

The Election of *Ad Litem* Judges and Other Recent Developments at the International Criminal Tribunals

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Abstract. There have been several important developments concerning the ICTY and ICTR recently. For example, steps have been taken to improve the efficient operation of both *ad hoc* Tribunals, to include the addition of *ad litem* judges at the ICTY, an increase in the number of judges assigned to the common Appeals Chamber (to include the permanent assignment of ICTR judges to The Hague for this purpose), and amendments to the Rules of Procedure and Evidence of both *ad hoc* International Criminal Tribunals. In addition, efforts have been initiated to provide for compensation to victims and to individuals wrongfully detained, prosecuted or convicted. There have also been recent allegations of improper conduct by defence attorneys and investigators. The following article surveys these developments.

1. EFFORTS TO IMPROVE THE EFFICIENCY OF THE ICTY

The International Criminal Tribunal for the former Yugoslavia (hereinafter 'ICTY' or 'the Tribunal') has seen a dramatic increase in the number of accused in custody during 2001.¹ Even before this sharp increase in the

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1. As of 10 September 2001, there were 28 detainees in custody at the ICTY either on trial or awaiting trial or re-sentencing, while 6 individuals were waiting for the judgments in their case to be rendered. A further 12 individuals were in custody awaiting Appeals Chamber action following their convictions, with one individual on provisional release. See Fact Sheet on ICTY Proceedings (10 September 2001), obtainable from <http://www.un.org/icty/glance/procfact-e.htm> (hereinafter 'ICTY Proceedings Fact Sheet'). Since 10 January 2001, 11 individuals have been arrested or have surrendered to the custody of the ICTY. ICTY Fact Sheet, Detainees and Former Detainees (14 August 2001), obtainable from <http://www.un.org/icty/glance/detainees-e.htm> (hereinafter 'ICTY Status of Detainees Report'). While this influx is not as dramatic as the increase in the number of accused in custody during the nine-month period from October 1997 to June 1998, when 22 accused either surrendered or were arrested, the 2001 arrivals include several very senior level accused, including Slobodan Milošević. *Id.* The International Criminal Tribunal for Rwanda (hereinafter 'ICTR'; the ICTY and ICTR shall be collectively referred to as 'the *ad hoc* Tribunals') has also experienced a rise in the number of accused in custody in 2001, with eight individuals arrested during the course of 2001, bringing the total number of detained individuals at the ICTR to 51. See the ICTR website at <http://www.ictor.org>.

number of accused in custody, however, questions arose about how to improve the operation and functioning of the *ad hoc* Tribunals. This process, which commenced with the release of a report by an expert group in November 1999, accelerated through the end of 2000 and into early 2001.² Acting on the basis of the Experts' Report, the President of the ICTY put forward a two-pronged approach for improving the efficiency of the ICTY.³ The first prong of this proposal called for creating a pool of *ad litem* judges to increase the capacity of the Trial Chambers to hear cases, while the second prong envisioned streamlining pre-trial management of cases by delegating certain pre-trial functions to the senior legal officers of the chambers.⁴

1.1. *Ad litem* judges for the ICTY

Pursuant to the first prong of this proposal, the Security Council amended the ICTY Statute to provide for a pool of 27 *ad litem* judges.⁵ Of these 27 judges, no more than nine may sit at any given time.⁶ The Secretary-General will maintain a list of the *ad litem* judges and upon the request of the president of the ICTY *ad litem* judges will be appointed to serve in a Trial Chamber for one or more trials.⁷ Although elected for a single four year term, each *ad litem* judge may sit for a cumulative period not exceeding three years.⁸

The *ad litem* judges will come to the Tribunal only after all the pre-trial issues and questions of law and fact have been identified and re-

2. See D.A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AJIL 759 (2000); and Report of the Expert Group to Conduct a review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 (1999) (hereinafter 'Experts' Report').

3. Report on the Operation of the International Criminal Tribunal for the former Yugoslavia, presented by H.E. Judge Claude Jorda, President, on behalf of the Judges of the Tribunal (May 2000), UN Doc. A/55/382-S/2000/865 (2000), Ann. I, obtainable from <http://www.un.org/ga/55/lista55b.htm#8> (hereinafter 'Jorda Report'). See also Mundis, *supra* note 2, at 770-773.

4. Jorda Report, *supra* note 3, at para. 129.

5. UN Doc. S/RES/1329 (2000), Ann. I, ICTY Statute, Art. 13ter(1)(d). Ann. I, attached to Res. 1329, sets forth the amended articles of the ICTY Statute, while Ann. II contains the amended articles of the ICTR Statute. By the same Resolution, the title of the currently existing judges was changed to "permanent" judge. UN Doc. S/RES/1329 (2000), Ann. I, Art. 12(1). ICTY Statute, Art. 13ter(1)(c) anticipates a minimum of 54 candidates for the 27 *ad litem* positions. On 23 March 2001, the President and Registrar of the ICTY hosted an information seminar for the diplomatic corps in The Hague to encourage States to nominate candidates. See Second Diplomatic Information Seminar held at the ICTY, ICTY Press Release (23 March 2001), CC/P.I.S./580-e, obtainable from <http://www.un.org/icty/pressreal/p580e.htm>.

6. ICTY Statute, Art. 12(1).

7. *Id.*, Art. 13ter(2).

