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Special Rules for Special Courts?

The United Nations International Criminal
Courts from a Human Rights Perspective¹

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¹ All views contained in this thesis and research reflect only those of the author and are in no way attributed to the Sesay Defence Team or any other organ of the Special Court for Sierra Leone.

“It’s a Special Court for Special People. Very special people.”

Farah Jalloh
Taxi driver, Freetown, Sierra Leone
November 2007

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Summary

The International Criminal Tribunals for the Former Yugoslavia and for Rwanda symbolise the commitment of the international community to put an end to impunity and to reintroduce justice and due process where it has long been denied. With the addition of the Special Court for Sierra Leone and the International Criminal Court international criminal justice has developed into a permanent feature of international law. Common to all international criminal courts is a commitment to the highest human rights standards and to the rule of law and due process.

This paper explores international criminal procedure from a human rights perspective. It focuses on the specific guarantees that form the basis of the right to a fair trial in international human rights law and compares the protection offered to accused persons under the two systems of law. A number of areas are identified where the international courts fall short of providing full protection for the rights of the accused.

In spite of clear human rights provisions to the contrary it is the general rule to keep the accused in detention throughout the proceedings even though international trials are often very lengthy. Ultimately, the time the accused spends in detention is so long it might amount to a violation of the right to be presumed innocent.

A closer look at the Special Court for Sierra Leone further reveals several areas where the conduct of chambers and prosecution unnecessarily slowed down the proceedings, potentially impinging on the right of the accused to be tried within reasonable time. The impartiality of judges is also investigated, as is their relationship with and independence from other international actors such as the UN and individual states.

A pattern emerges where the ambition to save funds and to achieve results in the form of convictions has taken a toll on efficiency. Last minute efforts to preserve the interests of the accused lead to longer trials and ends up increasing costs. Ultimately the credibility of the entire process is at risk.

Sammanfattning

Den internationella krigsförbrytartribunalen för det forna Jugoslavien och dess systertribunal för Rwanda förkroppsligar det internationella samfundets strävan att främja fred och säkerhet samt dess övertygelse att en varaktig fred kräver rättvisa och en återupprättad rättsstat. De har sedermera följts av andra domstolar såsom Specialdomstolen för Sierra Leone. Gemensamt för dessa domstolar är deras åtagande att tillämpa högsta möjliga standard till skydd för de åtalade i den rättsliga processen.

Denna uppsats tar avstamp i internationella konventioner för de mänskliga rättigheterna för att med dessa som grund granska rätten till en rättvis rättegång inom den internationella straffprocessrätten. Granskningen uppehåller sig huvudsakligen vid de specifika rättigheter som utgör grunden för rätten till en rättvis rättegång. Ett antal områden identifieras där det skydd som erbjuds i internationella domstolarna uppfattas som svagt.

Normen vid de internationella domstolarna är att den misstänkte hålls i häkte under hela den rättsliga processen, detta trots tydliga regler inom mänskliga rättigheter om motsatsen. Detta trots att en internationell rättegång kan vara i många år, med exempel som överstiger ett decennium. Risken är stor att den åtalade tillbringar så lång tid frihetsberövad, att detta i sig utgör ett brott mot rätten att bli betraktad som oskyldig.

En närmare undersökning av Specialdomstolen för Sierra Leone avslöjar exempel på hur domare och åklagare bidragit till att rättegångsförhandlingar i onödan dragit ut på tiden, något som i sig kan tänkas utgöra ett brott mot den åtalades rätt till en skyndsam rättegång. Även domarnas opartiskhet undersökes, liksom deras oberoende i förhållande till andra internationella aktörer såsom FN och enskilda stater.

Ett mönster framträder där ambitionen att spara pengar och uppnå resultat i form av fällande domar går ut över effektiviteten. När den åtalades intressen sedan ska räddas leder detta till längre rättegångar och högre kostnader. Hela processens trovärdighet riskerar att undermineras.

