3504] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1353
[3505] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95* (7 February 2006) at para. 23
[3506] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-AR73.5, *Decision on Appeal Regarding Statements of a Deceased Witness* (21 July 2000) at para. 27
[3507] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams* (1 September 2006) at para. 9
[3508] *Prosecutor v Prlic et al*, No. IT-04-AR73.16, *Decision on Jadranko Prlic's Interlocutory Appeal Against the Decision on Prlic Defence Motion for Reconsideration on the Decision on the Admission of Documentary Evidence* (3 November 2009) at para. 33
[3509] *Prosecutor v Prlic et al*, No. IT-04-AR73,13, *Decision on Jadranko Prlic's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence* (12 January 2009) at para. 15

Book which quoted the accused was not sufficiently reliable to be admitted from the bar table where it was not established whether the quotes were accurate.[3510]

statements of the accused

Statements made by the accused in the presence of counsel are presumed to be made knowing of the right to remain silent.[3511]

Only flagrant incompetent advocacy would justify exclusion of a statement of the accused on the ground of ineffective assistance of counsel.[3512]

Divergent political and personal views during the indictment period did not arise to the level of conflict of interest on the part of defence counsel such that the statement of the accused, taken in his presence, should not be admitted.[3513]

Statements not taken in accordance with national laws are not per se inadmissible but are evaluated under Rules 89 and 95.[3514]

Notes and reports of Macedonian commission provided to the accused to correct and sign, were sufficiently reliable to be admitted, whereas report of statement not taken down verbatim and not reviewed by the accused was not sufficiently reliable to be admitted. [3515]

The prosecution bears the burden of establishing all factors of the reliability of a statement of the accused which it offers in evidence.[3516]

Testimony of accused in another trial admitted in his own trial where he had been advised of his rights prior to giving the testimony and waived them.[3517]

[3510] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Prosecution Motion to Admit Evidence from the Bar Table, Revise its 65 ter Witness and Exhibit Lists, and Admit Evidence Pursuant to Rule 92 ter* (26 January 2012) at para. 31

[3511] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 15

[3512] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95* (7 February 2006) at para. 26

[3513] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.6, *Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence* (23 November 2007) at para. 25

[3514] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents…*(7 December 2007) at para. 18

[3515] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents…*(7 December 2007) at paras. 41-43

[3516] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95* (7 February 2006) at para. 22

[3517] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Prosecution's Motion to Admit into Evidence Transcripts of Vojislav Seselj's Testimony in the Milosevic Case* (30 October 2007)

An accused cannot invoke his right against self-incrimination to block admission of a statement freely given after being advised of his right to remain silent.[3518]

Statement of accused excluded where prosecution linked statement to its position on provisional release, failed to put on the record discussions during a break in the recording, and the accused was not represented by competent counsel.[3519]

Creating a privilege to exclude statements made during a national investigation of suspected war crimes would compromise the Tribunal's discretion to admit evidence under Rule 89 by potentially precluding the Tribunal from considering vital pieces of evidence and consequently undermining the Tribunal's ability to fulfil its mandate. It could also create an impromptu immunity, allowing those responsible for the commission of war crimes to comply with national investigations and thereafter rely on the exemption to exclude incriminatory evidence form subsequent criminal proceedings.[3520]

Defective translation of the statement, faulty interpretation of the questions to the accused, and alleged aggressive way the interview was conducted did not warrant exclusion of the statement of the accused.[3521]

statements by the co-accused

Recorded "suspect" interview of accused was admissible against co-accused despite the lack of cross examination, and the weight to be given to the interview statements would be determined when deliberating on the judgement.[3522]

To properly ensure the rights of all co-accused, a trier of fact is required to carry out a careful balancing of the probative value of the suspect's questioning to be admitted into evidence, considering all the circumstances of the case.[3523]

Recorded "suspect" interview of accused was admissible against co-accused. However, it could not be used as evidence of any critical element of the prosecution case

[3518] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 15
[3519] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 65
[3520] *Prosecutor v Boskoski & Tarculovski v. Boškoski,* No. IT-04-82-A, *Judgement* (19 May 2010) at paras 190 – 191.
[3521] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Exclude Interview of the Accused Pursuant to Rules 89(D) and 95* (7 February 2006) at paras. 24-28
[3522] *Prosecutor v Prlic*, No. IT-04-74-T, *Decision on Request for Admission of the Statement of Jadranko Prlic*(22 August 2007); *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Reasons for the Admission into Evidence of the Interviews of the Accused Ivan Cermak and Mladen Markac and Associated Exhibits* (17 April 2009) at para. 14
[3523] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.1, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning* (14 December 2007) at para. 51

unless corroborated. This is wider in scope than the "acts and conduct of the accused."[3524]

Statements of co-accused that went to the acts and conduct of the accused not admitted where accused had no opportunity to cross examine the accused. [3525]

Interview of accused was not inadmissible against co-accused despite fact that trials were joined upon motion of prosecution and therefore the co-accused could not cross-examine the accused on his statement. However, in certain circumstances, it may be appropriate for the Trial Chamber to safeguard the rights of the co-accused by severing proceedings, excluding certain evidence, or calling or recalling certain witnesses to be examined in court.[3526]

Where defence had relied upon position of prosecution that statement of accused could not be admitted against co-accused, the Trial Chamber would not admit the statements after an intervening decision of the Appeals Chamber allowed such use of the statements.[3527]

statements by NGOs

Statements taken by NGOs were not "prepared for the purpose of legal proceedings before the Tribunal" as that phrase is used in the jurisprudence of the Tribunal but were nevertheless inadmissible because an insufficient showing of reliability was made.[3528]

statements by third parties

Statement of third party who ultimately was not called as a witness could not be used for the truth of its contents but was admitted for the limited purpose of assessing the contradictions between the statement and the testimony of other witnesses to the extent that the statement had been put to those other witnesses.[3529]

[3524] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.6, *Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlic's Questioning into Evidence* (23 November 2007) at para 59
[3525] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Prosecution Motion for Admission into Evidence of Documents…*(7 December 2007) at para. 46
[3526] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.1, *Decision on Appeals Against Decision Admitting Material Relating to Borovcanin's Questioning* (14 December 2007) at para 46
[3527] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Use of Prosecution Interviews of Accused* (20 March 2008)
[3528] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams* (1 September 2006) at para. 19, 22; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Fuat Haxhibeqiri* (8 September 2006); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006)
[3529] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Motion for Removal from Evidence of Momir Nikolic's Statement of Facts* (6 February 2008)

Statement of third party put to a witness would not be admitted if the witness cannot confirm the statement.[3530]

Statement of third party admissible when reference in expert report.[3531]

Statements taken for the purpose of the present litigation are governed by Rule 92 *bis* and 92 *ter*, while statements taken by third parties are governed by Rule 89(C).[3532]

Statement of prosecution investigators concerning utterances of the accused in court were prepared for the litigation and went to the acts and conduct of the accused, therefore their admission under Rules 89 and 92 *bis* were denied.[3533]

summaries

Summaries by a party of written statements of potential witnesses are inadmissible. Parties may not circumvent the requirements of Rule 92 *bis* by seeking to admit summaries under Rule 89(C).[3534]

However, summaries by a non-party may be admissible provided that the witness through whom the summaries are tendered can give evidence on the stand showing sufficient indicia of reliability.[3535]

Summaries by a non-party may be admissible since they are not subject to Rule 92 *bis*. However, the statements summarized must be reliable, as well as the method by which the statements are summarized. The absence of cross-examination must also be considered.[3536]

tu quoque

It may be legitimate to present exhibits proving the other side's attacks upon the civilian population of an accused's camp if they go to refute, for example, allegations of a widespread or systematic attacks perpetrated upon a civilian population, allegations of the

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[3530] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Second Motion for Admission of Documents Previously Marked for Identification* (16 December 2010) at para. 6
[3531] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Admission of Exhibits Cited in Expert Report of Christian Nielsen* (9 May 2013) at paras. 39,43,56
[3532] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on the Motion to Bar the Testimony and Statement of Amir Masovic* (12 November 2008) at paras. 17-18
[3533] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on the Prosecution's Motion for Admission of the Utterances of the Accused* (4 June 2013) at para. 6
[3534] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams* (1 September 2006) at para. 14; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on the Motion to Bar the Testimony and Statement of Amir Masovic* (12 November 2008) at para. 20
[3535] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Evidence Tendered Through Sandra Mitchell and Frederick Abrahams* (1 September 2006) at para. 15
[3536] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on the Motion to Bar the Testimony and Statement of Amir Masovic* (12 November 2008) at para. 21

existence of a plan of concerted attacks upon several villages or perhaps to explain the behaviour of the accused, or even to provide information on the organisation and activities of the BH Army or the HVO. However, it is important in this instance that such evidence addresses places appropriately defined.[3537]

waiver

Defence waived objection to statement of witness being admitted from the bar table by failing to object at the time the statement was tendered.[3538]

Rule 90—testimony of witnesses
(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".
(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.
(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.
(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings.
(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.
(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
(i) make the interrogation and presentation effective for the ascertainment of the truth; and
(ii) avoid needless consumption of time.
(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 bis (C) and 73 ter (C).
(H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

[3537] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Praljak Defence Motion for Admission of Documentary Evidence* (1 April 2010) at para. 80
[3538] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Reconsideration of Decision Admitting Charts of Amor Masovic* (19 September 2016) at para. 12

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

accused as witness

While the accused is giving testimony, he shall have no communication with his lawyer except by seeking permission from the Trial Chamber in writing, setting forth the reasons for the contact.[3539]

Trial Chambers have discretion to determine when an accused may testify in his own defence, but this power must nevertheless be exercised with caution, as it is, in principle, for both parties to structure their cases themselves, and to ensure that the rights of the accused are respected, in particular his or her right to a fair trial.[3540]

The fact that the accused testified before any other defence witnesses were called counts in his favor in the assessment of credibility.[3541]

Trial Chamber did not err in requiring accused to be examined by his counsel, despite the breakdown in communication between them.[3542]

Trial Chamber erred in narrowly defining special circumstances in which an accused represented by counsel would be allowed to put questions to witnesses himself. Such circumstances should not be limited to matters in which the accused had personally participated or had special expertise at the time of the offence.[3543]

Trial Chamber did not err in requiring the accused to give testimony before the expert witness.[3544]

An accused is entitled to appear as a witness in his own defence. There are no restrictions regarding when, during the defence case, the accused can choose to exercise this right.[3545]

[3539] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Finalized Procedure on Chamber Witnesses, Decisions and Orders on Several Evidentiary and Procedural Matters* (24 April 2006) at para. 31
[3540] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 20
[3541] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 22
[3542] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 28
[3543] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.11, *Decision on Slobodan Praljak's Appeal of the Trial Chamber's Decision on the Direct Examination of Witnesses Dated 26 June 2008* (11 September 2008) at paras. 21-22
[3544] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 22
[3545] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 228

An accused, unlike other witnesses, may consult with his counsel during the duration of his testimony.[3546] This applies to cross examination by the prosecution, even after it had disclosed to counsel the documents it would use in cross examination.[3547]

Accused would be allowed contact with his defence team during his testimony, but they could not discuss the substance of his testimony or show him the documents notified by the prosecution to be used during his cross-examination.[3548]

There is no reason for departing from the well-established practice of question-and-answer format when it comes to a self-represented accused's testimony. Narrative testimony of the accused would not be more effective and timesaving than the standard question-and-answer form. Therefore, the accused shall testify in question-and answer form, with his legal advisor to put questions to him during his testimony.[3549]

compelled testimony

Witness whose case was pending on appeal was protected by Rule 90(E) and could be compelled to testify on behalf of accused in another case.[3550]

Rule 90(E) prohibits the direct and indirect or derivative use of compelled statements against a person in another proceeding.[3551]

Any self-incriminatory testimony inadvertently provided by a witness who is also an accused at the Tribunal cannot be used against the witness in his own case.[3552]

The protection afforded by Rule 90(E) against use of compelled testimony extends only before the Tribunal and does not bind national authorities. However, a

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[3546] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.10, *Decision on Prosecution's Appeal Against Trial Chamber's Order on Contact between the Accused and Counsel During an Accused's Testimony Pursuant to Rule 85(C)*(5 September 2008); *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order on the Mode of Examining an Accused Pursuant to Rule 85(C) of the Rules* (1 July 2008)
[3547] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order Clarifying the Relationship Between Counsel and an Accused Testifying Within the Meaning of Rule 85(C) of the Rules* (11 June 2009)
[3548] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Request for Access to and Communications With Counsel During Goran Hadzic's Testimony* (2 July 2014) at paras. 15-16
[3549] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Prosecutor's Submission on form of Karadzic's Testimony* (27 January 2014) at T45933-36
[3550] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.11, *Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (13 November 2013) at para. 45; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Zdravko Tolimir* (9 May 2013) at para. 22; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Ljubisa Beara* (9 May 2013) at para. 16; *Prosecutor v Karadzic*, No. IT-9505/18-T, *Decision on Accused's Motion to Subpoena Radivoje Miletic* (9 May 2013) at para. 16
[3551] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.11, *Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (13 November 2013) at para. 43
[3552] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.11, *Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir* (13 November 2013) at para. 44

witness may request a closed session to avoid disclosure of his testimony to national authorities.[3553]

Compelled testimony in national court of Bosnia is not necessarily inadmissible against the accused at the Tribunal or in other national jurisdictions.[3554]

cross examination

credibility

The defence has the right to ask a witness pointed questions to test his or her credibility or reliability even though this may be an unpleasant experience for the witness.[3555]

Subject to the overriding requirement of relevance, the Rules do not limit the scope of matters which may be inquired into on cross-examination which is directed solely at the credibility of the witness.[3556]

Where a party wishes to confront a witness with allegations that the witness has engaged in serious criminal conduct, that party must have reasonable grounds to do so at the time the allegations are made. Reasonable grounds do not require that the party have incontrovertible evidence of wrongdoing; it does however require more than mere hunch, innuendo, or unsubstantiated hearsay.[3557]

It would be unfair to preclude cross examination into pending criminal case against prosecution witness since cross examination may extend to matters of credibility.[3558]

limitations

The Trial Chamber's time limitations on cross examination did not violate rights of accused where there was sufficient flexibility in that the time limit could be modified as necessary by the Trial Chamber.[3559]

[3553] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross Examination* (12 June 2009) at para. 21
[3554] *Prosecutor v Mladic*, No IT-09-92R75 *bis, Second Decision on Request for Assistance from the Court of Bosnia and Herzegovina Pursuant to Rule 75 bis* (21 December 2011) at para. 10
[3555] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Cross Examination of Milorad Davidovic* (15 December 2005) at para. 8
[3556] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Cross Examination of Milorad Davidovic* (15 December 2005) at para. 8
[3557] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Cross Examination of Milorad Davidovic* (15 December 2005) at para. 9
[3558] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross Examination* (12 June 2009) at para. 18
[3559] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.2, *Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross Examination by Defence and Association of Defence Counsel's Request for Leave to File an Amicus Curiae Brief* (4 July 2006)

Recognizing that the procedure for hearing witness at the Tribunal is rooted in the adversarial process, it is important to be cautious in removing safeguards that belong to that process for reasons of fairness to the parties or for ascertaining the truth.[3560]

The right of cross examination is not absolute.[3561] Trial Chamber was reasonable in admitting testimony of witness who died while during cross examination where it determined that cross examination had been adequate to determine reliability and credibility of witness.[3562]

Trial Chamber excluded testimony of witness who testified on direct examination by fell ill before he could be cross examined on substantive matters. The prejudicial effect of admitting his testimony, which went to the acts and conduct of the accused, and which was not corroborated, outweighed its probative value.[3563]

A party must make a substantiated allegation of misconduct on the part of counsel before they will be permitted to ask questions about the conduct of counsel during pre-trial meetings.[3564]

There was sufficient substantiation of improper prosecution conduct in dictating the content of the witness' statement to allow the defence to cross examine the witness on the conduct of prosecution counsel during the pre-trial meeting.[3565]

relevant to one's own case

Rule 90(H) should be interpreted broadly as authorizing the cross-examining party to ask questions relevant to its own case, even when those questions go to matters that were not raised in the direct examination.[3566]

[3560] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.3, *Decision on Appeals Against Decision on Impeachment of a Party's Own Witness* (1 February 2008) at para. 24

[3561] *Prosecutor v Martic*, No.IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic* (14 September 2006) at para. 12; *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4A, *Judgement* (23 July 2009) at para. 61

[3562] *Prosecutor v Martic*, No.IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babic* (14 September 2006)

[3563] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and to Deny His Testimony Pursuant to Rule 92 Quarter* (14 December 2007) at para. 10

[3564] *Prosecutor v Perisic*, No. IT-04-81-T, *Written Reasons for Oral Decision on Defence Application for Permission to Cross Examine Muhamed Sacirbey Regarding his Pre-Trial Statements to the Prosecution* (8 July 2009) at para. 16

[3565] *Prosecutor v Perisic*, No. IT-04-81-T, *Written Reasons for Oral Decision on Defence Application for Permission to Cross Examine Muhamed Sacirbey Regarding his Pre-Trial Statements to the Prosecution* (8 July 2009) at para. 19

[3566] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Scope of Cross Examination Under Rule 90(H) of the Rules* (27 November 2008) at para. 11

The prosecution may ask questions on cross-examination which relate to its case, even though it has finished presenting its case.[3567]

When eliciting evidence beyond the scope of direct examination for the benefit of the party's own case, leading questions are not permitted.[3568]

When a party elicits information favourable to its case during cross examination, pursuant to Rule 90(H), it may do so through leading questions.[3569]

Rule 90(H)'s provision that the scope of cross examination shall include matters relating to the credibility of the witness and matters in which the witness can assist the case of the cross-examining party are important for effective utilization of an accused's right to confront the witness' brought against him and their restriction would appear to be patently unfair.[3570]

In exceptional circumstances, the prosecution may introduce inculpatory documents in its cross examination of defence witnesses upon a showing of when and by what means it obtained the documents, when it disclosed them to the defence, and why they are being offered only at the conclusion of their case. The defence would be granted time to offer evidence in rebuttal or to conduct additional examination of the witness if the prosecution evidence is admitted.[3571]

Trial Chamber has the discretion to admit fresh evidence from the prosecution in its cross examination of defence witnesses, considering the probative value of the evidence and the need to ensure a fair trial.[3572]

Trial Chamber erred in failing to determine whether prosecution exhibits used to cross examine defence witness and not contained on prosecution witness list could be

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[3567] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Scope of Cross Examination Under Rule 90(H) of the Rules* (27 November 2008) at para. 12

[3568] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Mode of Interrogating Witnesses* (10 May 2007) at para. 13; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motion on Use of Leading Questions …*(4 July 2008) at para. 19; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Submissions by Stanisic Defence Regarding Prosecution's Rule 90(H)(ii) Obligations During Cross Examination of Defence Witness Borislav Pelevic* (12 June 2012) at para. 11

[3569] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Objection to Leading Questions* (22 January 2013) at T32383-84

[3570] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR73.1, *Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65 ter Witness List* (20 April 2007) at para. 20

[3571] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (27 November 2008) at paras. 20-21; affirmed by *Prosecutor v Prlic et al*, No. IT-04-74-AR73.14, *Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (26 February 2009) at para. 24

[3572] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.14, *Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross Examination of Defence Witnesses* (26 February 2009) at para. 23

admitted for impeachment only or as substantive evidence, and in failing to consider alternative remedies to ameliorate prejudice to the accused.[3573]

Documents disclosed by defence for possible use during cross examination of prosecution witnesses may be used by the prosecution as exhibits.[3574]

by the accused

An accused represented by counsel may only cross examine a witness in exceptional circumstances. Those circumstances will ordinarily be linked to events in which the accused took part of issues in which the accused is particularly competent.[3575]

Trial Chamber declined to allow represented accused to examine witness where he had neither legal training nor expertise to interrogate witnesses in court.[3576]

Restrictions on the accused's right to question witnesses when represented by counsel were reasonable where Trial Chamber retained the flexibility to allow the accused to cross examine the witness after his counsel.[3577]

direct examination

When a party wishes to ask leading questions on direct examination, it must notify the Trial Chamber and parties that it is challenging its own witness. The evidence so elicited may include challenges on the substantive issues of the testimony as well as credibility.[3578]

The Trial Chamber, and not a party, shall be the one to determine whether the party may impeach or cross-examine its own witness.[3579]

It is not necessary that a witness be declared "hostile" for a party to put inconsistent statements to its own witness if the Trial Chamber determines it to be in the interest of justice.[3580]

[3573] *Prosecutor v Delic*, No. IT-04-83-AR73.1, *Decision on Rasim Delic's Interlocutory Appeal Against Trial Chamber's Oral Decisions on Admission of Exhibits 1316 and 1317* (15 April 2008)
[3574] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Joint Defence Motion to Prohibit Use of Defence Documents by the Prosecution* (5 December 2008)
[3575] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Mode of Interrogating Witnesses* (10 May 2007) at paras. 11-12
[3576] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Motion for Reconsideration Presented by the Praljak Defence* (26 June 2008)
[3577] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.5, *Decision on Praljak's Appeal of the Trial Chamber's 10 May 2007 Decision on the Mode of Interrogating Witnesses* (24 August 2007)
[3578] *Prosecutor v Popovic*, No. ICTR-05-88-T, *Decision on Certification and Clarification of the Trial Chamber's Oral Decision on Impeachment of a Party's Own Witness* (21 November 2007) at paras. 15-16
[3579] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.3, *Decision on Appeals Against Decision on Impeachment of a Party's Own Witness* (1 February 2008) at para. 26
[3580] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.3, *Decision on Appeals Against Decision on Impeachment of a Party's Own Witness* (1 February 2008) at para. 28

putting one's case to a witness

Rule 90(H)(ii) imposes an obligation on a party to put to a witness in cross-examination the nature of its case which is in contradiction with the evidence of that witness. This may well include that party's assessment of the character of the witness.[3581]

Rule 90(H)(ii) requires the cross-examining party to put the nature of its case, meaning the substance of the contradictory evidence, and not every detail that the party does not accept, to the witness if the party contests the evidence of the witness, and allows for a certain flexibility.[3582]

If it is obvious in the circumstances of the case that the version of the witness is being challenged, there is no need for the cross-examining party to waste time putting its case to the witness.[3583]

Putting one's case to the witness is only required when a cross examining party is eliciting evidence relating to the subject matter of his own case, and when he intends to elicit contradictory evidence from other witnesses or otherwise challenge the credibility of the witness on that point.[3584]

Trial Chamber will not rule on violations of Rule 90(H)(ii) in the abstract and provide guidelines but will rule on a case-by-case basis where specific violations of Rule 90(H)(ii) are alleged.[3585]

The cross-examining party fulfils its duty to put to the witness "the nature of its case" by explaining the general substance of that portion of its case which conflicts with the evidence of the witness. The party need not explain in every detail the evidence it intends to adduce, nor identify the witness or the provenance of the contradictory evidence.[3586]

[3581] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Cross Examination of Milorad Davidovic* (15 December 2005) at para. 8

[3582] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90 (H) (ii)* (17 January 2006); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para. 17

[3583] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para. 17

[3584] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Guidance on Rule 90(H)(ii) and Decision on Stanisic Defence Submissions on Rule 90(H)(ii)* (19 October 2011) at para. 15

[3585] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Partly Confidential Defence Motion Regarding the Consequences of a Party Failing to Put its Case to Witnesses Pursuant to Rule 90 (H) (ii)* (17 January 2006)

[3586] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Order Setting forth Guidelines for the Procedure Under Rule 90(H)(ii)* (6 March 2007) at para. 2

When the cross-examining party fails to satisfactorily put to the witness the nature of its case, it runs the risk of later not being able to adduce the contrary evidence.[3587]

The defence is not required to put the nature of its case in contradiction to the evidence of prosecution witnesses. However, its failure to do so may result in the Chamber giving little or no weight to its contradictory evidence that was not put to the prosecution witness.[3588]

If the cross-examining party puts specific evidence to the witness, it will be expected to adduce such evidence.[3589]

According to the circumstances of the case, such as complexity or scope of the indictment, the Chamber will adopt a flexible approach, allowing the defence latitude in presenting evidence that goes against particular aspects of the prosecution witness' testimony which it overlooked in cross-examination.[3590]

For Rule 90(H)(ii) to apply, the witness must testify, during cross examination, to something in contradiction to the cross-examining party's case. Absent any contradictory evidence from the witness, there is no obligation to further explore the issue or "put" one's case to the witness.[3591]

The prosecution was not required to have put all aspects of its case when cross examining the accused and the Chamber would not automatically find in the accused's favor as to all matters that were not put to him.[3592]

refreshing memory

A prior statement may be used to refresh the memory of a witness under cross-examination[3593], and direct examination.[3594]

[3587] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Order Setting forth Guidelines for the Procedure Under Rule 90(H)(ii)* (6 March 2007) at para. 3;); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para. 21

[3588]); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para. 21

[3589] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Order Setting forth Guidelines for the Procedure Under Rule 90(H)(ii)* (6 March 2007) at para. 4;); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para.17

[3590]); *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Prosecution's Motion Seeking Clarification in Relation to the Application of Rule 90(H)(ii)*(12 May 2010) at para. 18

[3591] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Submissions by Stanisic Defence Regarding Prosecution's Rule 90(H)(ii) Obligations During Cross Examination of Defence Witness Borislav Pelevic* (12 June 2012) at para. 9

[3592] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement* (10 June 2010) at paras. 20-21

[3593] *Prosecutor v. Simic et al.*, No. IT-95-9-AR73, *Decision on Prosecution Interlocutory Appeals on the Use of Statements not Admitted into Evidence Pursuant to Rule 92bis as a Basis to Challenge Credibility and to Refresh Memory* (23 May 2003) at paras. 18, 20.

[3594] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR73.2, *Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness* (2 April 2004)

Because the party does not seek to admit the prior statement *in lieu of* oral testimony, but rather seeks only to elicit the oral testimony of the witness after the memory of the witness has been refreshed, the statement shown to the witness need not satisfy the requirements of Rule 92*bis* of the Rules.[3595]

self-incrimination

Where witness was not warned prior to answering prosecution's questions on cross examination about statements he made to immigration authorities that could potentially be used against him in domestic proceedings, the Trial Chamber redacted his answers from the public transcript.[3596]

witness proofing

Trial Chamber declined to prohibit the practice of "witness proofing" finding that discussion between a party and a potential witness regarding his/her evidence can enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify the witness' evidence. The proofing must be timely so as not to prejudice the defence by late disclosure of new material.[3597]

Witness proofing is not objectionable in itself, it is a normal and useful procedure in most cases.[3598]

Trial Chamber has the power to require the audio recording of witness proofing sessions but was not convinced from circumstances of the case that such an order was required.[3599]

Trial Chamber declined to order prosecution to have no contact with those witnesses it had proposed for admission of their statements pursuant to Rule 92 bis, ter, or 94 bis.[3600]

[3595] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-AR73.2, *Decision on Interlocutory Appeal Relating to the Refreshment of the Memory of a Witness* (2 April 2004); *Prosecutor v Simic et al*, No. IT-95-9-AR73.6, *Decision on Prosecution Interlocutory Appeals on the Use of Statements Not Admitted into Evidence Pursuant to Rule 92 bis as a Basis to Challenge Credibility and to Refresh Memory* (23 May 2003) at para. 18

[3596] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Reconsideration of Redactions to Testimony of…*(27 September 2013) at p. 3

[3597] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion to Prohibit Witness Proofing* (12 December 2006)

[3598] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Boskoski Defence Motion for an Order to Disclose* (9 May 2007) at para. 10

[3599] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Defence Request for Audio Recording of Witness Proofing Sessions* (23 May 2007); *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Lahi Brahimaj's Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3* (31 October 2011) at para. 20

[3600] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Tolimir's Request to Prohibit Prosecution Contact with Witnesses Proposed in Prosecution's 92 bis and 92 ter Motions* (4 June 2009)

The practice of the Tribunal is to bar the parties from contacting a witness once his or her testimony has begun, to avoid the risk of affecting or calling into question the integrity of the witness's pending testimony.[3601] However, this does not apply to witnesses called at a retrial.[3602]

Witness proofing should not consist of the rehearsal, practice, or coaching of witnesses; should not be considered as permission to train or tamper with a witness before he or she gives evidence; must not be used by the Prosecution "to mould its case against the Accused during a trial and must not amount to the manipulation of a witness' evidence.[3603]

witness sequestration

Defence expert allowed to be present in the courtroom during prosecution expert testimony and Registrar ordered to provide funding for that purpose.[3604]

Rule 90 *bis*—transfer of a detained witness

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person's return within the period decided by the Tribunal.
(B) The transfer order shall be issued by a permanent Judge or Trial Chamber only after prior verification that the following conditions have been met:
(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;
(ii) transfer of the witness does not extend the period of detention as foreseen by the requested State.
(C) The Registrar shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.
(D) The Registrar shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; the Registrar shall remain abreast of any changes which might occur regarding the conditions of

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[3601] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Lahi Brahimaj's Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3* (31 October 2011) at para. 14
[3602] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Lahi Brahimaj's Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3* (31 October 2011) at para. 19
[3603] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*-T, *Decision on Lahi Brahimaj's Urgent Motion Seeking Memorialisation of Further Contact Between Prosecution and Witness 3* (31 October 2011) at para. 15
[3604] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order on Funding of Defence Experts Authorised to be Present in the Courtroom* (11 June 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Order to the Registry in Relation to Accused's Request for Assistance of Defence Expert in the Courtroom* (2 July 2010); *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision on Motion on Behalf of Veselin Sljivancanin Concerning the 12 October Review Hearing* (7 October 2010) at p. 5

detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber.
(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.
(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a permanent Judge or Chamber may extend the period on the same conditions as stated in paragraph (B).

Rule 91—false testimony under solemn declaration

(A) A Chamber, proprio motu or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.
(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:
(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or
(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.
(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:
(i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or
(ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct amicus curiae to prosecute the matter.
(D) The rules of procedure and evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule.
(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.
(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.
(G) The maximum penalty for false testimony under solemn declaration shall be a fine of 100,000 Euros or a term of imprisonment of seven years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).
(H) Paragraphs (B) to (G) apply mutatis mutandis to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 bis or Rule 92 quater which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.
(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to

appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless
(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

Barring unusual circumstances – such as repeated warnings given to a witness without apparent justification, in a manner that a witness might reasonably find intimidating – a simple statement of this basic duty does not constitute ridicule or harassment of a witness, nor does it compromise an accused's right to a fair trial.[3605]

Rule 92—confessions

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

The fact that an interview of an accused was broken off to discuss issues related to inducement and the matters discussed were not thereafter put on the record was sufficient to rebut the presumption of Rule 92 that a statement of an accused was voluntarily given.[3606]

A statement by the prosecution which linked the accused's statements to its position on his provisional release raised an issue as to the voluntariness of the statements which the Trial Chamber failed to consider in admitting the statements.[3607]

The Trial Chamber erred in failing to consider the possible incompetence of defence counsel when deciding to admit the interview of the accused.[3608]

Rule 92 bis—admission of written statements

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a

[3605] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 205
[3606] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 46
[3607] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 54
[3608] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 62

matter other than the acts and conduct of the accused as charged in the indictment.
(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:
(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be considered in determining sentence.
(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:
(a) there is an overriding public interest in the evidence in question being presented orally;
(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.
(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and
(i) the declaration is witnessed by:
(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and
(ii) the person witnessing the declaration verifies in writing:
(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.
The declaration shall be attached to the written statement presented to the Trial Chamber.
(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 ter shall apply.

acts or conduct of the accused

character

Evidence of the accused's good character without reference to any of the charged acts in the indictment does not constitute acts and conduct of the accused and may therefore be received pursuant to Rule 92 *bis*.[3609]

in general

The only kind of written statement or transcript absolutely precluded from admission under Rule 92 *bis* is one which goes to proof of acts and conduct of the accused.[3610]

liability for acts of others

Rule 92 *bis*' limitation against "acts and conduct of the accused" does not extend to acts and conduct of others for which the accused is charged in the indictment with responsibility.[3611]

"Acts or conduct of the accused" means deeds and behaviour of the accused, as well as any act or conduct of the accused which the prosecution relies upon to establish that the accused was a superior to those who did actually commit the crimes or that he knew or had reason to know of those crimes, or that he failed to prevent or punish them.[3612]

Rule 92 *bis* excludes a written statement that goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that the accused (a) committed any of the crimes charged; (b) planned, instigated, or ordered the crimes; (c) otherwise aided or abetted the alleged perpetrators; (d) was the superior of the perpetrators; (e) knew or had reason to know that those crimes were about to be or had been committed by his subordinates; or (f) failed to take reasonable steps to prevent or punish.[3613]

Rule 92 *bis* also excludes any written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that the accused

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[3609] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Partially Granting Stojan Zupljanin's Motion for Admission of Evidence Pursuant to Rule 92 bis* (21 July 2011) at para. 26
[3610] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 6
[3611] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 10
[3612] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion for the Admission of the Witness Statement of Avdo Husejnovic Pursuant to Rule 92 bis* (15 September 2005)
[3613] *Prosecutor v Djordjevic*, No. IT-05-97/1-T, *Decision on Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (11 February 2009) at para. 5

participated in a joint criminal enterprise or shared with the person who did commit the crime the requisite intent for those crimes.[3614]

The phrase "acts and conduct of the accused" means deeds and behaviour of the accused in the strict sense and does not extend to acts and conduct of subordinates or co-perpetrators.[3615]

When determining whether particular evidence goes to the acts and conduct of the accused, special consideration should be given to the special and sensitive situation posed by the charge of command responsibility where the evidence goes to the acts and conduct of the accused's immediately proximate subordinates—those subordinates from whose conduct it would be easy to infer that he knew or had reason to know.[3616]

Statement concerning the authenticity of a diary of the military police that was relevant to the command structure did not go to the acts and conduct of the accused but touched on a live issue of dispute between the parties and would not be admitted pursuant to Rule 92 *bis*.[3617]

state of mind

The "conduct" of an accused necessarily includes his relevant state of mind, so that a written statement which goes to proof of any act or conduct of the accused upon which the prosecution relies to establish that state of mind is not admissible pursuant to Rule 92 *bis*. Acts or patterns of acts by others used to establish the state of mind of the accused may be proven by Rule 92 *bis*.[3618]

Character evidence does not go to the "acts and conduct of the accused as charged in the indictment" and may be admitted pursuant to Rule 92 *bis*. However, evidence which pertains to the *mens rea* of the accused may not be admitted under this Rule, at least without cross examination.[3619]

specific examples

[3614] *Prosecutor v Djordjevic*, No. IT-05-97/1-T, *Decision on Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (11 February 2009) at para. 5

[3615] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis* (6 December 2005); *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92 bis and 94 bis* (7 July 2010) at para. 30

[3616] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (9 July 2007) at page 5

[3617] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion for the Admission of the Witness Statement of Avdo Husejnovic Pursuant to Rule 92 bis* (15 September 2005)

[3618] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 11

[3619] *Prosecutor v Stanisic & Zupljanin*, No. IT-06-91-T, *Decision Partially Granting Stojan Zupljanin's Motion for Admission of Evidence Pursuant to Rule 92 bis* (21 July 2011) at para. 26

Prior testimony of prosecution researcher who assembled intercepted communications, and intercept operators, not admissible insofar as conversations of the accused were concerned but was otherwise admissible pursuant to Rule 92 *bis*.[3620]

Expert testimony about the roles played in a joint criminal enterprise go to "acts and conduct of the accused" and cannot be admitted under Rule 92 *bis*.[3621]

Testimony not mentioning the accused but concerning a meeting in which he was in attendance was sufficiently related to the acts and conduct of the accused as to be excluded from admission under Rule 92 *bis.*[3622]

Testimony about whether a crime was reported to the accused, as well as whether the accused was involved in organizational issues within a municipality went to acts and conduct of the accused and would be excluded from the evidence admitted pursuant to Rule 92 *bis*.[3623]

Letter of Radovan Karadzic concerning role of the accused goes directly to the acts and conduct of the accused and cannot be admitted under Rule 92 *bis*.[3624]

adjudicated facts

Admission of portion of proposed Rule 92 *bis* evidence denied where the same information was already the subject of judicial notice of adjudicated facts.[3625]

certification

Verification by attorney for NGO attesting to signature of witness complied with the certification requirements of Rule 92 *bis* (B).[3626]

Admission of statement in another trial under Rule 92 *ter* satisfied the certification requirements of Rule 92 *bis* (B).[3627]

[3620] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at paras. 30, 105

[3621] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 26

[3622] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 75

[3623] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Milan Tupajic's Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (24 May 2012) at para. 15

[3624] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Admission of Material Sought by Chamber and Other Exhibits* (14 July 2006) at para. 18

[3625] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution's Ninth Motion to Admit Evidence Pursuant to Rule 92 bis* (18 July 2013) at para. 16

[3626] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 11

Exhibits attached to a declaration need not meet the requirements of Rule 92 *bis* (B).[3628]

Statement sworn to before French Chamber of Grand Instance sufficiently complied with requirements of Rule 92 *bis*.[3629]

To expedite the proceedings, a party is allowed to propose written statements under Rule 92 *bis* for provisional admission pending their certification.[3630]

Provisional admission of supplemental statement of Rule 92 *bis* statement denied where prosecution raised questions as to the accuracy of the statement and the statement was perfunctory.[3631]

While in certain circumstances it is permissible for a party to propose written statements for provisional admission pending their certification under Rule 92 *bis* (B), where witness had refused to testify in person, Trial Chamber denied Rule 92 bis motion based upon lack of certification.[3632]

Certification requirement does not apply to transcripts of prior testimony under oath but does apply to transcripts of interviews where the witness did not make a solemn declaration.[3633]

OTP Statement sought to be admitted by defence was admitted without the required certification where the prosecution did not object.[3634]

[3627] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Motion for Admission of Transcripts…*(15 December 2011) at para. 14
[3628] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 11
[3629] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Request for Admission of Exhibits P53 and P54* (10 May 2010)
[3630] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules* (16 January 2006) at para. 11; *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis* (17 January 2006); *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 11, fn. 52; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 21; *Prosecutor v Mladic*, No. IT-07-91-T, *Decision on Defence Motion to Admit the Evidence of Zelka Malinovic pursuant to Rule 92 bis* (8 September 2015) at para. 4
[3631] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Admission of Supplemental Statement of Rule 92 bis Witness Andja Gotovac* (11 January 2011) at para. 7
[3632] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence Pursuant to Rule 92 bis* (18 March 2014) at paras. 39, 44,64,68
[3633] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence Pursuant to Rule 92 bis* (18 March 2014) at para. 39
[3634] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Stanisic Defence Motion for Admission of Transcripts…*(15 December 2011) at para. 9

corroboration

It is permissible to admit evidence under Rule 92 *bis* which corroborates other Rule 92 *bis* evidence.[3635]

Rule 92 *bis* does not require that proffered written evidence be cumulative or corroborative of either live or other written evidence.[3636]

The cumulative nature of the Rule 92 *bis* statement is measured by whether the statement is cumulative to similar facts adduced in other evidence, and not whether the similar facts also are of similar weight. Trial Chamber erred in holding that statement was not cumulative because other witnesses were not of the same rank as the declarant.[3637]

cross-examination

The proximity of the described acts to the accused, the pivotal importance of the testimony for the prosecution, and the content of the cross-examination are factors to be considered in determining whether the witness should be required to attend for cross-examination.[3638]

Factors to be considered in determining whether to admit a statement without cross examination include whether the cross examination in the prior proceedings adequately dealt with the issues relevant to the defence in the current proceedings, whether the question relates to live and important issues between the parties, and whether the witness was extensively cross-examined by a party with a common interest to the accused.[3639]

Witnesses would be required to attend for cross examination where (1) they were eyewitnesses to the crimes charged in the indictment, which crimes were denied by the accused; (2) testimony of non-eyewitnesses were also of sufficient importance to require cross-examination; (3) a good deal of the proffered evidence was hearsay; and (4) cross-examination at the prior trial was conducted by a self-represented accused.[3640]

[3635] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 12
[3636] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 13
[3637] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-AR73, 2, *Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92 bis* (8 March 2011) at para. 14
[3638] *Prosecutor v Prlic et al*, No. IT-04-64-T, *Decision on the Prosecution Motion for Admission of Transcript of Evidence Pursuant to Rule 92 bis of the Rules* (28 September 2006) at para. 23
[3639] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules* (16 January 2006) at para. 15
[3640] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 18

Where issues of reliability and credibility of witness statements were raised by the defence, and the evidence was not cumulative, cross examination would be required.[3641]

Rule 92 *bis* does not place an explicit burden on the party seeking cross examination to make any particular showing of the necessity of such cross-examination.[3642]

Evidence of witnesses concerned conduct of persons sufficiently remote from the accused that these persons need not be called for cross-examination.[3643]

Where the prosecution intended to present its evidence of the crime of hostage taking through only one *viva voce* witness, Trial Chamber determined that it was in the interests of justice that other witnesses appear for cross examination as their testimony may be pivotal to the prosecution's case.[3644]

Where the witness whose prior testimony was sought to be admitted by the prosecution was called as a defence witness in the prior trial, and thus cross-examination was conducted by the prosecution, the prior testimony would not be admitted pursuant to Rule 92 *bis* in the exercise of the Trial Chamber's discretion.[3645]

The fact that the prior cross examination was conducted by a self-represented accused did not affect the admissibility of the prior testimony.[3646]

Witness would be called for cross examination where another prosecution witness claimed that witness was the source of his information that the accused was angry that footage of Srebrenica events had been broadcast.[3647]

Where witness' statement was admitted pursuant to Rule 92 *bis* at request of prosecution, he would not be called for cross examination based upon interview with

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[3641] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on the First Batch of Rule 92 bis Witnesses* (3 June 2008) at para. 8

[3642] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis* (22 August 2008) at para. 24

[3643] *Prosecutor v Karadzic*, No. I-95-5/18-PT, *Decision on Prosecution's Third Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Witnesses for Sarajevo Municipality)* (15 October 2009) at para. 24-26

[3644] *Prosecutor v Karadzic*, No. I-95-5/18-PT, *Decision on Prosecution's Sixth Motion for Admission of Statements and Transcripts of Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 bis (Hostages)* (2 November 2009) at para. 23

[3645] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 60

[3646] *Prosecutor v Mladic*, No. 09-92-T, *Decision on Prosecution's 38th Motion to Admit Evidence Pursuant to Rule 92 bis—Witness RM-098* (28 November 2013) at para. 10

[3647] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion to Call Witness Zoran Petrovic for Cross Examination* (13 March 2012) at para. 6

defence whereby he provided a favourable assessment of the accused, as such assessment was only his opinion and not based upon personal knowledge.[3648]

Witness would not be required to be cross examined where the allegedly new information could be elicited on cross examination of other prosecution witnesses or by calling defence witnesses.[3649]

Witness would not be required to be cross examined where defence can obtain information from the witness by calling him in its own case.[3650]

Factors considered in whether to require cross-examination include (1) whether the evidence relates to a live and important issue between the parties; (2) the cumulative nature of the evidence; (3) whether the evidence is "crime base" evidence or relates to the acts and conduct of subordinates for whom the accused is alleged to be responsible; (4) the proximity of the accused to the acts and conduct described in the evidence; and (5) whether the cross examination of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings.[3651]

Issues concerning the accuracy of the statement are adequately addressed by the witness confirming that the contents of the statement are true when the certification of the statement before the Registry is made.[3652]

The fact that the witness declined to be interviewed by the other party is not a factor to be considered when deciding whether to admit the statement or require the witness to attend for cross-examination.[3653]

critical and live issue

The issue of whether the witness should be called for cross examination depends on whether the information contained in the written statement is related to a critical and live issue between the parties as opposed to a peripheral or marginally important issue.[3654]

[3648] *Prosecutor v Karadzic*, No. I-95-5/18-T, *Decision on Accused's Motion to Call Witness Ferid Spahic for Cross Examination* (6 April 2011) at paras. 12-13
[3649] *Prosecutor v Karadzic*, No. I-95-5/18-T, *Decision on Accused's Motion to Call Witness Drazen Erdemovic for Cross Examination* (13 April 2011) at para. 11
[3650] *Prosecutor v Karadzic*, No. I-95-5/18-T, *Decision on Prosecution's Second Motion for Admission of Evidence of Slobodan Stojkovic…*(22 March 2012) at para. 18
[3651] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 16; *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92 bis and 94 bis* (7 July 2010) at para. 34
[3652] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Supplemental Rule 92 bis Statement (KDZ407)*(10 April 2012) at para. 6
[3653] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Partially Granting Stojan Zupljanin's Motion for Admission of Evidence Pursuant to Rule 92 bis* (21 July 2011) at para. 31
[3654] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis* (6 December 2005); *Prosecutor v Popovic et al*,