8. *Id.*, Art. 13ter(1)(e) and Art. 13ter(2).

solved.⁹ Each chamber will be assigned three *ad litem* judges, which combined with the three permanent judges, will result in a chamber of six judges in total. Two sections of each chamber will then be created, with one section having one permanent judge and two *ad litem* judges and the other section having two permanent judges and one *ad litem* judge.¹⁰ In making a request to the Secretary-General for the appointment of *ad litem* judges, the president of the ICTY will look at the list and take into consideration the number of votes received by the *ad litem* judges in the election process by the General Assembly and then consider the qualifications of the *ad litem* judges and the type of judges needed for a particular case, *i.e.*, whether the chamber needed a judge with trial experience or expertise in criminal law or international law.¹¹ The ICTY president will then make a recommendation to the Secretary-General, inviting him to appoint *ad litem* judges to the ICTY.¹²

Elections for the *ad litem* judges were held on 12 June 2001, with the four year terms of those elected commencing on that date and running through 11 June 2005.¹³ The first six judges have been appointed and will hear trials commencing in early September 2001.¹⁴ In early 2002, three additional *ad litem* judges would be available, allowing for six trials to be conducted simultaneously.¹⁵ Because the ICTY has only three court-rooms, it will be necessary to conduct one trial in the morning and one trial in the afternoon, with the scheduled court time for each specific trial

9. ICTY Weekly Press Briefing (6 December 2000), obtainable from <http://www.un.org/icty/briefing/PB061200.htm> (hereinafter '6 December 2000 Press Briefing').

10. *Id.*

11. *Id.*

12. *Id.*

13. See UN General Assembly Press Release (12 June 2001), UN Doc. GA/9878, obtainable from <http://www.un.org/News/Press/docs/2001/ga9878.doc.htm>; and ICTY Press Release SB/P.I.S./607-e (31 July 2001), obtainable from <http://www.un.org/icty/pressreal/p607e.htm> (hereinafter 'ICTY Press Release 607'). The following individuals were elected (names in italics represent *ad litem* judges who are former permanent ICTY judges, while those names which are bold represent the first six judges to be appointed): Carmen Maria Argibay (Argentina), Hans Henrik Brydensholt (Denmark), Guibril Camara (Senegal), Joaquin Martin Canivell (Spain), Romeo T. Capulong (Philippines), Arthur Chaskalson (South Africa), **Maureen Harding Clark** (Ireland), **Fatoumata Diarra** (Mali), Albin Eser (Germany), *Mohamed Al-Habib Fassi Fihri* (Morocco), Claude Hanoteau (France), Hassan Bubacarr Jallow (Gambia), **Ivana Janů** (Czech Republic), Per-Johan Lindholm (Finland), *Rafael Nieto-Navia* (Colombia), Mauro Politi (Italy), Vonimbolana Rasoazanany (Madagascar), Ralph Riachy (Lebanon), **Amarjeet Singh** (Singapore), Albertus Henricus Joannes Swart (Netherlands), Gyorgy Szenasi (Hungary), **Chikako Taya** (Japan), Krister Thelin (Sweden), Christine Van Den Wyngaert (Belgium), Volodymyr Vassylenko (Ukraine), *Lal Chand Vohrah* (Malaysia), and **Sharon A. Williams** (Canada). For complete curriculae vitae of the newly elected *ad litem* judges, see UN Doc. A/55/919 (2001). A total of 64 candidates from 35 states were nominated for *ad litem* positions. See UN Doc. S/RES/1350 (2001).

14. The *ad litem* judges have been assigned to the Simić and Others ('Bosanski Šamac'), Naletilić and Martinović ('Tuta and Štela') and Vasiljević cases. ICTY Press Release 607, *supra* note 13.

15. ICTY Weekly Press Briefing (18 April 2001), obtainable from <http://www.un.org/icty/briefing/PB180401.htm>.

being slightly reduced to approximately four hours a day.¹⁶ Consequently, there would be eight hours of trial time per courtroom, which exceeds the current normal working day, necessitating additional staff and resources.¹⁷

When the issue of *ad litem* judges was first raised, some of the permanent judges were concerned with the creation of a two-tiered system of judicial positions.¹⁸ These concerns were well-founded, since there are significant differences between the *ad litem* and permanent judges with respect to both their authority and benefits.¹⁹

With respect to their duties, Article 13^{quarter}(2)(b) of the Statute places limitations on the powers of the *ad litem* judges.²⁰ They may not adopt the Rules of Procedure and Evidence (hereinafter 'RPE' or 'the rules') pursuant to ICTY Statute Article 15;²¹ review an indictment pursuant to Article 19 of the Statute;²² nor may they participate in pre-trial proceedings.²³ The *ad litem* judges are also prohibited from consulting with the president of the ICTY regarding either the assignment of judges (pursuant

16. 6 December 2000 Press Briefing, *supra* note 9. Currently, each trial chamber typically sits approximately 4.5 hours per day, in three 90-minute sessions.

17. *Id.* The Tribunal has requested an additional 54 staff posts to support the *ad litem* judges and to increase the capacity to conduct the increased caseload. See Report of the Advisory Committee on Administrative and Budgetary Questions (hereinafter 'ACABQ'), Conditions of Service for the Ad Litem Judges of the International Tribunal for the Former Yugoslavia, UN Doc. A/55/806 (2001) (hereinafter 'ACABQ Conditions of Service Report'), Table 2. The ACABQ Conditions of Service Report was endorsed by the General Assembly on 1 May 2001. See A/RES/55/249. See also the ICTY's summary of the ACABQ Conditions of Service Report, prepared in part to encourage states to nominate candidates, obtainable from <http://www.un.org/icty/basic/statut/adlitem-cor.htm>. Simultaneously, the Tribunal is seeking an additional \$5,280,000 to implement this plan. ACABQ Conditions of Service Report, Table 1. See also Report of the Secretary-General, Financing of the International Tribunal for the Prosecutions of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/55/517 (2000) (hereinafter 'SG's Financing Report'); See also UN Doc. A/55/517/Add. 1 (2000) and UN Doc. A/55/517/Corr. 1 (2000).