Abbreviations

AFRC	Armed Forces Revolutionary Council
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CDF	Civil Defence Force
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
HRW	Human Rights Watch
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JCE	Joint Criminal Enterprise
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

1.1 Issues to be Addressed

The right to a fair and expeditious trial is at the heart of human rights and is considered essential also for the protection of other rights within the international human rights regime. It has a long tradition in human history and today the right to a fair and public hearing by a competent, independent and impartial tribunal established by law is protected under Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and is considered a fundamental right in international human rights law.² Due to its importance the Human Rights Committee (HRC) and regional bodies such as the European Court on Human Rights (ECtHR), have developed extensive jurisprudence on its scope and interpretation. The HRC has held that deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.³ It also holds the requirement that a tribunal be competent, independent and impartial in the sense of article 14.1 of the ICCPR as an absolute right that is not subject to any exception.⁴

International criminal justice in its modern form, by comparison, is a relatively new area of law. While the establishment of international criminal courts and tribunals has generally been accompanied by extensive rules on substantive law and definitions of the various crimes under their jurisdiction, there is not yet any general international criminal procedure. Instead, the procedure to be applied has generally been left for the judges to develop during the course of the proceedings. This is no small

² *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 (hereinafter: the ICCPR).

³ Human Rights Committee, *General Comment 29, States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (hereinafter: General Comment No. 29), para. 11; Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) (hereinafter: General Comment No. 32), para. 6.

⁴ General comment No. 32, *Ibid.* para. 19.

task and the judges of the two United Nations *ad hoc* Tribunals and of the Special Court for Sierra Leone (hereinafter commonly referred to as the international criminal courts) deserve recognition for the tremendous achievements that has been made. Since the initial establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and subsequently of the International Criminal Tribunal for Rwanda (ICTR), a body of case law has been developed which will serve as inspiration and guidance to actors in international criminal justice for years to come.

It is the enormity of their achievements that makes all the more important that we study them in order that we may learn for the future. Although ultimately very critical of certain aspects of international criminal justice, this work does not have as its aim to dismiss its potential. Quite the opposite, this critique is motivated by a sincere commitment to the aims of international criminal justice and to its core principles of accountability and the rule of law. It is only natural for this paper to, although it aims to give an as objective account as possible of the object of its inquiry, ultimately focus on the most problematic areas. After all, this is where we have the most to learn.

The international criminal courts act independently from one another; they are each guided by their own Statutes and rules of procedure and evidence (RPE) and are not bound by each other's case law.⁵ In addition, international human rights instruments are technically only binding on State parties, which international criminal courts are not. Nonetheless, the courts give great persuasive weight to the case law of other international criminal courts and have also adopted the protection of the right to a fair trial offered under international human rights law as a minimum level in the protection of the rights of the accused. The international judges in their decisions and judgements frequently refer to international human rights instruments and the interpretation given to them by their respective authoritative bodies.

⁵ However, the ICTY and the ICTR share the same Appeals Chamber composed of judges from both Tribunals.

In spite of their commitment to holding themselves to the highest human rights standards, international criminal courts are not subject to the scrutiny of any international human rights body and there is little by way of external scrutiny. At the same time, cases processed in international criminal justice are extremely sensitive and political in nature. States and other actors often have great interest in the outcome of a particular trial. The courts are also dependent on the international community and, in the case of the Special Court for Sierra Leone (SCSL), on particular donor States for the funds and resources they need to achieve their objectives. The international criminal courts are expensive and as a result they operate under considerable international pressure to show results in the form of concluded trials and in the establishment of guilt. After all, the object of their creation was to end impunity and a tribunal that fails to present anyone as guilty of crimes that have been committed will soon find the reasons for its establishment questioned.

These two factors, the tremendous pressure under which the tribunals operate and the absence of any external enforcement mechanism regarding international human rights with jurisdiction over the international courts, might contribute to a climate where the rights of the accused suffer as a result of political considerations. International criminal justice exists as a subsidiary system intended to intervene only when domestic systems have proven unwilling or unable to achieve justice and maintain the rule of law. It is inconceivable that the international community in such a situation should bring injustice to victims and perpetrators.