When the proffered written evidence relates to a critical element of the prosecution's case or a live and important issue between the parties, the requirements of a fair trial demand that the accused be given the right to cross examine the witnesses to fully test the prosecution's case.[3655]

Defence witness required to attend for cross examination where his testimony addresses live and important issues between the parties.[3656]

Although not implicating the accused, testimony concerning identification of the victims and methods and means of identification was of sufficient importance to require the witnesses to appear for cross examination.[3657]

Although not implicating the accused, testimony concerning exhumations was of sufficient importance to require the witnesses to appear for cross examination.[3658]

Testimony of defence witness concerning departure of Muslim civilians from Srebrenica went to critical issue in the case and should be heard orally.[3659]

Prior testimony of witness who refused to testify and could therefore not be called for cross examination would be admitted pursuant to Rule 92 *bis*, but those portions of the testimony that went to live and important issues in the case, or the conduct of persons in close proximity to the accused, would be excluded.[3660]

Relevant factors include whether the information goes to a critical element in the prosecution's case and the proximity of the accused to the material in the written statement.[3661]

No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 15

[3655] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 6

[3656] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Borovcanin's Motion for Admission of Written Evidence Pursuant to Rule 92 bis* (22 September 2008); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Statements Pursuant to Rule 92 bis (Srebrenica Component)* (29 November 2013) at para. 18

[3657] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis* (22 August 2008) at para. 25

[3658] *Prosecutor v Djordjevic*, No. IT-05-97/1-T, *Decision on Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (11 February 2009)

[3659] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion for Admission of Ljubislav Simic's Written Statement pursuant to Rule 92 bis* (14 December 2015) at para. 10

[3660] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Milan Tupajic's Evidence in lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (24 May 2012) at para. 21

[3661] *Prosecutor v Oric*, No. IT-03-68-T, *Decision on Defence Motion to Admit the Evidence of a Witness in the Form of a Written Statement Pursuant to Rule 92 bis* (6 December 2005); *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 13

Relevant to the issue of whether the witness shall be called for cross-examination is whether the statement touches upon the very essence of the prosecution case against the accused and the cumulative nature of the evidence sought to be admitted.[3662]

Where intercepted conversations played a pivotal role in the prosecution's case, witnesses providing evidence as to the reliability and chain of custody of those conversations should be called for cross-examination.[3663]

Evidence of the conduct of forces under the command of the accused or going to the existence and goal of the joint criminal enterprise, and effective control of the accused is so pivotal to the prosecution's case that cross-examination of witnesses on these facts is required.[3664]

Evidence of the relationship between the Mujahedeen and the Bosnian Army was a live and important issue between the parties and required that the witness be called for cross examination.[3665]

Evidence of relationship between "Skorpion" unit and Bosnian Serb Army and participation by Skorpions in execution of Srebrenica prisoners was live and important issue and sole witness to these facts would not be appropriate for Rule 92 *bis* evidence.[3666]

Evidence of the direction of sniper fire and command authority of the accused was admissible pursuant to Rule 92 *bis*, but the witness would be required to be cross-examined on those issues.[3667]

Evidence on important issue for which only other Rule 92 *bis* evidence had been received warranted requiring the witness to appear in person to give his evidence.[3668]

cumulative evidence

[3662] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Decision on Prosecution's Motion to Admit Rebuttal Statements Via Rule 92 bis* (7 July 2005) at para. 5
[3663] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 32
[3664] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules* (16 January 2006) at paras. 29, 33
[3665] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 November 2007) at para. 22
[3666] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution's Twenty-First Motion to Admit Evidence Pursuant to Rule 92 bis…*(16 October 2013) at para. 19
[3667] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Admission of Witness Statements Pursuant to Rule 92 bis* (19 April 2007)
[3668] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution's 32nd Motion to Admit Evidence Pursuant to Rule 92 bis* (31 October 2013) at para. 10

The purpose of Rule *92bis* is to promote efficiency and expedite the presentation of evidence while adhering to the requirements of a fair trial, not to encourage duplication of testimony which would unnecessarily delay proceedings.[3669]

discretion

Trial Chamber exercised its discretion not to admit written statements of "insiders" whose live testimony would give the Chamber a better understanding of the case, and not to admit the statements of deceased witnesses because the accused would be deprived of his right of cross examination.[3670]

While evidence of acts and conduct of persons proximate to the accused is admissible pursuant to Rule 92 *bis*, such evidence may be rejected in the exercise of the Chamber's discretion if it would be unfair to admit such evidence in written form.[3671]

Fact that different Trial Chamber required the same witnesses to attend for cross examination did not warrant reconsideration of decision to admit testimony pursuant to Rule 92 *bis* where witnesses were more proximate to the accused in the other case.[3672]

exhibits

Exhibits which were admitted during the testimony of a witness whose transcript is admitted pursuant to Rule 92 *bis* will also be admitted, as will exhibits shown to the witness, but admitted through the testimony of other witnesses. Admission of the exhibits is necessary to fully evaluate the relevance of the prior testimony.[3673]

However, exhibits which were admitted in connection with the testimony of a witness to a prior proceeding but not referred to during the testimony are not an integral part of the prior testimony and would not be admitted pursuant to Rule 92 *bis*.[3674]

Exhibits accompanying transcripts form an inseparable and indispensable part of the testimony and can be admitted.[3675]

[3669] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 198
[3670] *Prosecutor v Seselj*, No. IT-03-67-T, *Redacted Version of the Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89(F), 92 bis, 92 ter, and 92 quarter Filed Confidentially on 7 January 2008* (21 February 2008) at paras. 40-41
[3671] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92 bis and 94 bis* (7 July 2010) at para. 32
[3672] *Prosecutor v Karadzic*, No. IT-95/5-18-T, *Decision on Motion for Reconsideration: Srebrenica 92 bis Decision* (27 August 2010) at para. 6
[3673] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 24; *Prosecutor v Prlic et al*, No. IT-04-64-T, *Decision on the Prosecution Motion for Admission of Transcript of Evidence Pursuant to Rule 92 bis of the Rules* (28 September 2006) at para. 24
[3674] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 94

To admit an exhibit along with prior testimony or statements, the witness' testimony must actually discuss the document, and the document must be one without which the witness' testimony would become incomprehensible or of lesser probative value.[3676]

Documents attached to Rule 92 *bis* written statements will be admitted to allow full evaluation of the statement.[3677]

The Chamber may deny admission of testimony if the party fails to include associated exhibits, without which the testimony is incomprehensible.[3678]

Where the associated exhibits to the Rule 92 *bis* statements contained documents which went to the acts and conduct of the accused, the statement would not be admitted.[3679]

experts

Rule 92 *bis* applies to expert witnesses.[3680] However an accused's request to cross examine the expert should ordinarily be granted, bearing in mind the procedure set forth in Rule 94 *bis*.[3681]

Rule 92 *bis* does not apply to expert witnesses.[3682]

[3675] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (9 July 2007) at page 4; *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis* (22 August 2008) at para. 21; *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter* (10 February 2009) at para. 5; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 7

[3676] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter* (10 February 2009) at para. 5

[3677] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 25

[3678] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 bis* (22 August 2012) at para. 11

[3679] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution's Motion to Admit Witness GH-164's Evidence Pursuant to Rule 92 bis* (22 April 2013) at para. 15

[3680] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 23; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para.22

[3681] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92 bis and 94 bis* (7 July 2010) at para. 59

[3682] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 bis and 94 bis* (9 November 2009) at para. 23

A party has the right to cross examine an expert witness pursuant to Rule 94 *bis* and therefore a statement of an expert cannot be admitted pursuant to Rule 92 *bis* without cross-examination.[3683]

An expert report can be admitted as an integral part of the expert's testimony under Rule 92 *bis*. The right to cross examine an expert whose testimony and report are admitted is not automatic, but subject to the discretion of the Trial Chamber.[3684]

It is not required that expert witness reports be admitted pursuant to Rule 94 *bis* before the prior testimony of experts, including their reports tendered as exhibits, can be admitted pursuant to Rule 92 *bis*.[3685]

Expert testimony which goes to the acts and conduct of the accused cannot be admitted under Rule 92 *bis*.[3686]

Where the expert witnesses were thoroughly cross-examined on the issues identified by the defence in the trials in which they previously testified, their previous testimony will be admitted without cross-examination.[3687]

interviews of witnesses

Subpoena for defence interviews of Rule 92 *bis* prosecution witnesses declined where witnesses were crime-base witnesses and the information expected to be elicited during the interviews would not materially assist the case of the accused.[3688]

Subpoena for defence interview of Rule 92 *bis* witness denied where information sought to be elicited from the witness, while going to live issues in the case, was not necessary for a determination of those issues.[3689]

Whether or not a witness consented to be interviewed by the other party was irrelevant to the issue of whether the witness should be called for cross examination.[3690]

[3683] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 52

[3684] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 27

[3685] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 45

[3686] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Michael Phillips and Shaun Byrnes* (15 January 2007) at para. 32

[3687] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 35

[3688] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused Motion to Compel Interviews: Sarajevo 92 bis Witnesses* (21 March 2011) at para. 14

[3689] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Compel Interview: Griffith's Evans* (20 April 2011)

Subpoena for pre-trial interview of Rule 92 *bis* prosecution witness denied where witness would be called for cross examination and accused had not made showing that interview would materially assist his case.[3691]

other legal proceedings

Rule 92 *bis* applies to statements taken for ICTY proceedings, not to statements prepared for other legal proceedings.[3692]

Statements prepared for legal proceedings must meet the requirements of Rule 92 *bis* and cannot otherwise be admitted as hearsay pursuant to Rule 89(C).[3693]

other party's documents

When a party offers a statement pursuant to Rule 92 bis, the Chamber will also admit evidence offered by the responding party, to contextualise or clarify the witness' statement.[3694]

overbroad

Rule 92 *bis* motion denied where only a small portion of the testimony dealt with a relevant issue. The party should obtain a narrower witness statement or call the witness live.[3695]

procedure

The prosecution must notify the defence in advance which paragraphs of the witness statement it intends to elicit live testimony on.[3696]

proximity of acts to accused

[3690] *Prosecutor v Stanisic & Zupljanin*, No. IT-06-91-T, *Decision Partially Granting Stojan Zupljanin's Motion for Admission of Evidence Pursuant to Rule 92 bis* (21 July 2011) at para. 31
[3691] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion to Subpoena Prosecution Witness Ronald Eimers for Interview* (29 March 2010) at para. 11
[3692] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Testimony of Defence Witness Dragan Jasovic* (15 April 2005) at page 5
[3693] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 31
[3694] *Prosecutor v Mladic*, No. IT-07-91-T, *Decision on Defence Motion to Admit the Evidence of Zelka Malinovic pursuant to Rule 92 bis* (8 September 2015) at para. 9
[3695] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Prior Testimony of Thomas Hansen and Andrew Knowles Pursuant to Rule 92 bis* (22 August 2012) at para. 10
[3696] *Prosecutor v Prlic et al*, No. IT-04-64-T, *Decision on the Application of Rule 92 ter of the Rules* (25 June 2007)

Proximity of the accused to the acts sought to be proved is the core test for admission of a written statement, as well as the decision whether to require cross-examination.[3697]

President of Croatia's prior testimony in *Blaskic* trial admitted under Rule 92 *bis* with redactions of acts and conduct of the accused, but he would be required to attend for cross-examination where there were different interests than the parties in the prior case, the prior case is under review, and new documents have been discovered since the testimony was given.[3698]

A factor to be considered in determining whether to admit a written statement and to require cross-examination is whether the individual whose acts and conduct are described in the statement or transcript is so proximate to the accused and the evidence is so pivotal to the prosecution's case that it would be unfair to permit it to be given in written form.[3699]

A statement of acts committed in the presence of the accused should not be admitted pursuant to Rule 92 *bis* in the exercise of the Trial Chamber's discretion.[3700]

Statement of person in proximity to the accused in the VRS Main Staff about dispatch of buses to Srebrenica and Zepa was more appropriately the subject of *viva voce* testimony and would not be admitted pursuant to Rule 92 *bis*.[3701]

Where a statement did not identify the perpetrators of an incident nor any connection between the perpetrators and the accused, and was not pivotal to the prosecution's case, it would be admitted without cross-examination.[3702]

The party opposing Rule 92 *bis* evidence does not have the burden of making a concrete showing of why cross examination is warranted.[3703]

redactions

[3697] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 20
[3698] *Prosecutor v Prlic et al*, No. IT-04-64-T, *Decision on the Prosecution Motion for Admission of Transcript of Evidence Pursuant to Rule 92 bis of the Rules* (28 September 2006)
[3699] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 15
[3700] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 13
[3701] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Motion to Admit the Evidence of Ratko Miljanovic pursuant to Rule 92 bis* (18 December 2015) at para. 9
[3702] *Prosecutor v Limaj et al*, No. 03-66-T, *Decision on Prosecution's Third Motion for Provisional Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (9 March 2005) at para. 7
[3703] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 11

Where a statement has been admitted under Rule 92 *bis* but redacted to remove matters which go to the acts and conduct of the accused, it remains open to the accused to seek admission of the redacted portions pursuant to Rule 89(F).[3704]

relationship with Rule 89

Rule 92 *bis* applies to statements written for the purpose of the legal proceedings while documents not prepared for the proceedings are evaluated under Rule 89.[3705]

A Trial Chamber deciding to admit evidence must always ensure that the evidence is relevant, probative, and not unduly prejudicial.[3706]

A Trial Chamber faced with a request for admission of a written statement or transcript pursuant to Rule 92 *bis* must be satisfied, in addition to the fact that the matters do not go to proof of the acts and conduct of the accused and that the statements are properly sworn and verified, that the material is relevant, probative, and bears sufficient indicia of reliability. Even if probative, admission may be denied where the probative value is substantially outweighed by the need to ensure a fair trial.[3707]

Rule 92 *bis* motion denied as lacking probative value under Rule 89 where ABiH Commander simply stated that 68 listed documents appeared to be in the form and content of genuine ABiH documents but that he had only looked at their form and had not read them.[3708]

relationship with Rule 92 quarter

Where a party's reason for offering testimony pursuant to Rule 92 *bis* is because the witness is unable to travel to The Hague to testify for health reasons, the Trial Chamber will decide the motion under the criteria of Rule 92 *quater*. Since the unavailability of the witness under Rule 92 *quater* was not satisfactorily established, the motion was denied.[3709]

[3704] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Defence Request for Certification to Appeal* (13 January 2012) at fn. 29
[3705] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 223
[3706] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 5
[3707] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision Denying Prosecution's Second Motion for Admission of Evidence Pursuant to Rule 92 bis* (13 September 2006) at para. 4; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 9
[3708] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Statement of Vehid Karavelic Pursuant to Rule 92 bis* (5 November 2012) at para. 8
[3709] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Testimony of Pero Rendic Pursuant to Rule 92 bis* (6 February 2014) at para. 7; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Testimony of Branko Basara Pursuant to Rule 92 bis* (19 February 2014) at para. 4

requirements

Admission of evidence under Rule 92 *bis* is a two-step process. First, the Trial Chamber must determine if the material is admissible at all under the Rule; and second, if it is, whether to admit the evidence in the exercise of its discretion.[3710]

Admission of evidence under Rule 92 *bis* involves three steps. First, the Trial Chamber must determine if the evidence is admissible in that it goes to proof other than that of the acts and conduct of the accused. Second, the Trial Chamber must determine, in the exercise of its discretion, whether it is appropriate to admit the evidence. And third, the Trial Chamber must decide whether the witness giving the evidence should be required to appear for cross-examination.[3711]

retroactivity

Rule 92 ter and quarter may be applied retroactively so long as the accused is not prejudiced. No prejudice existed where the accused could also use these rules in his case.[3712]

timing

Trial Chamber deferred decision on admission of Rule 92 *bis* statements until trial had progressed to stage where it could determine cumulative nature of the evidence and proximity of persons mentioned in the statements to the accused.[3713]

Defence motion for admission of statements denied where pre-trial deadline for admission of statements had passed and where witnesses' subsequent refusal to testify after having been granted protective measures should have been foreseen by the defence.[3714]

[3710] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 5

[3711] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis* (12 September 2006) at para. 8; *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution Motion for Admission of Written Evidence Pursuant to Rules 92 bis and 94 bis* (7 July 2010) at para. 28

[3712] *Prosecutor v Seselj*, No. IT-03-67-T, *Redacted Version of the Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89(F), 92 bis, 92 ter, and 92 quarter Filed Confidentially on 7 January 2008* (21 February 2008) at para. 37

[3713] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on the Admission of Rule 92 bis Witness Transcripts* (4 April 2006); *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on the Admission of Rule 92 bis Written Statements* (4 April 2006)

[3714] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Statements Pursuant to Rule 92 bis: Sarajevo Component* (6 November 2013) at paras. 8-9

Defence motion for admission of statements denied where witnesses who refused to testify had not been contacted by the defence in advance of the deadline for filing of Rule 92 *bis* motions.[3715]

Defence motion for admission of testimony under Rule 92 *bis* denied where defence failed to specify that witness would testify under Rule 92 *bis* at the time he filed his witness list.[3716]

transcripts

Admission of transcript of testimony in other ICTY trial allowed where testimony did not involve the acts and conduct of the accused and the witness would be available for cross-examination.[3717]

Where the testimony of a witness in a prior proceeding is admitted, the related exhibits may also be received into evidence provided they do not go to the acts and conduct of the accused.[3718]

Admission of transcript does not include exhibits and other documents related to the transcript.[3719]

***viva voce* testimony**

There is no prohibition on admission of a written statement where the witness also gives *viva voce* testimony.[3720]

weight

Where evidence has been admitted without cross-examination, it cannot lead to a conviction unless corroborated by other evidence.[3721]

Rule 92 *ter*—other admission of written statements

[3715] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence Pursuant to Rule 92 bis* (18 March 2014) at paras. 43,60-62
[3716] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence Pursuant to Rule 92 bis* (18 March 2014) at para. 65-66
[3717] *Prosecutor v Beqaj*, No. IT-03-66-R77, *Decision on Prosecution's Motion for Admission of Transcript Pursuant to Rule 92 bis* (7 April 2005); *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 bis* (22 August 2008)
[3718] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motion for Admission of an Exhibit As Part of Transcripts Pursuant to Rule 92 bis* (19 May 2006)
[3719] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 47
[3720] *Prosecutor v Seselj*, No. IT-02-67-T, *Decision on the Accused's Submission No. 403* (4 November 2008) at para. 8
[3721] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 27; *Prosecutor v Delic*, No. IT-04-83-T, *Judgement* (15 September 2008) at para.36

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:
(i) the witness is present in court;
(ii) the witness is available for cross-examination and any questioning by the Judges; and
(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.
(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

The significance of the evidence as to the individual criminal responsibility of the accused is a factor weighing against admission of evidence pursuant to Rule 92 *ter*.[3722]

Admission of statements and testimony under Rule 92 *ter* denied where direct examination would allow the testimony to be more focused than in the written material.[3723]

Where the defence challenged the witness' credibility, the scope of his testimony demonstrated that he was a key witness, and he had not testified before at the Tribunal, the advantages of hearing his testimony live outweighed the time savings for using Rule 92 *ter*.[3724]

Rule 92 *quarter*—unavailable persons

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 bis, if the Trial Chamber:
(i) is satisfied of the person's unavailability as set out above; and
(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.
(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

acts and conduct of the accused

[3722] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter* (10 February 2009) at para. 10
[3723] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 ter* (10 February 2009) at paras. 13,15
[3724] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision on Denying Prosecution's Motion for Admission of Evidence of Predrag Radulovic Pursuant to Rule 92 ter* (1April 2010) at para. 10

Although statement of deceased witness went to the acts and conduct of the accused, it was cumulative to other testimony which had been subject to cross examination and would be admitted.[3725]

Rule 92 *quater* allows for evidence that goes to the acts and conduct of the accused to be admitted, although such contents may be a factor against admission of the evidence. If admitted, cautious scrutiny of such evidence is required.[3726]

Rule 92 *quater* allows for admission of evidence of acts and conduct of the accused.[3727]

The Chamber must be particularly cautious in admitting evidence of acts and conduct of the accused under Rule 92 quarter. Evidence of acts and conduct of the accused which was vague and confusing in prior testimony would be excluded.[3728]

admission in another trial

A finding by another Trial Chamber that a witness is reliable is entitled to no weight when determining whether the testimony should be admitted by another Trial Chamber.[3729]

Admission of testimony of same witness under Rule 92 *quarter* by another Trial Chamber did not provide grounds to reconsider decision to exclude the same testimony in this case.[3730]

associated exhibits

Associated exhibits, including prior statements of the witness, may be admitted under Rule 92 *quater* as ancillary to his prior testimony. However, OTP report of interview was not sufficiently reliable to be admitted.[3731]

[3725] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures* (7 September 2007) at para. 10

[3726] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quater* (5 February 2009) at para. 9; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazic Pursuant to Rule 92 quater…*(9 January 2012) at para. 20

[3727] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 4; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1222

[3728] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ446 and Associated Exhibits Pursuant to Rule 92 quater* (25 September 2009) at para. 8

[3729] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 29

[3730] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Reconsideration of the Decision of 7 January 2008 Rejecting the Admission of Milan Babic's Testimony* (10 December 2010) at para. 14

corroboration

A statement or transcript admitted without cross examination cannot support a conviction by itself unless the statement is otherwise corroborated. The Trial Chamber will also consider the absence of cross examination when determining how much weight to give to the statement.[3732]

A conviction may not rest solely, or in a decisive manner, on the evidence of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial. This principle applies to any fact which is indispensable for a conviction, meaning the findings that a trier of fact must reach beyond reasonable doubt. It is considered to run counter to the principles of fairness to allow a conviction based on evidence of this kind without sufficient corroboration.[3733]

Trial Chamber would not rely on evidence admitted under Rule 92 *quarter* to any decisive extent unless it is corroborated by other evidence.[3734]

Testimony of witness admitted pursuant to Rule 92 *quarter* that went to the acts and conduct of the accused but was corroborated by other evidence in the case. However, the Trial Chamber noted that it could not base a conviction solely or to a decisive extent on evidence that has not been subject to examination by both parties.[3735]

Admission of evidence going to acts and conduct of the accused under this role could not serve as the sole basis of a conviction and therefore does not violate the right to a fair trial.[3736]

For evidence admitted pursuant to Rule 92 *quarter* of the Rules to support a conviction, it must be corroborated.[3737]

[3731] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 quarter* (30 November 2009) at paras. 18-19

[3732] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (16 February 2007) at para. 13; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 quarter* (30 November 2009) at para. 8; *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter (Herbert Okun)*(22 February 2013) at para.15

[3733] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 96

[3734] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter (Herbert Okun)*(22 February 2013) at para. 15

[3735] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution's Motion for Admission of Evidence of Mujo Dzafic Pursuant to Rule 92 quarter of the Rules of Procedure and Evidence* (13 May 2009) at paras. 17,20; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 43

[3736] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Admit the Evidence of Herbert Okun…* (12 November 2013) at para. 6

[3737] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 570

Although the Trial Chamber relied solely on the untested Rule 92 quater evidence concerning the presence of the accused at the brick factory, these findings were not indispensable for a conviction and therefore the untested Rule 92 quater evidence did not require corroboration.[3738]

Although no live witness testified to the killings at the Kravica Supermarket, no conviction for "opportunistic" killings was based on the Kravica Supermarket events alone. The convictions would stand even without the finding that the Kravica Supermarket killings took place.[3739]

Evidence that demonstrates a pattern of conduct may be used as corroborative evidence and therefore untested evidence on the Kravica Supermarket killings could be the basis of a conviction when supported by evidence of a pattern of other killings.[3740]

For a statement admitted pursuant to Rule 92 quater to support a conviction, it must be corroborated. Findings that are indispensable for a conviction must not rest solely or decisively on untested evidence. These findings must be sufficiently corroborated; the stronger the corroborative evidence, the less likely that the untested evidence will be decisive.[3741]

Corroboration is not a requirement for admissibility under Rule 92 quarter but is a factor to be taken into consideration when assessing the reliability of the evidence.[3742]

Where one piece of untested evidence is being used to corroborate another piece of untested evidence, a trial chamber must exercise caution to ensure that findings which are indispensable for a conviction do not rest solely or decisively on untested evidence.[3743]

Statement sworn in presence of representative of Registry by witness who later died admitted where it was reliable, relevant, and probative, and although going to acts and conduct of the accused, would not be used as the sole basis of a finding of fact.[3744]

expert witnesses

This rule also applies to expert witnesses.[3745]

[3738] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1226
[3739] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 103
[3740] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 104
[3741] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1222
[3742] *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (14 April 2010) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 30
[3743] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1226
[3744] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 quarter of the Rules (Hasan Rizvic)* (14 January 2008) at paras. 22-23

fairness

Where important evidence is sought to be admitted from a witness who has died, fairness and the circumstances of the case may preclude admission of the statement under Rule 92 *bis* since there is no opportunity for cross examination.[3746]

Proposed Rule 92 *quater* evidence is not necessarily excluded on the basis that it goes to critical issues of the prosecution's case.[3747]

Testimony of witness in previous trial and statements to OTP admitted pursuant to Rule 92 *quarter* where it did not go to fundamental issue in the case.[3748]

Testimony about the direction of fire in sniper incidents went to a critical issue in the prosecution's case and would not be admitted pursuant to Rule 92 *quater*.[3749]

Issues related to the substance of prior cross examination or interests of counsel go to the weight of the evidence under Rule 92 *quarter*, not its admissibility.[3750]

Issues related to the quality of prior cross examination go to the weight of evidence under Rule 92 *quarter* and not its admissibility.[3751]

Evidence elicited by defence in other trial which sought to blame the accused would not be admitted under Rule 92 *quater* as its admission would be unfair and more prejudicial than probative.[3752]

[3745] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para.
[3746] *Prosecutor v Milutinovic et al*, No. IT-05-87-PT, *Decision on Prosecution's Rule 92 bis Motion* (4 July 2006) at para. 7
[3747] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Testimony of Sixteen Witnesses and Associated Exhibits Pursuant to Rule 92 quarter* (30 November 2009) at para. 6
[3748] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (9 July 2007) at page 6
[3749] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Admission of Witness Statements Pursuant to Rule 92 quater* (19 April 2007) at paras. 16-17
[3750] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quater* (5 February 2009) at para. 8; *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (14 April 2010) at para. 23; *Prosecutor v Stanisic & Simatovic*, No.IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness C-057 Pursuant to Rule 92 Quarter* (12 April 2010) at para. 20; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevqn Todorovic Pursuant to Rule 92 quarter* (29 October 2010) at para. 41
[3751] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness B-161 Pursuant to Rule 92 quarter* (16 June 2010) at para. 28; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness Milan Babic Pursuant to Rule 92 quarter* (16 December 2010) at para. 37
[3752] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of the Evidence of Milenko Lazic Pursuant to Rule 92 quater…*(9 January 2012) at para.22

Evidence of the acts and conduct of the accused admitted where they were not highly incriminating, but where the evidence was highly incriminating and the cross-examination was non-existent or poor, those portions would not be admitted.[3753]

In the specific situation of a JCE, written statements which go to proof of acts and conduct of the accused upon which the prosecution relies to establish that said accused participated in that JCE or shared with the person who actually committed the crimes charged, the required intent for those crimes, might be a factor against admission. Such intent may be inferred from a written statement which indicates the presence of the accused during the occurrence of crimes committed by individuals other than the accused.[3754]

The right to cross examination is not absolute. Rule 92 *quarter* does not violate Article 21(4)(e) of the Statute.[3755]

The admission of evidence under Rule 92 *quarter*, individually, or cumulatively with 92 *bis* evidence and adjudicated facts, does not shift the burden of proof to the accused.[3756]

Statement of deceased witness in response to interrogation in Bosnia admitted at the request of accused, where indicia of reliability existed and, although going to acts and conduct of co-accused, it was only a fleeting reference.[3757]

redactions

This rule allows for admission of part of a statement, but other parts may also be admitted if it would have added to the relevant issue addressed by the admitted part. It is not solely the prerogative of the offering party to decide what part of the statement is admitted.[3758]

A witness' evidence need not be admitted in its entirety.[3759]

[3753] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 41
[3754] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witnesses Unavailable Pursuant to Rule 92 quarter* (16 September 2009) at para. 14
[3755] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 8
[3756] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 9
[3757] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Gvero's Motion for the Admission of Evidence Pursuant to Rule 92 quarter* (3 February 2009)
[3758] *Prosecutor v Galic*, No. IT-98-29-AR73.2, *Decision on Interlocutory Appeal Concerning Rule 92 bis (C)*(7 June 2002) at para. 46
[3759] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 4

relationship to Rule 92 *bis*

A Rule 92 *bis* application as to unavailable witnesses should be reviewed under the more stringent test of Rule 92 *quarter* even if the testimony does not go to the acts and conduct of the accused.[3760]

reliability

Rule 92 *quater*, unlike Rule 92 *bis*, does not require a declaration by the witness that the contents of the statement are true and correct to the best of the witness's knowledge and belief.[3761]

The following factors are relevant to the assessment of the reliability of the statement: (1) whether the statement was made under oath; (2) whether it was signed with an acknowledgement that it was true; (3) whether it was taken with the assistance of an interpreter qualified by the Registry; (4) whether the statement was subject to cross examination; (5) whether there is other evidence relating to the same events; and (6) other factors such as manifest inconsistencies in the statement.[3762]

Among the factors considered when determining the reliability of a statement under Rule 92 *quarter* are: (1) the circumstances under which the statement was generated; (2) whether the evidence was subject to cross examination; (3) whether there is other evidence which relates to the same events described by the witness; and (4) other factors, including whether there are manifest inconsistencies in the evidence.[3763]

Factors relevant to the exercise of discretion include issues of reliability going beyond the circumstances in which the testimony was given and recorded: such as (1) whether and to what extent the witness has been subject to cross-examination; (2)

[3760] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Partial Decision on Prosecution's Rule 92 bis Motion for Five Witnesses* (27 August 2010) at para. 32

[3761] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at para. 30

[3762] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (16 February 2007) at para. 7; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (9 July 2007) at page 4; *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures* (7 September 2007) at para. 8; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on the Admission of Statements of Two Witnesses and Associated Documents Pursuant to Rule 92 quarter* (16 January 2009) at para. 13; *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quater* (5 February 2009) at para. 6 *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 5; *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter* (25 November 2009) at para. 29

[3763] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjic) Pursuant to Rule 92 Quarter* (23 March 2010) at para. 22; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 25

whether the testimony is corroborated by other evidence; (3) the absence of manifest or obvious inconsistencies; and (4) whether and to what extent the testimony goes to the acts and conduct of the accused as charged in the indictment.[3764]

Testimony of witness in previous trial admitted pursuant to Rule 92 *quarter* where it was reliable and where other live witnesses had addressed the same topics.[3765]

The fact that a witness made a plea agreement with the prosecution does not render his testimony unreliable.[3766]

While the witness' status as an accused and beneficiary of a plea agreement with the prosecution does not by itself necessarily render his evidence unreliable, inconsistencies in his statements regarding the accused's participation in events relevant to the indictment, as well as his admission that he deliberately omitted the information until after he was indicted, required that his evidence as a whole must be approached with caution, and militates against admission.[3767]

The inordinate amount of evidence of the witness going to the acts and conduct of the accused, coupled with concerns over the reliability of the witness' evidence, resulted in the denial of admission of the witness' prior testimony and statements under Rule 92 *quarter*.[3768]

Pervasive inconsistencies in witness' answers to prosecution questions during recorded interview, and highly evasive answers, so undermined the probative value of the evidence to make it unreliable and inadmissible as defence evidence under Rule 92 *quater*.[3769]

Witness's repudiation of earlier statements and a finding that witness was not truthful when explaining his failure to appear before the Tribunal in another case

[3764] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness Milan Babic Pursuant to Rule 92 quarter* (16 December 2010) at para. 36
[3765] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (5 March 2007); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevqn Todorovic Pursuant to Rule 92 quarter* (29 October 2010); *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater (Milan Babic)* (7 February 2013); *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quater (Milan Babic)*(7 February 2013)
[3766] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 28
[3767] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjic) Pursuant to Rule 92 Quarter* (23 March 2010) at para. 31
[3768] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of the Evidence of KDZ297 (Miroslav Deronjic) Pursuant to Rule 92 Quarter* (23 March 2010) at para. 39
[3769] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for the Admission of the Statement of Rajko Koprivica Pursuant to Rule 92 quater* (3 October 2012) at para. 16

rendered his proposed evidence lacking in credibility and therefore devoid of probative value and would not be admitted under Rule 92 *quater*.[3770]

Recorded interview with prosecution, or testimony at earlier trial, was sufficiently reliable to warrant admission under Rule 92 *quater* despite inconsistencies, which were not so pervasive as to render the statement inadmissible but would be considered when evaluating the weight to be given to the evidence.[3771]

Any inconsistencies between the evidence of the Rule 92 *quater* witness and other evidence is to be assessed considering all the other evidence admitted at trial and goes to the weight to be given to the evidence, not its admission.[3772]

Testimony of witness at his own trial at which he was convicted was nevertheless sufficiently reliable to render it admissible pursuant to Rule 92 *quater*.[3773]

Summary of evidence given in Croatian court proceedings was not sufficiently reliable to be admitted.[3774]

Direct examination of witness who fell ill before being cross examined would not be admitted pursuant to Rule 92 *quarter* where the testimony was not sufficiently reliable or corroborated by other witnesses.[3775]

Portions of testimony initially rejected under Rule 92 *quarter* as being unreliable would be admitted on reconsideration after other witnesses at the trial had corroborated it.[3776]

Deceased witness who had signed his statement with an "X" in the presence of a representative of the Registry was sufficient proof of the reliability of the method under which the statement was taken.[3777]

[3770] [3770] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at para. 34

[3771] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for the Admission of the Statement of Vlado Lizdek Pursuant to Rule 92 quater* (10 October 2012) at paras. 12-13; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit Evidence of Velibor Ostojic Pursuant to Rule 92 quater* (23 October 2012) at paras. 12-13; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Admit the Evidence of Ljubomir Bojanovic and Miroslav Deronjic Pursuant to Rule 92 quater* (13 January 2014) at para. 8

[3772] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at paras. 30,46,54

[3773] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit the Evidence of Radislav Krstic Pursuant to Rule 92 quater* (26 November 2013) at paras. 26-28

[3774] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 61

[3775] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Reasons for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and to Deny His Testimony Pursuant to Rule 92 Quarter* (14 December 2007) at para. 16

[3776] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motion for Reconsideration of the Decision of 7 January 2008 Rejecting the Admission of Milan Babic's Testimony* (12 December 2010) at para. 18

Where witness appeared confused and disoriented during prior testimony, admission under Rule 92 *quarter* would be denied due to unreliability.[3778]

Recorded interview of deceased witness by Office of the Prosecution was sufficiently reliable to be admitted at the request of the defence, despite prosecution claims that the witness was lying.[3779]

Inconsistencies in the prior evidence do not affect the admissibility of the evidence under Rule 92 *quater* but go to the weight to be given to the evidence.[3780]

Testimony of an accused who testified at his own trial and later died admitted as the status of the witness as an accused does not necessarily render his evidence unreliable.[3781]

Whether prior testimony was given in open or closed session does not affect its reliability.[3782]

Fact that case in which prior testimony was given did not reach stage of adjudication does not affect the reliability of the testimony.[3783]

requirements

Rule 92 *quarter* requires that (1) the person whose statement or transcript is sought to be admitted is unavailable; and (2) the statement is reliable. The proffered evidence must also be relevant, have probative value, and not be unduly prejudicial.[3784]

[3777] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter and 13th Motion for Trial-Related Protective Measures* (7 September 2007) at para. 9

[3778] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 97

[3779] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Statement of Srdo Srdic pursuant to Rule 92 Quater* (21 September 2012) at para. 11

[3780] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 15; *Prosecution v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (14 April 2010) at para. 23; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence of Milorad Krnojelac Pursuant to Rule 92 quater* (6 December 2012) at para. 21; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence of Witness KW582 Pursuant to Rule 92 quater* (3 February 2014) at para. 14

[3781] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Evidence of Milorad Krnojelac Pursuant to Rule 92 quater* (6 December 2012) at para. 21

[3782] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness B-161 Pursuant to Rule 92 quarter* (16 June 2010) at para. 27

[3783] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution's Motion for Admission of Evidence of Witness B-161 Pursuant to Rule 92 quarter* (16 June 2010) at para. 27; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevqn Todorovic Pursuant to Rule 92 quarter* (29 October 2010) at para. 43

For a statement to be admitted pursuant to Rule 92 *quarter*, the Trial Chamber must satisfy itself that (1) the witness is unavailable; (2) the statement is reliable; (3) the statement is relevant and of probative value; and (4) whether the statement goes to the acts and conduct of the accused or involves critical evidence.[3785]

In addition to the elements required to satisfy Rule 92 *quarter*, the general requirements of admissibility of evidence under Rule 89 must be satisfied, namely that the proffered evidence is relevant and has probative value, and that the probative value is not substantially outweighed by the need to ensure a fair trial.[3786]

In deciding a motion to admit evidence pursuant to Rule 92 *quarter*, the Trial Chamber must first determine if the witness is unavailable, then whether the evidence is reliable, whether to admit the evidence in the exercise of its discretion, including whether the information goes to the acts and conduct of the accused, it goes to a core issue in the case, and whether the cross examination in the prior proceeding adequately addressed interests relative to the accused in this case.[3787]

supplemental material

Defence motion to admit additional material under Rule 92 *quarter* for witnesses whose testimony was admitted under the Rule in the prosecution's case was granted.[3788]

unavailability

can't be found

[3784] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (16 February 2007) at paras. 3, 6; *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (5 March 2007) at para. 6; *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Motions for Admission of Evidence Pursuant to Rule 92 quater* (5 February 2009) at para. 5; *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Admission of Evidence Pursuant to Rule 92 quarter* (25 November 2009) at paras. 27-28; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of the Evidence of KDZ172 (Milan Babic) Pursuant to Rule 92 Quarter* (13 April 2010) at para. 7

[3785] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution Motion for Admission of a Written Statement Pursuant to Rule 92 quarter of the Rules (Hasan Rizvic)* (14 January 2008) at paras. 10-13

[3786] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 quarter* (9 July 2007) at page 4; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion for Admission of Testimony of Witness KDZ198 and Associated Exhibits Pursuant to Rule 92 quater* (20 August 2009) at para. 6

[3787] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 bis and quarter of the Rules* (27 October 2006) at paras. 9-12; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Admission of Evidence of Stevqn Todorovic Pursuant to Rule 92 quarter* (29 October 2010) at para. 37

[3788] *Prosecutor v Perisic*, No.IT-04-81-T, *Decision on Defence Motion for Admission of Evidence Pursuant to Rule 92 quater* (21 April 2010)

The Trial Chamber must be satisfied on a balance of probabilities that a witness is dead or can no longer be traced with reasonable diligence.[3789]

health reasons

Witness suffering from PTSD whose testimony would be difficult for him was (was not) unavailable within the meaning of Rule 92 quarter.[3790]

Witness suffering from dementia or Alzheimer's disease was unavailable within the meaning of Rule 92 *quarter*.[3791]

Witness with psychosis not unavailable within the meaning of Rule 92 *quarter*.[3792]

Witness not shown to be unavailable absent further current medical information.[3793]

Witness with walking impairment not shown to be unavailable.[3794]

Witness who had suffered strokes and needed assistance when walking was unavailable.[3795]

Witness with cognitive impairments such as that she was sometimes not able to recognize family members was unavailable within the meaning of Rule 92 quarter.[3796]

[3789] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92 bis of the Rules* (16 January 2006) at para. 12

[3790] *Prosecutor v Stanisic & Zupljanin*, *Decision Granting in part Prosecution's Motion for Admission of Evidence of ST020 Pursuant to Rule 92 quater* (19 January 2011) at para. 17; *Prosecutor v* Mladic, No. 09-92-T, *Decision on Prosecution Rule 92 quarter Motion (Witness RM-132)*(28 June 2013) at para. 8; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Admit the Evidence of Radislav Krstic Pursuant to Rule 92 quater* (26 November 2013) at para. 19; contra: *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Prosecution's Motion to Admit the Evidence of Prosecution Witness No. 39 Pursuant to Rule 92 quater* (7 September 2011) at para. 30; *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at paras. 101, 104

[3791] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 41, 95; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Rule 92 quater Motion (Witness RM-012)*(13 December 2013) at para. 5

[3792] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 99

[3793] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 55, 71

[3794] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 59

[3795] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motions for Admission of Evidence of GH-079, GH-083, and GH-142 Pursuant to Rule 92 quater* (18 July 2013) at paras. 12,17

[3796] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter…*(9 May 2013) at para. 29

Witness who showed signs of forgetfulness and amnesia, and experienced episodes of spontaneous sleep after which he does not recall what he was doing, is incapable of answering questions put to him and testifying coherently and is therefore objectively unavailable within the meaning of Rule 92 *quater*.[3797]

Witness who suffered from multiple sclerosis, cerebral meningioma, and cerebral cavernoma and required therapy was unavailable within the meaning of Rule 92 *quater*.[3798]

Witness who had undergone brain surgery not unavailable absent evidence of memory loss or other impairment that would prevent him from testifying coherently.[3799]

Witness who had recent heart surgery not shown to be unavailable where he had been released for care and there was no showing that he was currently unable to testify.[3800]

refuses to testify

Failure of prosecution to prevail upon witnesses to testify voluntarily was insufficient to show that the witnesses were unavailable.[3801]

witness list

Rule 92 *quater* witnesses must be on the witness list filed pursuant to Rule 65 *ter*. Trial Chamber refused to admit statements of deceased witnesses who had been dropped from the witness list.[3802]

Rule 92 *quinques*—persons subject to interference

(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:
(i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;
(ii) the failure of the person to attend or to give evidence has been materially

[3797] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at para. 25
[3798] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at para. 58
[3799] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Admission of Testimony of Borivoje Jakovljevic Pursuant to Rule 92 quater* (25 February 2014) at para. 7
[3800] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Defence Omnibus Motion for Admission of Evidence Pursuant to Rule 92 quarter* (26 October 2015) at para. 42
[3801] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Partial Decision on Prosecution's Rule 92 bis Motion for Five Witnesses* (27 August 2010) at para. 33
[3802] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Admission of Witness Statements Pursuant to Rule 92 quater* (19 April 2007) at para. 11

influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;
(iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and
(iv) the interests of justice are best served by doing so.
(B) For the purposes of paragraph (A):
(i) An improper interference may relate inter alia to the physical, economic, property, or other interests of the person or of another person;
(ii) the interests of justice include:
(a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;
(b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and
(c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.
(iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.
(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Rule 92 *quinques* cannot be applied retroactively to cases pending at the time the Rule was adopted in December 2009.[3803]

To be admissible, the witness' reluctance to give evidence *viva voce* must be genuine and the extent of his fears must be such that it justifies admitting his prior testimony without cross-examination.[3804]

The interference with the witness must be improper, such as through intimidation or bribery.[3805]

Prosecution failed to convince Trial Chamber that witness' fears were genuine or resulted from improper interference that materially influenced his decision to refuse to testify, and therefore his prior testimony in another case would not be admitted pursuant to Rule 92 *quinques*.[3806]

Rule 93—evidence of consistent pattern of conduct

(A) Evidence of a consistent pattern of conduct relevant to serious violations of

[3803] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution Motion to Admit the Prior Evidence of Milan Tupajic pursuant to Rule 92 quinques* (7 May 2012) at para. 15
[3804] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution Motion to Admit the Prior Evidence of Milan Tupajic pursuant to Rule 92 quinques* (7 May 2012) at para. 17
[3805] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution Motion to Admit the Prior Evidence of Milan Tupajic pursuant to Rule 92 quinques* (7 May 2012) at para. 17
[3806] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Prosecution Motion to Admit the Prior Evidence of Milan Tupajic pursuant to Rule 92 quinques* (7 May 2012) at para. 18

international humanitarian law under the Statute may be admissible in the interests of justice.
(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66.