18. In presenting their plan to the Security Council, the ICTY judges stated, "In compliance with the principle of the equality of the judges, the *ad litem* judges would have to have the same qualifications and conditions of employment as the other judges (remuneration, pension, privileges and immunities). The judges were unanimous on this point." Jorda Report, *supra* note 3, at para. 113 (emphasis in original).

19. *But see* 6 December 2000 Press Briefing, *supra* note 9, in which the ICTY President's chef de cabinet is quoted as saying that under the new system "a judge is a judge," and that the concept of *ad litem* judges was based on the fact that under the resolution, the *ad litem* judges had all the same powers and privileges and exactly the same status as permanent judges.

20. As will be discussed *infra*. The ICTY judges met in plenary in mid-April 2001 to amend the Rules of Procedure and Evidence to bring them into conformity with these statutory changes and to bestow authority on the chambers' senior legal officers with respect to pre-trial management issues, in line with the second prong of the Jorda Report (*supra* note 3). Several amendments to the Rules placed additional limitations on the duties and responsibilities of the *ad litem* judges.

21. ICTY Statute, Art. 13^{quarter}(2)(b)(i). This article does provide that the *ad litem* judges shall be consulted prior to the adoption of such rules, however.

22. *Id.*, Art. 13^{quarter}(2)(b)(ii).

23. *Id.*, Art. 13^{quarter}(2)(b)(iv).

to Article 15 of the Statute) or in relation to a pardon or commutation of a sentence (in accordance with Article 28 of the Statute).²⁴ The *ad litem* judges would not be assigned to the Appeals Chamber.²⁵ Finally, they are ineligible to serve as president of the Tribunal or as a presiding judge of a Trial Chamber.²⁶ Other than these limitations, however, the *ad litem* judges enjoy the same powers as the permanent judges,²⁷ and in light of the fact that the *raison d'être* for creating the *ad litem* judge positions is to create additional capacity for trying cases, the limitations on their powers should not hinder them in performing trial judge duties.

Article 13*quarter*(1) of the ICTY Statute sets forth the general proposition that the *ad litem* judges shall benefit from the same terms and conditions of service as the permanent judges of the Tribunal,²⁸ and shall also enjoy the privileges and immunities, exemptions and facilities of the permanent judges.²⁹ Since the *ad litem* judges are limited to a single term to sit for one or more trials for a cumulative period not to exceed three years, however, their financial benefits are necessarily less generous than those extended to the permanent judges. For example, the *ad litem* judges are not entitled to a relocation allowance;³⁰ education allowance;³¹ survivors' lump-sum benefit;³² or pension.³³

1.2. Amendments to the ICTY Rules of procedure and evidence to improve efficiency

Regarding the second prong of the Jorda Report, there have been several significant amendments to the ICTY RPE³⁴ during recent plenaries of the ICTY judges. These changes have primarily taken three forms with respect to improving the efficient operation of the ICTY. First, the RPE have been amended to improve pre-trial case management, including the addition of important new duties and responsibilities for the senior legal officers in chambers. Second, the rules have been amended to expedite the trials,

24. *Id.*, Art. 13*quarter*(2)(b)(iii).

25. ICTY Weekly Press Briefing (18 April 2001), *supra* note 15.

26. ICTY Statute, Art. 13*quarter*(2)(a). They are also ineligible to vote for candidates for either of these positions. *Id.* See also Art. 14 of the Statute as amended.

27. *Id.*, Art. 13*quarter*(1)(b).

28. *Id.*, Art. 13*quarter*(1)(a). It should be noted in this respect that the Terms and Conditions of Service of the permanent judges are identical to those enjoyed by the judges of the International Court of Justice. See *id.*, Art. 13*bis*(3).

29. *Id.*, Art. 13*quarter*(1)(c).

30. ACABQ Conditions of Service Report, *supra* note 17, at para. 10. See also Report of the Secretary-General, Conditions of Service of the *Ad Litem* Judges of the International Tribunal for the Former Yugoslavia, UN Doc. A/55/756 (2001) (hereinafter 'SG's Conditions of Service Report'), para. 24. The SG's Conditions of Service Report was endorsed by the General Assembly on 1 May 2001. See UN Doc. A/RES/55/249.

31. ACABQ Conditions of Service Report, *supra* note 17, at para. 11.

32. *Id.*

33. *Id.*, at paras. 13–14; SG's Conditions of Service Report, *supra* note 30, at paras. 15, 21–22.

34. The ICTY RPE are obtainable from http://www.un.org/icty/basic/rpe/IT32_rev21con.htm. All references that follow are to the ICTY RPE.

while preserving the rights of the parties to a fair hearing. Third, the rules have been amended to take into consideration the introduction of the *ad litem* judges.

With respect to pre-trial management issues, Rule 65ter, governing the responsibilities of the pre-trial judge, has been amended to include sub-Rule (D) providing for increased responsibilities of the chambers' senior legal officers. Pursuant to Rule 65ter(D)(ii), the pre-trial judge must establish a work plan setting forth the pre-trial obligations of the parties and a timetable for the completion of the enumerated tasks. The senior legal officer, acting under the supervision of the pre-trial judge, will oversee the implementation of the work plan and provide the pre-trial judge with regular status reports.³⁵ The pre-trial judge shall order the parties to meet to discuss issues related to the preparation of the case and the work plan.³⁶

Once preliminary motions pursuant to Rule 72 have been resolved,³⁷ the pre-trial judge will order the prosecution, upon the report of the senior legal officer, to file a package of pre-trial documents.³⁸ These documents include the final version of the prosecution's pre-trial brief,³⁹ the prosecution's witness list,⁴⁰ and the list of exhibits that the prosecution intends to offer.⁴¹ Once the prosecution has complied with these obligations, the

35. Rule 65ter(D)(iii). The senior legal officer may be assisted by a representative of the registry in completing this task, and may require transcripts to be made of any meetings held pursuant to Rule 65ter. Rule 65ter(D)(vii).

