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## DEVELOPMENT OF HUMAN RIGHTS BEFORE INTERNATIONAL CRIMINAL TRIBUNALS A EUROPEAN PERSPECTIVE

### I. INTRODUCTORY REMARKS

¶1 The International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) is neither party to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter ECHR)<sup>1</sup> nor to the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter ICCPR)<sup>2</sup>. Thus it is not granted that human rights are directly applicable before it. However, how can a tribunal established by the United Nations ignore its own fundamental rights? How can citizens of a member state of the Council of Europe be worse off simply because they appear before an International Tribunal?

¶2 Therefore, it is to analyze how the two United Nations *ad hoc* Tribunals, ICTY and the International Criminal Tribunal for Rwanda (hereinafter ICTR)<sup>3</sup>, have defined in detail the notion of a fair trial by adopting in particular the provisions of the ICCPR. From a European perspective and with respect to pri-

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, CETS No. 005.

<sup>2</sup> International Covenant on Civil and Political Rights of 16 December 1966, 999 U.N.T.S. 171.

<sup>3</sup> The full names of these tribunals are “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” and “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 Serious Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994.” See Statute of the International Tribunal for the Former Yugoslavia, adopted May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda adopted Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute], with its respective amendments until today’s date.

marily ICTY it is even more important to focus on the not only slightly different detailed guarantees and their corresponding protections in the ECHR and the fundamentally developed jurisprudence of the European Court of Human Rights (hereinafter ECtHR) based in Strasbourg. The International Tribunals were established to protect human rights of victims by bringing former “untouchables”—individuals who were alleged to have committed grave crimes but had been shielded from prosecution—to justice. However, by the same token the tribunals must also provide for fair trials. They have a duty to guarantee the fundamental rights of the accused.

¶3 An accused party’s access to fundamental fair trial rights is a key indicator of equitability in any system of criminal justice, as proceedings lose their credibility and integrity without the consistent application of due process standards.<sup>4</sup> However, to rely on the notion of a “fair trial” without specifying exactly what that notion encompasses would leave inalienable human rights to the discretion of day to day’s legislation.

¶4 In his report to the Security Council on the establishment of the ICTY, the Secretary-General of the UN emphasized the following: “It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.” In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in Article 14 of the ICCPR.<sup>5</sup>

¶5 Hence, the fair trial guarantees of Article 14 of the ICCPR are repeated almost verbatim in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.<sup>6</sup> Consequently, fundamental due process rights have experienced a revival through the jurisprudence of both International Tribunals, as the inevitable gaps in the Rules of Procedure and Evidence (hereinafter Rules) had to be filled with those rights in mind. Furthermore, the Tribunals have recognized violations of due process rights and have sought to provide remedies in each case.

¶6 These developments will no doubt influence the interpretation of human rights law at a domestic level. Traces can already be found in some national or European decisions, referring to the jurisprudence of ICTY. This holds true even more when reviewing the work of European academics.

¶7 Additionally, another neither only academic nor necessarily provocative question never seriously discussed arises: What would have been the impact

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<sup>4</sup> Antonio Cassese, *The International Criminal Tribunal for the Former Yugoslavia and Human Rights*, 4 Eur. Hum. Rts. L. Rev. 329, 333 (1997); Mark Findlay, *Internationalised Criminal Trial and Access to Justice*, 2 Int’l Crim. L. Rev. 237, 251 (2002).

<sup>5</sup> The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 106, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) (emphasis added).

<sup>6</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 46 (Oct. 2, 1995).

on the jurisprudence if a European Criminal Court, composed of European Judges with the necessary forensic experience in criminal matters, would have been vested with the power “to prosecute Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991”? This would require a challenging new research by scientists from nearly all disciplines, *inter alia* philosophers, sociologists, historians and lawyers (human-rights, humanitarian law and criminal law with all its subsections), thus an effort that cannot be expected in the narrow framework of today’s contribution.

¶8 What follows are some selected aspects of the way in which the fair trial guarantees provided for in Articles 9(3), 14, 15 and consequently Article 2 (3) of the ICCPR and Articles 5 – 7 and consequently Article 13 of the ECHR were implemented by the International Tribunals through their Statutes, Rules, and jurisprudence, both procedural and substantive. It is also to show the distinctions existing between ICCPR and ECHR already in the wording but also in diverging interpretation of one and the same guarantee.

## **II. ARTICLE 9(3) OF THE ICCPR – “ANYONE ARRESTED... SHALL BE BROUGHT PROMPTLY BEFORE A JUDGE.”<sup>7</sup>**

ARTICLE 5(3) OF THE ECHR – “EVERYONE ARRESTED OR DETAINED ... **SHALL BE BROUGHT PROMPTLY BEFORE A JUDGE** OR OTHER OFFICER AUTHORISED BY LAW TO EXERCISE JUDICIAL POWER AND SHALL BE ENTITLED TO TRIAL WITHIN A REASONABLE TIME OR TO RELEASE PENDING TRIAL. RELEASE MAY BE CONDITIONED BY GUARANTEES TO APPEAR FOR TRIAL.”

¶9 The right stipulated by Article 9(3) of the ICCPR is one of the essential guarantees preventing arbitrary and unlawful detention as well as securing a detainee’s rights through a review by an independent judge or judicial officer. The right to be brought promptly before a judge is guaranteed in Article 20 of the ICTR Statute, Article 21 of the ICTY Statute, and Rule 62 of the Rules for both courts.<sup>8</sup>

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<sup>7</sup> ICCPR, art. 9(3). *See also* ECHR, art. 5(3); Rules of Procedure and Evidence, International Criminal Tribunal for the Former Yugoslavia, Rule 62, Dec. 13, 2001, T/32/REV.22 [hereinafter ICTY Rules]; Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Rule 62(A), June 29, 1995 [hereinafter ICTR Rules]. The ACHR does not make a detailed reference to the above mentioned right; however, art. 6 of the ACHR do prohibit arbitrary detention and art. 7(1)(d) of the ACHR refers to the right to be tried within a reasonable time. ACHR, arts. 6, 7(1)(d), 7(5).

<sup>8</sup> ICTY Statute, art. 21; ICTR Statute, art. 20; ICTY Rules, Rule 62 (stating “[u]pon transfer of an accused to the seat of the Tribunal... [t]he accused shall be brought before [a] Trial Chamber or a Judge thereof without delay, and shall be formally charged.”)

¶10 In its General Comment Number 8, the Human Rights Committee (hereinafter HRCComm) stipulates that in criminal cases, any person arrested or detained has to be brought “promptly” before a judge; “delays must not exceed a few days.”<sup>9</sup> The HRCComm has limited the period between detention and initial appearance before a judge to approximately three days to be in compliance with Article 9(3) of the ICCPR.<sup>10</sup> According to the jurisprudence of the ECtHR, a period of four days or longer without judicial supervision is not in compliance with Article 5(3) of the ECHR, even in the most complex cases.<sup>11</sup> This short time limit has its fundamental roots in the separation of powers and the corresponding system of checks and balances, specifically the controlling function of an independent and efficient judiciary over acts of the executive.<sup>12</sup>

¶11 The case of *Kajelijeli* is illustrative of the Appeals Chambers’ approach.<sup>13</sup> Juvénal Kajelijeli, who had been found guilty by an ICTR Trial Chamber of genocide and extermination as a crime against humanity, filed an appeal challenging, *inter alia*, the ICTR’s jurisdiction on the basis of the alleged illegality of his arrest and detention. *Kajelijeli* had been arrested with-

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<sup>9</sup> *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008), available at <http://www2.ohchr.org/english/bodies/icm-mc/docs/8th/HRI.GEN.1.Rev9.doc> (last visited Nov. 3, 2008) [hereinafter *Compilation*].

<sup>10</sup> SARAH JOSEPH, JENNY SCHULTZ, & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 324 (2d ed. 1998); *Freemantle v. Jamaica*, Communication No. 625/1995, U.N. Doc. CCPR/C/68/D/625/1995 (2000) (an incommunicado detention for a period of four days was found to be in violation of Art 9(3) of the ICCPR); *McLawrence v. Jamaica*, Communication No. 702/1996, U.N. Doc. CCPR/C/60/D/702/1996 (1997) (the Committee explicitly referred to its General Comment No. 8 and found a violation of art. 9(3) due to a delay of one week before an initial appearance occurred); *Kurbanov v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003) (a period of seven days before an appearance before a judicial officer was found to be incompatible with the ICCPR).

<sup>11</sup> *Brogan and Others v. UK*, 145-B Eur. Ct. H.R. (ser. A) at ¶ 62 (1988); *De Jong and Others v. The Netherlands*, 77 Eur. Ct. H.R. (ser. A) at ¶ 52 (1984).

<sup>12</sup> Concerning the separation of powers in a democratic state, Montesquieu stated: “Il n’y a point encore de liberté, si la puissance de juger n’est pas séparée de la puissance législative & de l’exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie & la liberté des citoyens seroit arbitraire; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d’un oppresseur.” C.-L. DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, *ŒUVRE DE MONSIEUR DE MONTESQUIEU, TOME PREMIER, L’ESPRIT DES LOIX, LIVRE XI, Chapitre VI*, 208 (London: Chez Nourse 1767).

<sup>13</sup> *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Appeals Judgment, (May 23, 2005); see also Sherrie L. Russell-Brown, *Poisoned Chalice?: The Rights of Criminal Defendants Under International Law During the Pre-trial Phase*, 8 UCLA J. INT’L L. & FOREIGN AFF. 127 (2003); Brianne McGonigle, *Updates From the International Criminal Courts*, 13 HUM. RTS. BRIEF 3(63) (2006).

out warrant on June 5, 1998 in Benin and was not transferred to the ICTR until September 9, 1998, ninety-five days later. *Kajelijeli*'s initial appearance before a judge of the ICTR did not take place until April 7, 1999, after he had been held in custody for an additional 211 days.<sup>14</sup>

¶12 With respect to *Kajelijeli*'s detention in Benin, the Appeals Chamber noted that both the Statute and the Rules are silent on "the manner and method in which an arrest of a suspect is to be effected by a cooperating State," including the suspect's right to be brought promptly before a judge.<sup>15</sup> Furthermore, it found compliance with international human rights law to be within the requested State's responsibility.<sup>16</sup>

¶13 Based on its reasoning that "international division of labour in prosecuting crimes must not be to the detriment of the apprehended person"<sup>17</sup>, the Appeals Chamber stressed that both the Prosecution and the requested State have a duty not to impair the rights of the apprehended person. The court described this shared duty in detail (and this is relevant also for the day to day's cooperation in criminal matters say within the framework of the Council of Europe):

A Judge of the requested State is called upon to communicate to the detainee the request for surrender (or extradition) and make him or her familiar with any charge, to verify the suspect's identity, to examine any obvious challenges to the case, to inquire into the medical condition of the suspect, and to notify a person enjoying the confidence of the detainee and consular officers. It is, however, not the task of that Judge to inquire into the merits of the case. He or she would not know the reasons for the detention in the absence of a provisional or final arrest warrant issued by the requesting State or the Tribunal. This responsibility is vested with the judiciary of the requesting State, or in this case, a Judge of the Tribunal, as they bear principal responsibility for the deprivation of liberty of the person they requested to be surrendered.<sup>18</sup>

¶14 The *Kajelijeli* case shows in a nutshell that emphasis is put on the rights of individuals subjected to the administration of international justice.<sup>19</sup> Traditionally, an individual has been perceived as an object of international law. However, the HRCComm and the ECtHR have contributed to transforming

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<sup>14</sup> *Kajelijeli*, Case No. ICTR-98-44A-A, ¶ 210, 237.