Rule 93 allows for the admission of evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law in the interests of justice. Similarly, under the so-called principle of "similar fact evidence", courts in England and Wales, Australia and the United States admit evidence of crimes or wrongful acts committed by the defendant other than those charged in the indictment, if the other crimes are introduced to demonstrate a special knowledge, opportunity, or identification of the defendant that would make it more likely that he committed the instant crime as well.[3807]

Prosecution is not at liberty to introduce similar fact evidence without proper notice to the defendant. In this connection, the Appeals Chamber notes that Rule 93 of the Rules provides specifically that the Prosecution must disclose any evidence of a consistent pattern of conduct to the defence pursuant to Rule 66.[3808]

Rule 94—judicial notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
(B) At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

acts and conduct of the accused

Judicial notice may not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused.[3809]

Judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused. However, other facts bearing less directly on the accused's criminal responsibility are left to the Trial Chamber's discretion.[3810]

Judicial notice may be taken of adjudicated facts relating to the existence of a joint criminal enterprise, the conduct of its members other than the accused, and facts

[3807] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 321
[3808] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 323
[3809] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 80
[3810] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 620

related to conduct of physical perpetrators of crimes for which the accused is alleged to be criminally responsible.[3811]

There is no reason why judicial notice could not be taken of adjudicated facts providing evidence of the existence of crimes committed by others, even if such facts were to serve as the basis for other evidence that the accused had notice of those crimes.[3812]

Evidence of the accused's notice of crimes must be produced separately from judicial notice of their existence.[3813]

Evidence as to the goals of unnamed superiors went to the act and conduct of the accused, who was alleged to be one of the superiors in the indictment.[3814]

Trial Chamber declined to take judicial notice of facts bearing upon the responsibility of the accused relating to the objective and members of the joint criminal enterprise, as well as facts relating to a fundamental issue raised in the indictment.[3815]

Trial Chamber declined to take judicial notice of facts which relate to the responsibility of the accused in that they refer to the goal or members of the alleged joint criminal enterprise as well as persons whom the accused is alleged to be responsible for, or are linked to a fundamental question raised in the indictment.[3816]

Judicial notice may be taken of a fact which relates to the responsibility of the accused, if it does not go to the acts, conduct, or mental state of the accused.[3817]

Facts which relate to the conduct of subordinates or members of the joint criminal enterprise may be judicially noticed. However, judicial notice should not be taken when such facts are crucial to the case and when they concern people proximate to the accused.[3818]

[3811] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 81
[3812] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *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) at para. 16
[3813] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *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) at para. 17
[3814] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base* (17 September 2008) at para. 21
[3815] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence* (10 December 2007) at para. 13
[3816] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motions to Take Judicial Notice of Facts Concerning the Mrksic Case* (8 February 2010) at para. 13
[3817] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 25
[3818] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 25

alibi

Prosecution argument that alibi facts should not be judicially noticed because not subject to the same burden of proof was rejected. Findings of fact regarding alibi may be judicially noticed.[3819]

appeal

A party seeking the taking of judicial notice of a fact or document on appeal must also meet the requirements of Rule 115.[3820]

The Appeals Chamber will not consider the alleged error of the Trial Chamber in refusing to take judicial notice of each fact but returned the matter to the Trial Chamber to consider the application of the test for judicial notice to each fact.[3821]

Although a case may be pending on appeal, judicial notice can be taken of facts which are not the subject of the pending appeal.[3822]

Judicial notice will only be taken of facts of facts which are clearly not the subject of pending appeal or review proceedings or inextricably commingled with findings that are being challenged by a party.[3823]

Facts from an appeal judgement may be judicially noticed.[3824]

Only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B).[3825]

[3819] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Sredoje Lukic's Amended Motion for Judicial Notice of Adjudicated Facts* (12 November 2008) at para. 13

[3820] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 17

[3821] *Prosecutor v Milosevic*, No. 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) at pg. 3

[3822] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 92; *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base* (2 September 2008) at para. 28; *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 15; *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 24

[3823] ; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 43

[3824] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 24

[3825] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on Motions by Drago Josipovic, Zoran Kupreskic, and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)* (8 May 2001) at para. 6

Where the fairness of the trial is challenged on appeal, the facts in the Trial Chamber judgement cannot be judicially noticed until the appeal is final.[3826]

Facts which are not challenged on appeal may be judicially noticed, even if the fairness of the trial is challenged on appeal, and if the appeal is successful, the defence can request that the facts be reconsidered.[3827]

burden of persuasion

While the burden of producing evidence shifts to the accused when the Trial Chamber judicially notices an adjudicated fact, the burden of persuasion on the prosecution beyond a reasonable doubt always remains with the prosecution.[3828]

Judicial notice does not shift the ultimate burden of proof, which remains with the Prosecution rather it operates only to relieve the prosecution of its initial burden to produce evidence on the point.[3829]

Adjudicated facts are merely presumptions which can be rebutted by the defence during the trial and does not shift the burden of persuasion which remains with the prosecution.[3830]

By taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of the fact, which therefore does not have to be proven again at the trial, but which, subject to that presumption, may be challenged at that trial.[3831]

The legal effect of taking judicial notice is only to relieve the prosecution of its initial burden to produce evidence on a particular point. The defence may put the issue into question by introducing reliable and credible evidence to the contrary.[3832]

[3826] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 96; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts* (9 July 2007) at para. 14

[3827] *Prosecutor v Mladic*, No. 09-92-PT, *Second Decision on Judicial Notice of Adjudicated Facts* (21 March 2012) at para. 33

[3828] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at para. 21; *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (10 April 2007) at para. 29; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1611

[3829] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 24

[3830] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base* (22 September 2008) at para. 21; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 620

[3831] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 25

[3832] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 25; *Prosecutor v*

Neither taking judicial notice of adjudicated facts nor admitting written evidence under Rule 92 *bis* shifts the burden of proof to the accused. Therefore, the cumulative effect of taking judicial notice of a large number of adjudicated facts does not violate the presumption of innocence.[3833]

Evidence led at trial from a witness whose evidence is also the basis of adjudicated facts will not be considered corroborated by the adjudicated facts.[3834]

A party relying on an adjudicated fact does not have to produce further evidence in proof of that fact, however, it may nonetheless seek to do so. The Trial Chamber has the discretion to admit additional evidence. It was not error to admit evidence relevant to the same facts as those established in the adjudicated facts.[3835]

There is no basis for the contention that where a trial chamber is presented with evidence upon which an adjudicated fact is based or evidence in excess of that evidence, the trial chamber should ignore the adjudicated fact of which it has taken judicial notice and restrict itself to the evidence on the record in the case before it.[3836]

Witness evidence should not be precluded simply because it overlaps with adjudicated facts.[3837]

common knowledge

Rule 94(A) requires the Trial Chamber to take judicial notice of a fact of common knowledge—general facts of history, general known geographical facts, the laws of nature, and generally known facts within a tribunal's territorial jurisdiction. The fact must be one in which is not subject to reasonable dispute. Once a fact is judicially noticed under Rule 94(A) it cannot be challenged.[3838]

Rule 94(A) cannot be used to admit evidence. Taking judicial notice of a fact under Rule 94(A) removes the need for evidence relating to that fact.[3839]

Karadzic, No. IT-95-5/18-T, *Decision on the Accused's Motion to Strike Sarajevo Shelling and Sniping Incidents* (27 January 2012) at para. 11

[3833] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Second Motion for Judicial Notice of Adjudicated Facts* (9 October 2009) at para. 53

[3834] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Preclude Evidence or to Withdraw Adjudicated Facts* (31 March 2010) at para. 12

[3835] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 25

[3836] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 26

[3837] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Preclude Evidence or to Withdraw Adjudicated Facts* (31 March 2010) at para. 17

[3838] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 10

[3839] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006) at para. 14

Rule 94(A) is mandatory and does not provide the Trial Chamber with discretion to refuse judicial notice once a fact is determined to be of common knowledge.[3840]

It is for the prosecution to establish that the facts are not subject to reasonable dispute, not for the accused to show that the facts are unsafe.[3841]

The standard of notoriety is particularly rigorous.[3842]

Information contained in materials of the United Nations does not become a fact of common knowledge simply because it was generated by a body of the United Nations.[3843]

Military rules or regulations, particularly those classified as "secret" do not qualify as facts capable of judicial notice.[3844]

Newspaper articles, ICTR court records, and Croatian laws are not facts of common knowledge which can be judicially noticed pursuant to Rule 94(A).[3845]

The facts proposed for judicial notice must be sufficiently well-defined such that the accuracy of their application to the described situation is not reasonably in doubt.[3846]

When a proposed fact has several elements, it is not sufficient that each element is separately recognized as a fact of common knowledge. The totality of elements constituting the proposed fact must be established to be of common knowledge.[3847]

A fact must relate to the events charged in the indictment to be subject of judicial notice.[3848]

[3840] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (26 September 2006) at para. 12
[3841] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Admission of Documentary Evidence Pursuant to Rules 94(A) and 89(C)* (3 February 2006) at pg. 6
[3842] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (10 April 2007) at para. 25
[3843] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Admission of Documentary Evidence Pursuant to Rules 94(A) and 89(C)* (3 February 2006) at pg. 6
[3844] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 34
[3845] *Prosecutor v Marijacic & Rebic*, No. IT-95-14-R77.2, *Decision on Prosecution Motion for Judicial Notice and Admission of Evidence* (13 January 2006) at page 3-4
[3846] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (26 September 2006) at para. 15
[3847] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (26 September 2006) at para. 17
[3848] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 22

Existence of plan by Bosnian Serb military and civilian leaders to ethnically cleanse part of Bosnia was not established to be a fact of common knowledge and judicial notice was refused.[3849]

Convictions of subordinates of the accused would not be judicially noticed as facts of common knowledge.[3850]

Judicial notice of state of armed conflict and existence of widespread and systematic attacks over entire are of Bosnia denied as not facts of common knowledge.[3851]

concrete facts

Judicial notice would not be taken of fact that General Galic "gave the impression" and that firing on civilians "was ordered by the chain of command", despite the lack of objection from the defence, as such facts were not sufficiently concrete.[3852]

Judicial notice would not be taken of facts which used general terms such as "full scope of plan" and "resources".[3853]

Judicial notice would not be taken of a finding that something "could have" been determined as it is a supposition rather than a fact.[3854]

context

Trial Chamber refused to take judicial notice of facts which were divorced from their context in the original judgement and hence misleading in the current proceedings.[3855]

The Trial Chamber refused to take judicial notice of some facts which were not sufficiently distinct, concrete, and clear in the original judgement.[3856]

[3849] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (26 September 2006) at para. 18
[3850] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Motion for Judicial Notice of ICTY Convictions* (25 September 2008)
[3851] *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Judicial Notice* (14 December 2007) at paras. 20, 27
[3852] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base* (17 September 2008) at para. 9
[3853] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts Relevant to the Srebrenica Crime Base* (22 September 2008) at para. 28
[3854] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion for Judicial Notice of Adjudicated Facts* (4 May 2010) at para. 15
[3855] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Defence Request for Judicial Notice of Adjudicated Facts* (29 August 2007); *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Judicial Notice* (14 December 2007) at para. 40
[3856] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo* (26 June 2008) at paras. 18-19

Trial Chamber refused to take judicial notice of facts which were not sufficiently clear or definitive.[3857]

Only when a Chamber has accepted evidence and made findings in accordance with that evidence, as opposed to merely reciting evidence, can the facts be considered as adjudicated facts. The burden is on the moving party.[3858]

corroboration

Where the adjudicated fact in the source judgement cited the same witness who gave evidence in this case on the same point and this latter evidence was the only evidence in this case on the point, other than the adjudicated fact, the Chamber did not consider the adjudicated fact to corroborate the witness's evidence in this case.[3859]

credibility assessment

Facts which constitute a credibility assessment are not truly adjudicated facts and would not be judicially noticed.[3860]

discretion

Trial Chambers should take a cautious approach in exercising its discretion to take judicial notice of adjudicated facts to ensure the right of an accused to a fair trial.[3861]

The taking of judicial notice under Rule 94(B) is discretionary. It must be demonstrated that the facts or documents sought to be judicially noticed are related to matters at issue in the current proceedings. A fact judicially noticed under this section is presumed to be established but may be challenged at trial.[3862]

[3857] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence* (10 December 2007) at para. 14, 16
[3858] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Partially Granting Motion of Mico Stanisic for Judicial Notice of Adjudicated Facts* (29 June 2011) at para. 5
[3859] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 31
[3860] *Prosecutor v Lukic & Lukic*, No IT-98-32/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (22 August 2008) at para. 28
[3861] *Prosecutor v Mladic*, No. IT-09-92-AR73.1, *Decision on Ratko Mladic's Appeal Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 24
[3862] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 11; *Prosecutor v Milosevic*, No. 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) at pg. 4; *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 9

The taking of judicial notice of adjudicated facts is within the discretion of the Trial Chamber. The Trial Chamber retains discretion to refuse judicial notice of adjudicated facts if the interests of justice, including the rights of the accused to a fair, public, and expeditious trial so require.[3863]

The fact that other Trial Chambers declined to take judicial notice of the same adjudicated facts does not require that a Trial Chamber also declined to take judicial notice.[3864]

Trial Chamber declined to take judicial notice of facts concerning crimes committed under the accused's predecessor which could be used to impute notice to the accused. Shifting the burden to the accused to rebut these facts would not be consistent with the rights of the accused under the Statute.[3865]

In exercising discretion, the Trial Chamber is mindful of the possibility that the fact might sought to be rebutted by the defence, thus consuming time and resources and frustrating the goal of judicial economy.[3866]

The Trial Chamber, in exercising its discretion whether to take judicial notice, decided to reject proposed facts that go to issues that are at the core of the prosecution's case against the accused; facts based upon subjective inferences, facts which are broad, vague, tendentious, or conclusory, and facts which might go to the acts, conduct or mental state of the accused, but this could not be discerned due to lack of specificity in the original judgement.[3867]

The Trial Chamber, in exercising its discretion whether to take judicial notice, considers whether the volume or type of evidence which the accused would have to produce in rebuttal could place such a significant burden on him that it would jeopardize his right to a fair trial.[3868]

[3863] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005* (14 April 2005)

[3864] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts* (16 June 2010) at para. 15; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Third Motion for Reconsideration of Decision on Judicial Notice of Adjudicated Facts* (14 September 2010) at para. 8

[3865] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (10 April 2007) at para. 32

[3866] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at para.; ; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para.45

[3867] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Documents* (23 May 2013) at para. 13

[3868] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 45

A proposed fact may go to the core of the prosecution case where it involves the objective of the joint criminal enterprise or relates to the acts and conducts of persons for whose criminal conduct the accused is allegedly responsible.[3869]

The exercise of discretion to decline to take judicial notice of facts which go to the core of the case is a new approach which the Trial Chamber is not obligated to follow.[3870]

Having properly defined the criteria for facts going to the core of the case, and deciding to exercise its discretion not to take judicial notice of core adjudicated facts, the Chamber erred in taking judicial notice of one fact that goes to the core of the case concerning the objectives of the Bosnian Serbs to forcibly remove civilians from Srebrenica.[3871]

However, considering that the adjudicated fact did not constitute the sole basis of the findings in support of which it was cited, the Trial Chamber's decision to take judicial notice of it did not occasion a miscarriage of justice.[3872]

Facts which contain subjective inferences of the Trial Chamber would not be judicially noticed.[3873]

Trial Chamber declined to take judicial notice of a fact which the previous Chamber found was not established due to the insufficiency of the evidence, since the specific evidence under consideration is not the same from case to case.[3874]

Finding that "the Trial Chamber is not satisfied that the mortar was launched from SRK territory is a factual finding which meets the requirements for judicial notice.[3875]

disputed facts

The proposed facts must not be based upon an agreement of the parties. However, where the judgement indicated the facts "were not disputed", it did not rise to the level of an agreement so as to preclude judicial notice.[3876]

[3869] ; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 46
[3870] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts* (16 June 2010) at para. 20
[3871] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 35
[3872] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 36
[3873] ; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 47
[3874] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion for Judicial Notice of Adjudicated Facts* (4 May 2010) at para. 20
[3875] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision of 4 May 2010 Concerning Adjudicated Facts* (15 October 2010) at para. 20
[3876] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Second Motion for Judicial Notice of Facts Relevant to the Sarajevo Crime Base* (17 September 2008) at para. 16

There is no requirement that adjudicated facts be beyond reasonable dispute. a trial chamber may exercise its discretionary power to determine whether to take judicial notice of an adjudicated fact, even if the fact may have been less central to the charges in the previous proceedings of the Tribunal than in the current proceedings, so long as the adjudicated fact has been established by the Trial Chamber in the previous proceedings based on evidence.[3877]

Trial Chamber declined to take judicial notice of facts which were "disputable".[3878]

Where it cannot be determined, by examining the citations in the original judgement, that the fact was not based upon an agreement of the parties, the Chamber must refrain from taking judicial notice of that fact.[3879]

documents

A party must establish the relevance of the document which is the subject of judicial notice in the same way it establishes the relevance of other evidence. There must be more than a remote connection to the current proceedings and this connection must be demonstrated by pointing to specific portions of the document.[3880]

Once judicial notice of a document is taken, the document is admitted for its contents. It establishes a presumption of authenticity of the document. The ultimate weight to be given to the document is up to the Trial Chamber.[3881]

Judicial notice of intercepted conversations admitted in previous trial was taken, relieving the prosecution of the burden of calling witnesses to establish the reliability of these intercepts.[3882]

Judicial notice of documents relating to crime base evidence from Croatia was taken where documents were admitted in other trial and were relevant to the present case.[3883]

Documentary evidence from another proceeding need not be "adjudicated" to qualify for judicial notice.[3884]

[3877] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 622
[3878] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motions to Take Judicial Notice of Facts Concerning the Mrksic Case* (8 February 2010) at para. 15
[3879] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 38
[3880] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes* (1 September 2008) at para. 6
[3881] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes* (1 September 2008) at para. 5
[3882] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes* (1 September 2008)
[3883] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base* (2 September 2008)

A Trial Chamber may take judicial notice pursuant to Rule 94(B) of documentary evidence admitted in a prior proceeding. The moving party must show that (1) the document was received in evidence in the prior proceeding; and (2) relates to the matters in issue in the current proceeding.[3885]

Judicial notice cannot be taken of an entire judgement. The mere reference to part of a judgement or document is insufficient to trigger the provisions of Rule 94(B). A party must demonstrate exactly which part of the section is relevant to the current proceedings. Since a paragraph can contain more than one fact, the precise fact to be judicially noticed and its relevance to an issue in the case must be specified.[3886]

This Rule envisions permitting a Chamber to take judicial notice of discrete items of evidence such as the testimony of a witness or a trial exhibit, not an entire judgement.[3887]

Where an adjudicated fact from a judgement is based upon documentary evidence, the limitation on judicial notice of the contents of a document do not apply, as it might when taking judicial notice of a document which has simply been admitted in a prior proceeding.[3888]

The taking of judicial notice of a document creates a presumption of the authenticity and reliability of the document, subject to rebuttal by the other party. The weight to be given to the content of the document is thereafter within the discretion of the Chamber.[3889]

The standard for taking judicial notice of documents is the same for taking judicial notice of adjudicated facts, including whether the facts, when taken together will result in such a large number as to compromise the principle of a fair trial and whether the facts are too broad, too tendentious, not sufficiently significant, too detailed, too

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[3884] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 45

[3885] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006) at para. 16; *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Srebrenica Intercepts with Confidential Annexes* (1 September 2008) at para. 6

[3886] *Nikolic v Prosecutor*, No. IT-02-60/1-A, *Decision on Appellant's Motion for Judicial Notice* (1 April 2005) at para. 47, 55

[3887] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on Motions by Drago Josipovic, Zoran Kupreskic, and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)* (8 May 2001) at para. 6

[3888] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Prosecution's Third Motion for Judicial Notice of Adjudicated Facts* (9 July 2009) at para. 14

[3889] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Documentary Evidence Related to Sarajevo Component* (31 March 2010)

numerous, repetitive of other evidence already admitted before the Trial Chamber, or not sufficiently relevant to the case.[3890]

Judicial notice of documents admitted in other proceedings denied where the Chamber preferred to understand their context by presenting them through witnesses or from the bar table during the trial.[3891]

Judicial notice of authenticity of documents admitted in other cases denied where party had not provided Chamber with transcript references to other cases to enable the Chamber to understand whether and how the authenticity had been discussed in those cases.[3892]

Judicial notice of intercepted conversations would not be taken absent proof that the applicable intercept was sufficiently authenticated and found to be reliable in the prior proceeding.[3893]

The recording of an intercepted conversation is included within the term "documentary evidence" and judicial notice may be taken of the authenticity of such recordings.[3894]

The December 2010 amendment to Rule 94(B) provides that only the authenticity of a document admitted in prior proceedings may be judicially noticed. The fact that a document was deemed relevant in another trial does not mean that it is automatically relevant to the current proceedings.[3895]

The December 2010 amendment to Rule 94(B) now only allows the taking of judicial notice of the authenticity of an exhibit admitted in a prior proceeding. This means that documentary evidence is no longer admitted into evidence because of judicial notice. Rather, Rule 94(B) now creates a well-founded presumption for the authenticity of the documentary evidence in question.[3896]

[3890] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 94(B)* (9 July 2007) at page 4

[3891] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 94(B)* (9 July 2007) at page 5; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Documentary Evidence Related to Sarajevo Component* (31 March 2010) at para. 12

[3892] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution Motion to Admit Evidence from the Bar Table: Foca Municipality* (14 November 2013) at para. 5

[3893] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Documentary Evidence Related to Sarajevo Component* (31 March 2010) at para. 11; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment* (2 May 2013) at para. 17

[3894] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component…*(4 February 2011) at para. 17

[3895] *Prosecutor v Stanisic and Zupljanin*, No. IT-08-91-T, *Decision Granting in Part the Prosecution's Bar Table Motion…* (1 February 2011) at para. 14

[3896] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component…*(4 February 2011) at para. 12

Judicial notice taken of authenticity of intercepted conversation because of its having been admitted in previous trial.[3897]

After creating a well-founded presumption for the authenticity of the exhibit by the taking of judicial notice pursuant to Rule 94(B), a party must then tender the exhibit either through a witness or a bar table motion.[3898]

The requirements of taking judicial notice of adjudicated facts are not applicable to the taking of judicial notice of documents.[3899]

Whether a party objected or not to the admission of the said document in the previous proceedings, or whether the decision to admit the exhibit was subject to appeal, is irrelevant.[3900]

Due to limited added value of taking judicial notice of such proposed facts based exclusively upon documents, compared to admitting the underlying document or parts thereof into evidence, the Chamber declined to take judicial notice of facts based entirely upon documents.[3901]

Judicial notice of facts from Rule 11 *bis* proceedings in the same case cannot be taken. Rule 94(B) applies to decisions in other cases, not the same case. And the facts must be the product of a trial, not a transfer proceeding.[3902]

findings

Sometimes Chambers do not make an explicit finding on the evidence but instead refer to the evidence given to the relevant witness. However, unless a contradiction is expressly noted or evidence is excluded, this type of fact may be said to be a "factual finding" for purpose of judicial notice.[3903]

[3897] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Documents Previously Marked for Identification* (6 November 2013) at para. 7
[3898] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component…*(4 February 2011) at para. 15
[3899] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component…*(4 February 2011) at para. 16
[3900] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Judicial Notice of Intercepts Related to the Sarajevo Component…*(4 February 2011) at para. 16
[3901] *Prosecutor v Mladic*, No. IT-09-92-PT, *First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 February 2012) at para. 15
[3902] *Prosecutor v Lukic & Lukic*, No IT-98-32/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (22 August 2008) at para. 10
[3903] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Three Accused's Motions for Reconsideration of Judicial Notice of Adjudicated Facts* (4 May 2012) at para. 10

A trial chamber is not required, in determining whether to take judicial notice, to examine the particular items of evidence from the previous case that constituted the basis for the findings reflected in the proposed adjudicated facts.[3904]

legal conclusions

While legal conclusions may be judicially noticed under Rule 94(A), findings or characterizations of an essentially legal nature may not be judicially noticed as adjudicated facts under Rule 94(B).[3905]

A paragraph of a judgement which contains facts mixed with some legal conclusions may be judicially noticed, but a paragraph which makes primarily legal points will not be judicially noticed.[3906]

Trial Chamber declined to take judicial notice of facts which contained legal characterizations or subjective opinions.[3907]

Facts taken from "legal findings" section of judgement, or which include terms such as "widespread or systematic shelling", "not justified by military necessity", "attacks on civilians" or "legitimate military target" were primarily legal conclusions which could not be judicially noticed.[3908]

The term "widespread and systematic attack" was a legal conclusion and would not be judicially noticed.[3909]

The term "ethnic cleansing" was used in a legal sense and therefore facts using this term were not appropriate for judicial notice.[3910]

Findings that crimes in municipalities of Bosnia in 1992 were not committed with genocidal intent was a legal conclusion not suitable for judicial notice of adjudicated facts.[3911]

[3904] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 51
[3905] *Prosecutor v Milosevic*, No. IT-98-29/1-T, *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) at para. 21; *Prosecutor v Lukic & Lukic*, No IT-98-32/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (22 August 2008) at para. 24
[3906] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 23
[3907] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence* (10 December 2007) at para. 15; *Prosecutor v Stanisic*, No. IT-04-79-PT, *Decision on Judicial Notice* (14 December 2007) at para. 42
[3908] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo* (26 June 2008) at para. 26
[3909] *Prosecutor v Mladic*, No. IT-09-92-PT, *First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 February 2012) at para. 38
[3910] ; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 37, fn. 118

A trial chamber is permitted to take judicial notice of facts that concern the Prosecution's investigation.[3912]

limitations

When the Chamber takes judicial notice of a Proposed Fact referring to a document in which a certain issue was reported or stated, the Chamber does not take judicial notice of the veracity of the facts stated in the document. The Chamber merely takes judicial notice of the fact that a certain issue was reported or stated in the document.[3913]

If a proposed fact indicates that a person or an entity said something, the Chamber takes judicial notice of the fact that this person or entity made such a statement and not of the truth of the content of the statement itself.[3914]

purpose

Rule 94(B) aims to achieve judicial economy by avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated, while ensuring the right of the accused to a fair, public, and expeditious trial.[3915]

While judicial economy is a desirable objective in the administration of justice it must nonetheless be balanced against other important considerations in ensuring the fairness of trials and compliance of the proceedings with the Rules of the Tribunal.[3916]

rebuttal

An adjudicated fact can be rebutted by evidence elicited by the defence on cross examination or in its case-in-chief. Once evidence is introduced to rebut an adjudicated fact, the prosecution must introduce evidence in support of that fact and can no longer rely on the presumption. Such evidence can be introduced in its own case or in its rebuttal case.[3917]

An adjudicated fact was rebutted where the Accused challenged an adjudicated fact and presented credible evidence to rebut or bring into question the accuracy of the

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[3911] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Judicial Notice of Adjudicated Facts Relating to Count One* (21 January 2014) at paras. 9-10
[3912] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 52
[3913] *Prosecutor v Mladic*, No. IT-09-92-PT, *First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 February 2012) at para. 13
[3914] *Prosecutor v Mladic*, No. IT-09-92-PT, *First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (28 February 2012) at para. 14
[3915] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 23
[3916] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 23
[3917] *Prosecutor v Mladic*, No. IT-09-92-PT, *Fourth Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Concerning the Rebuttal Evidence Procedure* (2 May 2012) at paras. 15, 19-20

adjudicated fact or where the evidence presented by the Prosecution on the point addressed by the adjudicated fact was internally contradictory or inconsistent with the adjudicated fact.[3918]

Orders to respect Geneva Conventions contradicted adjudicated facts that civilians were to be specifically targeted and therefore the adjudicated facts would be disregarded.[3919]

Regardless of whether rebuttal evidence is led, it remains for the Chamber, during its deliberations on the entire trial record, to weigh the adjudicated facts at issue against the reliability and credibility of the challenging evidence presented by the opposing side.[3920]

Where reliable evidence contradicted an adjudicated fact, be it presented by the Accused or the Prosecution, the adjudicated fact was not used as the basis of a finding in this case.[3921]

Evidence contradicting the adjudicated facts had to be unambiguous--evidence suggesting mere possibilities does not reach that threshold. A contradiction can exist in either presenting evidence on a specific alternative scenario, as opposed to a mere suggestion of one or more possible alternative scenarios, or in the unambiguous demonstration that the scenario as found in the adjudicated fact must reasonably be excluded as true.[3922]

Evidence contradicting adjudicated facts does not automatically rebut the adjudicated fact. The presumption of accuracy of the adjudicated fact is only rebutted by 'reliable and credible' contradictory evidence. In determining whether a piece of evidence rebuts the presumption of accuracy, the Trial Chamber was mindful to limit its analysis of the reliability only to that piece of evidence, without weighing it against any evidence supporting the relevant adjudicated fact. To do otherwise would be tantamount to prematurely reopening the evidentiary debate and thus undermine the very purpose of adjudicated facts.[3923]

As facts themselves cannot be weighed against evidence, once an adjudicated fact has been rebutted, the party who initially presented the adjudicated fact must be allowed to submit evidence proving the fact at issue. This evidence will then be weighed against the evidence presented to contradict the Adjudicated Fact. This restores a situation in which the Trial Chamber weighs evidence and makes its own findings regarding the issue addressed in the adjudicated fact.[3924]

[3918] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 28
[3919] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 4734
[3920] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion to Present Rebuttal Evidence* (21 March 2014) at para. 19
[3921] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Judgement* (24 March 2016) at para. 30
[3922] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5273
[3923] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5274
[3924] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5275

The same piece of evidence can be assessed differently in different cases because of other evidence on the record. The mechanism of Rule 94(B) of the Rules does not allow a trial chamber to defer to the assessment of the evidence by another trial chamber on the ground that it was fashioned to favour consistency and uniformity in the Tribunal's case-law. The Trial Chamber therefore has the obligation to assess the evidence and reach its own conclusion[3925]

reformulation

A Trial Chamber may reformulate an adjudicated fact, but only minor modifications or additions which do not alter the meaning of the original judgement from which the proposed adjudicated fact originates are permissible.[3926]

Although a Chamber may take judicial notice of adjudicated facts *proprio motu*, it may not substantively alter facts as proposed by a moving party or add new information to the fact.[3927]

In accepting time references provided by the prosecution which are not supported by a specific factual finding in the judgement, the Trial Chamber exceeded its discretion.[3928]

relevance

To be judicially noticed, a fact must be relevant.[3929]

Although facts about past crimes would be judicially noticed, the prosecution must prove that the accused had notice of these crimes by other evidence.[3930]

Facts which are too broad to have probative value would not be judicially noticed.[3931]

requirements

[3925] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Judgement* (4 December 2012) at para. 261
[3926] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 28
[3927] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at paras. 32-33
[3928] *Prosecutor v Mladic*, No. It-09-92-AR73.1, *Decision on Ratko Mladic's Appeal from Trial Chamber Decisions on Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 72
[3929] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (26 September 2006) at para. 11
[3930] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo* (26 June 2008) at para. 24
[3931] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 29

To be admissible, the fact requested to be judicially noticed must meet the following criteria: (1) it must be distinct and concrete; (2) it must represent factual findings, not legal ones; (3) it must be adjudicated, not admitted; (4) it must be final and not subject to pending appeals; (5) it must not attest, directly or indirectly, to the criminal responsibility of the accused; and (6) the formulation proposed for admission must not differ significantly from that in the former proceeding.[3932]

The Trial Chamber will not admit any facts as adjudicated facts if (1) the finding in the prior proceeding is subject to appeal or potentially subject to review; (2) it is not sufficiently clear and concrete, such as being mixed with accessory facts that serve to obscure the principal fact; (3) it contains a legal characterization; or (4) goes, or potentially goes, to the responsibility of the accused.[3933]

The consideration of judicial notice of adjudicated facts is a two-step process. First, the Trial Chamber must determine whether the fact fulfils the admissibility requirements: (A) relevance; (B) distinct, concrete, and identifiable; (C) not differ from the fact as formulated in the judgement; (D) not be unclear or misleading; (E) identified with adequate precision; (F) not contain an essentially legal characterization; (G) not be based on an agreement in the original proceeding; (H) not relate to the acts, conduct or mental state of the accused; (I) not be subject to pending appeal or review. Second, for each fact that fulfils these requirements, the Trial Chamber must determine whether in its discretion, it should nonetheless withhold judicial notice, on the ground that judicially noticing the fact in question would not serve the interests of justice.[3934]

The requirements for judicial notice of adjudicated facts are: (1) the fact must be distinct, concrete, and identifiable; (2) it must be relevant to the case; (3) it must not include findings or characterizations that are of an essentially legal nature: (4) it must not be based upon a plea agreement or upon facts voluntarily admitted in a previous case; (5) it must not have been contested on appeal, or, if it has, the fact has been settled on appeal; (6) it must not relate to the acts, conduct, or mental state of the accused; and (7) the formulation proposed in the moving party's motion for admission must not differ in any

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[3932] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts* (24 March 2005) at para. 14; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005* (14 April 2005)

[3933] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 12

[3934] *Prosecutor v Mladic*, No. IT-09-92-AR73.1, *Decision on Ratko Mladic's Appeal Against the Trial Chamber Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts* (12 November 2013) at para. 25; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at paras. 4-14; *Prosecutor v Lukic & Lukic*, No IT-98-32/1-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts* (22 August 2008) at para. 20; *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on First Prosecution's Motion for Judicial Notice of Adjudicated Facts* (5 June 2009) at para. 9; *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (17 December 2009) at para. 8; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94*(B) (1 April 2010) at para. 24

significant way from the way the fact was expressed when adjudicated in the previous proceeding.[3935]

Trial chambers must first determine whether an adjudicated fact proposed for judicial notice satisfies the admissibility criteria; and secondly, consider whether judicial notice should be withheld, notwithstanding that all the admissibility criteria are met, on the basis that it would serve the interests of justice.[3936]

For fact to be clear, distinct, concrete, and identifiable, it must be taken from one or more specific paragraphs of a trial or appeal judgement. The fact must be comprehensible on its own when taken out of the judgement and must have the same or similar form as that contained in the judgement.[3937]

Adjudicated facts do not have to be beyond reasonable dispute, as the taking of judicial notice of such facts only creates a rebuttable presumption.[3938]

A request for judicial notice of a document must contain information pointing to specific parts of each document and its relevance to matters in the current proceeding.[3939] The offering party must demonstrate the relevance of the document as if it were offering it anew under Rule 89(C).[3940]

Ineffectiveness of cross examination is not a reason for refusing to take judicial notice of adjudicated facts.[3941]

Judicial notice must be denied if a fact is inextricably commingled with other facts not themselves fulfilling the requirement of judicial notice or accessory facts which serve to obscure the principal fact.[3942]

Since the admission of an adjudicated fact only creates a presumption of its accuracy, the admission may consume considerable time and resources thereby frustrating the principle of judicial economy.[3943]

[3935] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (25 November 2009) at para. 27
[3936] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at fn. 80
[3937] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006* (7 September 2006) at para. 21
[3938] *Prosecutor v Milosevic*, No. 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); *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 10
[3939] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006) at para. 16,18
[3940] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Motion to Admit Documentary Evidence* (10 October 2006) at para. 30
[3941] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Fourth Motion for Judicial Notice of Adjudicated Facts* (14 June 2010) at para. 19
[3942] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at para. 16

The prosecution should keep its request for adjudicated facts to a manageable size to avoid the severe risk of oppression of its requests on the defence, especially regarding detailed facts of minor incidents.[3944]

Adjudicated facts must also be scrutinized for relevance before judicial notice can be taken of them.[3945]

Judicial notice of adjudicated facts pertaining to regions or municipalities not included in the indictment would not be taken on grounds of lack of relevance.[3946]

Judicial notice should not be used to litter the record with matters that would not be admitted otherwise.[3947]

Judicial notice denied where accused expressed intention to elicit evidence contradicting the documents to be noticed, thus undermining the judicial economy sought by the rule.[3948]

Judicial notice of adjudicated facts does not infringe upon the presumption of innocence because the defence is fully entitled to adduce evidence during its case to rebut the factual circumstances encapsulated in the adjudicated facts in question.[3949]

Facts which do not use the exact original language of the judgement will not be judicially noticed.[3950]

Facts which, although using the original language, are unclear or inadequate would not be judicially noticed in the exercise of the Trial Chamber's discretion.[3951]

[3943] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts* (24 March 2005) at para. 16

[3944] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts* (24 March 2005) at para. 22

[3945] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005* (14 April 2005); *Prosecutor v Milosevic*, No. IT-98-29/1-T, *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) at para. 13; *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Prosecution Motion for Admission of Documentary Evidence Pursuant to Rule 94(B)* (9 July 2007) at page 4

[3946] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Prosecution Motion to Take Judicial Notice of Facts Under Rule 94(B) of the Rules of Procedure and Evidence* (10 December 2007) at para.1 2

[3947] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 11

[3948] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Prosecution Motions for Judicial Notice of Documents Pursuant to Rule 94(B)*

[3949] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on Milan Lukic's Request for Reconsideration or of Certification to Appeal the Decision on Prosecution's Motion for Notice of Adjudicated Facts* (31 October 2008) at para. 14

[3950] *Prosecutor v Prlic et al*, No. IT-04-74-PT, *Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (14 March 2006) at para. 16

Facts would not be judicially noticed when it could not be determined with certainty from the judgement whether the fact referred to the acts and conduct of the accused or is derived from facts which implicates the acts or conduct of the accused, or groups of which he may have been a part.[3952]

In exercising its discretion whether to take judicial notice, the Trial Chamber should consider whether the adjudicated fact goes to the core of the case—thereby placing a burden on the accused which might jeopardize his right to a fair trial.[3953]

Facts which go to a highly contested issue, to the acts and conduct of a person for whom the accused is alleged to be responsible, pertain to an objective of the joint criminal enterprise, or relate to specific allegations against the accused go to the core of the case. Judicial notice of such facts was declined in the exercise of the Chamber's discretion.[3954]

timing

Motion for judicial notice of adjudicated facts filed after some of the accused had rested their case denied on grounds that admission at that stage would be unfair and would not promote judicial economy.[3955]

Rule 94 *bis*—testimony of expert witnesses

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.
(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:
(i) it accepts the expert witness statement and/or report; or
(ii) it wishes to cross-examine the expert witness; and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.

[3951] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at para. 17
[3952] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 September 2006) at para. 18 and fn. 62
[3953] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (17 December 2009) at para. 31
[3954] *Prosecutor v Tolimir*, No. IT-05-88/2-PT, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)* (17 December 2009) at paras. 33-34
[3955] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (26 November 2009) at para. 26

accepted as expert

Former employee of Ministry of Internal Affairs had sufficient qualifications to testify as defence expert on Ministry's operation and functions.[3956]

Prosecution military expert allowed to testify as his experience renders his opinion useful to the Trial Chamber to understand and determine issues in dispute.[3957]

Prosecution military expert qualified to give expert testimony.[3958]

Prosecution expert Patrick Treanor's methodology not sufficiently deficient to exclude his report. Separate opinion of Judge Maloto found that selection of documents to be included in report was subjective and called reliability of report into question.[3959]

An expert opinion on whether a target was a legitimate military objective may assist the Trial Chamber in making decisions on the criminal liability of the accused.[3960]

Prosecution military expert qualified to give opinion evidence on functions and operations of Bosnian Serb Army, even if his expertise was developed while working for the prosecution.[3961]

Former employee of Macedonian Ministry of Interior and criminal law professor was qualified to testify to the regulations and laws governing criminal investigations in Macedonia. The fact that she did not work at the Ministry at the time of the events in question does not disqualify her as an expert.[3962]

Witness was qualified as expert in social, cultural, political, and historical background of the former Yugoslavia and would be allowed to testify about the Greater Serbia ideology in the 19th and 20th Centuries.[3963]

[3956] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Notice re Defence Expert Witnesses Radomir Milasinovic, Aleksandar Pavic, and Zoran Stankovic* (24 March 2010) at para. 12
[3957] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler* (19 September 2007) at para. 25
[3958] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Expert Status of Reynaud Theunens* (12 February 2008) ; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) ; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Motion to Disqualify Richard Phillips as an Expert and bar the Prosecution from Presenting his Report* (1 November 2012)
[3959] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Admissibility of Expert Report of Patrick Treanor* (27 November 2008)
[3960] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Part of the Gotovina Defence's Rule 73 Motion in Limine* (21 May 2008)
[3961] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.2, *Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness* (30 January 2008) at para. 29
[3962] *Prosecutor v Boskoski & Tarculovski*, No, IT-04-82-T, *Decision on Prosecution's 94 bis Notice re Expert Witness Slagjana Taseva* (8 February 2008)
[3963] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Qualifications of Expert Yves Tomic* (15 January 2008)

Defence expert Kosta Cavoski was qualified to testify as expert on legal and political history of former Yugoslavia, but portions of his report beyond his expertise would be stricken.[3964]

acts and conduct of the accused

An expert witness may comment on the acts and conduct of the accused.[3965]

credibility

The expert is expected to testify with utmost objectivity and neutrality.[3966]

The alleged bias of the expert witness and his relationship to the accused do not affect the qualifications of the witness but are matters going to the weight to be given to his testimony.[3967]

Concerns relating to the expert witness' independence and impartiality are a matter of weight, not admissibility.[3968]

The alleged connection of the expert, who assisted the prosecution in interviews, and the prosecution team did not disqualify him from giving expert testimony but were matters which could be explored on cross-examination and would be considered when weighing the evidence of the expert.[3969]

[3964] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Exclude the Expert Report of Kosta Cavoski* (5 April 2013) at paras. 14-15

[3965] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Objection to Expert Testimony* (17 November 2011) at T21523-24

[3966] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Request to Disqualify Richard Butler as an Expert and bar the Prosecution from Introducing his Reports* (19 October 2012) at para. 9

[3967] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.2, *Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness* (30 January 2008) at para. 23; *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Admissibility of Expert Report of Vasilije Krestic* (7 December 2005) at para. 5; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 8 *Prosecutor v Popovic*, No. IT-05-88-T, *Second Decision Regarding the Evidence of General Rupert Smith* (11 October 2007) at pg. 4; *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Expert Status of Reynaud Theunens* (12 February 2008) at para. 30

[3968] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 69

[3969] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and his Report* (17 May 2007) at para. 12; *Prosecutor v Popovic et al*, No. IT-05-88-AR73.2, *Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness* (30 January 2008) at para. 26; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Report of Morton Torkildsen* (30 October 2008) at para. 9; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 19

The mere fact that a witness was employed by the Office of the Prosecutor or paid by a related agency does not disqualify him or her to be called and testify as an expert witness.[3970]

Evidence of Prosecution expert witness who described the accused as a 'monster' and expressed his desire that he 'be apprehended by justice' was deemed unreliable.[3971]

definition

An expert witness is a person whom, by virtue of some specialized knowledge, skill, or training can assist the trier of fact to understand or determine an issue in dispute.[3972]

The purpose of expert testimony is to supply specialised knowledge that might assist the trier of fact in understanding the evidence before it, and that in the ordinary case an expert witness offers a view based on specialised knowledge regarding a technical, scientific, or otherwise discrete set of ideas or concepts that is expected to fall outside the layperson's ken.[3973]

While a non-expert witness may be called to testify about the crimes with which the accused is directly charged, an expert witness is intended to enlighten the judges on specific issues of a technical nature.[3974]

exhibits

[3970] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 37; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 9; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler* (19 September 2007) at para. 27; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 10; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para.69; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 208

[3971] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5286

[3972] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 22; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 7; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 6; *Prosecutor v Popovic*, No. IT-05-88-T, *Second Decision Regarding the Evidence of General Rupert Smith* (11 October 2007) at pg. 3; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 8; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Report of Morton Torkildsen* (30 October 2008) at para. 8; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 9

[3973] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 375; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 196

[3974] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler* (19 September 2007) at para. 23

Selection of excerpts of documents which the prosecution intends to offer into evidence would not be admitted as part of expert's report.[3975]

Reports of expert witnesses are not admitted automatically once a decision is made to allow the expert to testify but may be considered for admission after the examination of the witness.[3976]

Exhibits to expert report would not be admitted unless referred to in court "rather than buried in masses of documents which the Chamber is left to sort out and make sense of."[3977]

Rule 94 *bis* does not allow for admission of documents related to the expert report, only the report itself.[3978]

fact witness

Lawyer who served on missing persons commission and presented the results of his investigation and that of the commission was a fact witness, and not an expert.[3979]

Mixture of facts and conclusions did not justify exclusion of the expert's evidence, as they could be remedied by calling the witness for cross examination.[3980]

first-hand knowledge

First-hand knowledge is not required for an expert; indeed, the expert will often not have first-hand knowledge of the facts.[3981]

Witness' lack of working experience with the VRS did not disqualifying from giving him expert testimony on the operations of the VRS since first-hand knowledge or experience is not required for qualifying as an expert.[3982]

[3975] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Reports of Robert Donia* (30 October 2008) at para. 15; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Reports of Mr. Patrick J. Treanor* (27 October 2008) at para. 27