36. Rule 65ter(D)(v). The accused is not required to be present at such meetings. Rule 65ter(D)(vi). These meetings "are held *inter partes* or, at his or her request, with the senior legal officer and one or more of the parties." Rule 65ter(D)(v).

37. Rule 65ter(E). Prior to the amendments made at the 24th plenary in mid-July 2001, the pre-trial judge ordered the filing of the pre-trial documents following the completion of the prosecution's disclosure obligations pursuant to Rule 66 and Rule 68. This amendment may reduce the likelihood that some of the pre-trial filings may have to be filed twice, once after the prosecution completes its initial disclosure and then again following the resolution of any preliminary motions filed by the defence.

38. Rule 65ter(E).

39. Rule 65ter(E)(i). The final version of the prosecution's pre-trial brief must include the following: "for each count, a summary of the evidence which the prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law." *Id.*

40. Rule 65ter(E)(ii). The witness list must include the following: (a) the name or pseudonym of each witness; (b) a summary of the facts on which each witness will testify; (c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment; (d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count; (e) an indication of whether the witness will testify in person or pursuant to Rule 92bis by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and (f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case. *Id.* A similar obligation is imposed upon the defence after the close of the prosecution case. See Rule 65ter(G)(i).

41. Rule 65ter(E)(iii). The prosecution is required to state, where possible, whether the defence has any objections as to the authenticity of the exhibits on the prosecution's exhibit list. *Id.* See also Rule 65ter(G)(ii), which imposes a similar obligation upon the defence after the close of the prosecution case.

defence is then ordered, within a time limit set by the pre-trial judge, to file its pre-trial brief.⁴²

With respect to pre-trial motions, the pre-trial judge shall set the schedule for the filing and, if required, hearings for such motions.⁴³ The pre-trial judge may order that such pre-trial motions be deferred for determination at trial.⁴⁴ Failure to raise objections or to make requests which can be made prior to trial are considered waived, although relief may be granted from the waiver.⁴⁵ Sanctions may be imposed upon a party that fails to perform its obligations pursuant to Rule 65*ter*. Such sanctions may include the exclusion of testimonial or documentary evidence.⁴⁶

At plenaries held in November and December 2000 and in mid-April and mid-July 2001, the ICTY judges adopted several rules to reduce the length of trials. For example, Rule 92*bis*, entitled "Proof of Facts other than by Oral Evidence," permits a Trial Chamber to admit the evidence of a witness in the form of a statement in lieu of *viva voce* testimony if the witness' testimony goes to the proof of a matter other than acts and conduct of the accused.⁴⁷ Rule 92*bis* also sets forth both factors in favor of admitting such evidence and factors against admitting such evidence.⁴⁸ This rule also sets forth certain technical requirements that must be met in order for the written statement to be admissible.⁴⁹ It is also permissible under Rule 92*bis*(D) for the Trial Chamber to admit a transcript of the previous ICTY testimony of a witness. If the Trial Chamber does so, it is within the discretion of the Trial Chamber to require the proponent of such evidence to produce the witness for cross-examination.⁵⁰ The first use of this rule was in the case of *Prosecutor v. Sikirica and Others* ('*Keraterm Camp*' case). In that case, the prosecution sought to admit transcripts of the prior ICTY testimony of six witnesses. The defence requested to cross-examine these witnesses and during a hearing on the motion, Judge May explained to the defence that the purpose of the new rule is:

[T]o try and cut down the lengths of these trials. It is a matter of concern to the international community that these trials have been taking up six months and more each. A large amount of time in this Tribunal has been taken up with pointless and repetitive cross-examination, and this rule is aimed at dealing with it.⁵¹

42. Rule 65*ter*(F). The defence pre-trial brief must set forth: (i) in general terms, the nature of the accused's defence; (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and (iii) in the case of each such matter, the reason why the accused takes issue with it. *Id.*

43. Rule 65*ter*(K).

44. *Id.*

45. *Id.*

46. Rule 65*ter*(N).

47. Rule 92*bis*(A).

48. Rule 92*bis*(A)(i) and (ii).

49. Rule 92*bis*(B) and (C).

50. Rule 92*bis*(E).

51. *Prosecutor v. Sikirica and Others*, Case No. IT-95-8-T, Trial Transcript, 24 April 2001, at 2441.

Concerning witnesses, Rule 73*bis* (with respect to the prosecution) and Rule 73*ter* (with respect to the defence) were amended to empower the Trial Chamber to set both the number of witnesses which the parties may call⁵² and the length of time available to the parties to conduct their case.⁵³ In order to eliminate time spent adjudicating interlocutory appeals, Rule 73(B) was amended to severely restrict the rights of the parties to file interlocutory appeals from “decisions rendered during the course of trial on motions involving evidence and procedure,”⁵⁴ unless the Trial Chamber certifies that an interlocutory appeal is “appropriate for the continuation of the trial.”⁵⁵

Finally, 23 rules were amended to bring the RPE into conformity with the statutory limitations on the duties and responsibilities of the *ad litem* judges⁵⁶ and to ensure that their role is limited to trial functions.⁵⁷

1.3. Conclusion

In his proposal calling for the creation of the *ad litem* judicial positions, ICTY President Jorda reported that without such new positions, and based on the anticipated trials yet to be conducted, the mandate of the ICTY could extend until the end of 2016.⁵⁸ With the implementation of the two-pronged approach described above, however, President Jorda contends that the ICTY can complete its mission by late 2007.⁵⁹ With most of this plan now in place, the international community will be watching closely to see whether this goal can be met. As of 10 September 2001, the ICTY had four trials underway,⁶⁰ with two cases completed and awaiting the ren-

52. Rule 73*bis*(C); Rule 73*ter*(C). Moreover, pursuant to Rule 90(G), “The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73*bis*(C) and 73*ter*(C).”