For these reasons it is important that the international criminal courts, and in the future specifically the permanent International Criminal Court (ICC), are able to draw on the experiences and knowledge on fair trial and rule of law as accumulated within the field of human rights. Only when they live up to these standards derived from all legal systems of the world will the international criminal justice have a chance of achieving the high set goal to end impunity and bring justice to those guilty of the most atrocious crimes. This thesis will examine the link between international human rights law and international criminal justice in terms of the rights of the accused

with focus on certain key rights and their protection in the two bodies of law. Drawing on this comparison, it will attempt to provide practical examples fair trial issues taken from the case law of the international criminal courts and analyse these from a human rights perspective.

1.2 Research Question and Hypothesis

The research question this study aims to answer is whether the international criminal courts respect the right of the accused to a fair trial as recognised under international human rights law. Based on the research question, the original hypothesis claims that in spite of a clear ambition in international criminal justice to maintain the highest standards in the protection of the rights of the accused, these rights may still come to suffer at the hands of international criminal courts when confronted with the political need to establish guilt.

1.3 Structure

This thesis consists of seven chapters. Chapter One serves as a general introduction. Chapter Two will give a background to the right to a fair trial under international human rights law historically and also introduce some general concepts important for understanding the specific guarantees discussed in the following chapters. It will also investigate the link between human rights law and international criminal justice. Following that, Chapters Three through Six will look at four specific aspects of the right to a fair trial. The chapters will be divided into two sections, the first of which will investigate how the right is defined in international human rights law. The second section of each chapter will look at the rights in international criminal procedure and attempt to determine how and to what extent the rights are guaranteed and enforced. Comparisons will be made to relevant human rights provisions where appropriate. The four specific rights to be investigated are: (i) the right to be presumed innocent until proven guilty (hereinafter: the presumption of innocence) discussed in Chapter Three; (ii)

the principle of equality of arms and the right to adequate time and facilities for the preparation of a defence in Chapter Four; (iii) the rules regarding judicial independence will be investigated in Chapter Five which will require an investigation into the relationship between the international criminal courts, and other international actors such as individual States and the United Nations (UN). The fifth chapter will also cover the requirement that a court be impartial and how the impartiality of an international judge may be challenged; (iv) the right to be tried within a reasonable time will be discussed in Chapter Six, illustrated with examples taken from the work of the SCSL. Finally, the findings of this investigation will be concluded in Chapter Seven.

1.4 Scope

The right to a fair trial is an extensive subject that spans every aspect of procedural law. Therefore, this thesis will necessarily be selective and limited to certain key aspects of the rights of the accused that may be particularly vulnerable in the special circumstances that form international criminal proceedings. During the author's work as a legal assistant for the Issa Sesay Defence Team (hereinafter: the Sesay Defence Team) at the RUF trial at the SCSL,⁶ elements of certain fair trial rights were particular aspects that were highlighted. It was striking how, at an advanced stage of the trial, a seemingly disproportionate amount of time and energy was spent arguing basic procedural questions, often related to the rights of the accused. These experiences came to form the natural framework for the thesis and where available practical examples have primarily been taken from the SCSL. The focus is on the protection of the right to a fair trial in the international criminal courts. The ICC and its Statute, the Rome Statute of the

⁶ The cases before the SCSL were originally divided into three trials that were named after the factions the defendants were allegedly involved in during the war. There were thus the RUF trial named after the Revolutionary United Front (RUF), the AFRC trial after the Armed Forces Revolutionary Council (AFRC) and the CDF trial after the Civil Defence Force (CDF). In addition, Charles Taylor, is being tried by the SCSL in a separate trial in the Hague. Issa Sesay is the first accused in the RUF trial. *See further* the Court's website: www.sc-sl.org (last visited on 29 December 2008).

International Criminal Court (hereinafter: the Rome Statute), will be used as a point of reference where examples are readily available but due to time constraints and, in part to its heavy focus on case law, the thesis concentrates on the ICTY, the ICTR and the SCSL.⁷

1.5 Methodology

This work is a comparative study of two overarching separate subjects: international criminal justice and international human rights law. The methods used to examine the subjects discussed are: traditional doctrinal research; the analysis of basic legal instruments and their application and non-doctrinal research based on policy, academic work and experiences of practitioners. Case law and opinions from international and regional human rights bodies and from the international criminal courts are frequently used. Due to the great volume of case law on fair trial issues emanating from that body, and to the fact that international criminal courts often refer to it in their decisions, the ECtHR will frequently be used as a source for interpreting the rights of the accused. In international criminal justice, great focus will be placed on interpreting the case law of the courts concerned. This in an attempt to discern how the rights protected in the Statutes and RPE should be interpreted, as well as to see how they are applied in practice. Finally, in order to provide a better understanding of the special circumstances of international criminal justice, and to show the practical impact the actions of the courts and of the parties to a trial can have on the fairness of the proceedings, reference will be made to a number of independent reports and studies of the work of the SCSL.