[3976] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on Defence Rule 94 bis Notice Regarding Prosecution Expert Witness Richard Butler* (19 September 2007) at para. 31; *Prosecutor v Popovic*, No. IT-05-88-T, *Second Decision Regarding the Evidence of General Rupert Smith* (11 October 2007) at pg. 4-5

[3977] *Prosecutor v Gotovina et al*, No. IT-05-90-T, *Decision and Guidance with Regard to the Expert Report, Addendum, and Testimony of Reynaud Theunens* (17 November 2008) at para. 32

[3978] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 47

[3979] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-T, *Decision on the Motion to Bar the Testimony and Statement of Amir Masovic* (12 November 2008) at para. 31

[3980] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 26

[3981] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.2, *Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness* (30 January 2008) at para. 27; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 1609

[3982] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 70

legal issues

Trial chambers have the discretion to bar the testimony of an expert witness called to give evidence on legal matters.[3983]

There was no justification for the introduction of expert testimony as to issues of international criminal law; the Trial Chamber was perfectly competent to pronounce on such issues without the assistance of a legal expert. Expert testimony as to domestic constitutional issues such as the legal obligations of the Crisis Staff would have been within the Trial Chamber's discretion to admit such testimony.[3984]

Professor William Schabas, proposed to testify on whether events in Srebrenica constituted genocide, rejected as expert witness as his testimony goes to a matter within the competence of the Trial Chamber.[3985]

Portions of the expert report dealing with legal conclusions, or the roles of the accused were scarce and their consideration could be confined by the Chamber to its proper limits. Exclusion of the testimony was not required.[3986]

notice

Given the absence of disclosure of the expert reports pursuant to Rule 94bis(A) of the Rules through a filing, the accused was deprived of a formal disclosure notification which would have given him the opportunity to object to the expert status of the reports. In these circumstances, the Trial Chamber erred by considering that the prosecution's notice of its intention to call the witness as an expert and to tender his reports as expert reports in its Rule 65ter list sufficed.[3987]

The fact that the accused referred to the witness as an expert during his cross-examination and that the Trial Chamber referred to him as an expert without objection carries little weight in the absence of a reasoned decision by the Trial Chamber during the trial on the status of the witness. The Trial Chamber therefore erred in considering that the accused implicitly accepted, and failed to object to, the witness' expert status during the trial.[3988]

However, although the Trial Chamber erred by classifying the witness' reports as expert reports, this error caused no prejudice to the accused or had any impact upon his

[3983] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 79
[3984] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 164
[3985] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas* (1 July 2008)
[3986] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and his Report* (17 May 2007) at para. 14
[3987] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 66
[3988] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 67

convictions.[3989]

outside of expertise

Expert testimony on which side was responsible for the destruction of cultural heritage sites went beyond the expertise of the witness and would not be considered.[3990]

Factual findings in expert report which were necessary for establishment of factual foundation of crimes charged would be given minimal weight. This type of evidence should be established through eye-witness testimony.[3991]

Portions of expert testimony excluded when beyond the direct knowledge and expertise of the witness.[3992]

An analysis of whether it was plausible from a military viewpoint that an officer acted in the way described by a prosecution witness could have been dismissed as straying beyond the purview of an expert witness and into the trial chamber's firmly established role of making factual findings, including assessments of the credibility of witnesses.[3993]

Accused's reliance on an expert witness to establish facts related to his habit of wearing glasses, when the role of an expert is to provide specialised knowledge – be it a skill or knowledge acquired through training – that may assist the fact finder to understand the evidence presented, was plainly unhelpful to his case.[3994]

Trial Chamber properly found that Butler's testimony concerning Nikolic's acts and whereabouts, were factual matters for the Trial Chamber's determination and not issues falling within his expertise or upon which the Trial Chamber has need of expert opinion.[3995]

peer review

Lack of peer review did not affect admissibility of the expert's report. Cross examination is an adequate substitute for peer review.[3996]

[3989] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 68
[3990] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on the Admission of Evidence Presented During the Testimony of Andras Reidlmayer* (14 April 2010) at para. 15
[3991] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 36
[3992] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Objections Pursuant to Rule 94 bis to Expert Evidence of Radovan Radinovic* (5 October 2007)
[3993] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 375
[3994] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 386
[3995] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 953
[3996] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Request to Disqualify Richard Butler as an Expert and bar the Prosecution from Introducing his Reports* (19 October 2012) at para. 14

rejected as expert

Defence expert witness on number of people killed in Srebrenica events rejected and his report excluded where he had no qualifications in demographic matters, used flawed methodology, and lacked objectivity.[3997]

Political analyst with Batchelor's Degree not sufficiently qualified to testify as expert on political and historical expert on Kosovo.[3998]

British general not qualified to give expert opinion on function and operation of Bosnian Serb Army main staff but may relate any factual observations he made during his contact with them.[3999]

For an expert witness to apply his expertise to the situation in Bosnia and Herzegovina, that person must have specialized knowledge of the military aspects of the conflict in Bosnia and Herzegovina in general and the situation in Central Bosnia in particular. Defence military expert lacked this knowledge and therefore precluded from testifying to these matters.[4000]

Serb general not qualified to give expert opinion on operation of Kosovo Liberation Army and their cooperation with NATO.[4001]

The acts and whereabouts of the accused are factual matters for the Trial Chamber's determination and not issues falling within expertise or upon which the Trial Chamber has need of expert opinion.[4002]

Testimony of handwriting expert excluded where probative value of evidence in connection with case of accused was low.[4003]

Refusal to allow defence handwriting expert, expert on structure of Bosnian police, constitutional law expert, demographics expert, and psychiatrist was within Trial Chamber's discretion.[4004]

[3997] *Prosecutor v Tolimir*, No. IT-05-88/2-T, *Decision on Admission of Expert Report of Ratko Skrbic* (22 March 2012) at paras. 37-39
[3998] *Prosecutor v Djordjevic*, No. IT-05-87/1-T, *Decision on Prosecution's Notice re Defence Expert Witnesses Radomir Milasinovic, Aleksandar Pavic, and Zoran Stankovic* (24 March 2010) at para. 21
[3999] *Prosecutor v Popovic*, No. IT-05-88-T, *Second Decision Regarding the Evidence of General Rupert Smith* (11 October 2007) at pg. 4
[4000] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Paul Cornish's Status as an Expert* (20 March 2008) at para. 12
[4001] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Prosecution Objection Pursuant to Rule 94 bis to Expert Evidence of Radovan Radinovic* (5 October 2007) at para. 4
[4002] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 1355
[4003] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for Admission of Evidence of Eight Experts Pursuant to Rules 92 bis and 92 bis* (9 November 2009) at para. 21
[4004] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at paras. 158, 161, 164, 168, 182

relevance

The standard of relevance for expert reports is the same as for other evidence pursuant to Rule 89(C).[4005]

Defence expert report and testimony about the history of Serbo-Croatian conflicts deemed inadmissible as its content was not relevant to the issues of the trial.[4006]

reports

An expert witness may testify *viva voce* without his or her expert report being tendered into evidence.[4007]

Expert reports should be sufficiently clear, insofar as they describe and draw conclusions, to render the tendering of underlying documentation unnecessary.[4008]

requirements

The requirements for expert testimony are (1) the witness must be an "expert"; (2) the expert report must meet minimum standards of reliability; (3) the report must be relevant to the case and of probative value; (4) the content of the report must fall within the expertise of the expert and not infringe upon the province of the Trial Chamber.[4009]

The factors considered in evaluating expert testimony are the competence of the expert, the methodologies used, and the credibility of the findings made.[4010]

The qualifications of an expert can be determined from the curriculum vitae, scholarly articles, other publications, and any other information.[4011]

[4005] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 10; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 11

[4006] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Admissibility of Expert Report of Vasilije Krestic* (7 December 2005) at para. 6

[4007] *Prosecutor v Mladic*, No. IT-09-92-T, *Second Decision on the Prosecution Submissions on the Expert Statement of Prosecution Witness Teufika Ibrahimefendic Pursuant to Rule 92 bis* (12 February 2013) at para. 10

[4008] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5282

[4009] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at paras. 6-10; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 7*; Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Admissibility of the Narratives of Expert Witness Richard Butler* (27 March 2008) at para. 9; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 8; *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Defence Request to Disqualify Richard Butler as an Expert and bar the Prosecution from Introducing his Reports* (19 October 2012) at para. 7

[4010] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 27

[4011] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 7; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert*

responsibility of the accused

The expert witness should not offer his opinion on the criminal liability of the accused. This is a matter which falls within the competence of the Trial Chamber.[4012]

Narratives of expert witness did not draw conclusions on the ultimate issue of criminal liability of the accused and would not be excluded.[4013]

The defence failed to demonstrate that the expert witness directly expressed his opinion on any of the ultimate issues in the case and exclusion of his testimony was not required on that basis.[4014]

Rule 92 *ter*

Expert reports may be admissible pursuant to Rule 92 *ter*.[4015]

timing

The time limits of Rule 94 *bis* are triggered by disclosure of the expert reports, not any kind of formal notice.[4016]

Motions seeking the exclusion of expert testimony are considered under Rule 89(C) and need not be filed within the time for filing of notices under Rule 94 *bis*.[4017]

Witnesses (21 August 2007) at para. 6; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 8; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Report of Morton Torkildsen* (30 October 2008) at para. 8; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 9

[4012] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 11; *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 29, fn. 35; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 10; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 12; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Report of Morton Torkildsen* (30 October 2008) at para. 10; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Expert Reports by Richard Butler* (4 March 2009) at para. 10

[4013] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision on the Admissibility of the Narratives of Expert Witness Richard Butler* (27 March 2008) at para. 19

[4014] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Burgess and his Report* (17 May 2007) at para. 10

[4015] *Prosecutor v* Karadzic, No. IT-95-5/18-T, *Oral Decision on Objection to Admission of form of Expert Testimony* (15 June 2010) at T3742-43

[4016] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision Regarding Prosecution's Rule 94 bis Notice* (6 March 2007) at para. 13

[4017] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-T, *Decision on Motion to Exclude the Prosecution's Proposed Evidence of Expert Bezruchenko and his Report* (17 May 2007) at para. 7

translation

Rule 94 *bis* requires that the reports of the expert be provided in the language of the accused, that the witness' CV be provided, and that the witness' area of expertise be stated.[4018]

transparency of sources

An expert is expected to give his or her expert opinion in full transparency of the established or assumed facts that he or she relies upon and of the methods used when applying his or her knowledge, experience, or skills to form his or her expert opinion.[4019]

The sources for the report must be clearly indicated and accessible to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions. In the absence of clear reference to accessible sources, the Trial Chamber will treat the matter as the witness' personal opinion rather than an expert opinion.[4020]

The failure of the expert to list his sources can be remedied when the witness testified.[4021]

Defence expert who copied large portions of material in his report without acknowledgement would be disqualified from appearing as an expert.[4022]

The Trial Chamber found that the defence expert's reliance on anonymous sources as either primary information or as corroboration rendered his report unreliable.[4023]

There is no rule which precludes the filing of an expert report comprised of excerpts from previous reports.[4024]

[4018] *Prosecutor v Perisic*, No. IT-04-81-PT, *Order on Defence Submissions Regarding Various Experts' Reports Disclosed by the Prosecution Pursuant to Rule 94 bis* (2 February 2007)
[4019] *Prosecutor v Martic*, No. IT-95-11-T, *Decision on Prosecution's Motions for Admission of Transcripts Pursuant to Rule 92 bis and of Expert Reports Pursuant to Rule 94 bis* (13 January 2006) at para. 37; *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Disclosure of Expert Materials* (27 August 2009) at para. 10
[4020] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Admission of Expert Report of Robert Donia* (15 February 2007) at para. 8; *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 7; *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-PT, *Decision on Prosecution's Submission of the Expert Report of Nina Tromp and Christian Nielsen Pursuant to Rule 94 bis* (18 March 2008) at para. 9
[4021] *Prosecutor v Delic*, No. IT-04-83-T, *Decision on Paul Cornish's Status as an Expert* (20 March 2008) at para. 14; *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion to Exclude the Expert Report of Morton Torkildsen* (30 October 2008) at para. 16; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Motion to Exclude the Expert Report of Kosta Cavoski* (5 April 2013) at para. 22
[4022] *Prosecutor v Milosevic*, No. IT-98/29-1-T, *Decision on Defence Expert Witnesses* (21 August 2007) at para. 23
[4023] *Prosecutor v Perisic*, No. IT-04-81-T, *Judgement* (6 September 2011) at para. 1272

Trial Chamber experts

The requirements of Rule 94 *bis* apply to experts requested by the Trial Chamber.[4025]

Request to prohibit parties from calling experts and providing that any experts should be called by the Trial Chamber at the end of the case rejected where not made until four months after the trial commenced. However, the Trial Chamber would determine on a witness-by-witness basis whether expert testimony was necessary.[4026]

waiver

Failure to file a timely notice does not waive the right of the party to cross examine the expert witness.[4027]

Rule 95—exclusion of certain evidence

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

An accused has standing under Rule 95 to contest the admission of evidence seized by the prosecution without the cooperation of local officials, allegedly in violation of State sovereignty.[4028] However, the accused failed to show how a search warrant executed without the participation of local officials was antithetical to or would seriously damage the proceedings or that substantial doubt was cast on the reliability of the evidence.[4029]

It is not necessary for the Trial Chamber to allow voir dire by the prosecution before deciding whether to admit defence evidence that the prosecution claims is unreliable and should be excluded.[4030]

Defence witness who denied taking statements under duress or torture provided sufficient reasons for not excluding the statements under Rule 95.[4031]

[4024] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Defence Request to Strike Expert Witness and Associated Expert Report* (27 September 2012) at para. 9
[4025] *Contempt proceedings against Dragan Jokic,* No. IT-05-88-R77.1-A, *Judgement on Allegations of Contempt* (25 June 2009) at para. 22
[4026] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Ojdanic Motion to Preclude Parties from Calling Expert Witnesses* (16 November 2006)
[4027] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision Regarding Prosecution's Rule 94 bis Notice* (6 March 2007) at para. 20
[4028] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 238
[4029] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 238
[4030] *Prosecutor v Milosevic*, No. IT-02-54-T, *Decision on Prosecution Motion for Voir Dire Proceeding* (9 June 2005)

Statement of witness would not be excluded because his lawyer failed to file notice of appearance before the interview—such a defect did not rise to the level required for Rule 95.[4032]

Even if recording of conversation with the accused violated domestic law, it would not require exclusion of the recording under Rule 95.[4033]

Statement of accused taken by military authorities under compulsion and without counsel would not likely be admitted during the prosecution case, but the circumstances were sufficiently reliable to allow the statements to be used for impeachment of testimony of accused. Use of the statements for impeachment of other defence witnesses, however, would not be sufficiently probative to be allowed.[4034]

Testimony of accused as defence witness during previous ICTY trial could not be admitted against him at his own trial where he was not advised that his statements could be used against him in a subsequent proceeding.[4035]

Rule 96—evidence in cases of sexual assault

In cases of sexual assault:
(i) no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defence if the victim
(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

The purpose of rule 96(i), which provides that no corroboration of a victim's testimony shall be required in cases of sexual assault, is not to create a 'presumption of reliability' with respect to the testimony of such victims. Rather, the purpose is simply to

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[4031] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Admission of Documents in Connection with Testimony of Defence Witness Dragan Jasovic* (26 August 2005) at para. 16
[4032] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Defence Objections to the Admissibility of Witness 81's Suspect Interview Under Rule 95* (8 July 2008)
[4033] *Prosecutor v Haraqija & Morina*, No. IT-04-84-R77.4A, *Judgement* (23 July 2009) at para. 28; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-T, *Decision Denying the Stanisic Motion for Exclusion of Recorded Transcripts* (6 December 2009) at para. 21; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion to Exclude Intercepted Conversations* (30 September 2010); *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Reconsideration of Chamber's Decision on Motion to Exclude Intercepted Conversations* (18 April 2012)
[4034] *Prosecutor v Mrksic et al*, No. IT-95-13/1-T, *Decision Concerning the Use of Statements Given by the Accused* (9 October 2006)
[4035] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on the Admission into Evidence of Slobodan Praljak's Evidence in the Case of Natelic and Martinovic* (5 September 2007)

affirm that contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not, generally, less reliable than the testimony of any other witness.[4036]

Rule 97—lawyer-client privilege

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:
(i) the client consents to such disclosure; or
(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Temporary restraining order issued to prevent government of Croatia from examining the contents of computer seized from defence team which allegedly contained privileged information pending further consideration of the issue.[4037]

Rule 97 protects the contents of privileged communications between lawyer and client from being available to any outside party without the client's consent or voluntary disclosure to a third party.[4038]

A government's seizure of materials from the defence team has the potential for violating Rule 97, depending on the procedure applied to the seized materials.[4039]

After the defence has identified seized materials which it claims are covered by Rule 97 or Rule 70, the President shall select an independent body to determine whether the materials are in fact covered by those rules.[4040]

Rule 98—production of additional evidence

A Trial Chamber may order either party to produce additional evidence. It may proprio motu summon witnesses and order their attendance.

The Trial Chamber has complete discretion as to whether it will name a particular person as a court witness and that the parties have no right to insist upon a particular person be named as a court witness.[4041]

[4036] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 505.
[4037] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber's Order of 11 December 2009* (18 December 2009) at para. 17
[4038] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 37
[4039] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 37
[4040] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia* (12 March 2010) at para. 44
[4041] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 170

The Trial Chamber's right to call additional witnesses after the parties have rested also includes the power to admit exhibits.[4042]

However, the parties must be given adequate time and facilities to develop its strategies with respect to the admitted exhibits. Pre-trial disclosure of the exhibits is not necessarily sufficient.[4043]

Rule 98 has been primarily used to obtain evidence for trial, not for a party's use in trial preparation. Trial Chamber declined to order prosecution under Rule 98 to obtain testimony of its witnesses in national courts but encouraged the prosecution to notify the defence when it had learned of prior testimony of one of its witnesses in national courts so that the defence could obtain the testimony.[4044]

A party has no standing to move the Trial Chamber to summon persons as chamber witnesses. It is squarely within the discretion of the Chamber to decide what steps it considers appropriate to obtain the attendance of chamber witnesses. Although Chamber issued order compelling cooperation of Serbia to produce one witness, it was not obligated to issue a similar order to the United States or Russia to produce other witnesses it had indicated it wished to hear.[4045]

There is no *per se* right of a party to interview a chamber witness before he testifies, and the Chamber exercised its direction by refusing to allow such an interview.[4046]

Trial Chamber *proprio motu* ordered the Registrar to appoint expert to determine authenticity of tapes offered by defence.[4047]

Trial Chamber declined to call Lord Owen as a Chamber witness, as requested by the prosecution, noting that the impartiality of international negotiators was not affected by which side of a criminal case called them as a witness.[4048]

Trial Chamber has the power to admit an exhibit *proprio motu*. However, given lack of opportunity for the accused to challenge the document, the Trial Chamber reconsidered its decision and decided not to admit the document.[4049]

[4042] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 115
[4043] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 117
[4044] *Prosecutor v. Karadzic*, No. IT-95-5/18-T, *Decision on the Accused's Motion for Order to Obtain Witness Statements and Testimony from National Courts* (12 January 2011) at paras. 10-12
[4045] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Sainovic Defence Motion for Trial Chamber to Summon Christopher Hill and Boris Mayorski* (3 July 2008)
[4046] *Prosecutor v Milutinovic et al*, No. IT-05-87-T, *Decision on Defence Request to Interview Aleksandar Dimitrijevic Prior to his Testimony* (1 July 2008) at para. 4
[4047] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Order for the Production of Additional Evidence and for the Appointment of an Expert Witness for the Chamber* (9 September 2008)
[4048] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Motion Requesting Lord David Owen to Testify as a Court Witness* (13 July 2009)
[4049] *Prosecutor v Perisic*, No. IT-04-81-T, *Decision on Defence Motion for Reconsideration of Document Admitted Proprio Motu* (28 February 2011)

Rule 98 *bis*—judgement of acquittal

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

appeal

An appeal of a denial of a motion for judgement of acquittal requires certification by the Trial Chamber.[4050]

Prosecution may appeal granting of judgement of acquittal without seeking certification since it constitutes a final judgement on that count.[4051]

Standard of review on appeal of decision on motion for judgement of acquittal is whether the Trial Chamber committed an error of law invalidating its decision.[4052]

A Trial Chamber's error in deciding a Rule 98 *bis* application is cognizable in a final appeal from the judgement as an accused's right to a fair trial is infringed if he is erroneously required to answer the prosecution's case.[4053]

Appeals Chamber would not exercise its discretion not to reverse judgement of acquittal where trial on the remaining counts was ongoing and the accused had not pled guilty to other offenses.[4054]

credibility

A Trial Chamber is required to assume that the prosecution's evidence is entitled to credence unless incapable of belief and to take the evidence at its highest. It cannot pick and choose among parts of that evidence in reaching its conclusion.[4055]

Prosecution evidence shall be presumed credible and reliable at the Rule 98 bis stage unless a witness is so lacking in credibility or reliability that no reasonable Trial Chamber could find him or her credible or reliable.[4056]

[4050] *Prosecutor v Krajisnik*, No. IT-00-39-AR98*bis*.1, *Decision on Appeal of Rule 98 bis Decision* (4 October 2005)
[4051] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution Request for Certification to Appeal Judgement of Acquittal Pursuant to Rule 98 bis* (13 July 2012) at para. 10
[4052] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.9, *Decision on Appeal of Denial of Motion for Judgement of Acquittal for Hostage Taking* (11 December 2012) at para. 6
[4053] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 51
[4054] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 114
[4055] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 21
[4056] *Prosecutor v Mladic*, No. IT-09-92-AR73.4, *Decision on Defence Interlocutory Appeal from the Trial Chamber Rule 98 bis Decision* (24 July 2014) at para. 20

oral hearing

Rule 98 *bis* must be read on the basis that it includes a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial . For example, the Trial Chamber may benefit in substantial ways from the analysis of the evidence by the prosecution and from its arguments on the applicable law. [4057]

Defence not required to give prosecution advance notice of issues to be raised during oral motion for judgement of acquittal.[4058]

paragraphs

Motion for No Case to Answer on one shelling incident was premature when filed after the Sarajevo component of the case was completed, but before the prosecution had rested its case, since the prosecution would not be precluded from offering additional evidence of any of the case's components before it rested its case.[4059]

Trial Chamber would not exercise its power under Rule 54 *bis* to order the prosecution to withdraw paragraphs or scheduled incidents for which it had not led evidence, as such an order would frustrate the purpose of amending Rule 98 *bis* so that only counts can be challenged at the end of the prosecution's case. However, the Trial Chamber noted the prosecution's willingness to review its evidence and bring any unproven allegations to the Chamber's attention.[4060]

standard

The legal test applied to determine whether there is a case to answer following the close of the Prosecution case at trial is whether there is evidence upon which, if accepted, a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[4061]

Presenting an alternative interpretation of the evidence, rather than showing that no reasonable trier of fact could have found, taking the evidence at its highest, that the crimes of genocide had been committed and that the accused had genocidal intent, was

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[4057] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 27.
[4058] *Prosecutor v Hadzic*, No. IT-04-75-T, *Decision on Prosecution Motion for Advance Notice of Issues to be Raised at Rule 98 bis Hearing* (4 December 2013)
[4059] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for No Case to Answer: Shelling Incident G9* (13 May 2011) at para. 3
[4060] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Accused's Motion for Order to Withdraw Unproven Allegations* (23 May 2012) at paras. 3-4
[4061]. *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Judgement* (11 July 2013) at para. 21

insufficient to overturn the Trial Chamber's decision denying a motion for judgement of acquittal.[4062]

"The evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt.[4063]

It would be an error of law not to consider evidence favourable to the accused elicited during the prosecution's case when deciding a motion for judgement of acquittal.[4064]

Rule 98 *ter*—judgement

(A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present, subject to the provisions of Rule 102 (B).
(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.
(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.
(D) A copy of the judgement and of the Judges' opinions in a language which the accused understands shall as soon as possible be served on the accused if in custody. Copies thereof in that language and in the language in which they were delivered shall also as soon as possible be provided to counsel for the accused.

Rule 99—status of the acquitted person

(A) Subject to paragraph (B), in the case of an acquittal or the upholding of a challenge to jurisdiction, the accused shall be released immediately.
(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal.

Rule 100—sentencing procedure on a guilty plea

[4062] *Prosecutor v Mladic*, No. IT-09-92-AR73.4, *Decision on Defence Interlocutory Appeal from the Trial Chamber Rule 98 bis Decision* (24 July 2014) at paras. 12.13.18
[4063] *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 37.
[4064] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 55

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.
(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).

Rule 101—penalties
(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
(B) In determining the sentence, the Trial Chamber shall consider the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
(i) any aggravating circumstances;
(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

aggravating circumstances

in general

Aggravating circumstances identified in the jurisprudence have included the abuse of the convicted person's superior position of leadership, the duration of the criminal conduct, the active and direct criminal participation under Article 7(1) of the Statute if linked to a high-ranking position of command, the active participation of a superior in the criminal acts of subordinates in the context of Article 7(3) of the Statute, premeditation and motive, the enthusiasm with which a crime was committed, a discriminatory state of mind where discrimination is not an element of the offence, the vulnerability of the victims—women, young, elderly, confined or wounded persons, the number of the victims, their status, and the effect of the crimes upon them, the systemic nature of the crime, the intimidation of witnesses, and the circumstances of the crimes generally[4065]

alcohol and drug use

In contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor.[4066]

[4065] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2139
[4066] *Prosecutor v Kvocka et al*, No. IT-98-30/1-T, *Judgement* (2 November 2001) at para. 706

burden of proof

Aggravating factors must be proved beyond a reasonable doubt. Mitigating factors must be proven by a preponderance of the evidence.[4067]

Aggravating factors must be proved beyond reasonable doubt. The Trial Chamber notes that if a particular circumstance has been included as an element of the offence under consideration, it will not also be regarded as an aggravating factor.[4068]

A Trial Chamber can only consider aggravating circumstances directly related to the crimes in question and the perpetrators thereof, which the prosecution has included in the indictment and proven beyond a reasonable doubt.[4069]

co-operation

Covering up the crimes and absconding from justice are not aggravating factors but may be considered when determining if the accused's character may be considered a mitigating factor.[4070]

Obstructing justice may be considered as an aggravating circumstance .[4071]

The timing of an accused's guilty plea cannot be an aggravating factor at sentencing.[4072]

The exercise by an accused of his right to remain silent may not constitute an aggravating circumstance.[4073]

counsel

The conduct of counsel for the accused must not be considered in deciding the sentence to be imposed.[4074]

double counting

[4067] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 763; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 592
[4068] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 840; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1089; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 413; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 408
[4069] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2069
[4070] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 134-35
[4071] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2046
[4072] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 126
[4073] *Prosecutor v. Mrkšić et al.,* No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 693; *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2139
[4074] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 262

Factors which a Trial Chamber considers as aspects of the gravity of the crime cannot additionally be considered as separate aggravating circumstances and *vice versa*.[4075]

A factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance as this would amount to impermissible double-counting.[4076]

The factors forming the basis of criminal responsibility may also be considered in the assessment of the gravity of the offence.[4077]

Vulnerability of the victims and discriminatory intent were taken into consideration when determining the gravity of the offence and could not serve as an aggravating factor.[4078]

The gravity of the offence includes the scale and brutality of the offences, their impact among the victims and their families, and the extent of long-term physical, psychological, and emotional suffering of the survivors and therefore these cannot also be considered as aggravating factors.[4079]

The Trial Chamber erred in taking the role of the accused into account in both the gravity of the offense and as an aggravating factor.[4080]

The Trial Chamber erred in double counting the accused's status of a commander as an element of Article 7(3) and as an aggravating factor.[4081]

The abuse of a position of authority cannot be taken into consideration both in connection with the gravity of the offence and as an aggravating factor.[4082]

Whereas the mode of liability of ordering requires that the person giving the order has a position of authority, the abuse of such authority may still be considered an aggravating factor in sentencing.[4083]

[4075] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 106; *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 58; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2019; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3251
[4076] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3251
[4077] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3251
[4078] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 500; *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 140
[4079] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 729
[4080] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 62
[4081] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 610, 626; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 320
[4082] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 108; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2026
[4083] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 302

Abuse of authority--understood as the commission of crimes in a particular position of authority - may be considered either as part of the gravity analysis or as an aggravating factor, provided that the same facts are not considered twice.[4084]

The abuse of superior position was counted twice – when considering the gravity of the crimes and aggravating circumstances.[4085]

A position of superiority and the abuse of such position are distinct issues. Only the latter qualifies as an aggravating factor in sentencing. Since the Trial Chamber considered the accused's abuse of his power, rather than his position of· authority, as an aggravating factor, it did not violate the double counting prohibition.[4086]

Relying on different aspects of the same fact is not permissible. In weighing a fact, either as an aspect of the gravity of the crime or as an aggravating circumstance, the Trial Chamber is required to consider and account all its aspects and implications on the sentence to ensure that no double counting occurs. Facts can only be taken into consideration once – either as factors relevant to the gravity of the crimes or as aggravating circumstances.[4087]

Where an accused pleads guilty to multiple counts, an element of one crime can be used as an aggravating factor for another crime.[4088]

indictment

There is no requirement that the prosecution plead aggravating factors in an indictment.[4089]

mens rea

Discriminatory intent can be used as an aggravating factor for the war crime of murder, but not persecution.[4090]

Voluntariness or willingness of the accused's participation in the crimes is not an aggravating circumstance.[4091]

[4084] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3271
[4085] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 307
[4086] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 643; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at paras. 1114, 1155
[4087] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 309
[4088] *Prosecutor v Zelenovic*, No. IT-96-23/2-S, *Sentencing Judgement* (4 April 2007) at para. 41
[4089] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 142
[4090] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 172, 173; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2032
[4091] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.849

The fact that the accused enjoyed committing the criminal acts can be considered as part of the depravity of the crimes—an aggravating factor.[4092] The gravity of the beatings can also be considered as an aggravating factor.[4093]

The Prosecution has failed to show that the accused's mere use of derogatory language should be considered as an aggravating factor.[4094]

The meticulous planning of the crime may be considered an aggravating factor.[4095]

A long phase of planning and preparation can be an aggravating factor. However, the use in aggravation, of findings concerning events that are temporally outside the scope of the Indictment, without providing a reasoned opinion as to why doing so would be appropriate in the circumstances of the case, is unfair.[4096]

nexus to offence

Only circumstances directly related to the commission of the offence may be regarded as aggravating.[4097]

offence circumstances

Additional torching of houses after the attack may be considered an aggravating factor.[4098]

Verbal abuse can be considered as an aggravating factor by Trial Chambers.[4099]

The long period of time over which the offences were committed was an aggravating factor.[4100]

offender circumstances

The educational background of the Accused is not an aggravating factor.[4101]

[4092] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 30
[4093] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 40; *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 34
[4094] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2032
[4095] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 113
[4096] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 423
[4097] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 731
[4098] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 120
[4099] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 161
[4100] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 499; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at paras. 2038,2040; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1119
[4101] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.846

Intelligence and good education may be considered as possible aggravating factors.[4102]

The Trial Chamber committed a discernible error in identifying the professional background of the accused as a doctor as an aggravating factor.[4103]

Abuse of superior authority may be an aggravating circumstance.[4104]

The abuse of superior authority as an aggravating circumstance is to be distinguished from a superior position per se which generally does not constitute an aggravating factor.[4105]

A high rank does not in and of itself merit a higher sentence. However, a person who abuses or wrongly exercises power deserves a harsher sentence.[4106]

A position of authority does not in and of itself attract a higher sentence.[4107]

Where the role of the accused was a limited one, his position of authority is not an aggravating circumstance.[4108]

victims

Where the scale of the crimes committed is reflected in the crimes for which each accused has been convicted, the number of victims will not be considered an aggravating factor.[4109]

The vulnerability of the victims, such as women, children, and elderly, as well as captured and wounded men is an aggravating factor as is the suffering of the survivors and their families.[4110] The disarming of villagers in advance, and promising them safety, making them particularly defenceless, could also be considered as an aggravating factor.[4111]

[4102] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1123
[4103] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 416; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 November 2006) at para. 274
[4104] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3264
[4105] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3270
[4106] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 80; *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 106; *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at paras. 939-40
[4107] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 320
[4108] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.848; *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 67
[4109] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 841
[4110] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 844-45; *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 119
[4111] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 125

The youth of the victims can be an aggravating factor.[4112]

Even if the mental suffering of the survivors constitutes an element of the crime of inhumane acts, the Trial Chamber was entitled to take the long-term effect of the trauma into account as an aggravating factor.[4113]

weight

Even when the conditions are met for considering aggravating circumstances, the Trial Chamber has the discretionary power to attach only limited weight to those circumstances.[4114]

concurrent sentences

A newly imposed sentence cannot run concurrently with a sentence that has already expired.[4115]

credit for time served

When an accused has been provisionally released, no credit will be given for the time spent on provisional release.[4116]

Home confinement and reporting conditions imposed on the accused while on provisional release fall short of being tantamount to detention in custody, and the accused are not entitled to credit for the time spent on provisional release towards their sentence.[4117]

cumulative convictions

***chapeau* element**

Convictions based upon the same conduct for charges brought under Articles 3 and 5 of the Statute are permissibly cumulative as each Article contains materially distinct elements in the *chapeau* requirements.[4118] The same is true for charges brought under Article 2 and Article 5.[4119]

[4112] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 31; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para.733
[4113] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 167
[4114] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2069
[4115] *Prosecutor v Seselj*, No. IT-03-67-R77.3-A, *Judgement* (28 November 2012) at para. 23
[4116] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3335
[4117] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3336
[4118] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 800; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 562; *Prosecutor v. Jelesic*, No. IT-95-10-A. *Judgement* (5 July 2001) at para. 82; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 165; *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Several Motions Challenging Jurisdiction* (19 March 2007) at para. 28
[4119] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 562

For the purposes of applying the test, the legal elements of the crime include the *chapeau* requirements of the particular crime.[4120]

It is permissible to convict for a murder under Article 3 of the Statute and persecution by way of murder under Article 5 of the Statute as each of them has a materially distinct element from the other.[4121]

Cumulative convictions for inhuman treatment under Article 2 and cruel treatment under Article 3 not allowed.[4122]

Cumulative convictions for wanton destruction of property under Articles 2 and 3 not allowed.[4123]

conspiracy

Cumulative convictions for genocide and conspiracy to commit genocide should be entered.[4124]

Conspiracy to commit genocide is not a mode of liability but an inchoate crime, constituted as soon as there is an agreement among the conspirators to act for the purpose of committing genocide. By contrast, JCE is a form of "committing" that requires the actual commission of the crime. A person can thus be convicted of both conspiracy to commit genocide and commission of genocide by virtue of participation in a joint criminal enterprise.[4125]

discretion

A Trial Chamber does not have discretion to decline to enter cumulative convictions for crimes with materially distinct elements.[4126]

A trial chamber is bound to enter convictions for all distinct crimes which have been proven to fully reflect the criminality of the convicted person.[4127]

In the interests of fairness, balanced with considerations of public interest and the administration of justice, and considering the nature of the offences and the circumstances of the case at hand, the Appeals Chamber finds it appropriate to refrain

[4120] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 356
[4121] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 145
[4122] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 4, para. 1260
[4123] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Judgement* (29 May 2013) at vol. 4, para. 1264
[4124] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 538; *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 621
[4125] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 590
[4126] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 324
[4127] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 399

from entering new convictions on appeal for persecution based on the same underlying conduct as other crimes against humanity.[4128]

modes of liability

Where both Article 7(1) and Article 7(3) responsibility are proven, a Trial Chamber should enter a conviction based on Article 7(1) only and consider the accused's superior position as an aggravating factor in sentencing.[4129]

Responsibility for ordering fully encompassed the accused's criminal conduct and thus did not warrant a conviction for planning the same crimes.[4130]

Concurrent convictions for individual and superior responsibility in relation to the same counts based on the same facts constitutes a legal error.[4131]

Trial Chamber erred in entering convictions for aiding and abetting and JCE where same conduct formed the basis for both forms of liability.[4132]

An accused may not be convicted for the same criminal incident under multiple forms of JCE.[4133]

materially distinct element

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. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.[4134]

The Appeals Chamber will permit multiple convictions only in cases where the same act or transaction clearly violates two distinct provisions of the Statute and where each statutory provision requires proof of an additional fact which the other does not.[4135]

[4128] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1096
[4129] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para. 34; *Prosecutor v. Blaskic*, No.:IT-95-14-A, *Judgement* (29 July 2004) at para. 91; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 343; *Prosecutor v Brdjanin*, No. 99-36-T, *Judgement* (1 September 2004) at para 285; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1806
[4130] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 274
[4131] *Prosecutor v Jokic*, No. IT-01-42/1-A, *Judgement on Sentencing Appeal* (30 August 2005) at para. 24
[4132] *Prosecutor v Djordjevic*, No. IT-05-87/1-A, *Judgement* (27 January 2014) at para. 833
[4133] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 55
[4134] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at paras 412 – 413; *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 218
[4135] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 173

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.[4136]

When the evidence supports convictions under multiple counts for the same underlying acts, the test does not permit the Trial Chamber discretion to enter one or more of the appropriate convictions, unless the two crimes do not possess materially distinct elements.[4137]

It is the legal elements of the offence, not the acts or omissions giving rise to the offence, which is considered when determining the issue of cumulative convictions.[4138]

The permissibility of cumulative convictions for the crimes of genocide and extermination is well established in the jurisprudence of the Appeals Chamber on the basis that each crime contains a materially distinct element not contained in the other.[4139]

Convictions for both genocide and murder as a violation of the laws or customs of war may be entered as both contain a materially distinct element not contained in the other.[4140]

The crimes of devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction of cultural property each have a distinct element and cumulative convictions are required.[4141]

The offence of unlawful attacks against civilians and the crime of terror have different elements, thus allowing cumulative convictions.[4142]

persecution

Convictions for murder under Article 5 and for persecutions based on the underlying act of murder when both convictions are based on the same acts, are in principle permissible.[4143] Similarly, convictions for other inhumane acts under Article 5 and for persecutions based on the same underlying acts are also in principle permissible.[4144]

[4136] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para 387
[4137] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 358
[4138] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1033
[4139] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 610
[4140] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 617
[4141] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 332
[4142] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 39
[4143] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 810; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1041; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 359; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1089
[4144] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 810; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1042; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 362

Convictions for murder and inhumane acts as impermissibly cumulative with the conviction for persecution where the persecution was accomplished through murder and inhumane acts.[4145]

Cumulative convictions are permissible for the crimes of deportation as a crime against humanity under Article 5(d) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute.[4146]

Cumulative convictions for forcible transfer as an act of persecution and as an "other inhumane act" are permitted.[4147]

prohibited

Conviction for wilful killing under Article 2 subsumes conviction for murder under Article 3.[4148]

Convictions for cruel treatment are consumed within the conviction for torture when based upon the same conduct.[4149]

Where it is attempted to charge rape as an outrage upon personal dignity, the rape is only evidence of the outrage; the substantial crime is not rape but the outrage occasioned by the rape. This leaves open the argument that an outrage upon personal dignity is substantially included in torture, with the consequence that convictions for both may not be possible.[4150]

Cumulative convictions for torture and other inhumane acts based upon the same conduct cannot be entered as other inhumane acts does not have an element materially distinct from torture.[4151]

Murder as a crime against humanity does not contain a materially distinct element from extermination as a crime against humanity. Thus, a conviction for murder should not be entered when the accused is convicted of extermination.[4152]

Devastation not justified by military necessity, unlawful attacks on civilian objects, and destruction or wilful damage of cultural property on a theoretical basis, contain "materially" distinct elements from each other. However, in the interests of

[4145] *Prosecutor v Krstic*, No. IT-98-33-A, *Judgement* (19 April 2004) at para. 231
[4146] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 360
[4147] *Prosecutor v Tolimir*, No. IT-05-88/2-A, *Judgement* (8 April 2015) at para. 606
[4148] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1038
[4149] *Prosecutor v Limaj et al*, No. IT-03-66-T, *Judgement* (30 November 2005) at para. 719; *Prosecutor v Haradinaj et al*, No. IT-01-74-T, *Judgement* (2 April 2008) at para. 480
[4150] *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 190
[4151] *Prosecutor v Martic*, No. IT-95-11-T, *Judgement* (12 June 2007) at para. 477
[4152] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1804

justice, a conviction will only be ordered in respect to wilful damage of cultural property.[4153]

victims

Convictions for murder and inhumane acts are not cumulative where they relate to distinct victims.[4154]

former Yugoslavia sentencing practices

Although both the Statute as well as the Rules provide that a Chamber shall consider the general practice regarding prison sentences in the courts of the former Yugoslavia, trial chambers are not bound by such national practice. The Tribunal is thus not prevented from imposing a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia.[4155]

Although it must consider sentencing practices in the former Yugoslavia, the Tribunal is not bound by such practice. Rather, the Tribunal should refer to this practice as an aid in determining an appropriate sentence.[4156] Article 142 of the SFRY Criminal Code permits a range of sentence from five years as a minimum to the maximum penalty of death for violations of international law in times of war or armed conflict.[4157]

Although a Trial Chamber should 'have recourse to' and should 'consider' the general practice regarding prison sentences in the courts of the former Yugoslavia, this does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice.[4158]

Trial chambers are required to take into consideration the general practice regarding prison sentences in the courts of the former Yugoslavia although they are not bound by it.[4159]

The punishment provided in the law of the former Yugoslavia for murder, rape, and grievous bodily harm do not reflect the seriousness of crimes against humanity and is thus not an adequate basis for determining the punishment to be imposed for this category of crimes.[4160]

[4153] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 452-54
[4154] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 167
[4155] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2087
[4156] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 827; *Prosecutor v Jokic*, No. IT-01-42/1-A, *Judgement on Sentencing Appeal* (30 August 2005) at para. 38; *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para 418
[4157] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 830
[4158] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 813.
[4159] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3354
[4160] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5207

A sentence imposed more than the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed does not necessarily violate the principles of legality and *nulla poena sine lege*.[4161]

Paragraph 21 of the Instructions on the Application of International Laws of War in the Armed Forces of SRFY, read together with Article 24(1) of the SFRY Criminal Code, appear to allow for a commander who failed to act to prevent or punish a crime to be sentenced as if he had committed the crime himself.[4162]

Trial Chambers are not obliged to consider every applicable provision of the laws of the former Yugoslavia.[4163]

Automatic application of the sentencing practices of the former Yugoslavia is not binding upon the Trial Chambers in determining sentences.[4164]

While some guidance may be found in sentencing practices other than those of the former Yugoslavia when determining the appropriate sentence, such practices should not be given undue weight.[4165]

The Trial Chamber did not err in seeking guidance by a review of the sentencing practices of other countries.[4166]

gravity of the offence

In sentencing, a Trial Chamber must start from the position that "the gravity of the offence is the primary consideration in imposing sentence[4167]

The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[4168]

The "gravity of the offence" takes into consideration the crimes for which each accused has been convicted, the underlying criminal conduct generally, the specific role played by the accused in the commission of the crime, and the impact of the crimes on the victims.[4169]

[4161] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 816 – 817.
[4162] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 475
[4163] *Prosecutor v Jokic*, No. IT-01-42/1-A, *Judgement on Sentencing Appeal* (30 August 2005) at para. 37
[4164] *Prosecutor v Kunarac et al,* No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 349
[4165] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3346
[4166] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 76
[4167] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 731; *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 442
[4168] *Prosecutor v. Kupreskic*, No. IT-95-16-T, *Judgement* (14 January 2000) at para 852; *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 731.
[4169] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 833

Galić's crimes were characterized by exceptional brutality and cruelty, his participation was systematic, prolonged, and premeditated and he abused his senior position of VRS Corps commander. The sentence imposed on Galić by the Trial Chamber falls outside the range of sentences available to it in the circumstances of this case. The sentence of only 20 years was so unreasonable and plainly unjust, in that it underestimated the gravity of Galić's criminal conduct, that it can infer that the Trial Chamber failed to exercise its discretion properly. Life sentence imposed.[4170]

The gravity of the subordinates' crimes is an essential consideration in sentencing a person found guilty of superior responsibility for those crimes.[4171]

In assessing the gravity of a crime in the context of a conviction under Article 7(3), the Trial Chamber must consider: (1) the gravity of the underlying crime committed by the convicted person's subordinate; and (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[4172]

The complete absence of any reference to his criminal responsibility as a superior is a sufficient indication that the Trial Chamber failed to consider this aspect of his conduct in determining the accused's sentence.[4173]

War crimes are not inherently less serious than crimes against humanity.[4174]