53. Rule 73*bis*(E); Rule 73*ter*(E). Additional time may be granted to either party during trial, “if this is in the interests of justice.” Rule 73*bis*(F); Rule 73*ter*(F).

54. Rule 73(B). Such decisions may be assigned as grounds for appeal from the final judgment. *Id.*

55. Rule 73(C). If the trial chamber so certifies, a party may appeal to the Appeals Chamber without leave. *Id.* Rule 73(D) provides that decisions on all other motions are without interlocutory appeal unless a bench of three Appeals Chambers judges grants leave to appeal on one of two grounds (“if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposition of the trial including post-judgment appeal” (Rule 73(D)(i)); or “if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally” (Rule 73(D)(ii)).)

56. ICTY Statute, Art. 13*quarter*(2)(b).

57. The following Rules were amended to reflect distinctions between the permanent and *ad litem* judges: 2, 6, 7*bis*, 17, 18, 20, 22, 23, 24, 25, 26, 27, 28, 30, 40*bis*, 45, 55, 59*bis*, 62, 65*bis*, 65*ter*, 90*bis*, and 124.

58. Jorda Report, *supra* note 3, at 12, para. 35; *see also* Mundis, *supra* note 2, at 770–773.

59. Jorda Report, *supra* note 3, at 24, para. 136.

60. The Keraterm Camp case; Prosecutor v. Martinović & Naletilić (‘Tuta and Štela’); Prosecutor v. Vasiljević (‘Višegrad’); and Prosecutor v. Simić and Others (‘Bosanski Šamac’ with four accused), ICTY Proceedings Fact Sheet, *supra* note 1.

dering of the judgment,⁶¹ and one case awaiting adjustment of sentence following appeal.⁶² There were 11 cases, involving 15 accused, in various stages of the pre-trial phase.⁶³ The Appeals Chamber was seized of appeals on the merits in five cases, involving 12 individuals.⁶⁴

2. OTHER RECENT DEVELOPMENTS AT THE ICTY AND ICTR

Several other recent developments affecting the *ad hoc* Tribunals merit brief mention. These developments concern additional amendments made to the Statutes of the *ad hoc* Tribunals; a date for concluding the temporal jurisdiction of the ICTY; possible compensation for victims and individuals wrongfully detained, prosecuted, or convicted; allegations of improper conduct by some defence counsel and investigators; and elections of the permanent ICTY judges.

2.1. Statutory Amendment concerning the Appeals Chamber

First, in addition to creating the ICTY *ad litem* judges, Security Council Resolution 1329 also amended the Statutes of both the ICTY and ICTR to expand the number of judges on the Appeals Chamber from five to seven, although each appeal will still be heard by five judges.⁶⁵ In addition, the Statutes of both *ad hoc* Tribunals were amended to permit two judges from the ICTR to be permanently assigned to the common Appeals Chamber.⁶⁶ This amendment should serve two primary purposes: it will allow the presiding judge of the Appeals Chamber⁶⁷ greater flexibility in

61. Prosecutor v. Krnojelac; and Prosecutor v. Kvočka and Others ('Omarska Camp' with five accused). *Id.*

62. Prosecutor v. Delalić and Others ('Čelebići Camp' case, involving three individuals). *Id.*

63. Prosecutor v. Milošević; Prosecutor v. Galić; Prosecutor v. Stakić; Prosecutor v. Blagojević; Prosecutor v. Krajišnik and Plavšić; Prosecutor v. Obrenović; Prosecutor v. Jokić; Prosecutor v. Ademi; Prosecutor v. Hadžihasanović and Others (three accused); Prosecutor v. Nikolić; and Prosecutor v. Brđanin and Talić. *Id.* See also ICTY Indictments and Proceedings, obtainable from <http://www.un.org/icty/ind-e.htm>; and ICTY Status of Detainees Report, *supra* note 1.

64. Prosecutor v. Krstić; Prosecutor v. Kordić and Čerkez; Prosecutor v. Kunarac and Others ('Foča' with three individuals); Prosecutor v. Blaškić; and Prosecutor v. Kupreškić and Others ('Ahmići' case with five individuals), ICTY Proceedings Fact Sheet, *supra* note 1.

65. UN Doc. S/RES/1329 (2000), Ann. I, Art. 12(3) and Ann. II, Art. 11(b).

66. UN Doc. S/RES/1329 (2000), Ann. I, Art. 14(4) and Ann. II, Art. 13(3). This amendment is in accord with the recommendation of the ICTR judges and the former Presidents of both International Tribunals. See Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the former Yugoslavia [*sic*] and the International Criminal Tribunal for Rwanda, UN Doc. A/54/850 (2000), Ann. 1, para. 85.