<sup>15</sup> *Id.* ¶ 219.

<sup>16</sup> *Id.* ¶ 220.

<sup>17</sup> *Id.* 220; as for the reasoning see also WOLFGANG SCHOMBURG & OTTO LAGODNY, INTERNATIONALE RECHTSHILFE IN STRAFSACHEN [International Cooperation in Criminal Matters] (4th ed. 2006).

<sup>18</sup> *Id.* 221.

<sup>19</sup> The Appeals Chamber reduced *Kajelijeli*'s sentence from two life terms in prison and one term of 15 years to a term of 45 years as an appropriate remedy pursuant to Article 2(3)(a) of the ICCPR, balancing the violation of fundamental rights against the extraordinary seriousness of his criminal conduct, *Id.* ¶ 324.

the status of an accused party from an object to a subject in international trials.<sup>20</sup> This development was acknowledged and confirmed by the International Court of Justice (ICJ) in the *LaGrand* case.<sup>21</sup> The Court in that case concluded that Article 36(1) of the Vienna Convention on Consular Relations of 24 April 1963<sup>22</sup> “creates individual rights, which by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.”<sup>23</sup> Based on the conclusion that an individual enjoys rights under international law, the ICJ held that a violation of Article 36 of the Vienna Convention on Consular Relations necessitated an effective remedy.<sup>24</sup>

### **III. ARTICLE 14(2) OF THE ICCPR = ARTICLE 6(2) OF THE ECHR: “EVERYONE CHARGED WITH A CRIMINAL OFFENCE SHALL HAVE THE RIGHT TO BE PRESUMED INNOCENT UNTIL PROVED GUILTY ACCORDING TO LAW.”<sup>25</sup>**

¶15 The right to be presumed innocent until proven guilty is one of the cornerstones of fair trial proceedings and is “related to the protection of human dignity.” Hence, this fundamental human right is set out in the major international and regional human rights instruments and is also incorporated in the Statutes of the UN *ad hoc* International Tribunals, namely in Article 21(3) of the ICTY Statute and Article 20(3) of the ICTR Statute. In its General Comment No. 13, the HRCComm stated:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated

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<sup>20</sup> SCHOMBURG & LAGODNY, *supra* note 17; STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 247 (2005).

<sup>21</sup> Federal Republic of Germany v. United States, 2001 I.C.J. 104 (June 27, 2001), available at <http://www.icj-cij.org/docket/files/104/7736.pdf> [hereinafter *LaGrand Case*].

<sup>22</sup> Vienna Convention on Consular Rights, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter *Vienna Convention*].

<sup>23</sup> See *LaGrand Case*; *supra* note 21, ¶ 77.

<sup>24</sup> *Id.* ¶¶ 77, 90-91. For further analysis of the ICJ judgment on art. 36 of the Vienna Convention on Consular Relations, see, e.g., B. Simma & C. Hoppe, *The LaGrand Case: A Story of Many Miscommunications*, in INTERNATIONAL LAW STORIES 23 (2007); Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellín—A Rocky Road Toward Implementation*, 14 TUL. J. INT’L & COMP. L. 7 (2005).

<sup>25</sup> ECHR, art. 6(2); ACHR, art. 7(1)(b); ACHR, art. 8(2); ICTY Statute, art. 21(3); ICTR Statute, art. 20(3).

in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of trial.<sup>26</sup>

¶16 In international criminal proceedings, two issues arise regarding the presumption of innocence: first, whether to deprive the accused of his liberty or grant him provisional release and, second, at what stage the accused is no longer presumed innocent.

¶17 Regarding the first issue, the presumption of innocence implies that an accused party should not be kept in pre-trial detention save for certain exceptions, such as if he poses a flight risk, if he poses a risk of intimidating victims and witnesses, or if there are no more lenient measures available. Such situations are rare in domestic proceedings. However, the proceedings before the International Tribunals are different. The alleged crimes are extremely serious, and both Tribunals have to rely solely on the cooperation of the states involved for enforcement. Furthermore, the host country of an international criminal tribunal may not be willing to grant a defendant the right to move freely in its territory if he is released before or during his trial.<sup>27</sup>

¶18 Some specific issues must be considered when deciding upon a motion for provisional release. Primarily, the court must assess the risk of flight, which often increases when an accused party is aware of the available evidence against him and the concrete sentence he can expect if the charges are proven beyond a reasonable doubt.<sup>28</sup> One cause of concern over this issue is the lack of scrutiny on part of the ICTY and the ICTR regarding the *writ of habeas corpus*. The tribunals do not require a repeated review of detention. The words of the ECtHR, however, have to be recalled:

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty.... Where such grounds are “relevant” and “sufficient,” the Court must also ascertain whether the competent... authorities displayed “special diligence” in the conduct of proceedings...<sup>29</sup>

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<sup>26</sup> Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *supra* note 8, Gen. Comm. 13, ¶ 7.

<sup>27</sup> Cassese, *supra* note 4, at 334 (the privilege of hosting a criminal tribunal should encompass this burden, which is part and parcel of every criminal proceeding).

<sup>28</sup> Prosecutor v. Jadranko Prlić, Case No. IT-04-74-AR65.6, Reasons for Decision on Prosecution’s Urgent Appeal Against “Décision Relative à la Demande de Mise en Liberté Provisoire de l’accusé Pušić” (Apr. 14, 2008); Prlić, Dissenting Opinion of Judge Schomburg, ¶ 3 (Apr. 23, 2008).

<sup>29</sup> Yağcı & Sargın v. Turkey, 319-A Eur. Ct. H.R. (ser. A) at 18 (1995); *see also* Ringeisen v. Austria, 13 Eur. Ct. H.R. (ser. A) at 42 (1971); Wemhoff v. Germany, 7 Eur. Ct. H.R. (ser. A) at 10-11 (1968).

¶19 Rule 65 of the ICTY and ICTR Rules stipulate the substantive prerequisites of a provisional release. For example, sub-paragraph (B) stipulates that “[r]elease may be ordered 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.”<sup>30</sup>

¶20 The principle of proportionality, i.e. whether the measure is necessary, suitable and proportional in its narrow sense, has found its way in international law again recently in Art. 49 (3) of the Charter of Fundamental Rights of the European Union: “The severity of penalties must not be disproportionate to the criminal offence.”

¶21 It is deplorable, and a lesson to be learned for the future, that ICTY’s host state agreement with The Netherlands does not provide for the possibility that provisional release is granted by allowing the person to stay in the territory of The Netherlands as it would be the case with in relation to all the other accused provisionally released by competent Dutch courts. It is bizarre, to say the least, that those provisionally released have to be sent back for some weeks to their home countries. Upon return, absent any flight risk or any other reason warranting ongoing pre-trial detention, they have nevertheless to be incarcerated in the UN detention unit. It was only recently, that the same happened before the ICC. The accused *Bemba* was held eligible for provisional release by the pre trial judge<sup>31</sup>, however no country, in particular not the host state The Netherlands, was ready to accept this person as a provisionally free man on its roads.<sup>32</sup> The Netherlands should not be allowed to raising picking alone by recruiting more and more institutions of law and not to accept the foreseeable consequences if the rule of law is consequently applied, in particular the principle of proportionality that is to be taken into consideration at all stages of deprivation of liberty.

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<sup>30</sup> ICTY R. P. & Evid. 65(B).

<sup>31</sup> The Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Combo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (Aug. 14, 2009). See, also, The Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s “Decision on the Interim Release of Jean-Pierre Bemba Combo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”, ¶ 95 (Dec. 2, 2009).

<sup>32</sup> The Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jen-Pierre Bemba Combo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa, (Aug. 14, 2009).



¶22 As to the existence of sufficiently compelling humanitarian reasons for release, due to the hybrid legal systems of the International Tribunals, the question arises at what point during criminal proceedings the accused can no longer be presumed innocent. Whereas countries with a civil law tradition consider that the presumption of innocence ends following a final verdict on appeal, common law countries predominantly tend to consider that the presumption ends once the accused has been convicted by the court of first instance. It remains unclear which position prevails in the jurisprudence of the International Tribunals, as highlighted in a separate opinion to a decision of the Appeals Chamber in *Krajišnik*, in which Judge Shahabuddeen stated that the general position in common law countries “lacks a sufficient measure of universality to be convincing.”<sup>33</sup> In *Simić*, the Appeals Chamber rejected the Prosecution’s argument that the accused’s right to be presumed innocent was not applicable since he had already been convicted by the Trial Chamber. The Appeals Chamber stated correctly that “the fact that the person has already been sentenced is a matter to take into account when balancing the probabilities.”<sup>34</sup>

¶23 The case of *Čerkez* also illustratively demonstrates the practical differences flowing from the diverse ways to interpret the right to be presumed innocent in the common and civil law tradition. In 2001, *Čerkez* had been sentenced to a term of 15 years of imprisonment by the Trial Chamber.<sup>35</sup> Some three years later on appeal, however, it became apparent that the initial sentence would have to be modified and would in effect fall below the time the accused had already spent in custody since 1997. The Appeal Chamber therefore ordered *Čerkez* to be immediately released.<sup>36</sup> It thereby relied on the civil law understanding of the right to be presumed innocent until a conviction has acquired the force of *res judicata* through the Appeals Judgement.