There is no hierarchy of the crimes within the jurisdiction of the Tribunal. A sentence of life imprisonment can be imposed in cases other than genocide.[4175]

There is no distinction in law between crimes against humanity and war crimes that would require, in respect of the same acts, that the former be sentenced more harshly than the latter.[4176]

Where the crimes for which an accused is held responsible are particularly grave, the imposition of a life sentence does not constitute a form of inhumane treatment but, in accordance with proper sentencing practice common to many countries, reflects a specific level of criminality.[4177]

It is up to the trier of fact to consider the level of contribution – as well as the category of JCE under which responsibility attaches – when assessing the appropriate sentence, which shall reflect not only the intrinsic gravity of the crime, but also the

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[4170] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 455; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3238
[4171] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 313
[4172] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3238
[4173] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3239
[4174] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 459
[4175] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para, 375
[4176] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 247; *Prosecutor v Kunarac et al*, No. IT-96-23&23/1, *Judgement* (12 June 2002) at para. 171
[4177] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 395

personal criminal conduct of the convicted person and consider any other relevant circumstance.[4178]

The jurisprudence does not support the assertion that the commission of crimes through the third category of joint criminal enterprise generally entails lesser culpability than the commission of crimes through the first category of joint criminal enterprise.[4179]

Factors to be considered when assessing the gravity of the offence include, *inter alia*, the legal nature of the offence committed; the discriminatory nature of the crime where this is not considered as an element of the crime for the purposes of a conviction; the scale and brutality of the crime; the vulnerability of the victims and the consequences, effect or impact of the crime upon the victims and their relatives….[A] sentence must reflect the *inherent gravity* or the *totality* of the *criminal conduct of an accused*, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.[4180]

There is no hierarchy of crimes within the jurisdiction of the International Tribunal. The Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime so that the accused are punished solely based on their wrongdoings" and not on the basis of abstract distinctions among crimes."[4181]

The fact that findings as to the conduct of the accused were not repeated in the sentencing analysis does not, by itself, indicate that they were not considered for sentencing. Therefore, there was no reason to set aside the sentence as requested by the Prosecution.[4182]

lex mitior

The principle of *lex mitior* is understood to mean that, if the law relevant to the offence of the accused has been amended, the less severe law should be applied . It is an inherent element of this principle that the relevant law must be binding upon the court. Accused persons can only benefit from the more lenient sentence if the law is binding, since they only have a protected legal position when the sentencing range must be applied to them. The principle of *lex mitior* is thus only applicable if a law that binds the International Tribunal is subsequently changed to a more favourable law by which the International Tribunal is also obliged to abide.[4183]

The principle of *lex mitior* applies at the ICTY and if its Statute is ever amended concerning sentencing powers, the more lenient penalties would have to apply.[4184]

[4178] *Prosecutor v Martic*, No. IT-95-11-A, *Judgement* (8 October 2008) at para. 84
[4179] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1146
[4180] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at para. 400
[4181] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Judgement* (5 May 2009) at paras. 375, 415
[4182] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3233
[4183] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 81
[4184] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 96

The principle of lex mitior prescribes that if the law relevant to the offence of the accused has been amended, the less severe law should be applied; however, the relevant law must be binding upon the court.[4185]

Whereas the principle of lex mitior applies to situations where there is a change in the concerned applicable law, specific direction has never been part of the elements of aiding and abetting liability under customary international law, which the ICTY had to apply. Therefore, lex mitior is not applicable to a conviction in the absence of specific direction.[4186]

life sentence

Neither Article 7 nor Article 10 of the ICCPR prohibits life imprisonment.[4187]

Mitigating circumstances do not preclude the imposition of life imprisonment.[4188]

In July 1995 when the crimes at issue took place, Rule 101(A) of the Rules was already in force, clearly constituting notice of a maximum custodial sentence of life imprisonment for the crimes falling within the jurisdiction of the Tribunal.[4189]

minimum terms

Recommending a minimum term of imprisonment to be served by an accused has occurred only rarely in cases before the Tribunal. Trial Chamber declined to do so.[4190]

mitigating circumstances

in general

The acknowledgement and application of mitigating circumstances does not diminish the gravity of the crime.[4191]

Mitigating factors have included (1) cooperation with the prosecution; (2) guilty plea; (3) remorse; (4) voluntary surrender; (5) good character with no prior convictions; (6) comportment in detention; (7) personal and family circumstances; (8) character of the accused after the conflict; (9) duress and indirect participation; (10) diminished mental responsibility; (11) age; and (12) assistance to detainees and victims.[4192]

[4185] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at para. 276
[4186] *Prosecutor v Stanisic & Simatovic*, No. MICT-15-96-A, *Judgement* (31 May 2023) at paras. 278-81
[4187] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1965
[4188] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2083
[4189] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2089
[4190] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 94
[4191] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5194
[4192] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43

The following circumstances have been identified as mitigating factors: co-operation with the Prosecution, the admission of guilt or a guilty plea, the expression of sincere remorse, sympathy, compassion or sorrow for the victims of the crimes, voluntary surrender, good behaviour while in detention, the personal and family circumstances of the convicted person, the post-conflict conduct of the convicted person, the duress under which he acted, indirect or limited participation in the commission of the crime, diminished mental responsibility, age, assistance to victims, fully complying with certain obligations, such as the terms and conditions of provisional release, and preventing others from committing crimes.[4193]

Appeal proceedings are not the appropriate forum to raise mitigating circumstances for the first time. A Trial Chamber cannot be faulted for failing to consider as mitigating circumstances elements which the accused did not properly identify.[4194]

alcohol or drug abuse

A state of intoxication can only constitute a mitigating circumstance if it is forced or coerced, an intentionally procured diminished mental state cannot result in a mitigated sentence.[4195]

assistance to victims

If a commander in charge of, as in this case, a prison-camp or detention facility, takes steps to alleviate the suffering of those detained, depending on the degree and level of this action, it may be that the seriousness of the overall offences can be mitigated. This would, however, depend on the circumstances of the case and the degree of assistance given.[4196]

The fact that the troops under the accused's command repeatedly breached the Anti-sniping Agreement and violated temporary ceasefires and the Geneva Conventions did not preclude a reasonable Trial Chamber from considering that "the negotiation and signing of the Anti-sniping Agreement" and the "orders the accused issued not to shoot civilians and to abide by the Geneva Conventions" were mitigating circumstances. The Anti-sniping Agreement "was implemented to some extent" and the accused's orders were followed by his subordinates, both of which tend to show that the accused's acts in favour of humanitarian law might actually have had some positive effects.[4197]

The accused's decision to open the corridor, which objectively saved thousands of lives, could be considered a mitigating factor, even absent a benevolent motive.[4198]

Accused's sporadic benevolent acts were not considered as a mitigating

[4193] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2140
[4194] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3310
[4195] *Prosecutor v Kvocka et al*, No. IT-98-30/1-T, *Judgement* (2 November 2001) at para. 706
[4196] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 775.
[4197] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 317
[4198] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2076

circumstance where he had the power to assist the victimised population on a wide scale.[4199]

burden of proof

Some of the factors that have been considered in mitigation of sentence by the Tribunal are: voluntary surrender, good character, family circumstances, and remorse. Mitigating factors need to be established on the balance of probabilities, and not beyond reasonable doubt.[4200]

contempt

In sentencing witness for contempt, the fact that the accused was not present during hearing at which witness refused to testify was not a mitigating factor.[4201]

Sentence of 12 months' imprisonment, with 8 months suspended, was warranted for defence investigator who participated in a scheme to procure false testimony where the accused was acting at the direction of others, was inexperienced, young, and had no prior record, and where continued detention would be in conditions of almost solitary confinement as the only woman in the detention unit.[4202]

cooperation

The Appeals Chamber acknowledges the obligation that Rule 101(B)(ii) of the Rules imposes upon Chambers to take account of the substantial cooperation with the Prosecution before or after conviction, in the determination of sentence. However, pursuant to its previous finding in the *Kupreskic* case, the Appeals Chamber finds that the circumstances in the present case do not demand its intervention in the interests of justice.[4203]

Appearing for two interviews with the Prosecutor and voluntarily surrendering to the Tribunal is a mitigating factor.[4204]

[4199] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5198
[4200] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.850; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1053; *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 43; *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 42; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2078
[4201] *Prosecutor v Milosevic*, No. IT-01-54-T, *Decision on Interlocutory Appeal of Kosta Bulatovic Contempt Proceedings* (29 August 2005) at para. 59
[4202] *Prosecutor v Rasic*, No. IT-98-32/1-R77.2, *Written Reasons for Oral Sentencing Judgement* (6 March 2012)
[4203] *Prosecutor v Jokic*, No. IT-01-42/1-A, *Judgement on Sentencing Appeal* (30 August 2005) at para. 88
[4204] *Prosecutor v Blagojevic &* Jokic, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 344; *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 472; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1090; *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 61

Voluntary surrender is a mitigating circumstance.[4205]

A commitment to cooperate with the prosecution, although not yet fulfilled, may constitute a mitigating circumstance.[4206]

In appropriate cases, co-operation between conviction and appeal could be a factor that the Appeals Chamber too may consider to reduce sentence. This will of course depend on the circumstances of each case and the degree of co-operation rendered.[4207]

The Trial Chamber committed an error when it declined to consider Zigic's voluntary surrender to the Tribunal a mitigating factor. However, given the fact that Zigic was in prison at the time of his surrender, the Appeals Chamber does not consider that significant weight should be given to this mitigating circumstance.[4208]

If an accused, who was arrested before having the opportunity to surrender voluntarily, shows a willingness to have done so, this mere willingness may, depending on the circumstances of the case, be considered in mitigation of the sentence. However, where there is no indication of such willingness to surrender voluntarily, Trial Chambers correctly exercise their discretion in not considering such a factor in mitigation of sentence. To do so would involve the Trial Chamber in speculation as to whether the accused would in fact have surrendered voluntarily.[4209]

Actions of an accused in custody to facilitate his transfer to the Tribunal, while not equivalent to voluntary surrender, are entitled to some weight as a mitigating factor.[4210]

An Accused's voluntary surrender to the Tribunal may properly be considered as a mitigating circumstance, even if he may well be considered to be under an obligation to surrender.[4211]

Cooperation with the prosecution is a mitigating circumstance. The evaluation of the accused's cooperation depends both on the quantity and quality of the information he provides.[4212]

Providing new information heard for the first time before the Tribunal is particularly valuable. This would include information on new perpetrators or identification of new mass graves.[4213]

[4205] *Prosecutor v Haradinaj et al*, No. IT-01-74-T, *Judgement* (2 April 2008) at para. 495
[4206] *Prosecutor v Zelenovic*, No. IT-96-23/2-S, *Sentencing Judgement* (4 April 2007) at para. 52
[4207] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 463
[4208] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 713
[4209] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 426
[4210] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 601
[4211] *Prosecutor v. Mrkšić et al.*, No. IT-95-13/1-T, *Judgement* (27 September 2007) at para 698
[4212] *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 51; *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 158
[4213] *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 52

Use by the prosecution in other cases of the information provided by the accused is a significant indication of the value of the information.[4214]

While the prosecution is able to accurately assess the cooperation of an accused, it is for the Trial Chamber to evaluate that cooperation to determine what weight to give it as a mitigating circumstance.[4215]

If the Trial Chamber disagrees with the prosecution's assessment of the cooperation of the accused, it must provide sufficient reasons for not following the prosecution's assessment.[4216]

Providing an interview to the prosecution, willingness to self-surrender, and agreeing to some facts at the trial are evidence of some cooperation and constitute a mitigating factor.[4217]

An accused's cooperation with the prosecution does not have to be substantial to be a mitigating circumstance.[4218]

The Trial Chamber did not err in concluding that the cooperation of the accused had not been beyond the scope envisioned by the plea agreement and therefore not warranting of extra mitigating credit.[4219]

good behaviour

The accused's extraordinarily good behaviour when detained at the UNDU shows good rehabilitative prospects and is a mitigating factor.[4220] However, post-sentencing conduct at the UNDU is not admissible in the Appeals Chamber's review of the sentence.[4221]

Good behaviour in detention has been considered in mitigation although it does not weigh significantly in favour of mitigation.[4222]

[4214] *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 52
[4215] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 91
[4216] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 96; *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 749
[4217] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 750
[4218] *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 51; *Prosecutor v Zelenovic*, No. IT-96-23/2-A, *Judgement on Sentencing Appeal* (31 October 2007) at para.24
[4219] *Prosecutor v Zelenovic*, No. IT-96-23/2-A, *Judgement on Sentencing Appeal* (31 October 2007) at para. 25
[4220] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1091; *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 82; *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2078
[4221] *Prosecutor v Jelesic*, No. IT-95-10-A, *Decision on Request to Admit Additional Evidence* (15 November 2000)
[4222] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5194

good character

Good character and family circumstances are mitigating factors, albeit of limited weight.[4223]

The good character of a person is often accorded little weight in the determination of the sentence.[4224]

Character of an accused before the crimes were committed is generally not a factor to be taken into consideration in mitigation of the sentence.[4225] However, the fact that the accused did not have a prior criminal record is a mitigating circumstance.[4226]

Family circumstances, such as the fact that the accused is the guardian of his teen-age son, is a mitigating circumstance, although not given undue weight.[4227] The accused's age (71) and poor health, as well as the poor health of his spouse, are mitigating factors.[4228]

Family circumstances of the accused being the father of four children were considered mitigating circumstances.[4229]

Respect towards all people, regardless of their nationality, ethnicity, or religion, is the demeanour expected of any individual and does not constitute a factor to be considered in mitigation of sentence.[4230]

The activities of the accused in the work of de-mining are a mitigating circumstance.[4231]

Character letters submitted in connection with provisional release application were considered by the Trial Chamber but were too general to support a finding of the accused's good character as a mitigating circumstance.[4232]

The Trial Chamber did not err in refusing to give effect to the accused prior good character as a factor in mitigation.[4233] Given the gravity of the crimes for which the

[4223] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 162
[4224] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5199
[4225] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para.853
[4226] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1090
[4227] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 855; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1090
[4228] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 469
[4229] *Prosecutor v Haradinaj et al*, No. IT-01-74-T, *Judgement* (2 April 2008) at para. 495
[4230] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 429
[4231] *Prosecutor v Blagojevic &* Jokic, No. IT-02-60-A, *Judgement* (9 May 2007) at para. 328
[4232] *Prosecutor v Haradinaj et al*, No. IT-01-74-T, *Judgement* (2 April 2008) at para. 495
[4233] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 51

accused was convicted, it is unlikely that evidence of good character prior to or following the events in question would have a significant impact on the sentence.[4234]

guilty plea

The avoidance of a lengthy trial can be considered as an element of the mitigating effect of a guilty plea.[4235] The International Tribunal's completion strategy is not a factor to be considered at sentencing.[4236]

A guilty plea is an important step in the offender's process of rehabilitation and may also, in connection with an appropriate sentence, have a healing effect on the community.[4237] It is a mitigating factor.[4238]

A Trial Chamber is not required to specifically mention the extent of the mitigating value it affords to a guilty plea. Upon a finding that mitigating circumstances existed, a decision of the weight to be accorded thereto is within the discretion of the Trial Chamber.[4239]

health

Ill-health of the convicted person is to be considered as a mitigating factor only in exceptional cases.[4240]

The deterioration of the health of the accused after sentencing justified an additional six-month reduction in his sentence.[4241]

Trial Chamber erred in denying prosecution access to medical reports of the accused which it relied upon at sentencing.[4242]

Where accused's general health condition was stable, his physical condition did not warrant consideration as a mitigating circumstance.[4243]

[4234] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 406
[4235] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 52; *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 79
[4236] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 79, fn. 200
[4237] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 71
[4238] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 145; *Prosecutor v Zelenovic*, No. IT-96-23/2-S, *Sentencing Judgement* (4 April 2007) at para. 46
[4239] *Prosecutor v Zelenovic*, No. IT-96-23/2-A, *Judgement on Sentencing Appeal* (31 October 2007) at para. 18
[4240] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Judgement and Sentence* (10 June 2010) at para. 2140; *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3315
[4241] *Prosecutor v Strugar*, No. IT-01-42-A, *Judgement* (17 July 2008) at para. 392
[4242] *Prosecutor v Rasic*, No. IT-98-32/1-R77.2-A, *Judgement* (16 November 2012) at para. 38
[4243] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5203

innocence

A possibility of innocence can never be a factor in sentencing.[4244]

lack of training

Trial Chamber did not err in considering commander's lack of training as a mitigating factor.[4245]

mental condition

Diminished responsibility requires proof that the accused is suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury. It is an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions.[4246]

Where grief from death of the accused's daughter did not rise to the level of diminished mental capacity, it would not be considered as a mitigating circumstance.[4247]

nexus to offence

Mitigating circumstances may be considered regardless of whether they have a direct nexus with the crimes in question.[4248]

non-discrimination

Acts of non-discrimination, during ongoing fighting, merits consideration are a mitigating circumstance where the accused is convicted of crimes carrying an element of discriminatory intent.[4249]

The Trial Chamber erred in holding that only post-conflict conduct which alleviates the suffering of the victims should be considered as a mitigating circumstance. The Trial Chamber should have considered the accused's attempts to further peace, although it would not have changed the sentence imposed.[4250]

offender circumstances

[4244] *Prosecutor v Furundzija*, No. IT-95-17/1-A, *Judgement* (21 July 2000) at para. 253
[4245] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-A, *Judgement* (22 April 2008) at para. 333
[4246] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 578.
[4247] *Prosecutor v Mladic*, No. IT-09-92-T, *Judgement* (22 November 2017) at para. 5201
[4248] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2069
[4249] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 854
[4250] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 59

The difficult circumstances faced by the accused as a Muslim commander in Srebrenica is the pivotal mitigating factor in determining his sentence.[4251]

The chaotic context of a conflict cannot be considered in mitigation.[4252]

Trial Chamber erred in relying on accused's false confession of crimes to prosecution where such lies were cured when the accused subsequently told the truth.[4253]

Execution of manifestly illegal orders cannot in any circumstance be justified, regardless of devotion to service or "military ethos". A reasonable trier of fact could have given no weight to this factor as a mitigating circumstance.[4254]

Where reports authored by accused represent the sole instance where a senior member of the VRS, in writing, challenged the Superior Command about the murder operation, the writing of those reports can be considered a mitigating factor.[4255]

remorse

A sincere expression of regret may constitute a mitigating circumstance, even in the absence of any admission of participation in a crime.[4256]

Voluntary surrender, a guilty plea, steps taken to atone for one's crimes, and genuine remorse are significant mitigating factors.[4257]

Expression of sympathy to the victims by defence counsel during the trial is a mitigating factor even if the accused made no statement.[4258]

The expression of remorse covered only a fraction of the crimes for which the accused was convicted. As such, it was within the Trial Chamber's discretion not to consider the accused's remorse as a mitigating circumstance.[4259]

Real and sincere remorse is a mitigating factor.[4260]

role in the offence

[4251] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 767
[4252] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Judgement* (30 June 2016) at para. 1166
[4253] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 107
[4254] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2061
[4255] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2078
[4256] *Prosecutor v Strugar*, No. IT-01-42-T, *Judgement* (31 January 2005) at para. 470; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 2063
[4257] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 72
[4258] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 752
[4259] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 715
[4260] *Prosecutor v Rajic*, No. IT-95-12S, *Sentencing Judgement* (8 May 2006) at para. 150; *Prosecutor v Zelenovic*, No. IT-96-23/2-S, *Sentencing Judgement* (4 April 2007) at para. 51

The Trial Chamber need not consider what the accused did not do—such as did not order or plan the crimes—but should sentence him for what he did.[4261]

The commission of a crime together with other persons in most cases will not be considered less serious than the commission of a crime on one's own.[4262]

Duress and superior orders are separate, but related, concepts and either may count in mitigation of sentence.[4263] However, where any orders given to the accused to kill civilians and destroy homes would have been manifestly unlawful, they have no mitigatory value in the determination of sentence in the present case.[4264]

The Trial Chamber erred in considering twice in mitigation the accused's subordinate role[4265]

tensions in the area

Tensions that existed in the region at the relevant time can in no way act in mitigation of the sentence to be imposed upon the accused for his commission of serious, violent crimes.[4266]

The chaotic context of a conflict, or the fact that many citizens committed crimes, is not a mitigating factor.[4267]

Fact that house of accused was attacked during conflict was not a mitigating factor in sentence.[4268]

violation of rights

Alleged agreement to resign in exchange for promise of non-prosecution could be considered for the purposes of sentence.[4269]

To have a remedy for violation of his rights, the violation must be attributable to the Tribunal. Violation of rights in connection with his arrest by a State on a warrant issued by the Tribunal is not grounds for a remedy, such as reduction of sentence.[4270]

[4261] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 56
[4262] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 703
[4263] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 53
[4264] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 56
[4265] *Prosecutor v. Limaj et al.*, No. IT-03-66-A, *Judgement (27 September 2007)* at para. 143
[4266] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 52
[4267] *Prosecutor v Blaskic*, No. IT-95-14-A, *Judgement* (29 July 2004) at para. 711; *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 13
[4268] *Prosecutor v Bralo*, No. IT-95-17-A, *Judgement* (2 April 2007) at para. 18
[4269] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.4, *Decision on Karadzic's Appeal from Trial Chamber's Decision on Alleged Holbrooke Agreement* (12 October 2009) at para. 55
[4270] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on the Accused's Motion for Remedy for Violation of Rights in Connection with Arrest* (31 August 2009) at para. 6

waiver of appearance

Agreeing that the Trial Chamber could proceed in his absence when he was ill during trial is not a mitigating factor. To the extent that the accused had health problems that merited recesses, he was free to raise them.[4271]

mode of liability

Aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.[4272]

An accused found guilty of command responsibility is generally entitled to a lesser sentence than one found guilty of individual responsibility.[4273]

As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.[4274]

The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender.[4275]

The fact that an accused is found guilty as an "indirect co-perpetrator" does not in itself entitle him to a lower sentence.[4276]

Because a person found responsible as a superior has been convicted of failure to prevent or punish the crime, and not of the crime of the subordinate, greater flexibility in sentencing is warranted.[4277]

Recognition of the importance of a superior's duty to enforce the rules of international humanitarian law does not automatically require a sentence above a certain threshold; rather, a trial chamber is required to consider this together with other considerations of the gravity of the offences, the accused's personal conduct, the general practice regarding prison sentences in the courts of the former Yugoslavia, and any aggravating or mitigating circumstances in arriving at a sentencing determination.[4278]

[4271] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 630
[4272] *Prosecutor v Vasiljevic*, No. IT-98-32-A, *Judgement* (25 Feb 2004) at para. 182
[4273] *Prosecutor v Hadzihasanovic & Kubura*, No. IT-01-47-T, *Judgement* (15 March 2006) at para. 2076
[4274] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 732; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1991
[4275] *Prosecutor v Krnojelac*, No. IT-97-25, *Judgement* (17 September 2003) at para. 73
[4276] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para, 380
[4277] *Prosecutor v Oric*, No. IT-03-68-T, *Judgement* (30 June 2006) at para. 724
[4278] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1997

While the mode of liability of ordering necessarily entails that the person giving the order has a position of authority, the level of authority may still play a role in sentencing as it is not an element of the mode of liability of "ordering" that an accused is high in the chain of command and thus wields a high level of authority.[4279]

sentencing of other accused

Sentences of like individuals in like cases should be comparable and, in this regard, the Appeals Chamber "does not discount the assistance that may be drawn from previous decisions rendered". Indeed, the Appeals Chamber has observed that a sentence may be considered "capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences". However, while comparison with other sentences may be of assistance, such assistance is often limited.[4280]

The principle of proportionality by no means encompasses proportionality between one's sentence and the sentence of other accused. Comparison with other sentences is of limited value.[4281]

The Trial Chamber is obliged to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime with due regard for the entirety of the case, which may justify different sentences in similar cases.[4282]

A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances. Such guidance may be limited by the Trial Chamber's obligation to consider the gravity of the crime and the individual circumstances of the accused.[4283]

Where a sentence does not differ substantially from that of another case, the Appeals Chamber will not exercise its discretion to compare the two cases.[4284]

Public confidence in the integrity of the administration of criminal justice depends, at least in part, in consistency of punishment. This means that as the jurisprudence of the Tribunal reaches the stage where a range or pattern of sentences imposed in relation to similar offences and circumstances emerges, a Trial Chamber would be obliged to *consider* that pattern. Whilst the Trial Chamber will not be *bound* by that pattern, it must at least consider it, to ensure that the sentence it imposes does not

[4279] *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 412
[4280] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Judgement* (28 February 2005) at para. 681
[4281] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 23; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1064
[4282] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3341
[4283] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 38; *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para, 381; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 615
[4284] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 33

produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice.[4285]

Where a sentence is out of reasonable proportion to sentences imposed in similar cases, it may be thought to be capricious or excessive.[4286]

A trial chamber is under no obligation to expressly compare the case of one accused to that of another. However, a disparity between sentences rendered in similar cases may be considered capricious or excessive, hence warranting the intervention of the Appeals Chamber, if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences.[4287]

It remains that a disparity out of reasonable proportion between an impugned sentence and another sentence rendered in a like case may give rise to an inference that the Trial Chamber failed to exercise its discretion properly in applying the law on sentencing.[4288]

The Appeals Chamber will not compare the sentence of the accused with that of a person whose sentence has not yet been reviewed on appeal.[4289]

When the Trial Chamber determines that the level of participation in the commission of the crime and the mitigating factors are different, it is justified in imposing different sentences.[4290]

Trial Chamber erred in failing to make individual assessment of the circumstances of the accused and the gravity of the crimes when imposing sentence in multiple accused case.[4291]

Although sentences received by subordinates may be a factor to be considered when determining the sentence of a commander, this should not derogate from the Trial Chamber's primary responsibility concerning sentencing to tailor the penalties to fit the individual circumstances of the accused.[4292]

sentencing purposes

[4285] *Prosecutor v. Delalic*, No. IT-96-21-A, *Judgement* (20 February 2001) at para 757.
[4286] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 39
[4287] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Judgement* (29 November 2017) at para. 3340
[4288] *Prosecutor v. Milosevic*, No. IT-98-29/1-A, *Judgement* (12 November 2009) at para. 327
[4289] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 51; *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 617
[4290] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 47
[4291] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 1839
[4292] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Judgement* (30 January 2015) at para. 1998

The purposes of punishment recognised under the jurisprudence of the Tribunal are retribution, deterrence, and rehabilitation.[4293]

General deterrence is the presumption that punishment will also have the effect of discouraging others, including commanders, from committing the same kind of crime under statute.[4294]

Individual deterrence aims at the effect upon the sentence upon an accused, which should be adequate to dishearten him from re-offending.[4295]

Individual deterrence is not a mitigating factor; it instead is a sentencing factor which, when relevant, is considered in imposing a penalty to enhance, but not to reduce, a sentence. A finding that individual deterrence does not apply cannot therefore prejudice an accused.[4296]

A Trial Chamber should not give "undue prominence" to deterrence in its overall assessment of an appropriate sentence.[4297]

Rehabilitation may take place through the trial process through reflection – and hearing the victims testify – and can inspire tolerance and understanding of "the other", thereby reducing the risk of recidivism. Reconciliation and peace would thereby be promoted. However, the rehabilitative purpose of sentencing will not be given undue prominence in determining the sentence.[4298]

Retribution is the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable, namely during armed conflict. It is also recognition of the harm and suffering caused to the victims.[4299]

Retribution as a purpose of punishment includes the concept that whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed and must therefore be proportionate to his specific conduct.[4300]

standard of review

[4293] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 817; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1073
[4294] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 823; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1078
[4295] *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1077
[4296] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 47
[4297] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 22
[4298] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 824; *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.1079
[4299] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Judgement* (17 January 2005) at para. 818
[4300] *Prosecutor v Bralo*, No. IT-95-17-S, *Sentencing Judgement* (7 December 2005) at para. 22

A Trial Chamber's decision may be disturbed on appeal if it either erred in the weighing process involved in the exercise of its discretion by considering what it ought not to have or erred by failing to consider what it ought to have considered.[4301]

Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime. Generally, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law. It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[4302]

The Appeals Chamber will not consider mitigating circumstances which were not presented to the Trial Chamber in the first instance.[4303]

The trial chamber erred in his exercise of discretion in imposing sentence. That error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute. The sentence imposed by the Trial Chamber was manifestly inadequate.[4304]

The Trial Chamber erred in determining a sentence by considering the time the accused would actually serve in prison.[4305]

Translation error of defence counsel's remarks led to error in the sentencing judgement and required revision of the sentence.[4306]

By imposing a minimum sentence of 20 years, the Trial Chamber acted *ultra vires* in imposing a review obligation on the Host State and therefore committed a discernible error.[4307]

Where a sentence is successfully appealed based on being either manifestly excessive or manifestly inadequate, it is open to the Appeals Chamber to consider and substitute its own sentence without remitting the matter to the Trial Chamber.[4308]

[4301] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 9
[4302] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 725; *Prosecutor v Jokic*, No. IT-01-42/1-A, *Judgement on Sentencing Appeal* (30 August 2005) at para. 8; *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 8
[4303] *Prosecutor v Babic*, No. IT-03-72-A, *Judgement on Sentencing Appeal* (18 July 2005) at para. 62; *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 150
[4304] *Prosecutor v Aleksovski*, No IT-95-14/1-T, *Judgement* (24 March 2000) at para. 187; *Prosecutor v Galic*, No. IT-98-29-A, *Judgement* (30 November 2006) at para. 455
[4305] *Prosecutor v Nikolic*, No. IT-94-2-A, *Judgement on Sentencing Appeal* (4 February 2005) at para. 97
[4306] *Prosecutor v Nikolic*, No. IT-02-60/1-A, *Judgement on Sentencing Appeal* (8 March 2006) at para. 72
[4307] *Prosecutor v Stakic*, No. IT-97-24-A, *Judgement* (22 March 2006) at para. 393
[4308] *Prosecutor v. Delalic,* No. IT-96-21-A, *Judgement* (20 February 2001) at para 851.

suspension of sentence

A Trial Chamber has the power to suspend the execution of all or part of a sentence. Such power is operative at the time of imposition of sentence and not thereafter when the rules governing pardon and commutation apply.[4309]

Rule 102—status of the convicted person

(A) The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.
(B) If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for the convicted person's arrest. On arrest, the convicted person shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed.

Rule 103—place of imprisonment

(A) Imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons
(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed.
(C) Pending the finalisation of arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal.

Rule 104—supervision of imprisonment

All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

Rule 105—restitution of property

(A) After a judgement of conviction containing a specific finding as provided in Rule 98 ter (B), the Trial Chamber shall, at the request of the Prosecutor, or may, proprio motu, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.
(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted

[4309] *Prosecutor v Rasic*, No. IT-98-32/1-R77.2-A, *Judgement* (16 November 2012) at para. 17

person has been found guilty.
(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.
(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F).

Rule 106—compensation to victims

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.
(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

Rule 107—general provision

The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.

Rule 108—notice of appeal

A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

scope

Rule 108 applies only to appeals after final judgement.[4310]

[4310] *Prosecutor v Nikolic*, No. IT-94-2-AR72, *Decision on Notice of Appeal* (9 January 2003)

variation of grounds of appeal

A motion to vary the grounds of appeal should be submitted as soon as possible after identifying the new alleged error or after discovering any other basis for seeking a variation of the notice of appeal.[4311]

The following factors, among others, are considered in determining whether good cause exists for varying the grounds of appeal: (1) the variation is minor, and it does not affect the content of the notice of appeal; (2) the opposing party would not be prejudiced by the variation or has not objected to it; (3) the variation would bring the notice of appeal in conformity with the appellant's brief.[4312]

In certain exceptional cases, where failure to include new or amended grounds of appeal resulted from counsel's negligence or inadvertence, a variation can be allowed without a showing of good cause.[4313]

The variation sought without good cause must be of substantial importance to the success of the appeal such as to fail to include it would lead to a miscarriage of justice.[4314]

Amendment to notice of appeal allowed to appeal mens rea issue for aiding and abetting when intervening decision of US court held that ICTY standard for mens rea was not in conformance with customary international law. Although counsel should have raised the issue even before the US decision, the failure to do so should not deprive the accused of having this important issue determined on appeal.[4315]

An appellant seeking to argue matters not contained in his notice of appeal must move to amend that notice. Otherwise, the arguments will not be considered. However, where the appellant reserved his right to raise additional issues and the prosecution was not prejudiced, the Appeals Chamber would consider an issue not included in the notice of appeal.[4316]

Amendments to the notice of appeal will be granted only (1) upon a showing of good cause; (2) if they remedy previous counsel's negligence or inadvertence and are of substantial importance to the success of the appeal; or (3) if they otherwise correct

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[4311] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) at para. 5
[4312] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) at para. 6
[4313] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) at para. 7
[4314] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) at para. 7
[4315] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Dragoljub Ojdanic's Second Motion to Amend his Notice of Appeal* (4 December 2009) at para. 17
[4316] *Prosecutor v Deronjic*, No. IT-02-61-A, *Judgement on Sentencing Appeal* (20 July 2005) at para. 102

ambiguity or error made by the previous counsel and do not unduly delay the proceedings.[4317]

Addition of ground of appeal relating to impact on fair trial rights of Judge's letter evidencing appearance of bias was granted in the unique circumstances of the case where the letter was published after the notice of appeal and where the addition of the issue would not substantially delay the appeal or prejudice the prosecution.[4318]

Revisions to the appeal brief will be permitted only (1) as necessary to reflect the amendments to the notice of appeal; or (2) as necessary to correct ambiguity or error in the previous counsel's filings, without unduly delaying the proceedings.[4319]

Change of counsel constituted good cause to vary grounds of appeal.[4320]

Rule 108 *bis*—State request for review

(A) A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal.
(B) The party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. The other party may be heard if the Appeals Chamber considers that the interests of justice so require.
(C) The Appeals Chamber may at any stage suspend the execution of the impugned decision.
(D) Rule 116 bis shall apply mutatis mutandis.

Rule 108 *bis* does not apply to decisions of a confirming Judge, rather than a Trial Chamber.[4321]

Rule 108 *bis* review is available to a State which can show that it is directly affected by an interlocutory decision of a Trial Chamber and that the issue is of general importance relating to the power of the International Tribunal.[4322]

[4317] *Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Motion of Dragan Jokic for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief* (26 June 2006) at para. 11
[4318] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Motion Seeking Leave to Amend Notice of Appeal* (14 April 2014) at para. 23; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Zupljanin's Second Request to Amend his Notice of Appeal and Supplement his Appeal Brief* (14 April 2014) at para. 17
[4319] *Prosecutor v. Blagojevic & Jokic*, No. IT-02-60-A, *Decision on Motion of Dragan Jokic for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief* (26 June 2006) at para. 11
[4320] *Prosecutor v Boskoski & Tarculovski*, No. IT-04-82-A, *Decision on Tarculovski Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal…*(26 March 2009) at para. 25
[4321] *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 9
[4322] *Prosecutor v Blaskic*, No. IT-95-14-AR108*bis*, *Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for*

The State's legal rights are not affected by an order to an arrest an accused person. Rule 108 *bis* applies to a State's legal rights, not its political ones.[4323]

The State's legal rights are not affected by a decision denying provisional release of an accused who had the guarantee of that State and therefore a State cannot appeal the denial of provisional release under Rule 108 *bis*.[4324]

Denial of request to appear as *amicus curiae* did not directly affect the State's legal rights and therefore State could not use Rule 108 *bis* to appeal that decision.[4325]

Request for review of order to disclose wiretap interceptions was admissible as it directly affected an important issue of the State and was of general importance to the jurisprudence of the Tribunal.[4326]

Rule 109—record on appeal

The record on appeal shall consist of the trial record, as certified by the Registrar.

Rule 110—copies of record

The Registrar shall make a sufficient number of copies of the record on appeal for the use of the Judges of the Appeals Chamber and of the parties.

Rule 111—appellant's brief

(A) An Appellant's brief setting out all the arguments and authorities shall be filed within seventy-five days of filing of the notice of appeal pursuant to Rule 108. Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal pursuant to Rule 108.
(B) Where the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.

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the Production of Documents and Request for Stay of Trial Chamber's Order of 30 January 1998 (26 February 1998)

[4323] *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002) at para. 11

[4324] *Prosecutor v Gotovina et al*, No. IT-06-90-AR108 *bis*.2, *Decision on Croatia's Request for Review of the Trial Chamber's Decision on Provisional Release* (17 January 2008)

[4325] *Prosecutor v Gotovina et al*, No. IT-06-90-AR108bis.1, *Decision on Prosecution Motion to Strike Request for Review Pursuant to Rule 108 bis* (13 December 2006); *Prosecutor v Prlic et al*. No. IT-04-74-AR108bis.1, *Decision on Prosecution Motion to Strike Request for Review Pursuant to Rule 108 bis* (13 December 2006)

[4326] *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108*bis.*2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 10

disclosure

Prosecution was required to file certification under Rule 111(B) that it had complied with its disclosure obligations in appeal from judgement of acquittal under Rule 98 *bis*. Its failure to do so required that it file a corrigendum to its brief.[4327]

Rule 112—respondent's brief

(A) A Respondent's brief of argument and authorities shall be filed within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief.
(B) Where the Prosecutor is the Respondent, the Prosecutor shall make a declaration in the Respondent's brief that disclosure had been completed with respect to the material available to the Prosecutor at the time of filing the brief.

Failure to provide a book of authorities did not require a sanction or remedy where the citations to the authorities were sufficiently clear.[4328]

Rule 113—brief in reply

An Appellant may file a brief in reply within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief.

supplemental authorities

After the filing of the reply brief, a party may file supplementary authorities to bring its briefs up to date provided that the issue has already been raised by the party's briefs and the supplemental authorities only became available after the filing of the briefs.[4329]

Rule 114—date of hearing

After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.

Rule 115—additional evidence

(A) A party may apply by motion to present additional evidence before the

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[4327] *Prosecutor v Karadzic*, No. IT-95-5/18-AR98*bis*.1, *Decision on Motion to Strike Prosecution's Brief* (9 November 2012)
[4328] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 103
[4329] *Prosecutor v Oric*, No. IT-03-68-A, *Decision on Prosecution's Notice of Supplemental Authority* (14 May 2007); *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Decision on Prosecution's Request for Leave to File Supplemental Authority* (15 November 2013)

Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not 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. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.
(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.
(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

credibility

A determination that evidence would be credible under Rule 115 does not mean that witness statements containing inconsistencies will be necessarily excluded. What is important is that it appears to be capable of belief or reliance.[4330]

The most appropriate course was to apply a relatively low threshold for credibility in admitting additional evidence, with the issue of its weight being decided at a later stage. However, the Appeals Chamber acknowledged there were instances where credibility had to be determined by hearing witnesses in open court where they could be subjected to cross-examination[4331]

Testimony given under oath at a subsequent ICTY trial was *prima facie* credible for purposes of admission under Rule 115.[4332]

delay in filing motion

[4330] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Motions of Appellants Vlatko Kupreskic, Drago Josipovic, Zoran Kupreskic, and Mirjan Kupreskic to Admit Additional Evidence* (26 February 2001) at para. 28
[4331] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 63
[4332] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (23 May 2014) at para. 28

The Appeals Chamber will not grant an extension of time in which to file a Rule 115 motion. Rather it will assess whether there was good cause for the delay after the motion is filed.[4333]

For a motion filed outside the 75-day deadline to be considered as validly filed, it must be demonstrated that the applicant was not able to comply with the time limit and submitted the motion as soon as possible after becoming aware of the new evidence.[4334]

Failure to explain delay between time material sought to be admitted was obtained and time motion was filed required that motion be denied.[4335]

Good cause not shown where information from Sarajevo could have been obtained earlier and the motion was not filed as soon as possible after the information, and its translation became available.[4336]

Accused failed to provide cogent reasons for seven-month delay in filing motion to admit new evidence from the time the evidence became publicly available and therefore motion to admit evidence on appeal was denied.[4337]

Accused failed to provide good cause for not filing motion earlier where material was disclosed one year before the motion filed. However, motion based on material which became available one month before motion filed was properly considered as timely.[4338]

An applicant's litigation strategy does not relieve the applicant of his/her obligation under Rule 115 of the Rules to seek admission of additional evidence on appeal "as soon as possible" after becoming aware of the existence of the evidence in question.[4339]

Rule 115 motion was untimely where counsel delayed in filing motion for seven months after testimony was available to him while waiting for correction of transcripts

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[4333] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Motion Regarding New Evidence* (14 July 2006) at para. 4

[4334] *Prosecutor v Natelic and Martinovic*,, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 10; *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (11 February 2015) at para. 17

[4335] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Sixth Motion for Admission of Evidence on Appeal Pursuant to Rule 115* (22 July 2014) at p. 3

[4336] *Prosecutor v Natelic and Martinovic*,, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 23

[4337] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Eighth Motion Pursuant to Rule 115* (29 April 2014) at p. 2

[4338] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (23 May 2014) at paras. 20-21

[4339] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (11 February 2015) at para. 21

and resolution of other interlocutory issues in the appeal.[4340]

The occupation of defence counsel with other matters may justify a delay in exceptional circumstances. However, when accepting assignment as Lead Counsel, a defence counsel is under an obligation to give absolute priority to observe the time limits foreseen in the Rules.[4341]

evidence not available at trial

To have additional evidence admitted on appeal, the moving party is required to establish that the evidence itself was not available at trial in any form and could not have been discovered through the exercise of due diligence. The party must show that it made use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring the evidence before the Trial Chamber.[4342]

However, the Appeals Chamber has inherent power to admit evidence that was available at trial if its exclusion would lead to a miscarriage of justice.[4343]

An exception to the requirement unavailability of the evidence at trial exists where it can be shown the counsel was grossly negligent at trial.[4344]

The public nature of a document can have a bearing on the unavailability at trial.[4345]

The due diligence requirement will be waived if it is shown that the failure to produce the evidence at trial was the result of counsel's gross negligence. A mere

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[4340] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (11 February 2015) at para. 22

[4341] *Prosecutor v Natelic and Martinovic*,, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 24

[4342] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Second Motion for Admission of Additional Evidence Pursuant to Rule 115* (21 March 2005) at para. 9; *Prosecutor v Galic*, No. IT-98-29-A *Decision on First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005) at para 13; *Prosecutor v Natelic and Martinovic*,, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 11; *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115* (16 November 2005) at para. 8; *Prosecutor v Nikolic*, No. IT-02-60-1/A, *Decision on Motion to Admit Additional Evidence* (9 December 2004) at para. 21

[4343] *Prosecutor v Jelesic*, No. IT-95-10-A, *Decision on Motion to Admit Additional Evidence* (15 November 2000)

[4344] *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115* (16 November 2005) at para. 9; *Prosecutor v Krajisnik*, No. IT-00-39-A, *Decision on Momcilo Krajisnik's Motion to Present Additional Evidence* (20 August 2008) at para. 21

[4345] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115* (3 March 2006) at para. 16

mistake does not constitute gross negligence. Tactical decisions not to obtain the evidence do not constitute gross negligence.[4346]

Where the prosecution makes a person a prosecution witness, then decides not to call that person as a witness, leaving the defence little time to enable the defence to make arrangements to call the witness in its case, evidence subsequently learned from that witness was "not available" at trial.[4347]

Documents were not available at trial through the exercise of due diligence where the prosecution announced its intention to rely on evidence of 1998 events relatively late in the pre-trial phase and therefore it is plausible that the defence did not have sufficient time to obtain them during the trial.[4348]

Letter from UNMIK that it has no information that accused was a danger to witnesses, and university document concerning the accused could have influenced Trial Chamber's provisional release decision and was admitted on appeal.[4349]

A document discovered after the case is submitted to the Trial Chamber for judgement is nevertheless available at trial and should be addressed by a motion to reopen one's case. Therefore, for purposes of Rule 115, the document is considered as having been available at trial.[4350]

Where archives became available to the parties after the conclusion of the trial, the documents sought to be admitted on appeal were not available with due diligence.[4351]

Where appointment book was disclosed near the end of the trial and revealed the existence of a meeting between President Karadzic and General Milovanovic at the relevant time, the defence did not exercise due diligence to learn the content of that meeting by moving to recall General Milovanovic and therefore the subsequent disclosure of his notes of that meeting was not evidence unavailable at trial.[4352]

[4346] *Prosecutor v Nikolic*, No. IT-02-60-1/A, *Decision on Motion to Admit Additional Evidence* (9 December 2004) at para. 40

[4347] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Motions of Appellants Vlatko Kupreskic, Drago Josipovic, Zoran Kupreskic, and Mirjan Kupreskic to Admit Additional Evidence* (26 February 2001) at para. 55