⁷ The SCSL has declared itself a fully international tribunal in spite of its ‘hybrid’ nature and considers itself akin to the two previous ad hoc tribunals, *see Prosecutor v. Kallon & Kamara*, 13 March 2004, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), ‘Decision on Challenge to Jurisdiction: Lomé Accord Amnesty’ (Appeals Chamber) (hereinafter: Lomé Amnesty Decision).

2 The Right to a Fair Trial in International Human Rights Law and International Criminal Law

2.1 The Right to a Fair Trial in International Human Rights Law

The guarantee of a right to a fair trial is of fundamental importance to the protection of all human rights. While it does not, in itself, protect from human rights abuses, such rights could never be protected or enforced unless citizens have recourse to courts which are independent of the state and which resolve disputes in accordance with fair procedures. It has been said that “[t]he protection of human rights therefore begins but does not end with fair trial rights”.⁸

Due to its great importance, it is perhaps not surprising to find that the right to a fair trial has roots dating far back in the history of human rights. Islamic law derives several aspects which are of fundamental importance to the notion of fair trial from a variety of ancient sources. One such example is found in Article 4 of the *Majjalla*, the Civil Code of the Ottoman State, which stipulates that “[s]urety does not end in suspicion”,⁹ and in its Article 8 which states that “[i]n principle one is not liable”.¹⁰ An application of these two principles is that “[t]he accused is considered

⁸ R. Clayton and H. Tomlinson, *Fair Trial Rights*, (Oxford University Press, Oxford, 2001), para. 11.01.

⁹ Zarqa (note 1), pp. 35–41; G. Attia, in D. Weissbrodt and R. Wolfrum (eds.), *The Right to a Fair Trial* (Springer-Verlag, Germany, 1998) p. 357.

¹⁰ *Ibid.*, pp. 59–68.

innocent till being found guilty”.¹¹ Even earlier examples include the ancient Indian legal system, pre-dating the Muslim Sultan rule and the British rule, which apparently placed great importance in the fairness and publicity of trials in criminal proceedings.¹² Often mentioned as the earliest example of the right to trial by due process of law in Europe is clause 39 of the Magna Carta of 1215 which states that: “No freeman shall be taken and imprisoned . . . except by lawful judgment of his peers or by the law of the land (*per legem terrae*)”.¹³ One of the most famous early provisions is found in the ‘Bill of Rights’ of 1791 which comprises the first ten amendments to the United States Constitution.¹⁴ The Fifth Amendment provides that “[n]o persons shall . . . be deprived of life, liberty, or property, without due process of law”. The Sixth Amendment contains the right to a speedy and public trial by an impartial jury in criminal prosecutions. A more comprehensive catalogue of rights can be found in revolutionary France two years earlier in the closely related ‘Declaration of the Rights of Man and Citizen’ of 26 August 1789 (hereinafter: the 1789 *Déclaration*), which includes for example a prohibition of arbitrary detention (Article 7), and the right to be presumed innocent until proven guilty (Article 9).¹⁵

It was not until the adoption of the Universal Declaration of Human Rights (UDHR), however, that the right to a fair trial was recognised as a universal human right under Article 10.¹⁶ Since then it has been included in a great number of international human rights instruments, including the ICCPR Article 14.1, the European Convention on Human Rights (ECHR)¹⁷ Article 6.1 and the American Convention on Human

¹¹ G. Attia, *supra* note 9, p. 357.

¹² K. L. Bhatia, in D. Weissbrodt and R. Wolfrum (eds.), pp. 373-375.

¹³ R. Clayton and H. Tomlinson, *supra* note 8, para. 11.09.

¹⁴ ‘The Constitution of the United States’, Amendments 1–10.