¶24 Had the Appeals Chamber instead relied upon principles of the common law, an *actus contrarius* (here the Appeals Judgement) would have been necessary in order to erase the legal basis of the deprivation of liberty. To await the Appeals Judgement before releasing the accused would, unlike in the civil law system, not have amounted to a violation of the right to be presumed innocent. Thus eyes wide open the judges by omission would have

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<sup>33</sup> Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Momčilo Krajišnik’s request to self-represent, on Counsel’s Motions in relation to appointment of amicus curiae, and on the Prosecution Motion of 16 February 2007, ¶ 7 (May 11, 2007) (Judge Shahabuddeen, J., concurring).

<sup>34</sup> Prosecutor v. Simić, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić pursuant to Rule 65(I) for provisional release for a fixed period to attend memorial services for his father, ¶ 14 (Oct. 21, 2004). See also Daryl A. Mundis & Fergal Gaynor, Current Developments at the Ad Hoc International Criminal Tribunals, 3 J. INT’L CRIM. JUST. 485, 500-501 (2005).

<sup>35</sup> Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-T, Trial Judgement (Feb. 26, 2001).

<sup>36</sup> Prosecutor v. Čerkez, Case No. IT-95-14/2-A, Order to Release Mario Čerkez (Dec. 2, 2004).

ordered a continuation of the deprivation of liberty not justified by the facts before the bench.

**IV. ARTICLE 14(3)(A) OF THE ICCPR – EVERYONE SHALL BE ENTITLED “TO BE INFORMED PROMPTLY AND IN DETAIL IN A LANGUAGE WHICH HE UNDERSTANDS OF THE CHARGES BROUGHT AGAINST HIM.”<sup>37</sup>**

ARTICLE 6(3)(A) OF THE ECHR – “TO BE INFORMED PROMPTLY, IN AN LANGUAGE WHICH HE UNDERSTANDS AND IN DETAIL, OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.”

¶25 The right to be informed promptly and in detail of the charges set out in Article 14(3)(a) of the ICCPR has to be distinguished from the right to be informed of the reasons of arrest pursuant to Article 9(2) of the ICCPR.<sup>38</sup> Unlike Article 9(2) of the ICCPR, which applies to any detained person, Article 14(3)(a) is solely applicable to individuals who are charged or about to be charged with a criminal offense. Thus, the reasons of the detention must be provided at the moment of the arrest. The ICTY Statute and the Rules as well as the relevant provisions of the ICTR are silent on the right to be informed promptly of the reasons of one’s arrest, since Rule 40*bis* merely obliges the Prosecution to communicate a provisional charge to the Registrar when requesting the transfer and a provisional detention of a suspect. No reference is made to the rights of a suspect that are triggered upon his arrest.

¶26 Nonetheless, the ICTR Appeals Chamber has confirmed the rights of a suspect at the time of his detention. In *Barayagwiza*, the Appeals Chamber held that “[i]nternational standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him”<sup>39</sup> because it provides the “elementary safeguard that any person arrested should know why he is deprived of his liberty.”<sup>40</sup> The Appeals Chamber subsequently confirmed this position in *Semanza*: “The Appeals Chamber holds that a suspect arrested by the Tribunal has the right to be informed promptly of the reasons for his or her arrest. In accordance with the norms of international hu-

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<sup>37</sup> ICCPR, art. 14(3)(a); *see also* Organization of American States, ACHR, art. 8(2)(b); ECHR, art. 6(3)(a); ICTY Statute, art. 21(4)(a); ICTR Statute, art. 20(4)(a). In ACHPR no particular reference of this right is made.

<sup>38</sup> ICCPR, art. 14(3)(a). *See also* ACHR, art. 7(4); ECHR, art. 5(2). *But see* ACHPR, where no particular reference of this right is made.

<sup>39</sup> *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision, ¶ 80 (Nov. 3, 1999) (footnote omitted).

<sup>40</sup> *Id.* ¶ 81 (quotation omitted).

man rights law, the Appeals Chamber has also accepted that this right comes into effect from the moment of arrest and detention.”<sup>41</sup> Similarly, in *Kajelijeli*, the ICTR Appeals Chamber held that “[a]lthough the Appellant was lawfully apprehended pursuant to Rule 40 of the Rules, the manner in which the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest.”<sup>42</sup> Moreover, the Appeals Chamber stressed that “85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual’s fundamental right to liberty is at issue.”<sup>43</sup>

#### **V. ARTICLE 14(3)(D) OF THE ICCPR – EVERYONE SHALL BE ENTITLED “TO DEFEND HIMSELF IN PERSON OR THROUGH LEGAL ASSISTANCE.”<sup>44</sup>**

ARTICLE 6(3)(C) OF THE ECHR – “TO DEFEND HIMSELF IN PERSON OR THROUGH LEGAL ASSISTANCE OF HIS OWN CHOOSING OR, IF HE HAS NOT SUFFICIENT MEANS TO PAY FOR LEGAL ASSISTANCE, TO BE GIVEN IT FREE WHEN THE INTERESTS OF JUSTICE SO REQUIRE.”

¶27 The right to be assisted by counsel is “paramount to the concept of due process”, since it is a guarantee of protection from being arbitrarily arrested, charged or prosecuted. Since the right to self-representation has been addressed in the jurisprudence of the International Tribunals from their establishment onwards, this part of the article will focus primarily on the ongoing struggle to define that right. As this analysis will show, the ICTY’s conception of the right to self-representation has undergone several shifts, from an absolute right facilitated by an *amicus curiae*, to a right facilitated by standby counsel, to a right facilitated by counsel imposed in the interest of justice, to an absolute right to pretend to defend oneself, and finally to a right to pretend to defend oneself while assisted both by counsel behind the scenes and by counsel in court accompanied by an *amicus curiae*.<sup>45</sup> The deplorable effect to the effectiveness and fairness of proceedings before the first *ad hoc* Criminal Tribunals calls for an in-depth discussion of this topic.

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<sup>41</sup> *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Decision, ¶ 78 (May 31, 2000).

<sup>42</sup> *Kajelijeli*, *supra* note 13, ¶ 226.

<sup>43</sup> *Id.* ¶ 231.

<sup>44</sup> ECHR, art. 6(3) (c); ACHPR, art. 7(1) (c); ACHR, art. 8(2) (d), O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; ICTY Statute, art. 21(1) (d); ICTR Statute, art. 20(1) (d).

<sup>45</sup> *See, e.g.*, the appellate proceedings in *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Appeals Judgment, ¶ 15 (Mar. 17, 2009).

¶28 Before taking a look at the history of self-representation within the UN *ad hoc* International Tribunals, it is necessary to understand what motivates an accused party to defend himself, given the conventional wisdom “that a lawyer who represents himself has a fool for a client.”<sup>46</sup> Unlike in civil law systems, where the accused is entitled to intervene in the trial proceedings whenever he deems it necessary, in common law systems, and as is practiced before ICTY, the accused does not enjoy this right. Instead, he becomes the mere object of his own proceedings as soon as he decides to be represented by counsel. His only opportunity to address the court directly is to give testimony on his own behalf. It is therefore not surprising that the right of self-representation is often given high priority e.g. before courts in the United States of America.<sup>47</sup>

¶29 Given that the proceedings at the ICTY and the ICTR are driven by an adversarial model rather than an inquisitorial model, parties have to make a decision to either play an active part in the proceedings or not. However, as M. Cherif Bassiouni rightly observes, “representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of the law and to the integrity of the judicial process.” Consequently, it is critical for the court to ensure the adequacy and effectiveness of self-representation.<sup>48</sup> Moreover, whenever the court deems it to be in the interest of justice and in the interest of providing for effective representation of the accused, it must assign counsel to him, of his own choosing, if possible. The disjunction of “self-representation *or* counsel” in Article 14(3)(d) of the ICCPR was never meant to be understood as a dichotomy.<sup>49</sup> Instead, “the right to defence ensures that the accused has an active role in the proceedings, the role of a subject rather than an object.”<sup>50</sup> Based on a sound interpretation the word “or” in Article 14(3)(d) of the ICCPR has to be replaced by the word “and”, thus reflecting the proper approach to a holistic understanding of “defence” forming part of the fair trial guarantee.

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<sup>46</sup> See generally Nina H.B. Jørgensen, *The Right of the Accused to Self-representation before International Criminal Tribunals*, 98 AM. J. INT’L L. 711, 711-726 (2004).

<sup>47</sup> As was illustratively put by the Court of Appeals for the Ninth Circuit in the recent case of *United States v. Johnson et al.*, D.C. No. 3:05-cr-00611-WHA (July 6, 2010): “The defendants’ courtroom behaviour, although eccentric at times, would not have justified, let alone required, the involuntary deprivation of their constitutional right to represent themselves.” The court went on to state that “they were clearly fully competent, albeit foolish, to represent themselves” concluding that “[i]n the absence of any mental illness or uncontrollable behaviour, they had the right to present their unorthodox defences and argue their theories to the bitter end.”

<sup>48</sup> *Id.*

<sup>49</sup> Emphasis (italics) added by the author. Regarding the (rather confusing) use of disjunctions in international law see, e.g., *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 491 (Sept. 30, 2008).

<sup>50</sup> TRECHSEL, *supra* note 20.

¶30 In 2004, the Appeals Chamber in *S. Milošević* had an opportunity to address the issue of self-representation. The Appeals Chamber, though it affirmed the Trial Chamber's decision and agreed that the right to self-representation was not absolute, limited the basis upon which counsel may be assigned to the accused.<sup>51</sup> Because it considered "the right to self-representation [to be] an indispensable cornerstone of justice," the Appeals Chamber concluded that "any restrictions on *Milošević*'s right to represent himself must be limited to the minimum extent necessary to protect the International Tribunal's interest in assuring a reasonably expeditious trial."<sup>52</sup> Hence, the Appeals Chamber allowed *Milošević* to represent himself, as long as he was "physically capable of doing so."<sup>53</sup>

¶31 The Trial Chamber had ordered the assignment of *amici curiae* to assist the court in the proper determination of the case,<sup>54</sup> but the Appeals Chamber altered their role from friends of the court to friends of a party to the proceedings. In its "Decision on Appeal by Amici Curiae," the Appeals Chamber confronted the question of whether *amici curiae* may appeal decisions or judgments even though Rule 73 of the ICTY Rules entitles only parties to the case to bring an appeal. Despite affirming that the status of *amici curiae* is not tantamount to that of parties, the Appeals Chamber decided to consider the appeal brought by the *amici curiae*, due to the "identity of interests between the amici and the accused with respect to the issue presented in this appeal" and the fact that *Milošević*'s interests were not infringed.<sup>55</sup> In his separate opinion, Judge Shahabuddeen stressed that the Appeals Chamber had illegitimately modified the role of an *amicus curiae* and that "under the system of the Tribunal, he is not legally competent to act as counsel for the accused, and he certainly is not an intervener."<sup>56</sup> In sum, the misuse of *amicus curiae* as a kind of mediator between the bench and the accused has proven to be a fundamental mistake. The true purpose of *amici curiae* is to submit arguments of states or others who do not have standing at trial, but nevertheless want the judges to hear their perspective. *Amici curiae* cannot serve both as pseudo-counsel for an accused pursuant to Article 14(3)(d) of the ICCPR and as pseudo-assis-

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<sup>51</sup> *Milošević v. Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 19 (Nov. 1, 2004).