[4348] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Nebojsa Pavkovic's Motion to Admit Additional Evidence* (12 February 2010) at para. 23

[4349] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115* (3 March 2006) at paras. 28, 39

[4350] *Prosecutor v Blagojevic* & Jokic, No. IT-02-60-A, *Decision on Appellant Vidoje Blagojevic's Motion for Additional Evidence Pursuant to Rule 115*(21 July 2005) at para. 10; *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (20 October 2011) at para. 36

[4351] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Motions of Appellants Vlatko Kupreskic, Drago Josipovic, Zoran Kupreskic, and Mirjan Kupreskic to Admit Additional Evidence* (26 February 2001) at para. 61

[4352] *Prosecutor v Popovic et al*. No. IT-05-88-A, *Decision on Radivoje Miletic's First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (15 April 2013) at para. 32

Information contained in statement was discoverable with due diligence at trial where identical information was contained in material which had been disclosed prior to trial.[4353]

There is a strong presumption that counsel at trial acted with due diligence. Gross negligence must be shown in fact and its prejudice to the interests of justice shown—that is, that the evidence would have changed the outcome of the trial.[4354]

impact on the trial

Evidence which was not available at trial or through the exercise of due diligence will be admitted if relevant to a material issue, is credible, and *could* have had an impact on the verdict. Evidence that was or could have been available at trial will only be admitted if it *would* have affected the verdict.[4355]

The more appropriate standard for the admission of additional evidence under Rule 115 on appeal is whether that evidence "could" have had an impact on the verdict, rather than whether it "would probably " have done so.[4356]

In deciding whether to uphold a conviction where additional evidence has been admitted, the relevant question is has the appellant established that no reasonable tribunal of fact could have reached a conclusion of guilt based on the evidence before the Trial Chamber together with the additional evidence admitted during the appeal proceedings.[4357]

The evidence must be such that, in the case of a request by a defendant, when considered in context of the evidence given at trial, it could show the conviction was unsafe.[4358]

An applicant must identify each ground of appeal to which the additional evidence relates and clearly describe the relationship of the evidence to the respective ground of appeal, identify with precision the ruling of the Trial Chamber to which the

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[4353] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Valentin Coric's Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115* (20 April 2016) at para. 13
[4354] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001* (11 April 2001) at paras. 23-34
[4355] *Prosecutor v Galic*, No. IT-98-29-A, *Decision on Defence Second Motion for Admission of Additional Evidence Pursuant to Rule 115* (21 March 2005) at para. 14; *Prosecutor v Natelic and Martinovic*,, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 12-13; *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001* (11 April 2001) at para. 6
[4356] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 68
[4357] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 76
[4358] *Prosecutor v Galic*, No. IT-98-29-A *Decision on First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005) at para 14

additional evidence relates, and demonstrate the impact of the additional evidence on the Trial Chamber's ruling.[4359]

Rule 115 motion denied where accused failed to identify with precision the factual finding of the Trial Chamber to which the new evidence related. Reference to grounds of appeal does not suffice.[4360]

The matters sought to be admitted could not have affected the Trial Chamber's judgement.[4361]

Testimony of accused at subsequent trial could not have affected the verdict in his own trial where it was not substantially different than his interview with the prosecution which had been admitted at his trial.[4362]

Letter written by judge of Trial Chamber after appeal was filed concerning his understanding of the JCE doctrine could have had an impact on the verdict by allowing the accused to seek to disqualify him for appearance of bias and therefore was admissible pursuant to Rule 115.[4363]

Statement of witness who recanted his identification of the accused at an execution not admitted where it was not crucial to Trial Chamber's finding that he participated in JCE for genocide.[4364]

Documents and expert reports which bore on the issue of whether shells landing further away than 200 meters from a military object were indiscriminate should have been produced at trial as the issue was reasonably foreseeable to the defence and would

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[4359] *Prosecutor v Natelic and Martinovic,*, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 15; *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115* (16 November 2005) at para. 10

[4360] *Prosecutor v Galic*, No. IT-98-29-A *Decision on Defence Motion to Present Additional Evidence* (28 August 2006)

[4361] *Prosecutor v Natelic and Martinovic,*, No. It-98-34-A, *Decision on Natelic's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence* (7 July 2005) at para. 42,46,59; *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115* (16 November 2005); *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Dragomir Milosevic's Third Motion to Present Additional Evidence* (8 September 2009) at para. 20; *Prosecutor v Popovic et al*. No. IT-05-88-A, *Decision on Radivoje Miletic's First and Second Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (15 April 2013) at para. 36

[4362] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (11 February 2015) at para. 24

[4363] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (14 April 2014) at paras. 22-23

[4364] *Prosecutor v Popovic et al*, No. IT-02-88-A, *Decision on Drago Nikolic's First Motion for Admission of Additional Evidence on Appeal* (19 November 2013) at p. 5; *Prosecutor v Popovic et al*, No. IT-02-88-A, *Decision on Drago Nikolic's Fourth Motion for Admission of Additional Evidence on Appeal…* (3 September 2014) at p. 3

not have affected the judgement in any event. Therefore, they will not be admitted on appeal as additional evidence.[4365]

Testimony of witness who was present at scene of execution and did not see the accused did not fatally undermine finding that accused participated in the executions, or the credibility of the witness who placed him there, such as to find that the verdict of the Trial Chamber would have been different. Therefore, the evidence is not admissible pursuant to Rule 115.[4366]

Alleged new evidence would not have affected the verdict where it did not affect the issue of the accused's knowledge and acceptance of mistreatment of detainees and where finding on accused's participation in the JCE was also based upon other events.[4367]

If the new evidence does not relate to findings material to the conviction or sentence, in the sense that those findings were crucial or instrumental to the conviction or sentence, then the new evidence is not capable of demonstrating that a miscarriage of justice had been occasioned, and thus will not be admitted.[4368]

obligation to raise before Trial Chamber

The Rule 115 moving party's duty to act with due diligence includes making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules to bring evidence on behalf of an accused before the Trial Chamber. The applicant is therefore expected to apprise the Trial Chamber of all the difficulties he encounters in obtaining the evidence in question.[4369]

Counsel must bring any difficulties in relation to obtaining evidence, including those arising from intimidation or inability to locate a witness, to the attention of the Trial Chamber. The party must also seek relief from the Trial Chamber to compel an uncooperative prospective witness to cooperate.[4370]

The defence cannot fail to produce evidence because they assume that the Trial Chamber will reject the evidence of a prosecution witness. The defence must make its

[4365] *Prosecutor v Gotovina & Markac*, No. IT-06-90-A, *Decision on Ante Gotovina's and Mladen Markac's Motions for Admission of Additional Evidence on Appeal* (2 October 2012) at paras. 41, 44
[4366] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (23 May 2014) at paras. 32-33
[4367] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Valentin Coric's Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115* (20 April 2016) at paras. 21-22
[4368] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 62
[4369] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Third and Fifth Motions for Admission of Additional Evidence on Appeal Pursuant to Rule 115* (23 May 2014) at para. 7
[4370] *Prosecutor v Galic*, No. IT-98-29-A *Decision on First and Third Rule 115 Defence Motions to Present Additional Evidence before the Appeals Chamber* (30 June 2005) at para 13; *Prosecutor v Nikolic*, No. IT-02-60-1/A, *Decision on Motion to Admit Additional Evidence* (9 December 2004) at para. 21

best case in the first instance. If it fails to do so, the additional evidence will not be admitted pursuant to Rule 115.[4371]

Where defence counsel is gathering evidence in support of an accused's defence, either at a pre-trial stage or during the course of a trial, and are aware of a potential witness and decide not to approach that person, for whatever reason, whether because counsel believe that the potential witness will not cooperate, or the witness may be placed in an invidious position, when the accused is subsequently convicted by the Trial Chamber, the defence cannot claim that the witness was "not available" at trial within the meaning of Rule 115 or ask for that witness to be called at the appellate stage.[4372]

procedure

Rule 117 instructs the Appeals Chamber to pronounce judgement based on the record on appeal along with any additional evidence it has received. This suggests that, even if the decision to admit the evidence is made at the same time as the main appeal, a two-step process is nonetheless envisioned in which new evidence, once admitted, will then be assessed as to its effect upon the appeal as a whole.[4373]

Where the Appeals Chamber determined that evidence should be admitted pursuant to Rule 115, an evidentiary hearing was ordered to provide the opposing party with the opportunity for cross-examination.[4374]

Appeals Chamber may exercise its discretion as to whether to decide upon the admissibility of additional evidence under Rule 115 during the pre-appeal phase of the proceedings or, alternatively, at the same time as the appeal hearing. [4375]

provisional release appeals

Rule 115 applies to appeals from decisions on provisional release.[4376] In such cases, the reply to such a motion is due within four days as provided by the practice direction.[4377]

[4371] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001* (11 April 2001) at para. 12; *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on Motions by Drago Josipovic, Zoran Kupreskic, and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)* (8 May 2001) at para. 10

[4372] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on Motions by Drago Josipovic, Zoran Kupreskic, and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)* (8 May 2001) at para. 10

[4373] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 71

[4374] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001* (11 April 2001) at para. 31

[4375] *Prosecutor v Kupreskic et* al, No. IT-95-16-A, *Judgement* (23 October 2001) at para. 76

[4376] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR65.1, *Decision on Prosecution's Application Under Rule 115 to Present Additional Evidence in its Appeal Against Provisional Release* (11 November 2004) at para. 7; *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Motion for Clarification of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings and*

rebuttal material

Rebuttal material is admissible if it directly affects the substance of the additional evidence admitted by the Appeals Chamber.[4378]

Rebuttal material has a different standard of admissibility than Rule 115 material. When deciding on its admission, the Chamber will look only to whether it affects the substance of the additional evidence and will not consider issues concerning the reliability and weight to be afforded to the material.[4379]

referral pursuant to Rule 11*bis*

Rule 115 is available on appeal from a decision to refer a case to national authorities pursuant to Rule 11 *bis*.[4380]

replies

A party need not seek leave to reply to a response filed under this rule.[4381]

sentencing

Where the appellant can demonstrate, upon the trial record, that the Trial Chamber has made an appealable error, the admission of further evidence relating to the appropriate sentence is within the discretion of the Appeals Chamber. The exercise of that discretion is dependent mainly upon the nature of the error demonstrated.[4382]

Where the nature of the error demonstrated is such that the Appeals Chamber is replacing the sentence with another which, in its view, the Trial Chamber should have imposed, further evidence will ordinarily not be admitted.[4383]

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for an Extension of Time (22 November 2005); *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115* (3 March 2006) at para. 9

[4377] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.1, *Decision on Motion for Clarification of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings and for an Extension of Time* (22 November 2005)

[4378] *Prosecutor v Haradinaj et al*, No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115* (3 March 2006) at para. 44

[4379] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Prosecution Motion to Admit Rebuttal Material* (11 June 2014) at para. 12

[4380] *Prosecutor v Mejakic et al*, No. IT-02-65-AR11*bis*.1, *Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115* (16 November 2005) at para. 6

[4381] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Sixth Motion for Admission of Evidence on Appeal Pursuant to Rule 115* (22 July 2014) at fn. 3

[4382] *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, *Judgment on Sentence Appeal* (8 April 2003) at para 11.

[4383] *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, *Judgment on Sentence Appeal* (8 April 2003) at para 12.

Where the nature of the error is such that it may be cured only by additional sentences to be imposed (or a new single sentence to cover additional convictions), the provisions of Rule 101(B) may apply to permit further relevant evidence to be adduced where that evidence is not already before the Appeals Chamber.[4384]

subpoenas

Where the appellant seeks the issuance of a subpoena to a prospective witness to be interviewed in anticipation of tendering that person's evidence on appeal pursuant to Rule 115, the legitimate forensic purpose to be established is that there is a reasonable basis for the belief that the prospective witness will be able to give information which will materially assist him in relation to clearly identified issues arising in his appeal, that the defence has been unable to obtain the cooperation of the witness, and that it is at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness.[4385]

The Appeals Chamber has the inherent power to summon witnesses to give evidence in Appeals proceedings.[4386]

testimony in subsequent trials

A witness' testimony in a subsequent trial will be deemed available to the accused in the prior trial unless it contains information the witness learned after the prior trial. However, inconsistencies between the testimony at the two trials would meet the criteria of Rule 115 in that they were not available at the prior trial, provided it can be shown that the inconsistency could or would have affected the verdict.[4387]

The testimony of an appellant in another case, being sought to be tendered in his own case on appeal, merely constitutes the appellant's own version of events, which he had the opportunity to present at the trial against him for the trial chamber to consider, and as such does not qualify as additional evidence on appeal.[4388]

Accused's compelled testimony in subsequent trial not unavailable to him at his own trial, where he elected not to testify, since the evidence was always within his personal knowledge.[4389]

[4384] *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, *Judgment on Sentence Appeal* (8 April 2003) at para 14.
[4385] *Prosecutor v Krstic*, No. IT-98-33-A, *Decision on Application for Subpoenas* (1 July 2003) at para. 17
[4386] *Prosecutor v Kupreskic et al*, No. IT-95-16-A, *Decision on Motions by Drago Josipovic, Zoran Kupreskic, and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)* (8 May 2001) at para. 5
[4387] *Prosecutor v Mrksic & Sljivancanin*, No. IT-95-13/1-A, *Decision on Mile Mrksic Second Rule 115 Application* (13 February 2009) at para. 15
[4388] *Prosecutor v Popovic et al*, No. IT-05-88-A, *Decision on Vujadin Popovic's Seventh Motion for Admission of Additional Evidence on Appeal pursuant to Rule 115* (4 December 2014) at p. 2
[4389] *Prosecutor v Stanisic & Zupljanin*, No. IT-08-91-A, *Decision on Mico Stanisic's Second Motion Seeking Admission of Additional Evidence Pursuant to Rule 115* (11 February 2015) at para. 23

Rule 116 *bis*—expedited appeals procedure

(A) An appeal under Rule 72 or Rule 73 or appeal from a decision rendered under Rule 11 bis, Rule 54 bis, Rule 65, Rule 73 bis (E), Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs.
(B) Rules 109 to 114 shall not apply to such appeals.
(C) The Presiding Judge, after consulting the members of the Appeals Chamber, may decide not to apply Rule 117 (D).

Rule 117—judgement on appeal

(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it.
(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.
(C) In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law.
(D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.

retrial

Retrial ordered where findings of Trial Chamber were not adequate for Appeals Chamber to exercise its own judgement as to the guilt of the accused.[4390]

Decisions regarding the admission of evidence made during his first trial are not binding on the Trial Chamber conducting a retrial. The different contexts in which the two trials are held mean that evidentiary decisions proper in one case may not be proper in the other.[4391]

Any failure to apply for admission of evidence under Rule 115 of the Rules during an appeal does not exclude the admission of that evidence in a subsequent retrial.[4392]

Whether a retrial follows acquittal or conviction is not necessarily insignificant. However, the context of each retrial is unique, and the impact of a previous conviction or acquittal can only be addressed by considering this individual context. Any potential for undue prejudice to a defendant in a retrial following an acquittal should be addressed

[4390] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Judgement* (9 December 2015) at para. 127
[4391] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*.AR73.1, *Decision on Haradinaj's Appeal on Scope of Partial Retrial* (31 May 2011) at para. 25
[4392] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*.AR73.1, *Decision on Haradinaj's Appeal on Scope of Partial Retrial* (31 May 2011) at para. 25

through both the Appeals Chamber's careful delineation of a retrial's parameters and the Trial Chamber's continuing duty to apply fair trial principles. When determining the admissibility of evidence in the retrial, the Trial Chamber should be particularly mindful of any potential prejudice that the admission of new evidence may cause to the fair trial rights of the Accused. Where the Prosecution seeks to introduce evidence that was excluded in prior proceedings, the Trial Chamber should explicitly consider whether re-litigation of this same issue in the retrial would be unduly prejudicial. If such is the case, the evidence must be excluded.[4393]

Since the Trial Chamber may not make findings with respect to Haradinaj's responsibility beyond those in the six counts alleged, consideration of the broader JCE in the context of the partial retrial does not place him in potential double jeopardy or otherwise affect his fundamental rights and interests.[4394]

Since the Trial Chamber cannot make findings with respect to criminal responsibility beyond that alleged in the six counts which are the subject of the retrial, the inclusion of general allegations, some of which the accused was acquitted of, in the "Statement of Facts" of the Operative Indictment does not expose the accused to any additional charges or render the retrial unfair *per se*.[4395]

Rule 118—status of accused following appeal

(A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.
(B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces an acquittal, order the arrest or surrender of the accused to the Tribunal.

Rule 119—request for review

(A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

[4393] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*.AR73.1, *Decision on Haradinaj's Appeal on Scope of Partial Retrial* (31 May 2011) at para. 26
[4394] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*.AR73.1, *Decision on Haradinaj's Appeal on Scope of Partial Retrial* (31 May 2011) at para. 32
[4395] *Prosecutor v Haradinaj et al*, No. IT-04-84*bis*.AR73.1, *Decision on Haradinaj's Appeal on Scope of Partial Retrial* (31 May 2011) at para. 39

(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.
(C) Any brief in reply shall be filed within fifteen days after the filing of the response.

assignment of counsel

To be assigned counsel at the Tribunal's expense for review proceedings requires the Appeals Chamber to authorise the review or to deem it necessary to ensure the fairness of the proceedings.[4396]

Counsel assigned to investigate potential grounds for review granted access to confidential evidence and confidential filings related to that evidence, but not other confidential filings.[4397]

deceased persons

The next of kin of a deceased convicted person has no standing to seek review of the judgement.[4398]

disclosure issues

Where no review petition is pending, Appeals Chamber has no jurisdiction to decide on motion for disclosure. Instead, a Trial Chamber must be appointed pursuant to Rule 75.[4399]

final judgement

Review is only available with respect to final judgement. If the Appeals Chamber rendered the final judgement in the instant case, then only the Appeal Judgement can be reviewed.[4400]

Review does not extend to decisions reached during ongoing proceedings in the case prior to the rendering of a final decision in the case.[4401]

miscarriage of justice

[4396] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Appointment of Counsel to Dragomir Milosevic* (6 January 2012) at para. 8
[4397] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion Seeking Variation of Protective Measures Pursuant to Rule 75(G)* (16 July 2012) at para. 14
[4398] *Prosecutor v Delic*, No. IT-04-83-R.1, *Decision on Defence Motion for Review* (17 December 2013)
[4399] *Prosecutor v Milosevic*, No. IT-98-29/1-A, *Decision on Motion for Reconsideration* (12 July 2012)
[4400] *Prosecutor v. Josipovic*, No. IT-95-16-R2, *Decision on Second Motion for Review* (7 March 2003) at para. 15
[4401] *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecutor's Request for Review or Reconsideration* (23 November 2006) at para. 23

In wholly exceptional circumstances, where the impact of a new fact on the decision would be such that to ignore it would lead to a miscarriage of justice, the Chambers may review their decision even though the new fact was known to the moving party or was discoverable by it through the exercise of due diligence.[4402]

Although information from witness to conversation was available to accused's counsel, to ignore the information on review would lead to a miscarriage of justice.[4403]

new fact

A party seeking review must satisfy four criteria; (1) there must be a new fact; (2) this new fact must not have been known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber; (3) the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and (4) the new fact, if proved, could have been a decisive factor in reaching the original decision;[4404]

What is relevant in evaluating an application for review is not whether the new fact existed but whether the deciding body and the moving party knew about the fact or not in arriving at its decision.[4405]

New fact was considered proved when testimony of witness to that fact was deemed to be credible. Review granted and conviction vacated.[4406]

There is a difference between a "new fact" under Rule 119 and "additional evidence" under Rule 115. Additional evidence pertains to a matter which was in issue at the trial, while a new fact involves evidence of a fact which was not in issue at the trial.[4407]

The process for determining whether there is a "new fact" is first for the party to define its "new fact". The Chamber then reviews the prior decisions and determines

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[4402] *Prosecutor v. Josipovic*, No. IT-95-16-R2, *Decision on Second Motion for Review* (7 March 2003) at para. 13; *Prosecutor v Blagojevic*, No. IT-02-60-R, *Decision on Vidoje Blagojevic's Request for Review* (15 July 2008) at para. 4; *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at p. 3

[4403] *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at pp. 3-4

[4404] *Prosecutor v Josipovic*, No. IT-95-16-R3, *Decision on Motion for Review* (2 April 2004); *Prosecutor v. Josipovic*, No. IT-95-16-R2, *Decision on Second Motion for Review* (7 March 2003) at para. 12; *Prosecutor v. Tadic*,. No. IT-94-1-R, *Decision on Motion for Review* (30 July 2002) at para. 20; *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at p. 3

[4405] *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at p. 3

[4406] *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Review Judgement* (8 December 2010) at paras. 31-32

[4407] *Prosecutor v Radic*, No. IT-98-30/1-R1, *Decision on Defence Request for Review* (31 October 2006) at para. 22

whether the previously litigated facts include the purported "new fact". If it does, review is not available.[4408]

Review proceedings are not an opportunity to relitigate unsuccessful appeals or requests.[4409]

The fact that the same events were the subject of prosecution evidence in another case and that a witness who testified may have refused to testify in another trial do not constitute "new facts" within the meaning of Rule 119.[4410]

Since the credibility of the witness was at issue in the trial, new information calling his credibility into question did not constitute a "new fact".[4411]

New facts refer to new evidentiary information supporting a fact that was not in issue or not considered in the original proceedings.[4412]

Rule 120—preliminary examination

If a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

Review hearing ordered at which each party may introduce evidence rebutting or supporting the "new fact".[4413]

Rule 121—appeals

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

Rule 122—return of case to Trial Chamber

[4408] *Prosecutor v Blaskic*, No. IT-95-14-R, *Decision on Prosecutor's Request for Review or Reconsideration* (23 November 2006) at para. 17
[4409] *Prosecutor v Blagojevic*, No. IT-02-60-R, *Decision on Vidoje Blagojevic's Request for Review* (15 July 2008) at para. 7
[4410] *Prosecutor v Blagojevic*, No. IT-02-60-R, *Decision on Vidoje Blagojevic's Request for Review* (15 July 2008) at para. 9
[4411] *Naletilic v Prosecutor*, No. IT-98-34-R, *Decision on Mladen Naletilic's Request for Review* (19 March 2009) at para. 25
[4412] *Naletilic v Prosecutor*, No. IT-98-34-R, *Decision on Mladen Naletilic's Request for Review* (19 March 2009) at para. 31; *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at p. 3
[4413] *Prosecutor v Sljivancanin*, No. IT-95-13/1-R.1, *Decision with Respect to Veselin Sljivancanin's Request for Review* (14 July 2010) at p. 4

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

Rule 123—notification by States

If, according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.

Rule 124—determination by the President

The President shall, upon such notice, 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.

Rule 125—pardon or commutation

In determining whether pardon or commutation is appropriate, the President shall consider, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

early release

Where accused had served 2/3 of his sentence, had behaved well in prison, and local authorities recommended his release, commutation of sentence would be granted.[4414]

[4414] *Prosecutor v Landzo*, No. IT-96-21-ES, *Order of the President on Commutation of Sentence* (13 April 2006); *Prosecutor v Delic*, No. IT-96-21-ES, *Decision on Hazim Delic's Motion for Commutation of Sentence* (24 June 2008); *Prosecutor v Jokic*, No. IT-01-42/1-ES, *Decision of the President on Request for Early Release* (1 September 2008); *Prosecutor v Banovic*, No. IT-02-65/1-ES, *Decision of the President on Commutation of Sentence* (3 September 2008); *Prosecutor v Plavsic*, No. IT-00-39 & 40/1-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavsic* (14 September 2009); *Prosecutor v Sikirica*, No. IT-95-8-ES, *Decision of President on Early Release of Dusko Sikirica* (21 June 2010); *Prosecutor v Rajic*, No. IT-95-12-ES, *Decision of President on Early Release of Ivica Rakic* (22 August 2011); *Prosecutor v Martinovic*, No. IT-98-34-ES, *Decision of the President on Early Release of Vinko Martinovic* (16 December 2011); *Prosecutor v Natelic*, No. IT-98-34-ES, *Decision of the President on Early Release of Mladen Natelic* (26 March 2013); *Prosecutor v Tarculovski*, No. IT-04-82-ES, *Decision of President on Early Release of Johan Tarculovski* (8 April 2003); *Prosecutor v Krajisnik*, No. IT-00-39-ES, *Decision of the President on the Early Release of Momcilo Krajisnik* (2 July 2013); *Prosecutor v Kovac*, No. IT-96-23-ES, *Decision of the President on Early Release of Radomir Kovac* (3 July 2013); *Prosecutor v Ojdanic* No. IT-05-87-ES.1, *Decision of the President on Early Release of Dragoljub Ojdanic* (29 August 2013); *Prosecutor v Mrdja*, No. IT-02-59-ES, *Decision of the President on Early Release of Darko Mrdja* (12 November 2013); *Prosecutor v Nikolic*, No. IT-94-2-ES, *Decision of the President on Early Release of Dragan Nikolic* (12 November 2013)

Accused who had served more than 4/5 of his sentence ordered released after sentencing and before appeal.[4415]

Accused ordered release after having served less than 2/3 of his sentence since good behaviour credits earned under Spanish law could be added to the time he already served.[4416]

Where accused had served 2/3 of his sentence, had behaved well in prison, and although not expressing remorse, had agreed to deportation to Serbia, commutation of sentence would be granted.[4417]

The practice of the States in which Tribunal prisoners serve their sentence is to release a convicted person after service of 2/3 of his sentence. Fairness dictates that this be applied to persons serving their sentenced at the UNDU.[4418]

Convict ordered release after serving 2/3 of sentence, even though he was not eligible for release under Italian law.[4419]

Convict ordered release after serving 2/3 of his sentence, even though he had been found in contempt of the Tribunal for refusing to testify at an ICTY trial.[4420]

Person convicted of contempt and sentenced to 2 months in prison was eligible for release after 2/3, but release was denied due to the severity of the offence.[4421]

Convict who was eligible for release before serving 2/3 of his sentence, would not be released. Most jurisdictions in which Tribunal convicts are serving their sentences require that 2/3 of the sentence be served prior to release.[4422]

[4415] *Prosecutor v Gvero*, No. IT-05-88-ES, *Decision of President on Early Release of Milan Gvero* (28 June 2010)
[4416] *Prosecutor v Kupreskic et al*, No. IT-95-16-ES, *Decision of the President on the Application for Pardon and Commutation of Sentence of Vladimir Santic* (9 February 2009) at para. 8
[4417] *Prosecutor v Tadic*, No. IT-94-1-ES, *Decision of the President on the Application for Pardon and Commutation of Sentence of Dusko Tadic* (17 July 2008); *Prosecutor v Vasiljevic*, No. IT-98-32-ES, *Decision of President on Application for Pardon and Commutation of Sentence of Mitar Vasiljevic* (12 March 2010)
[4418] *Prosecutor v Strugar*, No. IT-01-42-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence for Pavle Strugar* (16 January 2009) at para. 9
[4419] *Prosecutor v Krnojelac*, No. IT-97-25-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence of Milorad Krnojelac* (9 July 2009)
[4420] *Prosecutor v Dragan Jokic*, No. IT-02-60-ES, *Decision of the President on the Application for Pardon or Commutation of Sentence of Dragan Jokic* (13 January 2010)
[4421] *Prosecutor v Kabashi*, No. IT-04-84.R77.1-ES, *Decision of President on Early Release of Shefqet Kabashi* (28 September 2011) at para. 20
[4422] *Prosecutor v Radic*, No.IT-98-30/1-ES, *Decision of President on Application for Pardon and Commutation of Sentence of Mlado Radic* (23 April 2010); *Prosecutor v Kordic*, No. IT-95-14/2-ES, *Decision of President on Application for Pardon and Commutation of Sentence of Dario Kordic* (13 May 2010); *Prosecutor v Zelenovic*, No. IT-96-23/2-ES, *Decision of President on Application for Pardon or Commutation of Sentence of Dragan Zelenovic* (10 June 2010); *Prosecutor v Krajisnik*, No. IT-00-39-ES, *Decision of President on Early Release of Momcilo Krajisnik* (26 July 2010); *Prosecutor v Zigic*, No. IT-

Release 8 months before 2/3 of sentence granted where defendant had provided exceptionally substantial cooperation with the prosecution.[4423]

Despite Macedonian, UK, and Belgian law providing for release after serving ½ of one's sentence, accused would not be released until serving 2/3.[4424]

Due to high gravity of Srebrenica related crimes, convict would not be released after serving 2/3 of his sentence, but instead released after serving ¾ of his sentence.[4425]

Due to lack of remorse and high gravity of crimes in which the convict personally killed 9 people, convict would be released after serving 6 months more than 2/3 of his sentence.[4426]

Due to lack of integration in prison and high gravity of crimes, convict from Omarska camp would be released after serving ¾, rather than 2/3 of his sentence.[4427]

MICT, and not ICTY, has jurisdiction over early release of ICTY prisoners after 1 July 2013.[4428]

sentencing remissions

A convict serving his sentence in France may benefit from the French law on sentencing remissions, in the discretion of the President. The criteria of Rule 125 are applied when determining whether to grant such remissions. In this case, the high gravity

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98-30/1-ES, *Decision of President on Early Release of Zoran Zigic* (8 November 2010); *Prosecutor v Rajic*, No. IT-95-12-ES, *Decision of the President on Early Release of Ivaca Rajic* (31 January 2011); *Prosecutor v Mrdja*, No. IT-02-59-ES, *Decision of President on Early Release of Darko Mrdja* (1 February 2011); *Prosecutor v Zelenovic*, No. IT-96-23/2-ES, *Decision of President on Early Release of Dragan Zelenovic* (30 November 2012); *Prosecutor v Mrksic*, No. IT-95-13/1-ES.2, *Decision of the President on the Early Release of Mile Mrksic* (13 December 2013) at para. 20

[4423] *Prosecutor v Obrenovic*, No. IT-02-60/2-ES, *Decision of President on Early Release of Dragan Obrenovic* (21 September 2011) at para. 28

[4424] *Prosecutor v Tarculovski*, No. IT-04-82-ES, *Decision on Early Release of Johan Tarculovski* (23 June 2011) at para. 13; *Prosecutor v Krajisnik*, No. IT-00-39-ES, *Decision of President on Early Release of Momcilo Krajisnik* (11 July 2011); *Prosecutor v Zelenovic*, No. IT-96-23/2-ES, *Decision of President on Early Release of Dragan Zelenovic* (21 October 2011); *Prosecutor v Krajisnik*, No. IT-00-39-ES, *Decision of the President on Early Release of Momcilo Krajisnik* (8 November 2012).

[4425] *Prosecutor v Blagojevic*, No. IT-02-60-ES, *Decision of the President on Early Release of Vidoje Blagojevic* (3 February 2012) at para. 25

[4426] *Prosecutor v Bala*, No. 03-66-ES, *Decision of the President on Early Release of Haradin Bala* (28 June 2012) at para. 39

[4427] *Prosecutor v Radic*, No. 98-30/1-ES, *Decision of the President on Early Release of Mlado Radic* (13 February 2012) at para. 30

[4428] *Prosecutor v Pandurevic*, No. IT-05-88-A, *Decision on Motion for Early Release* (2 February 2015)

of the crimes and limited degree of rehabilitation of the convict required that recognition of the sentencing remissions be denied.[4429]

Remission credits against sentence under Italian law would be provisionally recognized by the President, without prejudice to the ultimate decision whether to release convict prior to the expiration of 2/3 of his sentence imposed by the Tribunal.[4430]

Sentence remissions are generally regarded as a tool of prisoner management in domestic systems. If the Tribunal did not recognize any sentence remissions to which a detainee is entitled under national law, it would result in discriminatory treatment of Tribunal prisoners vis-à-vis other prisoners in the same prisons and would, in addition, render more difficult their management by prison authorities.[4431]

Rule 126—general provisions

(A) Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date of the event.
(B) Where the Rules, or the practice Directions and Directives issued under the Rules, prescribe that the time for the doing of any act is to run from the filing of a relevant document, that time shall begin to run as from the date of the distribution of the document.
(C) Should the last day of a time prescribed by a Rule or directed by a Chamber fall upon a day when the Registry of the Tribunal does not accept documents for filing it shall be considered as falling on the first day thereafter when the Registry does accept documents for filing.

Time for response to motion begins to run the day after the motion is filed.[4432]

Time for response or reply is calculated from the time a motion is filed, not when it is received by a party.[4433]

So long as a pleading is electronically filed before midnight of the day it is due, it will be considered timely, notwithstanding it being filed after the business hours of the Registry.[4434]

[4429] *Prosecutor v Bala*, No. 03-66-ES, *Decision on Application of Haradin Bala for Sentence Remission* (15 October 2010) at paras. 15,28; *Prosecutor v Stakic*, No. IT-97-24-ES, *Decision of President on Early Release of Milomir Stakic* (15 July 2011) at para. 38
[4430] *Prosecutor v Jelesic*, No. IT-95-10-ES, *Decision of the President on Sentence Remission for Goran Jelesic* (28 May 2013) at para. 34
[4431] *Prosecutor v Jelesic*, No. IT-95-10-ES, *Decision of the President on Sentence Remission for Goran Jelesic* (28 May 2013) at para. 20
[4432] *Prosecutor v Popovic et al*, No. IT-05-88-T, *Decision Regarding Evidence of General Rupert Smith and the Calculation of Time Limits Under Rule 126* (30 March 2007) at p. 3
[4433] *Prosecutor v Gotovina et al*, No. IT-06-90-AR65.1, *Decision on Ante Gotovina's Appeal Against Denial of Provisional Release* (17 January 2008) at para. 22

Rule 126 *bis*—time for filing responses to motions

Unless otherwise ordered by a Chamber either generally or in the particular case, a response, if any, to a motion filed by a party shall be filed within fourteen days of the filing of the motion. A reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber.

Trial Chamber did not err in imposing three-day time limit for seeking leave to reply to a response to a motion.[4435]

Rule 127—variation of time limits

(A) Save as provided by paragraph (C), a Trial Chamber or Pre-Trial Judge may, on good cause being shown by motion,
(i) enlarge or reduce any time prescribed by or under these Rules;
(ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.
(B) In relation to any step falling to be taken in connection with an appeal, the Appeals Chamber or Pre-Appeal Judge may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out.
(C) This Rule shall not apply to the times prescribed in Rules 40 bis and 90 bis.

Erroneous assumption by counsel that he had 7, rather than 4, days to file reply brief is not good cause justifying an extension of time.[4436]

Admission of documents from the bar table denied when prosecution filed its motion after the deadline for the filing of evidence-related motions.[4437]

Neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply, although leave will usually be granted to file a further response where the reply raises a new issue.[4438]

Need for coordination of joint response in multiple accused case constituted good cause for accepting a late filing as validly done.[4439]

[4434] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-AR65.4, *Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115* (26 June 2008) at para. 40
[4435] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 146
[4436] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 6
[4437] *Prosecution v Karadzic*, No. IT-95-5/18-T, *Decision on Prosecution's Motion for the Admission of Two Intercepts from the Bar Table* (23 May 2012) at para. 8
[4438] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR65, *Decision on Provisional Release* (30 October 2002) at para.5

[4439] *Prosecutor v Popovic et al*, No. IT-05-88-AR73.2, *Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness* (30 January 2008) at para. 8

Directive on Assignment of Defence Counsel

Article 1—purpose and entry into force

(A) In accordance with Rule 45 of the Rules, the Registrar establishes this Directive to codify the Tribunal's system of assignment of counsel. The Tribunal's system of assignment of counsel seeks to provide legal assistance to indigent suspects or accused in the most efficient, economical and equitable manner to safeguard the rights afforded to suspects and accused under the Statute and Rules. This Directive establishes objective criteria to be used in the Registrar's determination of the eligibility of a suspect or accused for assignment of counsel and codifies the modalities of payment of assigned counsel and their support staff.
(B) This Directive shall enter into force on the first day of August nineteen hundred and ninety four (1 August 1994).

Article 2—definitions

Association of counsel: an association of defence counsel practicing before the Tribunal recognised by the Registrar in accordance with Rule 44(A)(iii) of the Rules;
Accused: a person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47 of the Rules;
Code of Conduct: the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal as promulgated by the Registrar on 12 June 1997 as amended;
Counsel: a person representing or eligible to represent a suspect or accused pursuant to Rules 44, 45 and 45 bis of the Rules;
Defence team: Counsel assigned by the Registrar to represent a suspect or accused and other persons assigned or approved by the Registrar to assist counsel in this task;
Directive: Directive No. 1/94 on the Assignment of Defence Counsel as amended;
President: the President of the Tribunal elected pursuant to Article 14 of the Statute;
Prosecutor the Prosecutor of the Tribunal appointed pursuant to Article 16 of the Statute;
Registrar: the Registrar of the Tribunal appointed pursuant to Article 17 of the Statute;
Rules: the Rules of Procedure and Evidence adopted by the Tribunal on 11 February 1994, and as subsequently amended;
Stage of procedure: each of the stages of procedure laid down in the Rules in which a suspect or accused may be involved (investigation, pre-trial proceedings, trial proceedings, appellate proceedings, and review proceedings);
Statute: the Statute of the Tribunal adopted by the Security Council under Resolution 827 (1993) of 25 May 1993, as subsequently amended;
Suspect: a person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the

Tribunal has jurisdiction;
Tribunal: 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.
In this Directive, the masculine shall include the feminine and the singular the plural, and vice versa. All references in this Directive to suspects or accused shall also be understood to apply to any persons detained on the authority of the Tribunal.

The Directive on Assignment of Counsel does not apply to self-represented accused.[4440]

Article 3—authentic texts

The English and French texts of the Directive shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute, Rules and the Directive shall prevail.

Article 4—amendment of the directive

(A) Proposals for amendments to the Directive may be made by a Judge, the Registrar, an association of counsel, or the Advisory Panel. Such proposals shall be directed to the Registrar. Amendments shall be promulgated by the Registrar following the approval of the permanent Judges, as provided for in the Rules.
(B) Without prejudice to the rights of the accused in any pending case, an amendment of the Directive shall enter into force seven days after the day of issue of an official Tribunal document containing the amendment.

Article 5—right to counsel

Without prejudice to the right of a suspect or an accused to conduct his own defence:
(i) a suspect who is to be questioned by the Prosecutor during an investigation;
(ii) an accused upon whom personal service of the indictment has been effected; and
(iii) any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 bis;
shall have the right to be assisted by counsel.

Neither the Rules nor the Directive invest a convicted and detained person with the right to ongoing legal representation following the completion of appeal proceedings.[4441]

[4440] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 28
[4441] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Appointment of Counsel to Dragomir Milosevic* (6 January 2012) at para. 8

While potential witnesses are not entitled to legal representation *per se*, Article 5(iii) of the Directive does provide that any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 *bis* of the Rules, is entitled to legal counsel. This would include persons who are present at the seat of the Tribunal to give evidence and detained under the authority of the Tribunal for such purpose. Accordingly, if a convicted and detained witness is required to appear as a witness before the Tribunal, and transferred pursuant to Rule 90 *bis*, he would have the right to be assisted by Tribunal-funded counsel.[4442]

The assignment of counsel to a witness can be ordered by the Chamber to protect this witness's rights in connection with incriminating testimony under Rule 90(E) of the Rules.[4443]

Counsel would not be assigned to convicted and detained person serving his sentence in another State for the purpose of defence interview to determine whether he should be called as a defence witness.[4444]

Counsel would be assigned to non-detained witness on exceptional basis where witness had been interviewed as a suspect by the prosecution on several occasions and had been assigned counsel when called as a witness in another ICTY case.[4445]

Counsel assigned to non-detained witness on exceptional basis where the witness' expected testimony my touch upon issues which could expose him to the risk of self-incrimination.[4446]

Trial Chamber has no jurisdiction over an application of defence witness Milan Martic for review of Registrar's decision not to assign his trial counsel to represent him in his capacity as a witness. This is a matter for the President.[4447]

Article 6—right to assigned counsel

(A) A suspect or accused who lacks the means to remunerate counsel shall have the right to have counsel assigned to him and paid for by the Tribunal in accordance with this Directive. The Registrar shall inform a suspect or accused in a language which he understands of his rights and duties pursuant to this Directive.

[4442] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Appointment of Counsel to Dragomir Milosevic* (6 January 2012) at para. 10
[4443] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Appointment of Counsel to Dragomir Milosevic* (6 January 2012) at para. 10
[4444] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Motion for Appointment of Counsel to Dragomir Milosevic* (6 January 2012) at para. 11
[4445] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Motion for Appointment of Counsel to Tomislav Kovac* (29 October 2013) at T42429
[4446] *Prosecutor v Mladic*, No. IT-09-92-T, *Order to the Registrar to Appoint or Assign Counsel to Vidoje Blagojevic* (10 March 2015)
[4447] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Oral Decision on Request for Review of Registrar Decision Not to Assign Trial Counsel* (22 March 2013) at T35851-52

(B) A suspect or accused lacks the means to remunerate counsel if he does not have the means which would enable him to cover the costs of his defence as determined by the Registrar in accordance with Section VII of this Directive.
(C) For an accused who has the means to partially remunerate counsel, the Tribunal shall pay that portion of his defence costs which the accused does not have sufficient means to cover, as determined in accordance with the Registry Policy for Determining the Extent to which an Accused is able to Remunerate Counsel.

Article 7—request for assignment of counsel

(A) Subject to the provisions of Article 18, a suspect or accused who wishes to have counsel assigned to him shall make a request to the Registrar on the form provided by the Registrar. The request shall be lodged with the Registrar, or transmitted to him, by the suspect or accused himself or by a person authorised by him to do so on his behalf.
(B) A suspect or accused requesting the assignment of counsel is required to make a declaration of his means on the form provided by the Registrar.
(C) A declaration must, to the extent possible, be certified by an appropriate authority, either that of the place where the suspect or accused resides or is found or that of any other place that the Registrar considers appropriate in the circumstances.
(D) The declaration must include an attestation by the suspect or accused that the information contained therein is true and complete to the best of his knowledge.
(E) To ensure that the provisions of Article 8 are met, a suspect or accused must update his declaration of means at any time a change relevant to his declaration of means occurs.

The accused is required to provide information to the Registry of his indigent status before funds can be disbursed on his behalf.[4448]

Where an accused refused to provide information as to his financial condition, he could nevertheless be provided with 50% of the legal aid provided to indigent accused, subject to later recovery, where the Registrar had the means to determine if the accused had any assets with which to find his own defence.[4449]

Article 8—burden of proof

(A) A suspect or accused who requests the assignment of counsel must produce evidence establishing that he is unable to remunerate counsel.
(B) Where the Registrar has opened an inquiry into the means of a suspect or accused pursuant to Article 9, the suspect or accused shall provide or facilitate the

[4448] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Financing of Accused's Defence* (23 April 2009) at para. 23
[4449] *Prosecutor v Seselj*, No. IT-03-67-R33B, *Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence Rendered on 8 April 2011* (17 May 2011) at paras. 26-28

production of information required to establish his ability to remunerate counsel. (C) Where a suspect or accused fails to comply with his obligations under Articles 8(A) and (B) to the extent that the Registrar is unable to properly assess the suspect or accused's ability to remunerate counsel, the Registrar may deny the request for the assignment of counsel after warning the suspect or accused and giving him an opportunity to respond.

Where accused failed to fully cooperate in disclosing his assets, and Registrar was unable to establish that the assets of the accused were capable of liquidation such that he could fund his defence, and where the commencement of the defence case was imminent, the Trial Chamber ordered that the accused be given legal aid at a rate of 50% to which he might otherwise be entitled.[4450]

The burden of proof is on the applicant to demonstrate his inability to pay the cost of his defence. Once the applicant has provided information on his inability, the burden shifts to the Registrar to show that the accused has the means to pay for the costs of his defence. The standard of proof is a balance of probabilities.[4451]

The more serious the matter asserted and the more serious the consequences flowing from a particular finding, the more difficult it would be to satisfy the relevant tribunal that what is asserted is more probably true than not.[4452]

The burden of proof is on the applicant to demonstrate his inability to remunerate counsel. Once the applicant has provided information regarding his inability to remunerate counsel, the burden of proof shifts to the Registrar to prove otherwise, based on the balance of probabilities.[4453]

The burden was on the accused to: (i) provide evidence that a property constitutes marital property; (ii) provide updated information on the value of the properties; and (iii) demonstrate that his wife's pension does not constitute disposable means. The Registry was then required to determine whether the relevant information given by the accused was more probably true than not.[4454]

Trial Chamber did not reverse the burden of proof when upholding determination of Registrar rejecting appellant's claims about the property, but not relying on evidence to the contrary.[4455]

[4450] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Financing of Defence* (2 November 2010) at para. 27
[4451] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 35
[4452] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 35
[4453] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 12
[4454] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 13
[4455] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 14

Article 9—authority to gather information

(A) For the purpose of establishing whether the suspect or accused is able to remunerate counsel, the Registrar may inquire into his means, request the gathering of any information, hear the suspect or accused, consider any representation, or request the production of any document likely to verify the request.
(B) In exercising his authority under Article 9(A), the Registrar may request any relevant information at any time, including after counsel has been assigned, from any person who appears to be able to supply such information.