¹⁵ ‘*Déclaration des droits de l’Homme et du citoyen de 1789*’, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789.5076.html (last visited 29 December 2008).

¹⁶ *Universal Declaration on Human Rights*, adopted by GA Res. 217 A(III) of 10 December 1948, UN Doc. A/810 1948.

¹⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 UNTS 22.

Rights (ACHR) Article 8.1.¹⁸ The African Charter on Human and Peoples Rights (ACHPR) differs from the ICCPR and from the other regional treaties.¹⁹ In its corresponding Article 7 it does not use the term ‘fair trial’. Instead, it speaks of a right of every individual to have his cause heard. It then enumerates a number of guarantees included in this right, including: the right to an appeal to a competent national organ; the right to be presumed innocent; the right to a defence, including the right to be defended by a council of ones choice; and, the right to be tried within a reasonable time by an impartial tribunal. The article does not explicitly refer to other relevant components of the right to fair trial as mentioned in, for example, the ICCPR. However, it should be read and understood in the light of Article 60 of the Charter which indicates that the application of the Charter shall be guided by the UDHR as well as other instruments adopted by the UN in the fields of human rights.²⁰ This has poised the African Commission to adopt a Resolution on the “Right to Recourse Procedure and Fair Trial” where it recognises the right to a fair trial as essential for the protection of fundamental rights and freedoms, and further elaborates on the guarantees it considers to be protected under article 7.²¹ However, there are several rights in the ICCPR that are still not mentioned even after considering this, such as the right not to be tried or punished twice for the same offence (article 14.7), the right of the accused not to be compelled to testify against himself or to confess guilt (article 14.3) and, of significant importance in an African context with great poverty, there is no mention of a right to be informed of the right to legal assistance, and to have such assistance assigned to you without payment if you do not have sufficient means to pay for it (article 14.3).²²

¹⁸ *American Convention on Human Rights*, OEA/ser. K/XVY1.1, Doc. 65, Rev. 1, Corr. 1 OASTS, No. 36 (1970).

¹⁹ *African Charter on Human and Peoples’ Rights (the Banjul Charter)*, OAU Doc. CAB/LEG/67/3 rev. 55, 21 ILM 58 (1982), adopted 27 June 1981, entered into force 21 October 1986.

²⁰ B. El-Sheikh, in D. Weissbrodt and R. Wolfrum (eds.), pp. 328–329.

²¹ African Commission on Human and Peoples’ Rights, *Resolution on the Right to Recourse and Fair Trial*, ACHPR/Res.4 (XI) (1992).

²² B. El-Sheikh, *supra* note 20, p 330.

In international instruments, the right to a fair trial includes two components: a general right to a fair trial with application in all relevant proceedings, and the specific rights of the defence in criminal proceedings.²³ The right to a fair trial is a procedural guarantee designed to secure ‘procedural justice’. It is not ‘result-oriented justice’. That is, it does not aim for a decision or judgement based on the true facts and the correct application of the law.²⁴

The relevant provisions guiding the right to a fair trial are relatively clear. The first paragraph of Article 14 of the ICCPR and Article 6 of the ECHR establish the general right which precedes a number of ‘minimum guarantees’, laying down the specific rights of the defence. If any of these specific guarantees is not respected, the trial cannot be regarded as having been fair. However, the fact that those rights have been respected is not sufficient to guarantee that the trial has been fair. There may be other aspects which lead to a different result.²⁵ The ECtHR has found a violation of the Convention on this ground in *Barberà v. Spain* where it took into consideration a number of circumstances including “the belated transfer of the applicants from Barcelona to Madrid, [...] the brevity of the trial and, above all, the fact that very important evidence were not adequately adduced and discussed at the trial in the applicants’ presence and under the watchful eye of the public”.²⁶ The court concluded that when considered as a whole, the trial had not been fair.

2.1.1 The Right to Adversarial Proceedings

When faced with an issue concerning the general right to a fair trial, the ECtHR in its standard formula for its definition mentions two aspects: the principle of equality of arms and the right to adversarial proceedings.²⁷ These apply to both civil and criminal cases, but the Court has

²³ S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, Oxford, 2005), p. 85.

²⁴ *Ibid.* p. 83.