<sup>52</sup> *Id.* ¶ 11, 17.

<sup>53</sup> *Id.* ¶ 19.

<sup>54</sup> *Prosecutor v. Milošević*, Case No. IT-02-54, Order Inviting Designation of Amicus Curiae (Aug. 30, 2001); *Prosecutor v. Milošević*, Case No. IT-02-54, Order Concerning Amici Curiae (Jan. 11, 2002).

<sup>55</sup> *Prosecutor v. Milošević*, Case No. IT-02-4-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence case, ¶ 4 (Jan. 20, 2004).

<sup>56</sup> *Id.* ¶ 15 (Judge Shahabuddeen, J., separately concurring).

tants to the bench. The conflict of interests in such circumstances is blatantly obvious.

¶32 Another Trial Chamber adopted a different approach in *Šešelj*. Due to the complexity of the case and the risk that *Šešelj* might harm the International Tribunal by using the trial as a platform for political interests and by showing disruptive behaviour, the Trial Chamber appointed a “standby counsel”.<sup>57</sup> Some of his responsibilities were to assist the accused in the preparation and presentation of the case whenever he requested to participate in the proceedings and to take over the defence from the accused whenever he was to be removed from the courtroom pursuant to Rule 80(B) of the ICTY Rules.<sup>58</sup> The Trial Chamber granted him access to all court documents, including confidential materials.<sup>59</sup> However, the Trial Chamber emphasized that “the accused’s right to defend himself is absolutely untouched and that standby counsel is not an *amicus curiae*.”<sup>60</sup> Additionally, the court distanced itself from the Trial Chamber in *S. Milošević* by declaring that “[i]t would be a misunderstanding of the word ‘or’ in the phrase ‘to defend himself in person or through legal assistance of his own choosing’ to conclude that self-representation excludes the appointment of counsel to assist the accused or vice versa.”<sup>61</sup> The advantage of a standby counsel is that he might deter the accused from engaging in obstructive behaviour, because the standby counsel’s presence would ensure that his conduct would not lead to a delay of the proceedings.<sup>62</sup>

¶33 In response to *Šešelj*’s obstructive behaviour, the Trial Chamber assigned him counsel in August 2006.<sup>63</sup> However, the Appeals Chamber reversed that decision because the Trial Chamber had failed to issue a formal warning to *Šešelj* prior to assigning counsel.<sup>64</sup> In November 2006, the Trial Chamber once again assigned counsel to *Šešelj*, who had been on a hunger strike.<sup>65</sup>

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<sup>57</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-PT, Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav *Šešelj* with his Defence, ¶ 30 (May 9, 2003); Prosecutor v. *Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav *Šešelj* with his Defence, ¶ 27 (May 9, 2003).

<sup>58</sup> *Id.* ¶ 30.

<sup>59</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order of Non-Disclosure, ¶¶ 2-3 (Mar. 13, 2003).

<sup>60</sup> *Id.* ¶ 28.

<sup>61</sup> *Id.* ¶ 29.

<sup>62</sup> See Michael P. Scharf, *Chaos in the Courtroom: Controlling Disruptive Defendants and Contumacious Counsel in War Crimes Trials*, 39 CASE W. RES. J. INT’L L. 155, 167 (2006).

<sup>63</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-PT, Decision on Assignment of Counsel, ¶ 79 (Aug. 21, 2006).

<sup>64</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber’s Decision on Assignment of Counsel, ¶ 52 (Oct. 20, 2006).

<sup>65</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-T, Decision on Assignment of Counsel, ¶ 81 (Nov. 27, 2006).

The Appeals Chamber was in the delicate position of reacting to *Šešelj's* deteriorating health while trying to uphold the integrity of the International Tribunal.<sup>66</sup> In December 2006, the Appeals Chamber not only reversed the assignment of counsel to *Šešelj* but also ordered the Trial Chamber not to impose standby counsel “unless *Šešelj* exhibits obstructionist behaviour fully satisfying the Trial Chamber that, in order to ensure a fair and expeditious trial, *Šešelj* requires the assistance of standby counsel.”<sup>67</sup> Hence, the Appeals Chamber restored the full right to self-representation.<sup>68</sup> The situation deteriorated as another judge ordered the ICTY to pay *Šešelj's* defence expenses with the International Tribunal's legal aid budget, even though the Registrar argued that only indigent accused parties are entitled to such assistance. This development led to the absurd situation in the ICTY, in which an accused party represents himself, but counsel in the background, presumably paid for in part by taxpayers worldwide, assist him.<sup>69</sup>

¶34 Scholars and practitioners have criticized the Appeals Chamber decision as being of “lamentable quality, as it distorts the law in an effort to achieve the desired result.”<sup>70</sup> Some have suggested that the Appeals Chamber decision was a betrayal of the Trial Chamber's effort to conduct the trial in an optimal manner and that *Šešelj* had finally succeeded in playing the Appeals Chamber against the Trial Chamber.<sup>71</sup>

¶35 In May 2007, in *Krajišnik*, the question was whether a convicted person can represent himself on appeal. The Appeals Chamber ruled in the affirmative, stating, “Article 21(4)(d) of the Statute draws no distinction between the trial stage and the appeal stage of a case.... there is no obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require an *a priori* distinction between the two.”<sup>72</sup>

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<sup>66</sup> It appears, however, that it did not succeed in doing so. See Alexander Zahar, *Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal*, 19 CRIM. L. F. 241 (2008); see also Goran Sluiter, *Comprising the Authority of International Criminal Justice: How Vojislav Šešelj Run His Trial*, 5 J. INT'L CRIM. JUST. 529 (2007).

<sup>67</sup> Prosecutor v. *Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, ¶ 28 (Dec. 8, 2006).

<sup>68</sup> *Id.* ¶ 30.

<sup>69</sup> Zahar, *supra* note 66, at 245-48.

<sup>70</sup> Sluiter, *supra* note 66, at 531.

<sup>71</sup> Zahar, *supra* note 66, at 260-61; Sluiter, *supra* note 66, at 531-535.

<sup>72</sup> Prosecutor v. *Krajišnik*, Case No. IT-00-39-A, ¶ 11 (Judge Shahabuddeen, J., concurring). However, a dissenting opinion argued: “The expeditiousness and fairness of the proceedings are intertwined. Therefore, when deciding whether the right to self-representation can be limited or qualified in appellate proceedings, it must be assessed whether such a step would benefit an appellant by ensuring his fundamental right to be the subject, not the object, of a fair and expeditious appeals process. An accused cannot waive his right to fair proceedings, under

¶36 The ICTR adopted a far more stringent position on the assignment of counsel as early as 2003. This position is mirrored in Rule 45*quater* of the ICTR Rules. The ICTY amended its Rules only in November 2008 by *verbatim* repeating the wording of the ICTR. Rule 45*quater* of the ICTR Rules and 45*ter* of the ICTY Rules now read as follows: “The Trial Chamber may, if it decides that it is in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused.”<sup>73</sup> The aim is to obtain efficient representation and adversarial proceedings.<sup>74</sup> Ideally, counsel and accused act, both actively, together in perfect harmony.<sup>75</sup>

¶37 To cut this never ending story short: *Radovan Karadžić* continues to represent himself assisted by an *amicus curiae* defence team of his choosing.<sup>76</sup> In addition, a stand-by counsel appointed by the Registrar of the Tribunal and paid by the tax-payer attends the proceedings remaining in the background available to step in at any time deemed necessary by the Chamber.<sup>77</sup> In case *Karadžić* should continue to absent himself from the trial proceedings or engage in any other conduct that obstructs the proper and expeditious conduct of the trial, he would forfeit his right to self-representation, no longer be entitled to assistance from his defence team, and the stand-by counsel would take over as an assigned counsel to represent him.<sup>78</sup>

¶38 My conclusion is that the overly doctrinal approach to permitting self-representation must yield to the fundamental right to a fair, public, and expeditious trial. Before International Tribunals, dealing with extraordinarily difficult cases only, assistance of a highly qualified counsel is a must. Nonetheless, the accused’s right to participate actively in the proceedings (i.e., to defend

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whatever circumstances”, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, ¶ 68, (Judge Schomburg, J., dissenting). See also *supra* chapter VI.

<sup>73</sup> ICTR Rules, Rule 45.

<sup>74</sup> *Id.* ¶ 21. In this regard, note the separately concurring opinion of Judge Gunawardana, who went a step further and considered that art. 20(4)(d) of the ICTR Statute envisioned the appointment of standby counsel. ICTR Statute, art. 20(4)(d). See also Patricia Wald (Former President of ICTY), *Tyrants at Trial, Keeping order in the Courtroom*, Open Society Institute, New York, 2009, 37-46, 51-58 and 61-62.

<sup>75</sup> It has, however, to be recalled that not only ICTY has problems to correctly apply the right of self-representation. The case of *Correia de Matos v. Portugal* was dealt before two different human rights institutions, the ECtHR and the UN HRC commencing in conclusions as different as chalk and cheese. The former rejected the application inadmissible as manifestly ill-founded, while the latter, ruling on the merits, found a violation of Article 14(3)(d) of the ICCPR.

<sup>76</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Designation of Standby Counsel, ¶ 8 (Apr. 15, 2010).

<sup>77</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Registrar’s Decision (Nov. 19, 2009).

<sup>78</sup> *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on Appointment of Counsel and Order on Further Trial Proceedings, ¶ 27 (Nov. 5, 2009).



himself or herself) must be protected.<sup>79</sup> Joint efforts of accused and counsel are feasible and finally serve best the interests of justice and the accused.