Article 10—means of suspects and accused

(A) The Registrar shall determine whether and to what extent the suspect or accused is able to remunerate counsel by considering means of all kinds of which the suspect or accused has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, account shall also be taken of the means of the spouse of a suspect or accused, as well as those of persons with whom he habitually resides, provided that it is reasonable to take such means into account.
(B) For the purpose of determining whether the suspect or accused has an ownership interest in any property, the Registrar may consider the apparent lifestyle of a suspect or accused, and his enjoyment of that or other property, and whether or not he derives income from it.

accounting

Registrar was required to provide accused with itemized account he was expected to re-imburse when finding that the accused was required to re-imburse the Tribunal for his legal aid.[4456]

assignment of interest

The Tribunal is not a creditor and does not enter into agreements for the transfer of real or personal property with persons indicted by the Tribunal. The offer of the accused to assign his property interest to the Registrar was therefore not an available option and that it was not unreasonable for the Registrar to have disregarded it.[4457]

debts

[4456] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 33
[4457] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 33

Any personal debts on behalf of an accused and members of his household are included as an offset in the calculation of his disposable means, reducing the total contribution to the cost of his defence.[4458]

Since the majority of the accused's assets were in Bosnia, the Registrar correctly limited his consideration to the legal framework governing the enforceability of foreign judgements to Bosnia, notwithstanding that the funds would have to be paid to defence team members in The Netherlands.[4459]

Even if the foreign judgements were enforceable in the Netherlands, in the absence of evidence that recognition of the foreign judgements in the Netherlands had been sought, the Registrar's decision to exclude the foreign judgements as liabilities was not unreasonable.[4460]

Accused failed to substantiate the existence of debts which would prevent him from contributing to his defence.[4461]

delay

Registrar's delay in deciding that accused had the ability to remunerate counsel was not undue where the accused frustrated the Registrar's ability to investigate his means.[4462]

disposable property

Where Registry was unable to inform the Chamber that the property of the accused was available for immediate liquidation, accused cannot be said not to qualify for legal aid.[4463]

Interest in family home was readily disposable where accused failed to substantiate difficulties in selling or mortgaging the home.[4464]

exchange rate

[4458] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 29
[4459] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at paras. 29-30
[4460] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 30
[4461] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 28
[4462] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at paras. 36-37
[4463] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Financing of Defence* (2 November 2010) at para. 23
[4464] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 25

It was proper to apply the standard exchange rate as of the time of the Registrar's decision.[4465]

family home

Registrar properly concluded that only E7,000 was credited to accused for value of a home for two persons in Bosnia without regard to whether a home could be purchased for E7000, as this was the result of the application of Registrar's policy formula.[4466]

pension

Accused failed to substantiate that part of his pension was an invalidity benefit which should not be included in his means.[4467]

Registrar properly calculated living expenses by determining the average expenses of a two-person household in the country of the accused's residence.[4468]

spouse's property

The equity in marital property jointly owned by an accused and his spouse is to be considered when calculating an accused's disposable means.[4469]

Whether assets constitute joint marital property is to be determined in accordance with the marital property regime of the State in which the accused and his spouse were wed or reside.[4470]

The Registrar was entitled to ignore the provisions of the Family Law of the RS that concerned the division of property and liabilities owed by a spouse to a creditor, rather than the determination of whether the assets constitute joint marital property. Those provisions were irrelevant in determining whether assets constitute marital property according to the marital property regime of RS.[4471]

[4465] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 46
[4466] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 20
[4467] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 31
[4468] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 80
[4469] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 24
[4470] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 24
[4471] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 25

It is not acceptable that the resources of the accused's close family members be included for the financing of his defence in lieu of being used for their daily expenses and all the costs related to their basic needs.[4472]

Registrar properly considered wife's salary in accused's disposable means.[4473]

Registrar did not err in including entire value of jointly owned family home in calculation of means, rather than the ½ interest of the accused.[4474]

Lack of consent of the Accused's spouse to the dissolution of marital property is not a basis upon which the Accused can avoid his obligation to contribute towards his defence.[4475]

transfer of property

Registrar did not err in including accused's equity in his family home beyond that reasonably needed for his family in his disposable means, and in disregarding the transfer of the accused's interest in that property after his arrest.[4476]

A visible transfer of assets into the hands of someone the accused considers immune from the Registry's claims, and for no consideration, falls well within the meaning of concealing.[4477]

A transfer for no consideration may be considered to be concealment.[4478]

The value of property found to have been concealed may be included in the calculation of the accused's means to remunerate counsel, even if he no longer owns the property.[4479]

withdrawal of counsel

[4472] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Financing of Defence* (2 November 2010) at para. 21(4)
[4473] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 34
[4474] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 24
[4475] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 26
[4476] *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at paras. 22-23
[4477] *Prosecutor v Prlic et al*., No. IT-04-74-T, *Decision on…Motion for Review of… Decision…Related to the Contribution of the Accused to the Costs of his Defence* (8 May 2013) at para. 16
[4478] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 68
[4479] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 68

Withdrawal of counsel on appeal was not contrary to the interests of justice where it had been determined that the accused had the means to fund his appeal.[4480]

Article 11—decision by the Registrar

(A) After examining the declaration of means referred to in Article 7 and any information obtained pursuant to Article 9, and having informed the suspect or accused of his findings with respect to those means, the Registrar shall determine whether and to what extent the suspect or accused is able to remunerate counsel, and shall decide, providing reasons for his decision:
(i) without prejudice to Article 19, to assign counsel from the list drawn up in accordance with Rule 45(B) of the Rules and Article 14; or
(ii) without prejudice to Article 19, that the suspect or accused disposes of means to partially remunerate counsel and to assign counsel, in which case the decision shall indicate which costs shall be borne by the Tribunal; or
(iii) not to grant the request for assignment of counsel.
(B) In the interests of justice, to ensure that the right to counsel is not affected while the Registrar examines the declaration of means referred to in Article 7 and the information obtained pursuant to Article 9, the Registrar may temporarily assign counsel to a suspect or an accused for a period not exceeding 120 days.
(C) If a suspect or an accused:
(i) requests the assignment of counsel but does not comply with the requirements set out above within a reasonable time; or
(ii) fails to obtain or to request the assignment of counsel; or
(iii) fails to elect in writing that he intends to conduct his own defence;
the Registrar may nevertheless, in the interests of justice, and without prejudice to Article 19, assign him counsel from the list drawn up in accordance with Rule 45(B) of the Rules.
(D) Where the Registrar decides to assign counsel in accordance with this Article, the Registrar shall:
(i) assign the counsel selected by the suspect or accused from the list drawn up in accordance with Rule 45(B), provided that there is no impediment to the assignment of that counsel; or
(ii) if the suspect or accused fails to select a counsel from the list drawn up in accordance with Rule 45(B) or if the Registrar determines that there is an impediment to the assignment of the counsel selected, assign other counsel from that list after hearing the suspect or accused.

Article 11 and its provisions allowing an accused to choose counsel does not apply to counsel imposed by the Trial Chamber on a self-represented accused.[4481]

[4480] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 38
[4481] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 29; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on*

Under Article 11(D), an accused must be provided with the list of counsel before the Registrar can select a counsel for him.[4482]

Since the accused continued to receive funds covering the costs of his defence throughout the duration of the inquiry, he did not suffer any prejudice because of the substantial amount of time the Registrar took in issuing the Registrar's Decision.[4483]

Article 12—notification of decision

The Registrar shall notify the suspect or accused of his decision, and shall also notify the counsel so assigned and the association of counsel of which he is a member.

Article 13—remedy against the Registrar's decision

(A) The suspect whose request for assignment of counsel has been denied may, within fifteen days from the date upon which he is notified of the decision, file a motion before the President for review of that decision. The President may either confirm the Registrar's decision or rule that a counsel should be assigned.
(B) The accused whose request for assignment of counsel has been denied or who has been found to have sufficient means to remunerate counsel in part, may within fifteen days from the date upon which he is notified of that decision, file a motion to the Chamber before which he is due to appear for review of the Registrar's decision. The Chamber may:
(i) confirm the Registrar's decision; or
(ii) quash the Registrar's decision and rule that counsel be assigned; or
(iii) direct the Registrar to reconsider the extent to which the accused is able to remunerate counsel.

The administrative decision by the Registrar with respect to legal aid will be quashed if the Registrar has failed to comply with the legal requirements of the Directive; if the Registrar has failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision, or if he has considered irrelevant material or failed to consider relevant material, or if he has reached a conclusion which no sensible person who has properly applied his mind to the issue could have reached.[4484]

The accused bears the onus of persuasion. He must persuade the Chamber conducting the review (a) that an error of the nature described has occurred, and (b) that

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Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey (12 February 2010) at para. 29
[4482] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 31
[4483] *Prosecutor v Karadzic*, No. IT-95-5/18-AR73.13, *Decision on Appeal from Decision on Indigence* (25 July 2014) at para. 37
[4484] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003) at para. 13

such error has significantly affected the Registrar's decision to his detriment. If the accused fails to persuade the Chamber of either of these matters, the Registrar's decision will be confirmed.[4485]

Registrar was entitled to withdraw legal aid from accused where it was demonstrated that he had income from fee-splitting with his attorneys which he could use to pay the cost of his appeal.[4486]

The Trial Chamber, and not the President, has the authority to review decisions by the Registrar on denial of legal aid which impacts on the rights of the accused to a fair trial.[4487]

Trial Chamber has authority to review decision of Registrar where the matter goes to the fairness of the trial, including adequate facilities for self-represented accused.[4488]

A Trial Chamber has jurisdiction to examine the decisions of the Registry on issues of self-representation considering its inherent power and duty to ensure the fair and expeditious management of the proceedings.[4489]

A Trial Chamber may intervene in a matter which is within the primary competence of the Registry when that matter goes to the fairness of the trial and where the power to review a decision of the Registrar is not specifically conferred upon the President.[4490]

Decision of Trial Chamber in review of Registrar's decision may also be reviewed by the Appeals Chamber upon a grant of certification.[4491]

Trial Chamber had jurisdiction to issue order that accused receive public funds for the conduct of his defence since the issue impacts the right of the accused to a fair and expeditious trial.[4492]

[4485] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003) at para. 14

[4486] *Prosecutor v Kvocka et al*, No. IT-98-30/1-A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003)

[4487] *Prosecutor v Seselj*, No. IT-03-67-PT, *Decision on Appeals Against Decisions of the Registrar of 4 January 2007 and 9 February 2007* (26 April 2007)

[4488] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Motion of Adequate Facilities and Equality of Arms: Legal Associates* (28 January 2009) at para. 12; *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Motion for Service of Documents* (20 April 2009) at para. 3

[4489] *Prosecutor v Seselj*, No. IT-03-67-T, *Decision on Financing of Accused's Defence* (23 April 2009) at para. 21

[4490] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 21

[4491] *Prosecutor v Karadzic*, No. IT-95-5/18-PT, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities* (7 May 2009) at para. 9; *Prosecutor v Tolimir*, No. IT-05-88-AR73.2, *Decision on Zdravko Tolimir's Appeal Against the Decision of Trial Chamber II on the Registrar's Decision on Legal Aid* (12 November 2009) at para. 7

President has authority to review decision of Registrar declining to assign counsel of choice to detained witness. However, counsel who was not admitted to Rule 45 list would not be assigned.[4493]

Accused person does not have standing in complaint of witness against denial of assignment of counsel.[4494]

President would not consider additional material submitted to Registrar after decision on means to remunerate counsel where Registrar had given accused the opportunity to provide such information prior to the decision.[4495]

Article 14—qualifications and standing of counsel

(A) Any person may be assigned as counsel to a suspect or accused if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(B) of the Rules. A person is eligible for admission to the list if:
(i) he is admitted to the practice of law in a State, or is a university professor of law;
(ii) he has written and oral proficiency in one of the two working languages of the Tribunal;
(iii) he possesses established competence in criminal law and/or international criminal law/international humanitarian law/ international human rights law;
(iv) he possesses at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings;
(v) he has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Conduct, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;
(vi) he has not been found guilty in relevant criminal proceedings;
(vii) he has not engaged in conduct whether in pursuit of his profession or otherwise which is dishonest or otherwise discreditable to counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute;
(viii) he has not provided false or misleading information in relation to his qualifications and fitness to practice and has not failed to provide relevant information;
(ix) he has indicated his availability and willingness to be assigned as counsel by the

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[4492] *Prosecutor v Seselj*, No. IT-03-67-R33B, *Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence Rendered on 8 April 2011* (17 May 2011) at paras. 20-21
[4493] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision of the President on the Complaint of Milan Martic Concerning the Appointment of Counsel* (8 April 2013) at p. 3
[4494] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision of the President on the Complaint of Milan Martic Concerning the Appointment of Counsel* (8 April 2013) at p. 3
[4495] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 31

Registrar to any suspect or accused who lacks the means to remunerate counsel, under the terms set out in this Directive; and
(x) he is a member in good standing of an association of counsel practising at the Tribunal.
(B) Any person may be assigned as duty counsel to an accused for the purposes of the initial appearance if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45
(C) of the Rules. A person is eligible for admission to that list if:
(i) he fulfils all the requirements of Article 14(A); and
(ii) he has informed the Registrar that he is readily available for assignment to an accused for the purposes of the initial appearance in accordance with Rule 62 of the Rules.
(C) 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).
(D) The Registrar may, after giving counsel a warning and an opportunity to respond, remove the name of counsel from the lists referred to in Rules 45(B) and (C) of the Rules:
(i) upon a decision by a Chamber under Rule 46(A)(i) of the Rules, after consulting with the Chamber; or
(ii) where counsel has been found to be in contempt pursuant to Rule 77 of the Rules, after consulting with the Chamber; or
(iii) where counsel has been found guilty of a disciplinary offense under the Code of Conduct, after consulting with the Chamber; or
(iv) where the Registrar has determined that counsel has provided false information in relation to his or her qualifications to be admitted to the list, or has failed to provide relevant information.
Counsel may seek review of the Registrar's decision before the President within fifteen days from the date upon which he is notified of that decision.
(E) The Registrar shall remove the name of counsel from the lists referred to in Rules 45(B) and (C) of the Rules:
(i) upon a decision by a Chamber under Rule 46 (A)(ii) of the Rules;
(ii) upon a final decision of the Disciplinary Panel or Disciplinary Board that counsel is banned from practicing before the Tribunal pursuant to Article 47(C)(vi) of the Code of Conduct;
(iii) where counsel no longer satisfies the requirements of Article 14(A).
(F) The Registrar may deny a request for the assignment of a counsel where a procedure pursuant to Rule 77 of the Rules or Part Three of the Code of Conduct has been initiated against that counsel.
Counsel may seek review of the Registrar's decision before the President within fifteen days from the date upon which he is notified of that decision.
(G) A counsel admitted to the lists referred to in Rules 45(B) and (C) of the Rules shall:

(i) confirm his continued availability to be assigned to indigent suspects or accused every two years from the date of his admission to the list; and
(ii) immediately advise the Registrar if he is no longer available to represent a suspect or accused for a period of more than 6 months.
If counsel fails to confirm his availability, the Registrar may, after giving notice to counsel, remove his name from the list.

conflict of interest

A conflict of interest between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.[4496]

Safeguarding the interests of justice requires the prevention of potential conflicts of interest before they arise. This may include ordering the withdrawal of counsel.[4497]

Where a Chamber can reasonably expect that due to a conflict of interest, a counsel may be reluctant to pursue a line of defence, to adduce certain items in evidence, or to plead certain mitigating factors at the sentencing stage to avoid prejudicing another client, it can no longer presume that counsel has fulfilled his or her professional obligations under the Code of Conduct and has the power and duty to intervene to guarantee or restore the integrity of the proceedings without delay.[4498]

For a conflict of interest to exist, there need not be substantial overlap between the two matters of dual representation. What is prohibited is the representation that will, or may reasonably be expected to, adversely affect the representation of either client.[4499]

Former Croatian Minister of Justice had conflict of interest where it was likely he would be called as a witness by the co-accused.[4500] Where he refused to resign, Trial Chamber refused him audience and ordered accused to obtain new counsel.[4501]

[4496] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 16
[4497] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 16
[4498] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 23
[4499] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 24
[4500] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Conflict of Interest of Attorney Miroslav Separovic* (27 February 2007)
[4501] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Finding of Misconduct of Attorney Miroslav Separovic* (6 March 2007)

Waiver of conflict of interest by accused was not determinative where administration of justice would be adversely affected by representation of counsel with conflict of interest.[4502]

Conflict of interest between counsel's representation of co-accused's subordinate who might be a witness in the case, and the accused, could not be waived and required that counsel withdraw from representing the accused.[4503]

Consent by the clients is not conclusive of there being no conflict of interest. This does not relieve the Trial Chamber of its obligation to maintain the integrity of the proceedings.[4504]

Counsel required to withdraw from dual representation of accused and client being prosecuted in a different jurisdiction, even where they received no confidential information from the other client.[4505]

Since a duty of loyalty also extends to a former client, withdrawal of counsel in one of the two cases would not remove the conflict of interest.[4506]

Trial Chamber has authority to determine on its own whether conflict of interest existed because of defence counsel's former employment with OTP. Registry ordered to furnish Trial Chamber and parties with reasons for its decision to appoint defence counsel.[4507]

Article 15—professional certification

(A) An applicant for admission to the lists envisaged in Rules 45(B) and (C) of the Rules shall supply the Registrar with:
(i) a certificate of professional qualification issued by the competent professional or governing body, including a certificate of current practice and good standing;
(ii) for applicants whose native language is not English or French, a certificate from a language institute or other evidence of proficiency in English or French. The Registrar may also require such applicants to demonstrate their language ability by

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[4502] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Finding of Misconduct of Attorney Miroslav Separovic* (6 March 2007) at p. 4
[4503] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (5 April 2007)
[4504] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 35
[4505] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007)
[4506] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.2, *Decision on Ivan Cermak's Interlocutory Appeal Against Trial Chamber Decision on Conflict of Interest of Attorneys Cedo Prodanovic and Jadranka Slokovic* (29 June 2007) at para. 48
[4507] *Prosecutor v Gotovina et al*, No. IT-06-90-PT, *Order to the Registrar Regarding Gregory Kehoe's Appointment as Defence Counsel for Ante Gotovina* (25 June 2007)

means of a language proficiency test;
(iii) a resume which evidences established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law and a minimum of seven years of relevant experience in criminal proceedings;
(iv) the names and addresses of two referees, who practice in the fields of criminal law, international humanitarian law, international human rights law or international criminal law, and who are in a position to advise the Registrar as to the professional competence of the applicants in these fields;
(v) certification that the applicant has not been found guilty in any criminal proceeding or to indicate the acts for which he has been found guilty;
(vi) certification that the applicant has not been found guilty in any disciplinary proceedings or to indicate the acts for which he has been found guilty; and
(vii) any other documentation that the Registrar may deem necessary.
(B) The Registrar may refer an applicant for admission to the lists referred to in Rules 45(B) and (C) of the Rules to a panel composed of senior legal officers in chambers, and/or counsel on the Rule 45(B) list who possess a minimum of 15 years experience in criminal proceedings, to interview the applicant and to make a recommendation to the Registrar on his application.
(C) An applicant who has been denied admission to the lists or who has been removed from the lists pursuant to Article 14(E)(iii) may seek review of the Registrar's decision before the President within fifteen days from the date upon which he is notified of that decision.

Article 16—basic principles

(**A) A suspect or accused shall be entitled to have one counsel assigned to him. Where suspects or accused are jointly charged or tried pursuant to the same indictment, each shall be entitled to have a separate counsel assigned.**
(B) The counsel assigned to represent a suspect or accused shall be referred to as the lead counsel and shall be responsible for all aspects of the defence of the suspect or accused before the Tribunal. Subject to Article 16 (C), the lead counsel shall sign all documents submitted to the Tribunal.
(C) In the interests of justice and at the request of lead counsel, the Registrar may assign a second counsel to assist with the defence of the suspect or accused. This counsel shall be called the cocounsel. Acting under the authority of lead counsel, the co-counsel may deal with all stages of the proceedings and all matters arising out of the defence of the suspect or accused. The co-counsel may also be authorised, in writing, to sign documents on behalf of the lead counsel.
(D) At the request of the lead counsel and where the interests of justice so require, the Registrar may assign a co-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. The Registrar may impose such conditions as deemed appropriate.
(E) At the request of the lead counsel, the Registrar may assign other persons such as legal assistants, consultants, investigators and interpreters, as required, to provide support to counsel. Only persons assigned or approved by the Registrar

may assist counsel with the defence of the suspect or accused. The lead counsel and the persons assisting him shall be referred to as the defence team. The lead counsel is responsible for selecting and supervising all defence team members, including co-counsel.
(F) Members of the family or close friends of suspects, accused and counsel are not eligible for assignment under the Directive as counsel, expert, legal assistant, investigator, translator or interpreter, unless the Registrar determines that the assignment is in the interests of justice.
(G) No counsel shall be assigned to more than one suspect or accused at a time, unless:
(i) each accused has received independent legal advice from the Registrar and both have consented in writing and
(ii) the Registrar is satisfied that there is no potential or actual conflict of interest or a scheduling conflict, and that the assignment would not otherwise prejudice the defence of either accused, or the integrity of the proceedings.
(H) Counsel assigned pursuant to Rule 62 of the Rules shall only represent the accused for the purpose of the accused entering a plea, unless the Registrar, in accordance with Article 25(B), deems it appropriate for the duty counsel to perform work which exceeds the mandate of duty counsel but is required to protect the rights of the accused until permanent counsel is assigned by the Registrar or retained by the accused, or the accused elects in writing to conduct his own defence pursuant to Rule 45(F) of the Rules.
(I) Lead counsel shall keep a complete and accurate case file of all documentation related to the case and of all work performed by the defence team during the representation of the suspect or accused. Subject to his obligations under the Code of Conduct, lead counsel shall retain the case file for five years after the completion of proceedings relating to the suspect or accused before the Tribunal.

co-counsel

The decision to appoint a co-counsel is to be made by Lead Counsel, subject to approval by the Registrar. The Trial Chamber did not err in sustaining the appointment of a co-counsel against the wishes of the accused.[4508]

Registrar did not abuse discretion in refusing to appoint a second co-counsel and refusing DSA for legal consultant who was fully participating in trial proceedings.[4509]

Trial Chamber did not err in refusing to adjourn trial during absence of lead counsel and requiring co-counsel to act in his absence.[4510]

[4508] *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team* (7 November 2003) at para. 21
[4509] *Prosecutor v Mladic*, No. IT-09-92-T, *Decision on Ratko Mladic's Request for Review of OLAD Decision on Additional Co-Counsel* (30 September 2013) at paras. 21-22
[4510] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Judgement* (23 January 2014) at para. 86

simultaneous representation

Article 16(G)'s requirement that both accused consent to simultaneous representation by a single counsel was not applicable to counsel imposed upon a self-represented accused.[4511]

Article 17—counsel-client privilege

(A) Notwithstanding counsel-client privilege as defined in Article 13(A) "Confidentiality" of the Code of Conduct, the Registrar may, if he determines that reasonable cause exists, require assigned counsel to provide information and documentation, including that which is otherwise privileged or confidential, as may be reasonably necessary for the Registrar to determine whether work for which Tribunal legal aid funds have been claimed or paid, has been performed. For this purpose, counsel shall allow the Registrar or the legal and investigative staff of the Office for Legal Aid and Detention Matters to examine, on a strictly confidential basis, any part of the case file, in accordance with Article 17(B). Disclosure of privileged or confidential information or documentation under this article does not negate or constitute waiver of counsel-client privilege.
(B) Counsel-client privilege shall extend to the Registrar or the legal and investigative staff of the Office for Legal Aid and Detention Matters, in respect of information or documentation obtained under Article 17(A).
(C) The general prohibition on the disclosure of privileged or confidential information and documentation under Articles 17(A) and (B) shall not apply to the Registrar or the legal and investigative staff of the Office for Legal Aid and Detention Matters, where:
(i) the Registrar initiates a disciplinary proceeding against counsel under Part III of the Code of Conduct in connection with Tribunal legal aid funds which have been claimed or paid, and to which the claimant or payee was not entitled;
(ii) the Registrar initiates proceedings in a national jurisdiction in connection with the administration of the Tribunal's legal aid system, including the misappropriation of Tribunal legal aid funds; or
(iii) disclosure is essential to establish a claim for recovery of funds from a person to whom legal aid was granted in accordance with Article 11.

Article 18—counsel away from the seat of the Tribunal

(A) Away from the seat of the Tribunal, in a case of such urgency that the procedure established in Article 7 cannot be followed, a suspect who, during the investigation, requests assignment of counsel, may indicate the name of a counsel whose name does not appear on the list envisaged in Rule 45(B) of the Rules, but who may be assigned in accordance with this Directive.

[4511] *Prosecutor v Karadzic*, No. IT-95-05/18-T, *Decision on Accused's Motion to Vacate the Appointment of Richard Harvey* (23 December 2009) at para. 33; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Radovan Karadzic's Appeal from Decision on Motion to Vacate Appointment of Richard Harvey* (12 February 2010) at para. 29

(B) Where the suspect requesting assignment of counsel is unable to provide the name of a counsel in accordance with Article 18(A), the Prosecutor, or a person authorised by her or acting under her direction, shall obtain the name of a counsel who may be assigned in accordance with the provisions of this Directive, and may contact the local bar association for this purpose.
(C) In the situations envisaged in Articles 18(A) and (B), the procedure for assignment of counsel as set out in this Directive shall apply mutatis mutandis but shall be accelerated where necessary.

Article 19—ability to remunerate counsel

(A) Where counsel has been assigned, the Registrar may withdraw the assignment of counsel if information is obtained which establishes that the suspect or accused has sufficient means to remunerate counsel. In such cases, the Registrar may recover the cost of providing counsel in accordance with Rule 45(E) of the Rules.
(B) Where counsel has been assigned, the Registrar may modify his decision on the extent to which the suspect or accused is able to remunerate counsel if it is established that the means of the suspect or accused:
(i) have changed since the Registrar issued his decision on the extent to which the suspect or accused is able to remunerate counsel; or
(ii) were not fully disclosed, or were otherwise not known to the Registrar, as of the date he issued his decision.
(C) The Registrar's decision shall be reasoned and notified to the suspect or accused and to the counsel assigned, and shall take effect from the date of notification.
(D) The provisions of Article 13 shall apply mutatis mutandis where a suspect or accused seeks a review of a decision made pursuant to Articles 19(A) or (B).

The only power a Trial Chamber has on application to review the Registrar's decision on the appointment or withdrawal of counsel is to stay the trial pending review of the Registrar's decision by the President.[4512]

President stayed the Registrar's order withdrawing counsel pending an appeal on the issue of whether the accused could afford to pay the costs of his defence.[4513]

Registrar did not act unreasonably in terminating legal aid during trial upon final determination that accused had the means to remunerate his defence team, rather than spreading the amount of the accused's contribution over the appeal phase.[4514]

[4512] *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team* (7 November 2003) at para. 7
[4513] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013) at para. 5
[4514] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *President's Decision on Request for Review of Registrar's Decision* (8 October 2014) at para. 17

Registrar did not err in failing to reach agreement with accused as to manner of reduction in legal aid where amount of accused's contribution exceeded amount of remaining funds to be allocated by legal aid program.[4515]

Article 20—withdrawal and suspension of assignment

(A) In the interests of justice, the Registrar may:
(i) at the request of the accused, or his counsel, withdraw the assignment of counsel;
(ii) at the request of lead counsel, withdraw the assignment of co-counsel.
Where a request for withdrawal has been denied, the person making the request may seek the President's review of the Registrar's decision within fifteen days from the date upon which he is notified of that decision.
(B) The Registrar may suspend the assignment of counsel for a reasonable and limited time after consulting with the Chamber if:
(i) a disciplinary procedure under Part Three of the Code of Conduct has been initiated against that counsel; or
(ii) contempt proceedings have been initiated against that counsel pursuant to Rule 77 of the Rules.
The counsel may seek the President's review of a decision to suspend within fifteen days from the date upon which he is notified of that decision.
(C) The Registrar shall withdraw the assignment of counsel:
(i) upon a decision of a Chamber under Rule 46(A)(ii); or
(ii) where counsel no-longer satisfies the requirements of Article 14(A); or
(iii) where counsel has been found to be in contempt pursuant to Rule 77 of the Rules, unless the Chamber rules that the assignment should continue.
Where the assignment of counsel has been withdrawn pursuant to Article 20(C)(ii), counsel may seek review of the Register's decision before the President within fifteen days from the date upon which he is notified of that decision.
(D) In such cases, the withdrawal or suspension shall be notified to the accused, to the counsel concerned, to the association of counsel of which he is a member, and to his professional or governing body.
(E) Where the assignment of counsel is suspended, the Registrar shall immediately assign replacement counsel to the suspect or accused. Where the assignment of counsel is withdrawn, the Registrar may, subject to Article 21, assign a replacement counsel. Where the assignment of counsel is withdrawn pursuant to Article 20(C), the Registrar shall assign a replacement counsel.

Co-counsel has standing under this section to request his own withdrawal.[4516]

Article 21—duties of counsel upon withdrawal

[4515] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *President's Decision on Request for Review of Registrar's Decision* (8 October 2014) at para. 18
[4516] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Urgent Request for Review of the Registry's Decision of 2 April 2015 and for a Decision on the Appellant's Request of 15 January 2015* (7 May 2015) at para. 12

(A) Assigned counsel shall continue to act until:
(i) a replacement counsel has been assigned by the Registrar; or
(ii) a replacement counsel has been retained by the suspect or accused pursuant to Rule 44 of the Rules; or
(iii) the suspect or accused has elected in writing to conduct his own defence pursuant to Rule 45(F) of the Rules and his election has been accepted by the Chamber.
(B) In the interests of justice, the Registrar may instruct the previously assigned counsel to continue to act or to assist the replacement counsel where one has been retained or assigned, for a period not exceeding 30 days from the date upon which replacement counsel is assigned or retained. During this period, the costs necessarily and reasonably incurred by both assigned counsel shall be met by the Tribunal.

Article 22—payment *pro rata temporis*

Where an assigned counsel is replaced by another assigned counsel, he and his replacement shall be remunerated pro rata temporis.

Article 23—responsibility for remuneration and expenses

(A) Where counsel has been assigned, the costs of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal in accordance with the Statute, the Rules, this Directive and related policies and subject to the budgetary provisions, rules, regulations, and practice set by the United Nations. All costs are subject to prior authorisation by the Registrar. If authorisation was not obtained, the Registrar may refuse to meet the costs.
(B) The Tribunal shall meet the following costs in so far as those costs are reasonable and necessary in the circumstances to ensure that the rights of the suspect or accused enshrined in Article 21 of the Statute are upheld:
(i) the remuneration of assigned counsel and assigned members of the defence team;
(ii) expenses related to the production of evidence for the defence and the ascertainment of facts;
(iii) expenses related to temporary consultancy on specific questions;
(iv) expenses related to the production of expert reports, which are paid at the rates established in Annex I;
(v) expenses related to the accommodation and transportation of witnesses testifying in court in accordance with the Directive on Allowances for Witnesses and Expert Witnesses; and
(vi) expenses related to travel, travel taxes and similar duties.
(C) General office costs which include but are not limited to costs for telephone and mail or express mail, photocopies, books and journals, lease of office space, purchase of office equipment, office supplies and secretarial support, are included in the remuneration of counsel. Where assigned counsel satisfies the Registrar that the costs of international shipping of case related material exceeds ordinary office costs and is reasonable and necessary, the Registrar shall meet those costs.

(D) The Registrar shall pay the costs referred to in Article 23(B) upon approval of a statement of fees or expenses from lead counsel. The statement of fees or expenses must be made out in accordance with the guidelines established by the Registrar and, unless otherwise provided for, must be presented to the Registrar within 120 days from the last day of the month during which work was performed or the expense was incurred.

complexity

The factors to take into consideration in determining the complexity of the case include (1) the number and nature of counts in the indictment; (2) the possible amendments of the indictment; (3) the nature of preliminary motions and challenges to the Tribunal's jurisdiction, (4) the number of accused joined in the same case; (5) the number of witnesses and documents involved; (6) the geographical territory covered in the indictment; (7) the previous ranking of the accused within the military or political hierarchy; and (8) the legal issues expected to arise during the trial.[4517]

Registrar erred in refusing to consider increase in number of prosecution witnesses as justifying an increase in the complexity level of the case.[4518]

Registrar did not err in finding that single accused case did not require more resources for a defence team than a multiple accused case.[4519]

Registrar did not err in concluding that the scope of disclosure material or geographical scope of the case did not warrant upgrading of complexity level of the case.[4520]

pre-trial

The Registrar erred in not considering the duration of the pre-trial period in rejecting a request for additional funds, but the duration alone does not justify overturning the Registrar's determination.[4521]

Registrar's decision as to level of complexity of the case for legal aid purposes may be reviewed by the Trial Chamber considering the effect upon the fairness of the trial.[4522]

[4517] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Request for Review of the Registrar's Decision on the Level of the Case* (3 March 2005) at page 3
[4518] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding* (26 September 2012) at para. 19
[4519] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding* (26 September 2012) at para. 15
[4520] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Second Urgent Request for Review of OLAD Decision on Pre-Trial Funding* (26 September 2012) at paras. 16-17
[4521] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 25

Registrar was unreasonable in failing to consider that volume of prosecution disclosures, timing of disclosures relative to the start of the trial, and relevance of the disclosures to the case were extraordinary circumstances requiring additional remuneration.[4523]

Registrar was unreasonable in allocating 4500 hours to defence team of self-represented accused where 7500 hours was considered necessary for support staff of represented accused persons.[4524]

procedural fairness

Procedural fairness demands that the Registrar identify the other cases which it used to compare to the case at hand when denying additional remuneration.[4525]

Where Registrar only identified other cases which it used to compare to the case at hand in its Response to the appeal from its decision, its decision would be reversed and remanded for it to provide the information in its decision at first instance.[4526]

After Registry disclosed the cases which it had used to compare to the current case, its decision not to increase the complexity level of the case was found to be reasonable.[4527]

standard of review

It must be shown that the Registrar (1) failed to comply with the requirements of the Directive; (2) failed to observe any basis rules of natural justice; (3) considered irrelevant material or failed to consider relevant material; or (4) reached a conclusion that no sensible person could reach.[4528]

trial

[4522] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Request for Review of the Registrar's Decision on the Level of the Case* (3 March 2005) at page 3
[4523] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds* (17 December 2009) at para. 23
[4524] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds* (17 December 2009) at para. 29
[4525] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Request for Review of Decision on Pre-Trial Funding* (17 August 2012) at para. 17; *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Third Request for Review of OLAD Decision on Pre-Trial Funding* (18 December 2012) at para. 20
[4526] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Request for Review of Decision on Pre-Trial Funding* (17 August 2012) at para. 19
[4527] *Prosecutor v Hadzic*, No. IT-04-75-PT, *Decision on Third Request for Review of OLAD Decision on Pre-Trial Funding* (18 December 2012) at para. 24
[4528] *Prosecutor v Mrksic et al*, No. IT-95-13/1-PT, *Decision on Defence Request for Review of the Registrar's Decision on the Level of the Case* (3 March 2005) at page 3

Registrar erred in concluding that volume of Rule 66(B) material was irrelevant to funding decision. The fact that the requests of the accused under Rule 66(B) result in the production of a large volume of material does not offer a reasonable basis for the Registrar to conclude that the accused should not be afforded sufficient resources to deal with it.[4529]

Decision of President allocating 750 hours per month to self-represented accused's defence team was reconsidered and an additional 270 hours per month was awarded based upon the complexity of the case.[4530]

unforeseen circumstances

Registrar did not err in refusing to reconsider level of funding for defence team on basis other than unforeseen circumstances. Although unforeseen circumstances are not the only factor that may be considered when reconsidering the level of funding, the failure to demonstrate unforeseen circumstances may justify denial of reconsideration.[4531]

The test for allocation of defence team funding is objective, rather than subjective. Therefore, the fact that the accused foresaw the need for additional funds is not determinative.[4532]

Article 24—remuneration of assigned counsel

(A) From 1 December 2004, during pre-trial proceedings, assigned counsel and assigned members of the defence team shall be remunerated in accordance with the Defence Counsel Pre-Trial Legal Aid Policy. In cases where pre-trial proceedings commenced before 1 December 2004, assigned counsel and assigned members of the defence team shall continue to be remunerated on the basis of a maximum allotment of working hours paid at a fixed hourly rate as established in Annex I to this Directive, for the work reasonable and necessary for the preparation of the defence case for trial.
(B) During trial proceedings, assigned counsel and assigned members of the defence team shall be remunerated in accordance with the Defence Counsel Trial Legal Aid Policy.
(C) During appellate proceedings, assigned counsel and assigned members of the defence team shall be remunerated on the basis of a maximum allotment of working hours paid at a fixed hourly rate as established in Annex I to this Directive, for the work reasonable and necessary to the preparation and presentation of the defence case.

[4529] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Defence Team Funding* (31 January 2012) at para. 31
[4530] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Defence Team Funding* (31 January 2012) at para. 40
[4531] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Defence Team Funding* (31 January 2012) at para. 23
[4532] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Decision on Defence Team Funding* (31 January 2012) at para. 25

(D) Without prejudice to Article 6(C), assigned counsel and assigned defence team members who receive remuneration from the Tribunal shall not accept remuneration for the assignment from any other source.

awaiting judgement

It was unreasonable for the Registrar to refuse to remunerate legal advisor to self-represented accused for time spent reviewing material from ongoing related case where the charges in the related case were identical, the defence had been given access to the related case by that Chamber, and the history of disclosure violations by the Prosecution.[4533]

It was unreasonable for the Registrar to refuse to remunerate legal advisor to self-represented accused for preparation of post-trial motions to reopen defence case in the absence of an order from the Chamber to withhold payment under Rule 73.[4534]

Registrar was unreasonable in conditioning remuneration for work on post-trial motions on whether motion was successful.[4535]

Remuneration for work on post-trial motions cannot be contingent on success of motion or whether motion was filed at all.[4536]

It was reasonable for legal advisor to self-represented accused to review information which became available after the trial and examine its potential relevance to the defence. The Registrar was unreasonable when failing to remunerate legal advisor for this work.[4537]

It was unreasonable for Registrar to refuse to remunerate legal advisor to self-represented accused for time spent responding to requests for information from Registry and Prosecution in the post-trial period. The legal advisor was required to perform such tasks to serve the best interests of the accused.[4538]

It was unreasonable for Registrar to refuse to remunerate legal advisor to self-represented accused for work done to seek reclassification of confidential material to

[4533] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at paras. 27-29
[4534] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 33
[4535] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 36
[4536] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 36
[4537] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 36
[4538] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 39

public and vice versa.[4539]

Registrar was unreasonable in refusing to remunerate legal advisor to self-represented accused during post-trial period on the grounds that the work should have been performed during the trial.[4540]

Registrar was unreasonable in refusing to remunerate legal advisor to self-represented accused for reviewing pleadings in the case during post-trial period, but properly denied remuneration for reading pleadings in other cases.[4541]

Assistance of legal advisor for accused to correspond with the news media was not necessary and therefore it was not error for the Registrar to deny remuneration for time spent on those tasks.[4542]

It was reasonable for the Registrar to refuse to remunerate legal advisor to self-represented accused for time spent requesting approvals for post-trial work from OLAD.[4543]

appeal

Registrar failed to act with procedural fairness when denying remuneration of 50 hours to defence team to consider whether to file a cross-appeal after the prosecution appealed the accused's acquittal.[4544]

The scope, volume, and nature of additional disclosures during the appeal phase were not such as to warrant an allocation of additional hours for the appeal.[4545]

It was unreasonable to conclude that 7,500 pages of disclosure during the appeal phase was foreseeable and therefore the Registrar's rejection of additional hours to review this disclosure was reversed.[4546]

Defence failed to establish that the time between preparation of the briefs and the

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[4539] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 40
[4540] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 41
[4541] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 44
[4542] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 45
[4543] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 47
[4544] *Prosecutor v Stanisic & Simatovic*, No. IT-03-69-A, *Decision on Request for Review of OLAD Decision on Remuneration for the Appeal Phase* (20 August 2014) at para. 17
[4545] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Prlic's Request for Review of the Registrar's Decision on Remuneration for Additional Funds in the Appeals Phase* (26 April 2016) at para. 19
[4546] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Request for Review of OLAD Decisions on Appeal Phase Remuneration* (25 May 2010) at para. 31

appeal hearing was so long as to necessitate unforeseeable supplementary preparation and thus a supplemental remuneration.[4547]

The need to discuss the trial judgement with one's client during the appeal phase, prepare for final arguments and discuss the appeals judgement after it is rendered are tasks typical of all appeals before the Tribunal and therefore do not warrant an increase in allocation of funds on appeal.[4548]

The need to discuss the trial judgement with one's client once it has been translated into a language the client understands is a foreseeable task and did not warrant an increase in the appeal phase remuneration for counsel.[4549]

Responding to the Trial Chamber judgement, liaising with the defendant, rectifying self-made errors in the notice of appeal, and preparing for the oral appeal hearing were not unforeseen and therefore the Registrar did not abuse his discretion in refusing additional remuneration for these tasks.[4550]

Where defence counsel accepted to work on the appeal under the remuneration system in place, he could not complain that he had been required to work "without pay".[4551]

Article 25—remuneration of duty counsel

(A) Duty counsel assigned pursuant to Rule 62 of the Rules shall be remunerated at a fixed rate of €1,688 in accordance with the Defence Counsel Pre-Trial Legal Aid Policy.
(B) Where exceptionally, the circumstances of the case require work to be performed which exceeds the mandate of duty counsel, the duty counsel shall obtain authorisation from the Registrar prior to performing such work. Where authorisation is granted, the Registrar shall remunerate duty counsel for such additional work at the rates established in Annex I to this Directive.

Article 26—travel expenses

(**A) Subject to prior authorisation by the Registrar, travel expenses of assigned counsel and where applicable, assigned members of the defence team shall be met in accordance with the Registry Defence Travel and Daily Subsistence Allowance**

[4547] *Prosecutor v Lukic & Lukic*, No. IT-98-32/1-A, *Decision on Request for Review of OLAD Decision Denying Additional Funding* (22 November 2011) at para. 11
[4548] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Request for Review of OLAD Decisions on Appeal Phase Remuneration* (25 May 2010) at para. 27
[4549] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Request for Review of Registry Determination on Appeal Phase Remuneration* (23 February 2011) at para. 25
[4550] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Prlic's Request for Review of the Registrar's Decision on Remuneration for Additional Funds in the Appeals Phase* (26 April 2016) at para. 20
[4551] *Prosecutor v Sainovic et al*, No. IT-05-87-A, *Decision on Request for Review of OLAD Decisions on Appeal Phase Remuneration* (25 May 2010) at para. 29

Policy.
(B) Travel expenses of assigned counsel and where applicable, assigned members of the defence team who do not usually reside in the territory of the host country or in the country where the particular stage of the procedure is being conducted, shall be met by the Registrar on the basis of one economy class standard fixed-date round trip air ticket or one first class train ticket by the shortest route to and from the country where the procedure is being conducted and within the limits set out in the Registry Defence Travel and Daily Subsistence Allowance Policy.
(C) Travel expenses of assigned counsel and where applicable, assigned members of the defence team who usually reside in the territory of the host country but not in the town where they are acting, shall be met by the Registrar on the basis of either first class public transportation tickets or fixed rates as established by the United Nations Schedule of Rates of Reimbursement for Travel by Private Motor Vehicle applicable to different groups of Countries and Territories, per kilometre travelled on the outward and return journeys by the shortest route, within the limits set out in the Registry Defence Travel and Daily Subsistence Allowance Policy.
(D) All travel authorisation requests and amendments thereof shall be submitted to the Registrar at least seven days before the proposed travel unless it can be demonstrated that circumstances beyond the control of the defence team prevented the traveller from complying with this requirement. The Registrar may refuse to cover additional costs associated with a failure to comply with this requirement. Where such a failure causes the Tribunal to incur additional costs, the Registrar may deduct those costs from payments otherwise due to the traveller.