67. Pursuant to ICTY Statute, Art. 14(2) and Art. 14(4) and ICTR Statute, Art. 13(4), the *ad hoc* Tribunals share a common Appeals Chamber and the president of the ICTY serves as the presiding judge of the Appeals Chamber.

assigning judges to cases, and it will also give the Appeals Chamber greater insight into the ICTR trial experience, since the new Appeals Chamber judges will have formerly been ICTR trial judges. In late May 2001, ICTR Judges Mehmet Güney (Turkey) and Asoka de Zoysa Gunawardana (Sri Lanka) were permanently assigned to the Appeals Chamber pursuant to this amendment.⁶⁸

2.2. Developments concerning ICTR Chambers

Second, the Security Council simultaneously amended the ICTR Statute to provide for the election of two additional judges.⁶⁹ On 24 April 2001, Winston Churchill Maqutu (Lesotho) and Arlette Ramaroson (Madagascar) were elected to the ICTR. They will serve on the ICTR until the expiry of the terms of office of the current ICTR judges on 24 May 2003.⁷⁰ Moreover, on 6 May 2001, the first President of the ICTR, Judge Laïty Kama (Senegal) died and was replaced by Judge Andréia Vaz (Senegal).⁷¹ Judge Navanethem Pillay (South Africa) was re-elected President of the ICTR, while Judge Erik Møse (Norway) was re-elected Vice-President of the ICTR.⁷²

2.3. Temporal date for the ICTY's jurisdiction

Third, pursuant to paragraph 6 of Security Council Resolution 1329, the Secretary-General was requested to submit to the Council a report containing an assessment and proposals regarding a terminal date for the temporal jurisdiction of the ICTY.⁷³ No terminal date for the ICTY's jurisdiction was provided for in the Statute nor was there any specific guidance regarding the terminal date in Security Council Resolution 827 (1993), which established the ICTY. Rather, pursuant to paragraph 2 of that Resolution, the subsequent determination of the ICTY's terminal date was reserved to the Council "upon the restoration of peace." In his report on this issue,⁷⁴ the Secretary-General noted that several recent Security Council decisions demonstrate that the Council has not yet found that peace has been restored in the region.⁷⁵ Consequently, the Secretary-General determined that he is not in a position to make an assessment to

68. See ICTR Press Release 267 (29 May 2001), obtainable from <http://www.ictr.org>.

69. UN Doc. S/RES/1329 (2000), Ann. II.

70. Journal of the United Nations (25 April 2001), UN Doc. Journal 2001/78 (Part I). For curriculae vitae of the newly elected ICTR judges, see UN Doc. A/55/873 (2001).

71. See ICTR Press Release 270 (4 June 2001), obtainable from <http://www.ictr.org>.

72. See ICTR Press Release 268 (1 June 2001), obtainable from <http://www.ictr.org>.

73. Pursuant to Art. 8 of the ICTY Statute, the Tribunal has jurisdiction to adjudicate alleged offenses that occurred on the territory of the former Yugoslavia from 1 January 1991 onwards.

74. Report of the Secretary-General Pursuant to Paragraph 6 of Security Council Resolution 1329 (2000), UN Doc. S/2001/154 (2001).

75. *Id.*, at paras. 12–15.

the affect that peace has been restored in the former Yugoslavia and accordingly, he declined to make a recommendation concerning the terminal date for the temporal jurisdiction of the ICTY.⁷⁶

2.4. Victim compensation

Fourth, based on the determination that “the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation in the Balkans,” the ICTY judges have proposed that the Security Council consider the creation of an international compensation commission for victims of the conflict in the former Yugoslavia.⁷⁷ This proposal follows a similar proposal advanced by the ICTR judges earlier in 2000,⁷⁸ and is in accord with several international human rights conventions⁷⁹ and the International Criminal Court (‘ICC’) Statute, which contains several provisions concerning the rights of victims.⁸⁰

Based on an analysis of international law and domestic practice, the ICTY judges concluded that there is a right under international law for compensation to victims.⁸¹ The judges examined several options, including: (1) whether it was practical and feasible to permit victims to bring claims before the ICTY, ancillary to the criminal trials of the accused;⁸² (2) the creation of a UN compensation commission for victims, similar to the commission established after the Gulf War;⁸³ (3) the use of truth and rec-

76. *Id.*, at paras. 15–16.

77. Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia [*sic*] addressed to the Secretary-General, Annex to UN Doc. S/2000/1063 (2000). A report prepared by the ICTY judges on this issue was also attached (hereinafter ‘ICTY Victim Compensation Report’). In this regard, it should be noted that ICTY Statute Article 24(3) provides: “In addition to imprisonment, the trial chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” Some commentators are of the view that by inserting such language in the Statute, the Security Council considered the issue of victim compensation and expressly decided not to include it in the Statute. See V. Morris & M.P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia* 167, 286–289 (1995).

78. ICTY Victim Compensation Report, *supra* note 77, at para. 1.

79. Including Art. 14(1) of the Torture Convention. ICTY Victim Compensation Report, *supra* note 77, at para. 5. See also Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Res. 40/34, UN Doc. 40/RES/34 (29 November 1985); and the van Boven Principles, UN Doc. E/CN.4/1997/104 (1997), cited to in paras. 9–11 of ICTY Victim Compensation Report, *supra*.

80. See Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9*, corrected in UN Doc. PCNICC/1999/INF/3*, reprinted in 37 ILM 999 (1998), Art. 19(3) (permitting a victim to submit observations to the ICC with respect to jurisdiction or the admissibility of a case); Art. 68(3) (recognizing the right of access for victims whose personal interests have been affected to the international criminal justice system, including the right to representation); Art. 75 (dealing with reparations for victims); and Art. 79 (establishing a Trust Fund for the benefit of victims and their families).

81. ICTY Victim Compensation Report, *supra* note 77, at para. 21.

82. *Id.*, at paras. 23–41.