## VI. COMPENSATION/REMEDY

ARTICLE 2 (3) OF THE **ICCPR** – “EACH STATE PARTY TO THE PRESENT COVENANT UNDERTAKES:

(A) TO ENSURE THAT ANY PERSON WHOSE RIGHTS OR FREEDOMS AS HEREIN RECOGNIZED ARE VIOLATED SHALL HAVE AN EFFECTIVE **REMEDY**, NOTWITHSTANDING THAT THE VIOLATION HAS BEEN COMMITTED BY PERSONS ACTING IN AN OFFICIAL CAPACITY;

(B) TO ENSURE THAT ANY PERSON CLAIMING SUCH A REMEDY SHALL HAVE HIS RIGHT THERETO DETERMINED BY COMPETENT JUDICIAL, ADMINISTRATIVE OR LEGISLATIVE AUTHORITIES, OR BY ANY OTHER COMPETENT AUTHORITY PROVIDED FOR BY THE LEGAL SYSTEM OF THE STATE, AND TO DEVELOP THE POSSIBILITIES OF JUDICIAL REMEDY;

(C) TO ENSURE THAT THE COMPETENT AUTHORITIES SHALL ENFORCE SUCH REMEDIES WHEN GRANTED.”

ARTICLE 14(6) OF THE **ICCPR** – “WHEN A PERSON HAS BEEN... CONVICTED OF A CRIMINAL OFFENCE AND WHEN SUBSEQUENTLY HIS CONVICTION HAS BEEN REVERSED... THE PERSON WHO HAS SUFFERED PUNISHMENT SHALL **BE COMPENSATED** ACCORDING TO LAW.”<sup>80</sup>

ARTICLE 13 OF THE **ECHR** – “EVERYONE WHOSE RIGHTS AND FREEDOMS AS SET FORTH IN THIS CONVENTION ARE VIOLATED SHALL HAVE AN EFFECTIVE **REMEDY** BEFORE A NATIONAL AUTHORITY NOTWITHSTANDING THAT THE VIOLATION HAS BEEN COMMITTED BY PERSONS ACTING IN AN OFFICIAL CAPACITY.”

ARTICLE 5(5) OF THE **ECHR** – “EVERYONE WHO HAS BEEN THE VICTIM OF ARREST OR DETENTION IN CONTRAVENTION OF THE PROVISIONS OF THIS ARTICLE SHALL HAVE AN ENFORCEABLE RIGHT TO **COMPENSATION**.”

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<sup>79</sup> It must be noted that the most recent and, consequently, developed standard is found in the Rules of Procedure and Evidence of the Special Tribunal for Lebanon. “A suspect or an accused electing to conduct his own defence shall so notify, in writing, the Pre-Trial Judge or a Chamber of his election. The Pre-Trial Judge or a Chamber may impose counsel to represent or otherwise assist the accused in accordance with international criminal law and international human rights where this is deemed necessary in the interests of justice and to ensure a fair and expeditious trial.” Rules of Procedure and Evidence, Special Tribunal for Lebanon, Rule 59(F), STL/BD/2009/01/Rev. 1 (June 10, 2009).

<sup>80</sup> ICCPR, art. 14(6). *See also* ECHR, art. 5; Protocol No. 7 to the ECHR of 22. November 1984, CETS No. 155, art. 3; ACHR, art. 10. The right is not addressed specifically in the ACHR.

¶39 In the *Rwamakuba* case, after finding the defendant not guilty on all charges,<sup>81</sup> the ICTR Trial Chamber stated in a further decision that even though the Statute does not provide explicitly for an appropriate remedy, the Security Council “cannot have intended that the Tribunal would be in breach of generally accepted international human rights norms.”<sup>82</sup> Consequently, the International Tribunal “must have the inherent power to make an award of financial compensation.”<sup>83</sup> The Trial Chamber awarded Rwamakuba compensation of \$2,000 and ordered the Registrar to apologize for the violation of his right to legal assistance. The Registrar objected to the Trial Chamber’s award of financial compensation, but the Appeals Chamber affirmed the International Tribunal’s power to grant compensation in appropriate and limited circumstances.<sup>84</sup> Furthermore, over the objections of the Registrar, the Appeals Chamber stated that “internal institutional considerations related to the execution of an order, including budgetary matters, are separate considerations from the Tribunal’s authority to award an effective remedy.”<sup>85</sup>

¶40 The right to compensation provided for in Articles 14(6) and 9(5) of the ICCPR has to be distinguished from the right to an effective remedy stipulated in Article 2(3) of the ICCPR. Whereas the entitlement to an effective remedy arises from any violation of the rights recognized in the ICCPR, the right to compensation comes into effect in the event of a sentence based on a miscarriage of justice (Article 14(6) of the ICCPR) or in the case of a violation of the right to liberty and security (Article 5(5) of the ECHR). An additional distinction is that the right to compensation is limited to situations in which a person has been convicted of a criminal offence and his conviction has subsequently been reversed.<sup>86</sup> Consequently, Article 14(6) does not itself provide for any compensation if the accused is acquitted in the first instance.<sup>87</sup>

¶41 Nor does Article 14(6) provide for any compensation if the acquittal is upheld on appeal, as seen in *Rwamakuba*, where the Appeals Chamber confirmed the jurisprudence of the HRCComm and held:

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<sup>81</sup> Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Judgment (Sept. 20, 2006).

<sup>82</sup> Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appropriate Remedy (Jan. 31, 2007).

<sup>83</sup> *Id.* ¶ 218.

<sup>84</sup> Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appeal Against Decision on Appropriate Remedy, 26 (Sept. 31, 2006).

<sup>85</sup> *Id.* ¶ 30.

<sup>86</sup> It has to be noted that, on a domestic level, the entitlement to compensation also encompasses – under certain circumstances – the scenario of *cum grano salis*, when the damage caused is not attributable to an acquitted person’s behavior during proceedings. For greater detail, see, e.g., the German law on compensation for unjustified punitive measures. Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen [StrEG], Mar. 8, 1971, as amended on Dec. 13, 2001, BGBI I at 3574-3577.

<sup>87</sup> See, e.g., Prosecutor v. Halilović, Case No. IT-01-48-T, (Nov. 16, 2005); Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Sentence (Feb. 25, 2004).

The Appeals Chamber can identify no error on the part of the Trial Chamber in finding that it lacked authority to award compensation to Mr. Rwamakuba for having been prosecuted and acquitted. As the Trial Chamber observed, the Statute and Rules of the International Tribunal do not provide a basis for compensation in such circumstances. ... In this respect, the International Covenant on Civil and Political Rights (ICCPR) refers to a right of compensation only where an individual already convicted by a final decision has been exonerated by newly discovered facts. A person in such circumstances who has been convicted and has suffered punishment as a result of the conviction may receive compensation. Mr. Rwamakuba, however, was not convicted and punished; he was acquitted in the first instance.<sup>88</sup>

¶42 It is deplorable that the UN *ad hoc* International Tribunals are not at least in the position to grant financial compensation to accused parties who have been acquitted, in particular when the deprivation of liberty over years of pre-trial detention and detention pending appeal is in whole or in part attributable to the Tribunal.

## VII. NE BIS IN IDEM – UNRESOLVED CHAPTER

ARTICLE 14(7) OF THE ICCPR – “NO ONE SHALL BE LIABLE TO BE TRIED OR PUNISHED AGAIN FOR AN OFFENCE FOR WHICH HE HAS ALREADY BEEN FINALLY CONVICTED OR ACQUITTED.”<sup>89</sup>

¶43 The principle of *ne bis in idem*, the right not to be tried or punished for the same offence more than once, is enshrined in Article 14(7) of the ICCPR. The rationale of this rule can be addressed from different perspectives – that of inter-state relations (horizontal perspective) and that of relations between states and international criminal tribunals (vertical perspective).<sup>90</sup>

¶44 Regarding the horizontal perspective, it must be noted that even though protection from double jeopardy is an internationally recognized human right,

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<sup>88</sup> Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, ¶ 10 (Sept. 13, 2007). See also Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appeal Against Decision on Appropriate Remedy, ¶ 26 (Sept. 31, 2006); Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Decision on Appropriate Remedy, (Jan. 31, 2007).

<sup>89</sup> Protocol No. 7 to the ECHR, art. 4 (ECHR itself remains silent); ACHR, art. 8(4); ICTY Statute, art. 10; ICTR Statute, art. 9. In ACHPR no mention is made of this right.

<sup>90</sup> See Resolution of the XVII<sup>th</sup> International Congress of Penal Law, *Concurrent National and International Criminal Jurisdiction and the Principle of ‘Ne bis in idem,’* 75 INTERNATIONAL REVIEW OF PENAL LAW 801 (2004).

it applies only to prosecutions within one and the same state.<sup>91</sup> However, in Europe, Article 54 of the Convention Implementing the Schengen Agreement explicitly provides for the application of the principle of *ne bis in idem* in the entire Schengen area, a group of States nearly identical to those that comprises the European Union.<sup>92</sup> Only recently Article 50 of the Charter of Fundamental Rights of the European Union entered into force, providing now with a different wording for the duty not to prosecute twice within the entire judicial area of the European Union: „No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

¶45 Regarding the vertical perspective, the ICTY and the ICTR have acknowledged the principle of *ne bis in idem* in Article 10 and Article 9 of their respective Statutes. Additionally, this principle is reflected in the Rule 13 of the UN *ad hoc* International Tribunals. Article 10(1) of the ICTY Statute and Article 9(1) of the ICTR Statute provide that “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 Tribunal.<sup>93</sup> Thus, Article 10(1) of the ICTY Statute and Article 9(1) of the ICTR Statute represent the downward effect of the *ne bis in idem* principle. Moreover, Rule 13 stipulates that either International Tribunal can request a national court to discontinue a proceeding involving the prosecution of a person who has already been tried by the Tribunal, a right that the UN Security Council can help to enforce.

¶46 Given the strict interpretation of the downward effect of the *ne bis in idem* principle, an accused party runs the risk of being prosecuted by national authorities for other crimes for which he has not been indicted by the UN *ad hoc* International Tribunals. To protect an acquitted defendant from facing never-ending prosecutions, a distinction must be made based on whether he was acquitted on substantive or procedural grounds.

¶47 By the same token, the downward effect can also lead to prosecutorial lacunas. To give an example, if rape has been charged as a crime against humanity or a war crime and the conviction before an International Tribunal

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<sup>91</sup> A.P. v. Italy, Communication No. 204/1986, Admissibility, ¶ 7.3 (Nov. 2, 1987) (Article 14(7) “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observe[d] that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State”).

<sup>92</sup> See Convention Implementing the Schengen Agreement, 22.9.2000 OFFICIAL J. EUROPEAN COMMUNITIES 19 (June 19, 1990), at art. 54 (“A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served...”).

<sup>93</sup> ICTR Statute, art. 9(1).

is only excluded due to the fact that one of the chapeau elements cannot be proven national jurisdictions are barred from prosecuting this conduct in its totality even though the rape as such, as a national crime, has been proven.