Article 27—daily subsistence allowance
(A) Subject to prior authorisation by the Registrar, daily subsistence allowance for assigned counsel and where applicable, assigned members of the defence team, shall be paid by the Registrar in accordance with the Registry Defence Travel and Daily Subsistence Allowance Policy.
(B) Daily subsistence allowance paid to assigned counsel and where applicable, assigned members of the defence team shall be calculated on the basis of fixed rates as established by the United Nations Schedule of Daily Subsistence Allowance Rates applied to the number of days of work. Neither assigned counsel, nor assigned members of the defence team shall be entitled to daily subsistence allowance while staying at their place of residence.
(C) Daily subsistence allowance shall be paid in accordance with the United Nations rules and regulations on the basis of the current rates applicable in the country where assigned counsel, or where applicable, assigned members of the defence team, are acting.
(D) In accordance with United Nations regulations, the applicable rate shall be lowered by twenty-five percent when assigned counsel or where applicable, assigned members of the defence team have spent more than 60 days in total from the date of their assignment, in a country in which they are acting.
(E) Where appropriate in the circumstances, the Registrar may provisionally pay daily subsistence allowances in advance.

Article 28—translation and interpretation costs

(A) The Tribunal shall provide translation and interpretation services or meet the cost of such services as reasonably necessary to protect the rights of a suspect or accused enshrined in Article 21 of the Statute.
(B) The Registry Translation Services Policy sets out the type of documents translated and the interpretation services provided by the Tribunal to the suspect or accused and his defence team.
(C) Translation and interpretation services other than those provided by the Tribunal in accordance with the Registry Translation Services Policy shall be organised by the defence team. The cost of these services shall be met by the resources allocated to the defence team in accordance with Article 24.

Article 29—adoption and amendment of policies

The policies referred to in Articles 24, 26, 27, and 28 shall not be adopted or amended by the Registrar without prior consultation with the associations of counsel.

Article 30—responsibility for payments

All sums payable to assigned counsel and assigned members of a defence team under the provisions of this Directive shall be paid by the Financial Officer of the Registry.

Article 31—settlement of disputes over payment

(A) Where a dispute arises over remuneration or reimbursement of expenses and where the sum involved is less than €1,000, an aggrieved party may request the Head of the Registry's Office of Legal Aid and Detention Matters to review and decide upon the matter.
(B) Where a dispute arises over remuneration or reimbursement of expenses and where the sum involved is between €1,000 and €4,999, an aggrieved party may request the Registrar to review the matter. The Registrar shall decide on the matter personally or assign the Deputy Registrar to do so on his behalf. Before reaching his decision, the Registrar or Deputy Registrar shall invite submissions from the aggrieved party and the respondent and may consult with the President if necessary. The decision of the Registrar or Deputy Registrar shall be final and binding upon the parties. The review procedure envisaged in this article applies also where an aggrieved party demonstrates that individual claims involving amounts less than €1,000 are part of the same dispute as they relate to the same or similar subject matter.
(C) Where the dispute involves a sum greater than €4,999, an aggrieved party may file a request for review with the Registrar, who shall refer the matter to the President for his determination. Before making a determination the President shall request submissions from the aggrieved party and the respondent. The President's

determination shall be final and binding upon the parties.
(D) Requests for review of decisions of the Registrar on the extent to which an accused is able to remunerate counsel shall be brought before the Chamber seised of the case in accordance with Article 13(B).

Judicial economy was best served by President's consideration of request for review, even though it had not been made to Registrar for submission to President as required by Article 31(D).[4552]

Registrar erred in denying reconsideration of his decision to reduce funding of defence teams during period of preparation of closing briefs without consulting with the President.[4553]

Registrar's denial of assignment of investigators without adequate explanation violated right of accused to procedural fairness and required remand of decision to Registrar.[4554]

Administrative decisions are not pronouncement of Delphic oracles and should be comprehensible on their face.[4555]

Sufficient explanation of the rationales underlying administrative decisions is crucial to assuring that the Tribunal both acts and is seen to act in a fair manner, guides parties in their interactions with the Tribunal, and permits focused applications for review.[4556]

Registrar should exercise particular caution before attempting to determine the inner functioning of individual defence teams, and the role that specific team members may play therein, especially with respect to ancillary employees such as investigators.[4557]

Decision by Registrar to terminate legal aid payments after Appeals Chamber upheld decision that accused had to contribute to the cost of his defence was not a matter concerning the "extent" to which the accused was able to remunerate counsel within the

[4552] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Appeal of OLAD Decision in Relation to Additional Pre-Trial Funds* (17 December 2009) at para. 19
[4553] *Prosecutor v Prlic et al*, No. IT-04-74-T, *Decision on Joint Motion…Regarding Reconsideration of the Registry Decision of 9 November 2010* (16 December 2010) at pp. 5-6
[4554] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Request for Review of Registrar Decision and for Summary Reversal* (7 May 2012) at para. 9
[4555] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Request for Review of Registrar Decision and for Summary Reversal* (7 May 2012) at para. 10
[4556] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Request for Review of Registrar Decision and for Summary Reversal* (7 May 2012) at para. 11
[4557] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on the Request for Review of Registrar Decision and for Summary Reversal* (7 May 2012) at para. 12

meaning of Article 31(D) and jurisdiction to review the decision lay with the President and not the Trial Chamber.[4558]

Counsel was not entitled to disclosure of the results of consultations between the Registrar and Appeals Chamber concerning request for increase in allocation for appeals phase.[4559]

Registrar's claim that legal advisor to self-represented accused had no standing to seek review from the President of Registrar's remuneration decision was moot where the request for review was also signed by the accused.[4560]

Article 32—advisory panel

(A) An Advisory Panel shall be set up consisting of two persons chosen by the President in consultation with the Registrar and the association(s) of counsel of which they are members from the list referred to in Rule 45(B) of the Rules who have appeared before the Tribunal, two persons proposed by the International Bar Association, two persons proposed by the Union Internationale des Avocats, and the President of the Nederlandse Orde van Advokaten or his representative. Each member of the Advisory Panel must have a minimum of ten years legal experience.
(B) The President of the Advisory Panel will be the President of the Nederlandse Orde van Advokaten or his representative. The membership of the Advisory Panel shall come up for appointment every two years on the anniversary date of the entry into force of this Directive.

Article 33—role and function of the advisory panel

(A) The role of the Advisory Panel is to provide advice to the President of the Tribunal, the Registrar and the associations of counsel, including but not limited to:
(i) Those Rules of Procedure and Evidence which affect the rights of suspects and accused and the work of defence counsel before the Tribunal;
(ii) The Directive on the Assignment of Defence Counsel;
(iii) The Code of Conduct; and
(iv) The policies and practice directions of the Tribunal.
(B) The Advisory Panel may be consulted as and when necessary by the President of the Tribunal, the Registrar of the Tribunal, and the Presidents of the associations of counsel on matters referred to in Article 33(A).
(C) The Advisory Panel may also on its own initiative address the President of the Tribunal, the Registrar or the Presidents of the associations of counsel on the matters referred to in Article 33(A).

[4558] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar Decision* (5 September 2014) at para. 16; *Prosecutor v Karadzic*, No. IT-95-5/18-T, *President's Decision on Request for Review of Registrar's Decision* (8 October 2014) at para. 14
[4559] *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Prlic's Request for Review of the Registrar's Decision on Remuneration for Additional Funds in the Appeals Phase* (26 April 2016) at para. 18
[4560] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Request for Review of Registrar's Decision on Remuneration for October 2014-January 2015* (12 October 2015) at para. 23

(D) The Advisory Panel shall meet at least once per year, and as often as the Chair of the Advisory Panel deems necessary. Upon the invitation of the Advisory Panel, the President of the Tribunal, the Registrar, or the Presidents of the associations of counsel, or their representatives, may attend the meetings of the Advisory Panel.

Code of Professional Conduct for Defence Counsel

Article 1—definitions

(A) In this Code, unless the context otherwise requires, the following terms shall mean:
Code: The Code of Professional Conduct for Counsel Appearing Before the International Tribunal in force;
Directive: The Directive on Assignment of Defence Counsel (IT/73) adopted on 1 August 1994, as subsequently amended;
Rules: The Rules of Procedure and Evidence of the Tribunal adopted on 11 February 1994, as subsequently amended;
Statute: The Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993, as subsequently amended;
Tribunal: 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, established by Security Council resolution 827 of 25 May 1993.
*** * ***
Advisory Panel: Body established to assist the President and the Registrar in all matters relating to defence counsel under Rule 44 (D) of the Rules;
Association of Counsel: An association recognised by the Registrar in accordance with Rule 44 of the Rules;
Client: An accused, suspect, detainee, witness or other person who has engaged counsel or has been assigned counsel by the Registry;
Counsel: Any person who is or has been engaged by a client and has filed a power of attorney with the Registrar; who is or has been assigned by the Registrar to represent a client; or who is in communication with a prospective client;
Firm: Persons belonging to a private firm, a legal department of an organisation or a legal services organisation;
Parties: The Prosecution and the Defence;
Team: Counsel, co-counsel, legal and non-legal associates and other persons who perform services for counsel for the purpose of representing a client before the Tribunal.
(B) Any term not defined in this Code has the same meaning given to it by the Statute or by the Rules.
(C) General provisions of this Code should not be read or applied in a restrictive way by reason of any particular or illustrative provisions.
(D) In this Code, the masculine shall include the feminine and the singular the plural, and vice versa.

Article 2—entry into force
This Code shall enter into force on 12 June 1997.

Article 3—basic principles

This Code is based, in particular, on the fundamental principles that:
(i) clients have the right to legal assistance of their own choosing;
(ii) as legal practitioners, counsel shall maintain high standards of professional conduct;
(iii) the role of counsel as advocates in the administration of justice requires them to act honestly, independently, fairly, skilfully, diligently, efficiently and courageously;
(iv) counsel have a duty of loyalty to their clients consistent with their duty to the Tribunal to act with independence in the administration of justice;
(v) counsel shall take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute; and
(vi) counsel may be subject to disciplinary proceedings and should be informed of the circumstances under which such proceedings may take place and his rights and obligations in those proceedings.

Statement by counsel implying that Tribunal had demonized Serbia constituted misconduct for which a public reprimand was warranted.[4561]

Discipline for making a statement disparaging of the Tribunal did not violate the right to free expression of the lawyer.[4562]

There is no greater duty upon lawyers assigned by the Tribunal to represent an indigent accused than upon those who are privately retained to refrain from public criticism of the Tribunal.[4563]

Article 4—conflicts

If there is any inconsistency between this Code and any other codes of practice and ethics governing counsel, the terms of this Code prevail in respect of counsel's conduct before the Tribunal.

Article 5—authentic texts

The English and French texts of this Code shall be equally authentic. In case of discrepancy, the version that is more consonant with the spirit of the Statute, the Rules, the Directive and this Code shall prevail.
Article 6—amendments

(A) Under the supervision of the President, amendments shall be promulgated by the Registrar after consultation with the permanent Judges, the Association of

[4561] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 84
[4562] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 87
[4563] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 89

Counsel and the Advisory Panel.
(B) An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of counsel or clients in any pending case.

Article 7—purpose

The purpose of this Part is to provide for standards of conduct for counsel in the interests of the fair and proper administration of justice.

Article 8—scope of representation

(A) Counsel shall advise and represent a client until counsel's representation is terminated by the client or withdrawn by the Registrar.
(B) When representing a client, counsel shall:
(i) abide by the client's decisions concerning the objectives of representation;
(ii) consult with the client about the means by which those objectives are to be pursued, but is not bound by the client's decision; and
(iii) seek or accept only those instructions which emanate from the client and which are not given as the result of an inducement from any person, organisation or State.
(C) Counsel shall not advise or assist a client to engage in conduct which counsel knows is criminal or fraudulent, in breach of the Statute, the Rules, this Code or any other applicable law and, where counsel has been assigned to the client, the Directive. However, counsel may discuss the legal consequences of any proposed course of conduct with a client and may advise or assist a client in good faith to determine the validity, scope or meaning of the applicable law.

The accused does not have a right to be consulted on each and every action taken by defence counsel in his case.[4564] The lawyer is obligated to consult with the accused but is not bound to carry out the views of the accused about what is best for his defence.[4565]

Article 9—termination of representation

(A) Counsel shall not represent a client if:
(i) representation will result in conduct which is criminal, fraudulent or a violation of the Statute, the Rules, this Code or any other applicable law;
(ii) counsel's physical or mental condition materially impairs counsel's ability to represent the client; or
(iii) counsel's representation is terminated by the client or withdrawn by the Registrar.

[4564] *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team* (7 November 2003) at para. 26
[4565] *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team* (7 November 2003) at para. 27

(B) Counsel may terminate or request, if applicable subject to the provisions of the Directive, withdrawal of his representation of a client if such termination or withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
(i) the client has used counsel's services to perpetrate a crime or fraud, or persists in a course of action involving counsel's services that counsel reasonably believes is criminal or fraudulent;
(ii) the client insists upon pursuing an objective that counsel considers repugnant or imprudent;
(iii) the client fails to substantially fulfil an obligation to counsel regarding counsel's services and has been given reasonable warning that counsel will terminate or request withdrawal of his representation unless the obligation is fulfilled; or
(iv) other good cause for termination or withdrawal exists.
(C) Subject to leave from the Chamber, if representation by counsel is to be terminated or withdrawn, counsel shall not do so until a replacement counsel is engaged by the client or assigned by the Registrar, or the client has notified the Registrar in writing of his intention to conduct his own defence.
(D) Upon termination or withdrawal of representation, counsel shall take steps to the extent reasonably practicable to protect the client's interests, such as giving sufficient notice to the client, surrendering papers and property to which the client or the Tribunal is entitled and refunding any advance payment of fee that has not been earned.

Where the accused unjustifiably resists legal representation from assigned counsel, counsel's professional obligations to continue to represent the accused remain.[4566]

Counsel who accepted the assignment, aware of the system of renumeration of assigned counsel, could not withdraw under the belief that they were not given adequate resources to defend the accused.[4567]

Article 10—competence, integrity, and independence

During providing representation to a client, counsel shall:
(i) act with competence, skill, care, honesty and loyalty;
(ii) exercise independent professional judgement and render open and honest advice;
(iii) never be influenced in the matter of his representation;
(iv) preserve their own integrity and that of the legal profession as a whole;
(v) never permit their independence, integrity and standards to be compromised by external pressures.

[4566] *Prosecutor v Blagojevic*, No. IT-02-60-AR73.4, *Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team* (7 November 2003) at para. 54
[4567] *Prosecutor v Milutinovic et al*, No. IT-99-37-AR73.2, *Decision on Interlocutory Appeal on Motion for Additional Funds* (13 November 2003) at para. 22

Article 11—diligence

Counsel shall represent a client diligently and promptly to protect the client's best interests. Unless the representation is terminated or withdrawn, counsel shall carry through to conclusion all matters undertaken for a client within the scope of his legal representation.

Article 12—communication
Counsel shall keep a client informed about the status of a matter before the Tribunal in which the client is an interested party and must promptly comply with all reasonable requests for information.

Article 13—confidentiality

(A) Whether or not counsel continues to represent a client, counsel shall preserve the confidentiality of the client's affairs and shall not reveal to any other person, other than to members of his team who need such information for the performance of their duties, information which has been entrusted to him in confidence or use such information to the client's detriment or to his own or another client's advantage.
(B) Notwithstanding paragraph (A), counsel may reveal information which has been entrusted to him in confidence under the following circumstances:
(i) when the client has been fully consulted and knowingly consents; or
(ii) when the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or
(iii) when essential to establish a claim or defence on behalf of counsel in a controversy between counsel and the client, to establish a defence to a criminal or disciplinary charge or other claim formally instituted against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning counsel's representation of the client; or
(iv) for counsel assigned by the Registrar pursuant to the Directive, when necessary to comply with that counsel's obligations under Article 17 of the Directive; or
(C) to prevent an act which counsel reasonably believes:
(i) is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; and
(ii) may result in death or substantial bodily harm to any person unless the information is disclosed.

Article 14—conflict of interest

(A) Counsel owes a duty of loyalty to a client. Counsel also has a duty to the Tribunal to act with independence in the interests of justice and shall put those interests before his own interests or those of any other person, organisation or State.
(B) Counsel shall exercise all care to ensure that no conflict of interest arises.
(C) Counsel shall not represent a client in connection with a matter in which counsel

participated personally and substantially as an official or staff member of the Tribunal or in any other capacity, unless the Registrar determines, after consultation with the parties and taking account the views of the Chamber, that there is no real possibility shown that a conflict between the former and present assignment exists.
(D) Counsel or his firm shall not represent a client with respect to a matter if:
(i) such representation will be, or may reasonably be expected to be, adversely affected by representation of another client;
(ii) representation of another client will be, or may reasonably be expected to be, adversely affected by such representation;
(iii) the matter is the same or substantially related to another matter in which counsel or his firm had formerly represented another client ("former client"), and the interests of the client are materially adverse to the interests of the former client; or
(iv) counsel's professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by:
(1) counsel's responsibilities to, or interests in, a third party; or
(2) to counsel's own financial, business, property or personal interests.
(E) Where a conflict of interest does arise, counsel shall:
(i) promptly and fully inform each potentially affected present and former client of the nature and extent of the conflict; and
(ii) either:
(1) take all steps necessary to remove the conflict; or
(2) obtain the full and informed consent of all potentially affected present and former clients to continue the representation unless such consent is likely to irreversibly prejudice the administration of justice.

Where both accused were charged with the same criminal acts and are linked by a relatively close superior-subordinate relationship at the relevant time, it would be a conflict of interest for the same counsel who represented one accused to subsequently represent the other,[4568] or to simultaneously represent both in different trials.[4569]

The Trial Chamber has the inherent power to review the decision of the Registrar concerning conflict of interest.[4570]

A conflict of interest between an attorney and a client arises in any situation where, by reason on certain circumstances, representation by such an attorney prejudices, or could prejudice the interests of the client or the wider interests of justice.[4571]

[4568] *Prosecutor v Delic*, No. IT-04-83-PT, *Decision on Motion Seeking Review of the Registry Decision Stating that Mr. Stephane Bourgeon Cannot be Assigned to Represent Rasim Delic* (10 May 2005)
[4569] *Prosecutor v Prlic et al*, No. IT-04-74-AR73.1, *Decision on Appeal of Bruno Stojic Against Trial Chamber's Decision on Request for Appointment of Counsel* (24 November 1994) ; *Prosecutor v Mejakic et al*, No. IT-02-75-AR73.1, *Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic* (6 October 2004) at para. 7
[4570] *Prosecutor v Mejakic et al*, No. IT-02-75-AR73.1, *Decision on Appeal by the Prosecution to Resolve Conflict of Interest Regarding Attorney Jovan Simic* (6 October 2004) at para. 7

Registrar acted unreasonably when it refused assignment of legal associate to the accused who had worked on related case on the grounds that self-represented accused had no lead counsel who could police potential breaches of duty of loyalty and confidentiality.[4572]

Conflict of interest existed where counsel, as former Minister of Justice, contended that the Ministry was not responsible for the military courts, whereas it may be in interests of his client, a General, to contend otherwise.[4573]

Conflict of interest in former prosecutor working as defence counsel extends to when a prosecutor has worked in the same case, but not working in part on the same factual basis.[4574]

While position in Office of the Prosecutor may have afforded counsel insight into the functioning of the Office of the Prosecutor and investigations ongoing at the time, including information about the factual background of the present case, the attorney did not obtain any undue advantage that would impact on the fairness of the proceedings.[4575]

Client's consent is not a remedy for conflict of interest where administration of justice would be prejudiced by continued representation by counsel. One of the limits of the accused's choice of counsel is a conflict of interest.[4576]

Article 15—sexual relations with clients

Counsel shall not:
(i) require or demand sexual relations with a client as a condition of professional representation;
(ii) employ coercion, intimidation or undue influence in sexual relations with a client; or
(iii) represent or continue to represent a client with whom counsel has or had sexual

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[4571] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.1, *Decision on Miroslav Saparovic's Interlocutory Appeal Against Trial Chamber Decisions on Conflict of Interest and Finding of Misconduct* (4 May 2007) at para. 23

[4572] *Prosecutor v Karadzic*, No. IT-95-05/18-PT, *Decision on Accused Request for Judicial Review of the Registry Decision on the Assignment of Mr. Marko Sladojevic as Legal Associate* (20 April 2009) at para.15

[4573] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.1, *Decision on Miroslav Saparovic's Interlocutory Appeal Against Trial Chamber Decisions on Conflict of Interest and Finding of Misconduct* (4 May 2007) at para. 24

[4574] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's and Mladen Markac's Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe* (29 November 2007) at page 8

[4575] *Prosecutor v Gotovina et al*, No. IT-06-90-T, *Decision on Ivan Cermak's and Mladen Markac's Joint Motion to Resolve Conflict of Interest Regarding Attorney Gregory Kehoe* (29 November 2007) at pages 9-10

[4576] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.1, *Decision on Miroslav Saparovic's Interlocutory Appeal Against Trial Chamber Decisions on Conflict of Interest and Finding of Misconduct* (4 May 2007) at paras. 32, 37

relations if such sexual relations may reasonably be expected to result in violations of this Code.

Article 16—client under a disability

When a client's ability to make adequately considered decisions in connection with his representation is affected because of a mental disability, his status as a minor or any other reason, counsel shall:
(i) inform the Judge or Chamber hearing the matter, if any, of the client's mental disability or status as a minor; and
(ii) take such steps as are necessary to ensure the adequate legal representation of that client.

Article 17—consultations with clients at liberty

(A) Counsel shall not consult with a client on provisional release or at liberty at the client's place of residence.
(B) Notwithstanding paragraph (A), counsel may exceptionally consult with a client at his residence if illness, physical disability or other constraints restrict the client's mobility and preferably in the presence of an independent person.

Article 18—fee splitting

(A) Fee-splitting arrangements, including but not limited to financial arrangements, between assigned counsel and their clients, relatives and/or agents of their clients are prohibited by the Tribunal.
(B) Where assigned counsel are being requested, induced or encouraged by their clients to enter into fee-splitting arrangements, they shall advise their clients on the prohibition of such practice and shall report the incident to the Registrar forthwith.
(C) Counsel shall inform the Registrar of any alleged fee-splitting arrangement by any member of his or any other defence team.
(D) Following receipt of information regarding possible fee-splitting arrangements between assigned counsel and their clients, the Registrar shall investigate such information to determine whether it is substantiated.
(E) Where assigned counsel is found to have engaged in a practice of fee-splitting or to have entered into a fee-splitting arrangement with his client, the Registrar shall consider taking action in accordance with the Directive.
(F) Where the Registrar has granted leave, counsel may provide their clients with equipment and materials necessary for the preparation of their defence.

Article 19—fees and compensation

(A) Counsel, other than counsel assigned by the Registrar, shall provide to a client, in writing and before counsel is engaged to represent a client, a statement of costs of representation, including:
(i) the basis for calculating the costs;

(ii) the billing arrangements; and
(iii) the client's right to receive a bill of costs.
(B) Counsel, other than counsel assigned by the Registrar, shall not accept compensation for representing a client from a source other than that client unless:
(i) that client consents in writing after being fully informed by counsel of the source and any other information relevant to the interests of the client; and
(ii) there is no interference with counsel's independence of professional judgement nor with the client-counsel relationship.
(C) Counsel, if assigned by the Registrar, shall not accept compensation for representing a client except as provided for under the Directive.

Article 20—rules of the Tribunal

Counsel shall at all times comply with the Statute, the Rules, this Code or any other applicable law including such rulings as to conduct and procedure as may be issued by the Tribunal in its proceedings. Counsel shall at all times have due regard to the fair conduct of proceedings.

Article 21—discriminatory conduct

Counsel shall not engage directly or indirectly in discriminatory conduct in relation to any other person because of race, colour, ethnic or national origin, nationality, citizenship, sex, sexual orientation, marital status, disability, religion or political persuasion.

Article 22—communication with Chambers

Unless permitted by the Rules, this Code or the Judge or Chamber hearing the matter, counsel shall not:
(i) make contact with a Judge or Chamber in relation to the merits of a particular case, except within the proper context of the proceedings in the case; or
(ii) submit exhibits, notes or documents to a Judge or Chamber without transmitting them through the Registry, except in an emergency or when at the same time transmitted to the Registry.

Article 23—candour toward the Tribunal

(A) Counsel shall be personally responsible toward the Tribunal for the conduct and presentation of a client's case.
(B) Counsel shall not knowingly:
(i) make an incorrect statement of material fact or law to the Tribunal; or
(ii) offer evidence which counsel knows to be incorrect.
(C) Notwithstanding paragraph (B)(i), counsel will not have made an incorrect statement of material fact or law to another party to the proceedings or to the Tribunal simply by failing to correct an error on any matter stated to counsel or to the Tribunal during proceedings.

(D) Counsel shall take all necessary steps to correct an incorrect statement of material fact or law by counsel in proceedings before the Tribunal as soon as possible after counsel becomes aware that the statement was incorrect.
(E) Counsel may refuse to offer evidence if counsel makes a reasoned determination that the material in question is irrelevant or lacks probative value.

Article 24—integrity of evidence

Counsel shall at all times maintain the integrity of evidence, whether in written, oral or any other form, which is or may be submitted to the Tribunal.

Article 25—meritorious proceedings and claims

Counsel shall not bring or defend a proceeding or action unless there is a basis for doing so that is not frivolous. It shall not be considered frivolous for counsel to defend a proceeding so as to require that every element of the case be established.

Article 26—counsel as witness

Counsel shall not act as an advocate in a proceeding in which counsel is likely to be a necessary witness except where:
(i) the testimony relates to an uncontested issue;
(ii) the testimony relates to the nature and value of legal services rendered in the case; or
(iii) substantial hardship would be caused to the client if that counsel does not so act.

Former Minister of Justice properly disqualified as counsel to accused where co-accused and Trial Chamber had not ruled out possibility of calling him as a witness.[4577]

Article 27—persons participating in the proceedings

(A) Counsel shall demonstrate respect, integrity and courtesy for officials and staff members of the Tribunal and for all persons who facilitate and participate in the proceedings.
(B) Counsel shall not seek to influence or communicate with a Judge, official, or staff member of the Tribunal by means prohibited by the Statute, the Rules, this Code or any other applicable law.
(C) Counsel shall recognise the representatives of the parties as professional colleagues and shall act fairly, honestly and courteously towards them.
(D) Counsel shall not communicate with the client of another counsel without the authorisation of that client's counsel unless permitted under the Rules, this Code or any other applicable law.

[4577] *Prosecutor v Gotovina et al*, No. IT-06-90-AR73.1, *Decision on Miroslav Saparovic's Interlocutory Appeal Against Trial Chamber Decisions on Conflict of Interest and Finding of Misconduct* (4 May 2007) at para. 18

Article 28—victims and witnesses

(A) Counsel shall not use any means that have no substantial purpose other than to embarrass, delay or burden victims and witnesses, or use coercive or other methods of obtaining evidence that violate the Statute, the Rules or this Code.
(B) Counsel shall not make any payments in monies or assets to witnesses or potential witnesses for the purpose of unduly influencing or inducing such witnesses or potential witnesses.

Article 29—unrepresented persons

(A) Counsel communicating, on behalf of a client, with a person who is not represented by counsel ("unrepresented person"), shall not:
(i) knowingly mislead the unrepresented person, to the prejudice of that person, concerning the identity and interests of counsel's client;
(ii) coerce, harass or threaten the unrepresented person or his relatives;
(iii) state or imply that counsel is disinterested;
(iv) make other statements prohibited by applicable law;
(v) fail to disclose information required by applicable law; or
(vi) give advice to the unrepresented person, except to retain counsel and in relation to matters specified under paragraph (B), if the interests of that person are or may reasonably be expected to be in conflict with the interests of his client.
(B) Whether or not a conflict exists or may exist with the interests of counsel's client, counsel shall inform the unrepresented person of:
(i) the role counsel plays in the matter;
(ii) the person's right to counsel under the Rules; and
(iii) the nature of legal representation in general.

Article 30—prospective clients

Counsel shall not:
(i) contact a prospective client, his relatives or acquaintances directly or indirectly;
(ii) solicit work from a prospective client, if:
(1) the prospective client, his relatives or acquaintances have made known to counsel a desire not to be solicited by counsel; or
(2) the solicitation involves behaviour such as fraud, undue influence, coercion, duress or harassment; or
(iii) make false, misleading or deceptive communications to a prospective client, his relatives or acquaintances about the counsel or another counsel's services.

Article 31—referral fees

(A) Counsel shall not demand or accept from another counsel or any other person a fee, commission or any other compensation for referring or recommending the

counsel to a client.
(B) Counsel shall not pay any person a fee, commission or any other compensation as a consideration for referring a client to the counsel.

Article 32—responsibilities of supervising counsel

(A) Counsel having direct supervisory authority over another counsel in his team shall make reasonable efforts to ensure that the other counsel adheres to this Code.
(B) Counsel shall be responsible for another counsel's violation of this Code if:
(i) counsel orders, or with knowledge of the specific conduct, approves the conduct involved; or
(ii) counsel has direct supervisory authority over the other counsel, and knew or had reason to know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Article 33—responsibilities of subordinate counsel

(A) Counsel is bound by this Code notwithstanding that counsel acted at the direction of another counsel.
(B) Counsel reasonably acting in accordance with a supervisory counsel's reasonable resolution of an arguable question of professional duty shall not be considered to have violated this Article.

Article 34—responsibility for other team members

(A) Counsel having direct supervisory authority over other members of his team shall make reasonable efforts to ensure that such members' conduct is compatible with the professional obligations of counsel.
(B) Counsel shall be responsible for the conduct of other members of his team who provide services for counsel that would be a violation of this Code if engaged by counsel if:
(i) counsel orders or, with knowledge of the specific conduct, approves the conduct involved; or
(ii) counsel has direct supervisory authority over the team member, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Article 35—misconduct

It shall be professional misconduct for counsel, inter alia, to:
(i) violate or attempt to violate the Statute, the Rules, this Code or any other applicable law, or to knowingly assist or induce another person to do so, or to do so through the acts of another person;
(ii) commit a criminal act which reflects adversely on counsel's honesty, trustworthiness or fitness as counsel;
(iii) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(iv) engage in conduct which is prejudicial to the proper administration of justice before the Tribunal; or
(v) provide inaccurate information or fail to disclose information regarding counsel's qualifications to practice before the Tribunal as set out in the Rules and, where counsel has been assigned to a client, the Directive.

Material delay in disclosing discipline in national jurisdiction violated the Code of Professional Conduct regardless of fact that sanction had not yet been determined.[4578]

A counsel may be guilty of failing to disclose that he was no longer a member of the bar even if no prejudice is shown.[4579]

There is no liability under this section for continuing to represent clients after no longer meeting the qualifications under the Rules.[4580]

Non-disclosure of appointment as Legal Advisor to Deputy Prime Minister of Serbia was not a grave violation of the code of conduct.[4581]

Article 36—reporting misconduct

In accordance with the disciplinary regime set out in Part Three of this Code, counsel shall inform the Disciplinary Panel if counsel knows that another counsel has breached this Code or has otherwise engaged in professional misconduct.

Article 37—purpose

The purposes of this Part are:
(A) to protect clients and other individuals, and particularly witnesses from counsel who have not discharged, will not discharge or are unlikely to discharge their professional responsibilities and to provide every person the right to submit a complaint about the conduct of counsel;
(B) to ensure compliance by individual counsel with the necessary standards of professionalism, competence, diligence and honesty and to maintain at a significantly high level the ethics and practice of the legal system operated by the Tribunal; and
(C) to guarantee that procedural fairness is applied to any disciplinary proceedings taken against counsel.

[4578] *In Re Brashich*, No. IT-39-A, *Decision in the Appeal by the Registrar to the Disciplinary Board* (22 March 2007) at para. 29
[4579] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 32
[4580] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 26
[4581] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 46

Article 38—inherent powers of the Tribunal

This Part shall not affect the inherent powers of the Tribunal to deal with conduct which interferes with the administration of justice under the Statute, the Rules or any other applicable law.

Article 39—filings, decisions, and orders

Unless otherwise provided in this disciplinary regime, all filings, decisions and orders in relation to the disciplinary regime shall be submitted in confidence to, or transmitted by, the Registry in a working language of the Tribunal. The Registry shall maintain all records for the purposes of this disciplinary regime.

Article 40—disciplinary panel

(A) A Disciplinary Panel shall deal with all matters relating to counsel ethics. The Panel shall consist of:
(i) a member of the Association of Counsel to be appointed in accordance with the Association's statute;
(ii) a member of the Advisory Panel having practised at the Tribunal to be appointed by the President of the Advisory Panel;
(iii) the Registrar of the Tribunal, or a senior Registry legal official designated by him.
(B) The members of the Panel shall select at its first meeting a counsel chairperson from amongst its members. The chairperson shall be appointed for a term of two years.
(C) Except as otherwise provided by this Code, the Panel may determine its own procedure for the filing of briefs and presentation of argument.
(D) Complaints concerning the conduct of a counsel or a member of his team relating to matters before the Tribunal and specified in Article 35 shall be submitted to the Chairperson of the Panel in accordance with Article 39. Where the Panel itself has reasonable grounds to suspect that counsel or a member of his team has engaged in such conduct, it may commence, proprio motu, an investigation into the matter.

Article 41—submission of complaints

(A) Complaints may be submitted by a client, a party to proceedings before the Tribunal, or any other person, organisation or State whose rights or interests could be substantially affected by an alleged misconduct.
(B) The complaint, which shall be in writing and submitted in accordance with Article 39, shall identify the complainant and the counsel against whom the complaint is made, and describe in sufficient detail the alleged misconduct of the counsel.
(C) The complaint shall be submitted within twelve months after the alleged

misconduct is brought to the attention of the complainant or within twelve months after the complainant should have reasonably known about the existence or occurrence of the alleged misconduct. The Disciplinary Panel may pursue complaints after these deadlines if the matter is of general importance for the Tribunal or in the interests of justice in a pending case.

Article 42—summary dismissal of complaints

In consultation with the Duty Judge of the Tribunal, the Disciplinary Panel may dismiss a complaint if it is vexatious, misconceived, frivolous, lacking in substance or out of time.

Article 43—withdrawal of complaints

(A) By notice in writing served on the Chairperson of the Disciplinary Panel, a complaint may be withdrawn by the complainant in writing. The withdrawal of a complaint does not impact upon the Panel's competencies under Article 40 (D) to investigate the matter raised in the complaint.
(B) The withdrawal of the complaint does not prevent a further complaint being made under this Part by the same or any other complainant, with respect to the subject matter of the withdrawn complaint; or action being taken on any other complaint made with respect to that matter.

Article 44—investigation of alleged misconduct

(A) The Disciplinary Panel shall conduct, as soon as possible, an investigation into the alleged misconduct specified in Article 35, provided that a complaint is not summarily dismissed.
(B) In the investigation of the conduct, the Panel:
(i) shall send particulars of the conduct to the respective counsel or team member ("respondent") in a language he understands, and invite him to submit a written explanation in response to the complaint;
(ii) may order, by notice served in writing, the respondent to:
(1) produce, at any time and place specified in the notice, any books, documents, papers, accounts or records that are in his possession or under his control and that relate to the subject-matter of the complaint; or
(2) otherwise assist in, or co-operate with, the investigation of the complaint in a specified manner.
(C) The Disciplinary Panel may inspect any book, document, paper, account or record produced in accordance with paragraph (B)(ii)(1) and may retain it for such period as it deems necessary for the purposes of the investigation. For the purpose of investigating an alleged misconduct of counsel involving allegations of fee-sharing, the Panel may request the Registrar to provide information on his related inquiries into the financial status of an accused, if any.
(D) Any respondent who, without reasonable justification or excuse, refuses or fails to comply with any order or requirement of the Disciplinary Panel under this

Article may be fined by the Disciplinary Panel with a penalty of up to 10,000 €.

Article 45—interim suspension from practice

(A) At any time after a complaint against a respondent has been filed or the Disciplinary Panel has commenced an investigation proprio motu, if there are reasonable grounds to conclude that the alleged misconduct is likely to cause immediate and irreparable harm to the interests of justice, a party to the proceedings, a witness, the respondent's client or any other prospective client, the Panel may, without prior notice to the respondent, issue a reasoned order that the respondent be suspended from practicing before the Tribunal until the charge has been heard and disposed of.
(B) If counsel is representing a suspect or accused while the Disciplinary Panel considers an order for suspension, the Panel must obtain approval from the Presiding Judge of the Chamber in front of which counsel appears before issuing an order.
(C) The respondent, or his client, may at any time apply to the President of the Tribunal for the revocation of the order. The President of the Tribunal shall review such application within seven days after it has been received and may grant or refuse the application as he deems fit.

Article 46—charges against counsel

(A) The Disciplinary Panel shall inquire into each particularised allegation, and if there are reasonable grounds that the counsel has committed misconduct, formulate charges against counsel.
(B) The Disciplinary Panel may order, if it is in the interests of justice, the joinder of:
(i) more than one charge against the same respondent; or
(ii) a charge against one or more respondents if all the charges are founded on the same, or closely related, acts or omissions.
(C) During the course of the inquiry, the respondent shall be provided the opportunity to file a reply to the allegation in the charge in accordance with the rules of the Disciplinary Panel.
(D) If there are any material issues of fact raised in the pleadings or if the respondent requests the opportunity to be heard in mitigation, the Disciplinary Panel shall hold a hearing in public at the seat of the Tribunal unless it decides, proprio motu or upon application by the respondent, to exclude the public.
(E) During the hearing the respondent shall have the right to be represented by counsel, to examine evidence submitted by the complainant or gathered by the Disciplinary Panel, cross-examine witnesses and to present evidence. The complainant, if any, shall be permitted to address the Disciplinary Panel concerning the respondent's alleged misconduct and its effect on him.
(F) The Disciplinary Panel may admit any evidence which is relevant or which has probative value, whether oral or written, whether direct or hearsay and whether or not the same would be admissible in a court of law.

(G) Every witness appearing before the Disciplinary Panel shall, before giving evidence, make the solemn declaration as set out in the Rules. The provisions of the Rules relating to false testimony under solemn declaration shall apply, mutatis mutandis, to witnesses appearing before the Disciplinary Panel.

Article 47—findings and sanctions

(A) The findings of the Disciplinary Panel on each charge shall be rendered, in consultation with the Duty Judge of the Tribunal, by the majority of its members and shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.
(B) The Disciplinary Panel may conclude its proceedings without a finding of misconduct, or dismiss any charge. The Panel may suspend or dismiss a complaint, before, during or after the investigation of the complaint, if it is in the interests of justice to do so or it fails to find reasonable grounds to conclude that the respondent committed the alleged misconduct.
(C) A respondent against whom a charge of professional misconduct has been found proved beyond a reasonable doubt may be sentenced by the Disciplinary Panel to be, either alternatively or cumulatively:
(i) admonished by the Disciplinary Panel;
(ii) given advice by the Disciplinary Panel as to his future conduct;
(iii) publicly reprimanded by the Disciplinary Panel;
(iv) ordered to pay a fine of up to 50,000 € to the Tribunal;
(v) suspended from practising before the Tribunal for an appropriate fixed period of time not exceeding two years;
(vi) banned from practising before the Tribunal.
(D) In addition to any of the sanctions imposed under Article 47 (C), where the Disciplinary Panel finds, beyond a reasonable doubt that the respondent's misconduct has resulted in:
(i) the loss or misuse of the Tribunals' legal aid funds, or that additional legal aid funds must be expended as a result of such misconduct; or
(ii) where the complainant is a privately paying client, a financial loss on the part of the client
the Disciplinary Panel may order the respondent to make monetary restitution by reimbursing the Tribunal, or the privately paying client, in whole or in part such expended funds or fees paid. In determining the amount to be reimbursed, the Disciplinary Panel shall have regard to the amount of compensation for services actually rendered by the respondent that the Panel considers reasonable for the respondent to retain.
(E) In determining the sentence imposed, the Disciplinary Panel must consider any mitigating factors it considers relevant, including, inter alia, the fact that the respondent was acting pursuant to a provision of another code of practice and ethics which governs his conduct and that provision is inconsistent with this Code. A sentence must be proportionate in view of the misconduct.
(F) The decision of the Disciplinary Panel shall be notified in writing to the complainant, if any, and to the respondent in a language the respondent

understands.
(G) A copy of the decision shall be communicated to the Association of Counsel as well as the professional body regulating the conduct of the respondent in his State of admission, or to the governing body of the university where counsel is a law professor.
(H) The Registry shall take such action as may be required to enforce the sentence.

There is no provision for requiring counsel to make restitution for amounts earned after he should have notified the registry of his suspension.[4582] Fine of $10,000 imposed.[4583]

Article 48—Appeal to the Disciplinary Board

(A) In cases where one or more charges of professional misconduct have been proved, the respondent may file an appeal with the Disciplinary Board within fourteen days of notification of the decision of the Disciplinary Panel.
(B) In cases where the Disciplinary Panel has decided that a charge has not been proved, the Registrar may file an appeal with the Disciplinary Board within fourteen days of notification of the decision to the respondent.
(C) The Disciplinary Board may hear appeals filed by the respondent or the Registrar after the fourteen day deadline if the matter is of general importance for the Tribunal or in the interests of justice in a pending case.
(D) The Disciplinary Board shall consist of:
(i) three Judges to be appointed by the President of the Tribunal;
(ii) two members of the Association of Counsel, to be appointed for a two year period, and in accordance with the Association's statute. No member of the Disciplinary Panel shall be a member of the Disciplinary Board at the same time.
(E) No Judge who sat as a member of the Chamber before which the respondent appeared shall be eligible to sit as a member of the Disciplinary Board on the hearing or determination of any charge against the respondent for professional misconduct.
(F) The members of the Disciplinary Board shall, at its first meeting, select a chairperson from amongst their number.
(G) Except as otherwise provided by this Code, the Disciplinary Board may determine its own procedure for the filing of briefs and presentation of argument. During its review, however, the Disciplinary Board shall not receive or consider any evidence that was not presented to the Disciplinary Panel, unless it considers that the interests of justice so require.
(H) The Disciplinary Board may dismiss an appeal if it is vexatious, misconceived, frivolous, lacking in substance or out of time.
(I) Any respondent who, without reasonable justification or excuse, refuses or fails

[4582] *In Re Brashich*, No. IT-39-A, *Decision in the Appeal by the Registrar to the Disciplinary Board* (22 March 2007) at para. 43
[4583] *In Re Brashich*, No. IT-39-A, *Decision in the Appeal by the Registrar to the Disciplinary Board* (22 March 2007) at para. 51

to comply with any order or requirement of the Disciplinary Board under this Article may be fined by the Board with a penalty of up to 10,000 €.
(J) The Disciplinary Board may confirm, reverse or modify the decision on appeal.
(K) In any case in which the respondent has given notice of appeal to the Disciplinary Board, the actions set out in Article 47 paragraph (G) shall be deferred until the appeal has been disposed of by the Disciplinary Board with or without a hearing. The Board may at any time after it was seized order a measure in accordance with Article 45 (A). Article 45 (B) does not apply.
(L) The decision of the Disciplinary Board is final, and shall in particular not be subject to any remedy before the President or a Chamber of the Tribunal.

Proof of misconduct before the disciplinary board must be beyond a reasonable doubt.[4584]

Disciplinary Board reviews findings of the disciplinary panel under the same standard of review as that employed by the Appeals Chamber.[4585]

Article 49—costs

(A) If a respondent is sentenced by the Disciplinary Panel, and an appeal is not filed, or by the Disciplinary Board, the respondent shall bear the costs of the procedure. These costs consist of necessary and reasonable travel costs of the Panel or Board members in accordance with the Tribunal's practice for travel of defence counsel, if any, and an office expenses lump sum of up to 1,000 € to be determined by the Disciplinary Panel or Board.
(B) If a proceeding or complaint is dismissed by the Disciplinary Panel, and an appeal is not filed, or by the Disciplinary Board, the Tribunal bears the costs of the proceedings, unless the Panel or Board decides, on the basis of reasonable cause, that the respondent should bear up to fifty percent of the costs.
(C) All costs shall be paid to the Registrar.

Article 50—*non bis in idem*

Once a proceeding or complaint has been finally adjudicated by:
(i) the Disciplinary Panel, and an appeal has not been filed to the Disciplinary Board within fourteen days of notification, save as provided by Article 48 (C);
or
(ii) the Disciplinary Board,
no further action shall be taken by the Disciplinary Panel or Disciplinary Board against the respondent with respect to the subject matter of the proceeding or complaint.

[4584] *In Re Brashich*, No. IT-39-A, *Decision in the Appeal by the Registrar to the Disciplinary Board* (22 March 2007) at para. 19
[4585] *In Re Toma Fila*, No. IT-13-93-Misc.1, *Decision on Appeals to the Disciplinary Board* (8 July 2013) at para. 14