83. *Id.*, at paras. 42–43.

conciliation commissions empowered to award compensation;⁸⁴ and (4) the use of domestic jurisdictions to award compensation.⁸⁵ Regarding the latter option, the judges noted that under ICTY Rule 106, a Judgment of the Tribunal may be transmitted to national authorities for use in a compensation claim pursuant to national law.⁸⁶ Ultimately, they concluded that the best approach would be for the United Nations to establish a compensation commission.⁸⁷ The Security Council remains seized of the matter.⁸⁸

2.5. Compensation for persons wrongfully detained, prosecuted, or convicted

Fifth, in September 2000, the Presidents of both the ICTY and ICTR submitted, on behalf of the judges at their respective tribunals, virtually identical letters to the Secretary-General requesting the Security Council to consider amending the respective Statutes of the *ad hoc* Tribunals to permit them to award compensation to persons who have been wrongfully detained, prosecuted, or convicted by the ICTY or ICTR.⁸⁹ The judges cite the need to bring the *ad hoc* Tribunals into compliance with international human rights norms⁹⁰ and Article 85 of the ICC Statute as the main reason for requesting amendments to the Statutes of the *ad hoc* Tribunals.⁹¹ As President Jorda of the ICTY noted in his letter:

84. *Id.*, at para. 44.

85. *Id.*, at para. 45.

86. The judges conceded that this approach has generally not been successful: "This approach appears unlikely to produce substantial results in the near future." *Id.*, at para. 45.

87. *Id.*, at para. 48.

88. Provisional Record of the 4240th meeting of the Security Council (30 November 2000), UN Doc. S/PV.4240.

89. With respect to the letter submitted by the ICTY, *see* Letter dated 19 September 2000 from the President of the International Tribunal for the Former Yugoslavia [*sic*] addressed to the Secretary-General, Annex to UN Doc. S/2000/904 (2000) (hereinafter 'ICTY Compensation Letter'); regarding the letter submitted by the ICTR, *see* Letter dated 26 September 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, Annex to UN Doc. S/2000/925 (2000) (hereinafter 'ICTR Compensation Letter').

90. In particular, the norms enshrined in Arts. 9 and 14 of the International Covenant on Civil and Political Rights ('ICCPR'). Pursuant to these obligations, many states have legislation permitting persons wrongfully convicted or prosecuted to receive compensation for the deprivation of liberty suffered and for economic losses sustained due to the legal proceedings instituted against him or her. Similarly, persons who are wrongfully arrested or detained can also receive compensation. ICTY Compensation Letter, *supra* note 89.

91. ICTY Compensation Letter, *supra* note 89; ICTR Compensation Letter, *supra* note 89. The issue of compensation arose in *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Reconsideration or Review), Appeals Chamber, 31 March 2000. In that case, the Appeals Chamber *found* that the accused's rights had been violated, but after reversing an earlier Appeals Chamber Decision that he be released as a result of those violations, the Appeals Chamber on review held that if the accused were to be acquitted that he would receive financial compensation. Left unanswered by this decision were several questions, such as the statutory grounds for even contemplating such a remedy, where such financial compensation would come from in the event that the Security Council

Since the International Tribunal for the Former Yugoslavia [*sic*] wishes, by definition, to abide fully by the internationally recognized norms relating to the rights of suspects and accused persons, the absence of any provision which would allow for awarding compensation in such situations is a cause for concern.⁹²

The judges considered compensation for unlawfully detained persons, in accord with Article 9(5) of the ICCPR. In the view of the judges, if a violation of the rights set forth in Article 9 occurred, and if this right is imputable to the Tribunal (and thus the UN), then the UN would be legally bound to award compensation to the victim of the unlawful detention.⁹³

Concerning compensation for unjustly prosecuted persons, the judges noted that Article 85(3) of the ICC Statute, which permits compensation for acquitted persons in the event of a grave and manifest miscarriage of justice, no international human rights treaty provides such a right.⁹⁴ However, in light of “the particular circumstances in which the Tribunal operates, including the fact that the accused are detained for long periods of time,” the judges conclude that it is in the best interest of both the *ad hoc* Tribunals and the United Nations, to be able to award such compensation.⁹⁵ Such an award, however, should be discretionary, available only to persons who are acquitted or against whom proceedings were terminated, and limited to exceptional circumstances, following a grave and manifest miscarriage of justice.⁹⁶

With respect to compensation for wrongfully convicted persons, Article 14(6) of the ICCPR and Article 85(2) of the ICC Statute provide for compensation for wrongfully convicted persons. Because the ICTY and ICTR are subsidiary organs of the Security Council, the actions of the *ad hoc* Tribunals can be imputed to the United Nations. Moreover, the United Nations considers itself bound by generally accepted norms, and thus the judges take the position that the UN would be “legally bound to compensate persons whose conviction by the Tribunal is subsequently overturned.”⁹⁷

The judges studied several options (in consultation with the UN Office of Legal Affairs) to compensate individuals unlawfully detained, prosecuted or convicted, including arbitration, exceptional ruling, *ex gratia* payment, General Assembly Resolutions authorizing limited liability and

does not amend the Statute and whether it was appropriate for the Appeals Chamber to specify a remedy which it lacked the authority to guarantee. *See also* W.A. Schabas, *Barayagwiza v. Prosecutor*, 94 AJIL 563 (2000).

92. ICTY Compensation Letter, *supra* note 89.

93. *Id.*; ICTR Compensation Letter, *supra* note 89.