¶48 It is impossible to address the full scope of *ne bis in idem* and the problems emanating from the fact that the accused can be charged by the International Tribunals only for international crimes and not for the entirety of his alleged conduct.<sup>94</sup> However, on at least three occasions, a person acquitted by an International Tribunal has been charged on a domestic level, either for different acts or because he was acquitted for procedural reasons only.<sup>95</sup>

¶49 Article 10(2) of the ICTY Statute reflects the upward effect of *ne bis in idem*, providing that a person who has been tried by a national court for acts constituting serious violations within the jurisdiction of the International Tribunal, may subsequently be tried by the ICTY in only two cases: when the act for which the person was tried constituted an ordinary crime, and when the domestic proceedings were not impartial or independent, not diligently prosecuted, or designed to shield the accused from international criminal responsibility. A similar provision is also encompassed in Article 20(3) ICC Statute allowing for the International Court to step in within its jurisdiction *ratione materiae* where a national prosecution is inadequately carried out. These kinds of safeguards are more than necessary in order to prevent states from hampering international prosecution through national scam trials and they should be included in every international *ne bis in idem* rule.

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<sup>94</sup> See *supra* Part VI.

<sup>95</sup> Cf. Prosecutor v. Limaj, Case No. IT-03-66-A, Judgment (Sep. 27, 2007) (confirming the acquittal of Fatmir Limaj); Republic of Serbia, Office of the War Crime Prosecutor, Press Release, July 17, 2008, [http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA/S\\_17\\_07\\_08\\_ENG.mht](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA/S_17_07_08_ENG.mht) (On July 17, 2008, the Belgrade District Court's War Crimes Chamber was requested by the Serbian War Crimes Prosecutor to investigate the case of Limaj, regarding offenses that were not embraced by the indictment brought before the ICTY); Cf. Prosecutor v. Orić, Case No. IT-03-68-A, Judgment (Jul. 3, 2008) (On 1 November 2008, the Prosecutor's Office in Bjeljina opened an investigation against Naser Orić for his involvement in war crimes in 1992 and 1993 not forming part of the charges for which he was acquitted by the ICTY Appeals Chamber); Cf. Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-A, Judgment (Jul. 7, 2006) (confirming the acquittal of Bagambiki); Hirondelle News Agency, News, June 3, 2008, <http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/BE76A1585142D6574325745F001C79D5?OpenDocument> (Following Bagambiki's final acquittal by the ICTR, Rwanda decided to prosecute him, and he was sentenced *in absentia* on October 10, 2007 by a Rwandan court of first instance to life in prison for crimes for which he was not tried by the ICTR. As Bagambiki obtained the right to join his family in Belgium in July 2007, Belgium is now investigating the case).

### VIII. NULLUM CRIMEN, NULLA POENA SINE LEGE STRICTA ET PRAEIVIA

**ARTICLE 15 OF THE ICCPR** – “1. NO ONE SHALL BE HELD GUILTY OF ANY CRIMINAL OFFENCE ON ACCOUNT OF ANY ACT OR OMISSION WHICH DID NOT **CONSTITUTE A CRIMINAL OFFENCE, UNDER NATIONAL OR INTERNATIONAL LAW**, AT THE TIME WHEN IT WAS COMMITTED. NOR SHALL A HEAVIER PENALTY BE IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME WHEN THE CRIMINAL OFFENCE WAS COMMITTED. IF, SUBSEQUENT TO THE COMMISSION OF THE OFFENCE, PROVISION IS MADE BY LAW FOR THE IMPOSITION OF THE LIGHTER PENALTY, THE OFFENDER SHALL BENEFIT THEREBY.

2. NOTHING IN THIS ARTICLE SHALL PREJUDICE THE TRIAL AND PUNISHMENT OF ANY PERSON FOR ANY ACT OR OMISSION WHICH, AT THE TIME WHEN IT WAS COMMITTED, WAS CRIMINAL ACCORDING TO THE GENERAL PRINCIPLES OF **LAW RECOGNIZED BY THE COMMUNITY OF NATIONS.**”

**ART. 7 OF THE ECHR** – “1. NO ONE SHALL BE HELD GUILTY OF ANY CRIMINAL OFFENCE ON ACCOUNT OF ANY ACT OR OMISSION WHICH DID NOT **CONSTITUTE A CRIMINAL OFFENCE UNDER NATIONAL OR INTERNATIONAL LAW** AT THE TIME WHEN IT WAS COMMITTED. NOR SHALL A HEAVIER PENALTY BE IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME THE CRIMINAL OFFENCE WAS COMMITTED.

2. THIS ARTICLE SHALL NOT PREJUDICE THE TRIAL AND PUNISHMENT OF ANY PERSON FOR ANY ACT OR OMISSION WHICH, AT THE TIME WHEN IT WAS COMMITTED, WAS CRIMINAL ACCORDING TO THE GENERAL PRINCIPLES OF **LAW RECOGNISED BY CIVILISED NATIONS.**”

¶50 Article 15 ICCPR provides and allows for the concurrent applicability of three layers of law: National Law, International Law and acts and omissions that had been criminal at the time of commission according to the general principles of law recognized by the community of (civilised<sup>96</sup>) nations.

¶51 Let us turn to three illustrative examples of situations where the *nullum crimen* prohibition has played a decisive role in cases before ICTY. I will first handle the controversial doctrine of “Joint Criminal Enterprise (JCE<sup>97</sup>)”, a mode of liability invented by the International Tribunal for the purposes of imposing individual criminal responsibility in situations of mass atrocities and

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<sup>96</sup> Cf. this slightly different wording of Art. 7 ECHR, whatever “civilized nations” may mean.

<sup>97</sup> An abbreviation not intended to mean “Just Convict Everyone” as interpreted by some scholars. Cf. e.g. *Badar, M. E.* „Just Convict Everyone!“ – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 *International Criminal Law Review* (2006), pp.293 et seq., quoting the father of the cynical remark, Bill Schabas.

collective criminal activity. Subsequently, I will turn to explore whether the crime named “terrorization against a civilian population” was recognized in customary international law in the time relevant for the ICTY’s jurisdiction *ratione temporae* and the applicability of the principle of *lex mitior* before the International Tribunal.

¶52 To make no secret about it, in the view of the author the doctrine of JCE is in its entirety an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today’s international tribunals, in particular not in the Statutes of ICTY and ICTR<sup>98</sup>, however invented and applied by the Appeal Chamber of both Tribunals.<sup>99</sup> Furthermore, this artefact has all the potential of violating at least in its third category the fundamental right not to be punished without law as no corresponding customary international law to this mode of liability existed at the time the crimes under investigation before the International Tribunals were committed.

¶53 The foundation for the JCE doctrine was laid in *Tadić*<sup>100</sup> where the Appeals Chamber explicitly started by showing, however without saying and drawing the necessary consequences, that indeed the past WW II jurisprudence had created no customary international law beyond reasonable doubt on modes of liability. The cited jurisprudence was far too divergent and limited to suffice as a proof for the opposite.<sup>101</sup> Notwithstanding the obvious deficits in its reasoning, the Appeals Chamber came to the conclusion that “[...] 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.” before turning to define the elements<sup>102</sup> of the newly invented mode of liability. The doctrine was divided into three distinct categories on the basis of differing *mens rea* requirements. The basic form of JCE (JCE I) was to assert in cases where the participants act on the basis of a common design or enterprise sharing the same intent to commit a crime. The systematic form (JCE II) required the participants to be involved

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<sup>98</sup> ICTY Statute, art. 7; ICTR Statute, art. 6.

<sup>99</sup> The wording of the Statute ultimately limits its interpretation. It follows that the only crimes or modes of liability are those foreseen in the Statute. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law. Cf. Prosecutor v. Simić, Case No. IT-95-9-A, Appeal Judgement, ¶ 3 (Nov. 28, 2006), referring to the Report of the Secretary-General, U.N. Doc. S/25704, ¶ 34.

<sup>100</sup> Prosecutor v. Tadić, *supra* note 6, ¶¶ 192, 201, 220, 227-228 (July 15, 1999).

<sup>101</sup> *Inter alia*, Universal State practice was never under comparative scrutiny. In particular state practice of Former Yugoslavia was ignored. Cf. also, Darcy, S., *Collective Responsibility and Accountability Under International Law*, Leiden 2007, p. 243 et seq.

<sup>102</sup> The common *actus reus* elements of all three forms of JCE include the following: (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 ICTY Statute, and (iii) participation of the accused in this common design. Cf. Tadić, *supra* note 6 ¶ 227.

in a criminal plan that was implemented in an institutional framework such as an internment camp, involving an organized system of ill treatment. The third extended form (JCE III) was to be applied in cases where one of the participants engages in acts that go beyond the common plan but which could still be considered as a natural and foreseeable consequence of the realization of the common plan.

¶54 The first two categories by and large overlap with traditional definitions of the term “committing”, thus constituting a matter of unnecessary labelling, not worth any in-depth discussion.<sup>103</sup> As regards these two categories it was only an unnecessary academic game first to invent a new doctrine and then to subsume this doctrine under one form of liability explicitly foreseen in the Statute.

¶55 It is primarily the third category that in its broadness and vagueness infringes the principle of *nullum crimen, nulla poena sine lege stricta*.<sup>104</sup> The ICTY/ICTR Appeals Chamber’s constant adjustment of what is encompassed by the notion of JCE raises serious concerns.<sup>105</sup> Furthermore, to simply impose liability on the accused for any actions by another individual that “were a natural and foreseeable consequence of a common criminal purpose” lacks an additional objective component, such as control over the crime.<sup>106</sup> This necessary element of having control over the crime would on the one hand serve as a safeguard to adequately limit the scope of *individual*<sup>107</sup> criminal responsibility, and on the other hand properly distinguish between a principal and an accessory. By contrast, the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association.<sup>108</sup> The membership in a criminal group is, opposed

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<sup>103</sup> Cf. also Prosecutor v. Simić, Case No. IT-95-9-T, Trial Judgement, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, ¶¶ 2, 5 (Oct. 17, 2003).

<sup>104</sup> Barthe, C., Joint Criminal Enterprise (JCE). Ein (originär) völkerstrafrechtliches Haftungsmodell mit Zukunft?, p. 209, Berlin 2009.

<sup>105</sup> Prosecutor v. Martić, Case No. IT-95-11-A, Appeal Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić ¶ 7 (Oct. 8, 2008) referring to the varying language employed in the Tadić Appeal Judgement, ¶¶ 204 *et seq.*, 228), the Brđanin Appeal Judgement, ¶¶ 410 *et seq.*, 418 *et seq.*), the Limaj Appeal Judgement, ¶ 119, explicitly limiting the responsibility for crimes committed by members [*sic*] of the JCE, whereas the Martić Appeal Judgement, ¶ 171, explicitly rejects such limitation.

<sup>106</sup> See The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 485 with further exhaustive references.

<sup>107</sup> As was stated before the International Military Tribunal in Nuremberg: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced” (Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1949, p. 223).

<sup>108</sup> Prosecutor v. Martić, Appeal Judgement, *supra* note 105, ¶ 7 (Oct. 8, 2008). Cf. also, Manacorda, S., Imputazione collettiva e responsabilità personale, Torino 2008, p. 261 *et seq.*



to the law of many countries<sup>109</sup> or, more importantly, the Statute of the ICC<sup>110</sup>, not punishable under the Statutes of ICTY and ICTR.

¶56 Since *Tadić* the doctrine of JCE has slowly evolved into the pet mode of liability of the Office of the Prosecution within the *ad hoc* Tribunals in macro-criminality cases. The humble attempts of some judges to eliminate or at least to limit this overarching structure have remained unheard by the majority thus enabling the doctrine's further flourishing before the International Tribunals.<sup>111</sup> The Appeals Chamber has clarified that it regards JCE to be a form of "commission" pursuant to Article 7(1) of the Statute.<sup>112</sup> In the opinion of the author, this conclusion overlooks the fact that JCE only forms one of several possible interpretations of the term "commission" under Article 7(1) of the Statute and that other definitions of collective liability, including co-perpetration, should equally be taken into account.<sup>113</sup> Co-perpetratorship differs slightly from joint criminal enterprise with respect to the key element of attribution.<sup>114</sup> However, both approaches widely overlap and should therefore be harmonized in the jurisprudence of both *ad hoc* Tribunals. Unlike the

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<sup>109</sup> See, e.g. § 129 (1) German Criminal Code which reads as follows: "Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine."

<sup>110</sup> Article 25(3)d of ICC-Statute which reads as follows: "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime[.]" This norm, however, regulates a new form of participation. It does not deal with a form of perpetration, but constitutes the broadest, and the least grave, mode of participation (cf. *Werle, G.*, Principles of International Criminal Law, 2<sup>nd</sup> ed., The Hague, 2009, ¶ 493).

<sup>111</sup> Prosecutor v. Simić, Trial Judgement, Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, *supra* note 103; Prosecutor v. Simić, Dissenting Opinion of Judge Schomburg, *supra* note 99, ¶¶ 2-3, 11-21, 23; Prosecutor v. Martić, Appeal Judgement, Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martić, *supra* note 105, ¶¶ 2, 5-9; Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, ¶¶ 19-22, 24-27 (July 7, 2006).

<sup>112</sup> Prosecutor v. Milutinović et al., Case No. IT-99-37-AR72, Decision on Draguljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶¶ 18-20 (May 21, 2003).

<sup>113</sup> Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgement, ¶¶ 437-442 (July 31, 2003); Simić Appeal Judgement, *supra* note 99, ¶ 3.

<sup>114</sup> While JCE is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship also depends on whether the perpetrator exercises control over the criminal act (objective criterion).

ICTY Appeals Chamber held in *Stakić*,<sup>115</sup> the author is convinced that co-perpetration represents a mode of liability recognized under customary international law.<sup>116</sup> Surprisingly enough, in *Seromba*<sup>117</sup> the Appeals Chamber came to accept a silent convergence of the JCE doctrine with the concept of co-perpetration in essence embarking without saying on the objective limitation by the criterion of *Tatherrschaft* (control over the act), an element commonly associated with the latter.<sup>118</sup>

¶57 Fortunately, the ICC that unlike the *ad hoc* Tribunals had time to wait for a well-drafted comprehensive general part of a code of criminal procedure to be included in its Statute clearly departs in its initial jurisprudence from the overly subjective concept of JCE at the same time declaring the concept of co-perpetration as the mode of liability better suited for situations of macro-criminality.<sup>119</sup> However, despite of this clear dismissal the JCE doctrine has been recently revived in the jurisprudence of some hybrid/internationalized tribunals.<sup>120</sup> The foreseeable and predicted risk emanating from the vagueness of the third category of JCE has found its realization at least in part in the final conviction of the accused *Gboa* before the Special Court for Sierra Leone.<sup>121</sup> It has to be emphasized that for the sake of the principle of *nullum crimen sine lege certa* there should be only one exhaustive enumeration of modes of liability in International Criminal Law.

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<sup>115</sup> Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgement, ¶ 62 (March 22, 2006).

<sup>116</sup> Cf. Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor - Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany 2006 [hereinafter Expert Opinion].

<sup>117</sup> Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Appeal Judgement, ¶¶ 171-172 (12 March 2008).

<sup>118</sup> *Id.* ¶¶ 171-174.

<sup>119</sup> The Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶¶ 322-367 (Jan. 29, 2007); The Prosecutor v. Katanga et al., Case No. ICC-01/04-01/07, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶¶ 487-538 (Sep. 30, 2008); The Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Pre-Trial Chamber Decision on the Confirmation of Charges, ¶¶ 350-353, 369-371 (June 15, 2009).

<sup>120</sup> Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-A, Appeal Judgement, ¶¶ 400-402, 475, 485 (Oct. 26, 2009). Furthermore, before the Extraordinary Chambers in the Courts of Cambodia: Office of the Co-Investigating Judge, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case File No: 002/19-09-2007-ECCC-OCIJ (Dec. 8, 2009); Pre-Trial Chamber, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No: 002/19-09-2007-ECCC/OCIJ (May 20, 2010).

<sup>121</sup> Prosecutor v. Sesay, Kallon and Gbao, *Id.* Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, ¶¶ 17-19, 26, 44-45 and Separate Concurring Opinion of Justice Renate Winter.

¶58 Let us now turn to another example on the possible repercussions of the *nullum crimen sine lege* rule in the case-law before ICTY. In 2006, the Appeals Chamber affirmed the conviction of *Galić* for the crime of “terrorization against a civilian population”<sup>122,123</sup> The majority was convinced that this crime was founded in customary international law during the time relevant to the Indictment, i.e. between 1992 and 1994. In my opinion,<sup>124</sup> while the *prohibition* of such acts and threats as subsumed under the crime in question was part of international customary law at the time *Galić*’s criminal conduct took place, the same could not be conscientiously said about its *penalization*.<sup>125</sup> In other words, in my humble view, the Appeals Chamber infringed the prohibition of *nullum crimen sine lege* when convicting *Galić* for a conduct that was not a recognized *crime* under customary international law at the time of commission.

¶59 According to settled jurisprudence of the Appeals Chamber since *Tadić*<sup>126</sup> the ICTY has jurisdiction for a violation of international humanitarian law under Article 3 of the Statute only when four conditions are met: i) the violation must constitute an infringement of a rule of international humanitarian law; ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...]; iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. [...]; iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>127</sup>

¶60 There can be no doubt that the prohibition of acts and threats of violence the primary purpose of which is to spread terror among the civilian population, as set out in Article 51(2), 2nd Sentence of Additional Protocol I<sup>128</sup> and Article 13(2), 2nd Sentence of Additional Protocol II<sup>129</sup>, was part of customary

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<sup>122</sup> A mere renaming of the term “crime of terror” as used by the Trial Chamber in Prosecutor v. *Galić*, Case No. IT-98-29-T, Trial Judgement (Dec. 5, 2003).

<sup>123</sup> Prosecutor v. *Galić*, Case No. IT-98-29-A, Appeal Judgement (Nov. 30, 2006).

<sup>124</sup> Prosecutor v. *Galić*, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Schomburg, ¶¶ 4-22 (Nov. 30, 2006) [hereinafter *Galić* Separate and Partially Dissenting Opinion].

<sup>125</sup> *Id.* ¶ 24.

<sup>126</sup> Prosecutor v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

<sup>127</sup> *Id.* ¶ 94.

<sup>128</sup> 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, 1125 UNTS (1979) 3-608.

<sup>129</sup> 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts, 1125 UNTS (1979) 609-99.

international law already at the time relevant to the *Galić* Indictment. The violation of this prohibition thus fulfils the first three *Tadić* conditions. However, the fourth *Tadić* condition was not met, i.e. the aforementioned prohibition was not penalized, thus attaching individual criminal responsibility opposed to imposing mere disciplinary measures, at the time of commission.<sup>130</sup>

¶61 It was the Secretary-General's view that "the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt [sic] part of customary law [...]. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law."<sup>131</sup>

¶62 In my view, the Appeals Chamber in *Galić* failed to show that sufficient state practice as well as *opinio juris* corresponding to this practice existed in regard to the crime of terrorization against a civilian population at the time relevant to the Indictment. According to my analysis, no such state practice in the width as claimed by the Appeals Chamber<sup>132</sup> existed in the first half of the nineties. In fact, the Appeals Chamber was only able to establish with certainty that just an extraordinarily limited number of states at the time relevant to the Indictment had penalized terrorization against a civilian population in a manner corresponding to the prohibition of the Additional Protocols.<sup>133</sup> In any event, it did not suffice for the Appeals Chamber to simply refer to a "continuing trend of nations criminalizing terror as a method of warfare"<sup>134</sup> when this trend, if it was identifiable as such, was of no relevance to the time period in which the criminal conduct under examination fell. With regard to *opinio juris*, it is undisputed, that there were many statements by states concerning the *prohibition* of acts and threats of violence the primary purpose of which is to spread terror among the civilian population but not referring to its *penalization*.<sup>135</sup>

¶63 In sum, the conduct prohibited by Article 51(2), 2nd sentence of Additional Protocol I and Article 13(2), 2nd sentence of Additional Protocol

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<sup>130</sup> *Galić* Separate and Partially Dissenting Opinion, *supra* note 124, ¶ 7.

<sup>131</sup> Report of the Secretary-General, *supra* note 5, ¶ 34.

<sup>132</sup> The Appeal Chamber, ¶¶ 94, 95, comes to the conclusion that the fourth *Tadić* condition was satisfied, stating "that *numerous* states criminalise violations of international humanitarian law – encompassing the crime of acts or threats of violence the primary purpose of which is to spread terror among the civilian population – within their jurisdiction" and "that *numerous* States have incorporated provisions as to the criminalisation of terror against the civilian population as a method of warfare in a language similar to the prohibition set out in the Additional Protocols." [emphasis added].

<sup>133</sup> *Galić* Separate and Partially Dissenting Opinion, *supra* note 124, ¶¶ 9-15.

<sup>134</sup> Footnote 297 of the *Galić* Appeal Judgement, *supra* note 123.