94. Nevertheless, many states do provide for compensation to “wrongfully prosecuted persons.” *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

amendment of the Statutes.⁹⁸ They stressed that these international obligations extend beyond simply compensating the wronged person:

It is therefore necessary, in order to fulfill this obligation, to enact legal provisions that meet the essential requirements of legality and respect for law, conferring on persons wrongfully prosecuted or convicted by the Tribunal and on those who have been unlawfully arrested or detained, a specific right to compensation.⁹⁹

Consequently, the judges determined that amendment of the Statutes was the best way to ensure that a right to seek compensation was created.¹⁰⁰ The Security Council remains seized of the matter.¹⁰¹

2.6. Issues concerning improper conduct by certain defence counsel

Sixth, the Group of Experts reported, but was unable to verify, that fee-splitting (under which part of the defence counsel fees are paid to the accused or his family) may be a problem at the *ad hoc* Tribunals.¹⁰² As a result, the UN Office of Internal Oversight Services ('OIOS') conducted an investigation.¹⁰³ This investigation uncovered evidence that:

- (a) Several former defence counsel assigned at both *ad hoc* Tribunals have either been solicited and/or have accepted requests for fee-splitting arrangements made to them by their respective clients;
- (b) One current defence counsel at the ICTR rejected a detainee's request for fee-splitting and informed the Registrar accordingly;
- (c) Some defence teams at the ICTR have made arrangements for gifts to their clients, their clients' relatives, and other forms of indirect support and maintenance detailed in the report;
- (d) Some defence teams at both *ad hoc* Tribunals have hired friends or relatives of their clients as defence investigators.¹⁰⁴

According to the OIOS Report, the issue of fee-splitting is inherently linked to other problems affecting the assignment of defence counsel at

98. *Id.*

99. *Id.*

100. *Id.* The judges also indicated that they, rather than the General Assembly or some other body, were in the best position to determine whether an individual had been unlawfully detained, convicted, or prosecuted.

101. Provisional Record of the 4240th meeting of the Security Council, *supra* note 88.

102. Experts' Report, *supra* note 2, at paras. 79, 81 and 217.

103. Report of the Office of Internal Oversight Services on the Investigation into Possible Fee-Splitting Arrangements between Defence Counsel and Indigent Detainees at the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia [*sic*], UN Doc. A/55/759 (2001) (hereinafter 'OIOS Report'). This investigation was conducted at the request of the Assistant Secretary-General, Programme Planning, Budget and Accounts, Controller of the United Nations.

104. OIOS Report, *id.*, Summary.

both *ad hoc* Tribunals. These problems include: verifying claims of indigence submitted by suspects or accused in order to qualify for assigned counsel; the process of selecting and changing assigned counsel; the fees paid to assigned defence counsel and investigators; and the use by defence counsel of “frivolous motions and other delaying tactics.”¹⁰⁵

Based on these findings, the UN Under-Secretary General for Internal Oversight Services made 14 recommendations for curbing abusive practices and improving the quality of defence counsel assigned at both the ICTY and the ICTR.¹⁰⁶ Both *ad hoc* Tribunals are taking steps necessary to correct these problems.¹⁰⁷ As part of these efforts, for example, the ICTR Registrar has instituted a number of measures to curb the problem, including restrictions on gifts from defence counsel to their clients, prohibiting defence counsel to contact detainees other than their clients, and enhancing screening procedures for defence investigators.¹⁰⁸

2.7. Allegations of participation by some ICTR defence investigators in the Rwandan genocide of 1994

On 13 June 2001 ICTR Registrar Adama Dieng decided not to renew the contracts of three individuals, and suspended the contract of a fourth individual, employed by the ICTR as defence investigators on the grounds that they were suspected of having participated in the genocide that occurred in Rwanda in 1994.¹⁰⁹ The decision not to renew the contract of one of these investigators was subsequently rescinded on the grounds of mistaken identity.¹¹⁰

2.8. Elections for ICTY judges

Finally, on 15 March 2001, the General Assembly conducted elections for the terms of all of the permanent ICTY judges, which expire on 16 November 2001. The following were elected to four year terms as permanent judges commencing on 17 November 2001: Carmel A. Agius (Malta), Mohamed Amin El Abassi Elmahdi (Egypt), *David Hunt* (Australia), *Claude Jorda* (France), O-gon Kwon (Republic of Korea), *Liu*

105. *Id.*

106. OIOS Report, *id.*, at paras. 78–93.

107. *Id.*

108. See ICTR Press Release, Statement by the Registrar, Mr Adama Dieng, on Some Issues Relating to the Defence of Accused Persons (13 June 2001), ICTR/INFO-9-3-02.EN, obtainable from <http://www.ictr.org>.

109. See ICTR Press Release, Statement by the Registrar, Mr Adama Dieng on the Non-Renewal of the Employment Contracts of Certain Defence Investigators (16 July 2001), ICTR/INFO-9-3-03.EN, obtainable from <http://www.ictr.org>.

110. See ICTR Press Release, Statement of the Registrar Concerning the Contract of Employment of a Defence Investigator (17 August 2001), ICTR/INFO-3-04.EN, obtainable from <http://www.ictr.org>.

Daqun (China), *Richard George May* (United Kingdom), Theodor Meron (United States), *Florence Ndepele Mwachande Mumba* (Zambia), Alphonsus Martinus Maria Orié (Netherlands), *Fausto Pocar* (Italy), *Patrick Lipton Robinson* (Jamaica), Wolfgang Schomburg (Germany), *Mohamed Shahabuddeen* (Guyana).¹¹¹

111. ICTY Press Release (15 March 2001), CC/P.I.S./577-e, obtainable from <http://www.un.org/icty/pressreal/p577e.htm>; UN General Assembly Press Release (14 March 2001), UN Doc. GA/9859 (2001), obtainable from <http://www.un.org/News/Press/docs/2001/ga9859.doc.htm>. The names in *italics* represent those permanent judges who were re-elected. For curriculae vitae of the elected judges, see UN Doc. A/55/773 (2001).