<sup>135</sup> *Galić* Separate and Partially Dissenting Opinion, *supra* note 124, ¶ 19.

II, namely, acts and threats of violence the primary purpose of which is to spread terror among the civilian population should be penalized as a crime *sui generis*. However, it is not for the ICTY to act as a legislator; the International Tribunal is under the obligation to apply only customary international law applicable at the time of the criminal conduct. It is required to adhere strictly to the principle of *nullum crimen sine lege praevia* and must ascertain that a crime was “beyond any doubt part of customary law.”<sup>136</sup> It would, in my view, be detrimental not only to ICTY but also to the future development of international criminal law and international criminal jurisdiction if its jurisprudence gave the appearance of inventing crimes – thus highly politicizing its function – where the conduct in question was not without any doubt penalized at the time when it took place.<sup>137</sup>

¶64 Lastly, also the applicability of the principle of *lex mitior* as a component of the prohibition of *nullum crimen sine lege* shall be illustrated by a concrete example. In 2003, the Defence for *Nikolić*<sup>138</sup> submitted to the Trial Chamber the sentencing range for the convicted person to be restricted according to the principle of *lex mitior* to a fixed term of imprisonment instead of a term up to and including the remainder of the convicted person’s life as provided for in the Rules of Procedure and Evidence of the Tribunal.

¶65 The principle of *lex mitior*, as contained in international human rights instruments such as the ICCPR<sup>139</sup> and the American Convention on Human Rights (ACHR)<sup>140</sup>, foresees that if, subsequent to the commission of an offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit of this lighter penalty. While accepting that the principle of *lex mitior* formed an internationally recognized standard protecting the rights of the accused the Trial Chamber in *Nikolić* held that the principle only applied to cases in which the commission of a criminal offence and the subsequent imposition of a penalty took place within one and the same jurisdiction.<sup>141</sup>

¶66 The Trial Chamber noted that in the event of concurrent jurisdictions, no state was generally bound under international law to apply the sentencing range or sentencing law of another state where the offence was committed. With respect to the concurrent jurisdiction of the Tribunal and the jurisdictions in the former Yugoslavia,<sup>142</sup> the Appeals Chamber had in an earlier case

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<sup>136</sup> Report of the Secretary-General, *supra* note 5, ¶ 34.

<sup>137</sup> Galić Separate and Partially Dissenting Opinion, *supra* note 124, ¶ 21.

<sup>138</sup> Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgement, ¶¶ 157-165 (Dec. 18, 2003) [hereinafter *Nikolić Sentencing Judgement*].

<sup>139</sup> ICCPR, art. 15(1) sentence 3.

<sup>140</sup> ACHR, art. 9 sentence 3.

<sup>141</sup> *Nikolić Sentencing Judgement*, *supra* note 138, ¶ 163.

<sup>142</sup> ICTY Statute, art. 9 (1), provides that the Tribunal and national courts have concurrent jurisdiction to prosecute persons for the statutory crimes.

adopted without further explanation the same approach when it had stated that the principle that Trial Chambers are not bound in sentencing by the practice of courts in the former Yugoslavia applied to offences committed both before and after the Tribunal's establishment.<sup>143</sup> In conclusion, the Trial Chamber stated that owing to its primacy *vis à vis* national jurisdictions in the former Yugoslavia it was not bound to apply the more lenient penalty under these jurisdictions. However, it went on to explain, such penalties could be taken into consideration as one factor among others when determining a sentence.

## IX. CONCLUSIONS

¶67 Overall, a positive conclusion can be drawn from this analysis. Where impunity used to be the rule, International Tribunals have made it the exception in their respective areas of responsibility. In doing so, they have safeguarded the rights of the accused while also protecting the fundamental rights of victims. By adopting all the detailed facets of fair trial rights, the Tribunals have not only enhanced their own legitimacy but also set a minimum standard with which any legitimate international criminal court must comply. In our globalized society, the importance of this standard on a domestic level, which has made the concept of justice more concrete at an international level, should not be underestimated. However, one lesson may additionally be learned: we desperately need a stronger European (and African) judiciary coping itself with problems of their own continents against the backdrop of the corresponding own legal culture. As was said before, the development of a European Criminal Court is another topic, a topic seriously to be discussed in the near future.

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### Sažetak

#### RAZVOJ LJUDSKIH PRAVA PRED MEĐUNARODNIM KAZNENIM SUDOVIMA – EUROPSKA PERSPEKTIVA

Međunarodni kazneni sud za bivšu Jugoslaviju (MKSJ) nije stranka ni Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda (EKLP) ni Međunarodnog pakta za zaštitu građanskih i političkih prava (MPGPP). Zbog toga nije osigurano ni da ljudska prava sadržana u njima budu izravno primjenjiva pred njim. Međutim, kako sud koji su osnovali Ujedinjeni narodi može ignorirati njihova vlastita temeljna prava? Kako građani države članice Vijeća Europe mogu biti u lošijem položaju samo zbog toga što se pojavljuju pred međunarodnim sudom?

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<sup>143</sup> Prosecutor v. Delalić et al. (Celebići), Case No. IT-96-21-A, Appeal Judgement, ¶ 816 (Feb. 20, 2001).

Stoga, treba analizirati kako dva UN-ova međunarodna kaznena suda, MKSJ i Međunarodni kazneni sud za Ruandu (MKSJ), detaljnije definiraju pojam pravičnog suđenja usvajajući posebice odredbe MPGPP. Iz europske perspektive, posebno u odnosu na MKSJ, još je važnije usredotočiti se na prilično različito razrađena jamstva i njihovu odgovarajuću zaštitu u EKLJP i razvijenoj judikaturi Europskog suda za zaštitu ljudskih prava i temeljnih sloboda (ESLJP) u Strasbourgu. Međunarodni kazneni sudovi osnovani su kako bi se zaštitila ljudska prava žrtava dovodeći bivše “nedodirljive” – pojedince koji su navodno počinili zločine, ali su bili zaštićeni od kaznenog progona – pravdi. Međutim, po istom obrascu sudovi moraju također osigurati i pravično suđenje. Oni imaju dužnost jamčiti temeljna prava optuženika.

Pristup temeljnim pravima pravičnog suđenja optuženoj strani ključan je pokazatelj ravnovjesja u bilo kojem sustavu kaznenog pravosuđa, budući da postupak gubi svoju vjerodostojnost bez dosljedne primjene standarda minimalnih prava obrane. Međutim, oslanjanje na pojam “pravičnog suđenja” bez točnog određivanja što taj pojam obuhvaća ostavilo bi neotuđiva ljudska prava svakodnevnoj diskreciji sudova.

U izvješću o osnivanju MKSJ Vijeću sigurnosti glavni tajnik UN-a naglasio je sljedeće: “Očigledno je da Međunarodni sud mora u potpunosti poštovati međunarodno priznate standarde u pogledu prava optuženika u svim stadijima postupka”. Takvi međunarodni standardi sadržani su osobito u članku 14. MPGPP, a gotovo doslovno su ponovljeni u čl. 21. Statuta MKSJ i čl. 20. Statuta MKSR. Slijedom toga, minimalna prava obrane ponovo oživljavaju kroz sudsku praksu oba suda, budući da se neizbježne praznine u Pravilima o postupku i dokazima moraju popunjavati imajući na umu ta prava. Uz to, sudovi su utvrdili povrede minimalnih prava obrane i nastojali su pružiti pravna sredstva u svakom od tih slučajeva. Ovaj razvoj će nedvojbeno utjecati na tumačenja ljudskih prava na nacionalnoj razini. Tragovi se već mogu pronaći u pojedinim nacionalnim i europskim odlukama, koje se pozivaju na sudsku praksu MKSJ, a još i više u radovima europskih teoretičara.

Osim toga, javlja se još jedno ne samo teoretsko i ne nužno provokativno pitanje o kojem se nikad nije ozbiljno raspravljalo: Koji bi bio utjecaj na jurisprudenciju da je Europskom kaznenom sudu, sastavljenom od sudaca koji raspolažu nužnim forenzičkim iskustvom u kaznenim stvarima, dana ovlast “da kazneno goni osobe odgovorne za teška kršenja međunarodnog humanitarnog prava počinjana na teritoriju bivše Jugoslavije od 1991. godine”? To bi zahtijevalo novo istraživanje znanstvenika iz različitih područja, među ostalim filozofa, sociologa, povjesničara i pravnika (ljudska prava, humanitarno pravo, kazneno pravo), dakle pothvat koji se ne može očekivati u uskim okvirima današnjeg doprinosa.

U radu su obrađeni izabrani aspekti načina na koji su međunarodni sudovi implementirali jamstava pravičnog suđenja sadržana u člancima 9(3), 14, 15 te članku 2(3) MPGPP i člancima 5-7 i 13 EKLJP, kroz svoje statute, pravila i sudsku praksu, i postupovnu i materijalnu. Od jamstava su obrađena: pravo na dovođenje pred sud u najkraćem roku, presumpcija nedužnosti, pravo na obavještanje u najkraćem roku, na jeziku koji okrivljenik razumije, o prirodi i razlozima optužbe protiv njega, pravo da se okrivljenik brani sam ili uz branitelja po vlastitom izboru te pravo na besplatnog branitelja, pravo na žalbu i odštetu te pravila *ne bis in idem* i *nullum crimen, nulla poena sine lege stricta et praevia*. Prikazane su i postojeće razlike između MPGPP i EKLJP u njihovu tekstu, ali i u različitom tumačenju jednog te istog jamstva.

Iz provedene analize može se izvući pozitivan zaključak. Tamo gdje je nekažnjivost bila pravilo, međunarodni su je sudovi u području svoje nadležnosti učinili iznimkom. Pritom su štitili prava optuženika istovremeno štiteći i temeljna prava žrtava. Usvajajući sve aspekte prava pravičnog suđenja, sudovi nisu samo ojačali vlastiti legitimitet nego su i postavili minimalne standarde koje svaki legitiman međunarodni kazneni sud mora poštovati. U našem globaliziranom društvu, važnost ovog standarda na nacionalnoj razini, koji je učinio koncept pravde konkretnijim na međunarodnoj razini, ne treba biti podcijenjen. Međutim, možemo

izvući dodatnu pouku: očajnički trebamo jače europsko (i afričko) sudstvo koje se samo nosi s problemima vlastitih kontinenata u okviru odgovarajuće vlastite pravne kulture. Kao što je prije rečeno, razvoj Europskog kaznenog suda je drugo pitanje, pitanje koje treba ozbiljno razmotriti u bliskoj budućnosti.

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