²⁵ *Ibid.* p. 86.

²⁶ *Barberà et al. v. Spain*, 5 December 1988, ECtHR, no. 24/1986/122/171-173, para. 89; as quoted in S. Trechsel, *ibid.* p. 86.

²⁷ See S. Trechsel, *ibid.* p. 85, fn. 31 with further references.

acknowledged that States have greater latitude when dealing with cases concerning rights and obligations arising out of civil claims than they do when dealing with criminal cases.²⁸ In its case law, the ECtHR reveals that it also considers the notion of fair trial to include other elements such as the right to a reasoned decision.²⁹

It is not always easy to distinguish the right to adversarial proceedings from the principle of equality of arms. Essentially, the term equality of arms presupposes a comparison between the opposing parties in order to ascertain whether one party has been disadvantaged. The notion of adversarial proceedings is more specific. It requires that the accused is informed of the case against them and knows all the evidence or arguments which the court could take into account when determining the charge, and that they have the opportunity to challenge this evidence and contradict the arguments.³⁰

The HRC seems to have a slightly wider view than that of the ECtHR. In *Moraël v. France* it stated that the right to a fair trial also includes “equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure”.³¹

2.1.2 The Right to be Heard and to have Access to Documents

The ECtHR has interpreted the right to an adversarial proceeding in a criminal case as meaning “that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and evidence adduced by any party”.³² It is not important whether the material filed by the other party concerns the establishment of the facts,

²⁸ S. Trechsel, *ibid*, p. 85.

²⁹ *Ibid*.

³⁰ See further *infra*, chapter ‘4 Equality of Arms’, p. 42.

³¹ *Yves Moraël v. France*, HRC, Communication No. 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989), para. 210.

³² *Laukkanen and Manninen v. Finland*, 3 February 2004, ECtHR, Application no. 50230/99, para. 34.

legal argument on the merits, or submissions on procedural issues.³³ The notion that the right applies to both the prosecution and the defence is somewhat surprising, rights under international human rights instruments such as the ECHR can only be enjoyed by individuals, which the prosecution is not.³⁴

The right to be heard is an absolute guarantee. Therefore it is for the defence to determine whether a submission deserves a reaction.³⁵ What emphasis the court has placed on the submission does not have any impact on this right.³⁶ The court is appropriately under an obligation to make the accused aware of the prosecution material. For example, the ECtHR has not accepted it as sufficient that the defence could have obtained a copy of the Principal Prosecutor's opinion at the Court of Cassation in *Göç v. Turkey*. Instead it held that, "as a matter of fairness, it was incumbent on the registry of the Court of Cassation to inform the applicant that the opinion had been filed and that he could, if he so wished, comment on it in writing." The court found it would be imposing a disproportionate burden on the defence to require him to inform himself periodically on whether any new elements have been included in the case file.³⁷

2.1.3 Predictability

The right to a fair trial also requires a certain level of predictability to be seen in the process. There is a right of the defence to know which rules will be applied to the proceedings. This was at issue in the case of *Coëme v. Belgium*, which concerned a criminal prosecution against a minister of government.³⁸ Under the Belgian Constitution only a full Court of Cassation is competent to try a person holding that office. The basic rule was laid

³³ This is stressed *e.g.* in *Kamasinski v. Austria*, 19 December 1989, ECtHR, no. 9/1988/153/207, para. 102.

³⁴ The same view is expressed by Trechsel who also points out that, as a matter of fact there will be instances where the prosecution is not allowed to reply to the defence, as the last word at the trial will normally belong to the accused, S. Trechsel, *supra* note 23, p 90.

³⁵ *Bulut v. Austria*, 22 February 1996, ECtHR, no. 59/1994/506/588, para. 49.

³⁶ *Kuopila v. Finland*, 27 April 2000, ECtHR, Application no. 27752/95, para. 35.

³⁷ *Göç v. Turkey (GC)*, 11 July 2002, ECtHR, Application no. 36590/97, para. 57.

³⁸ *Coëme v. Belgium*, 22 June 2000, ECtHR, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96.

down in the Constitution of 1831, but there was no definitive rule regarding implementation of constitutional rules when dealing with specific cases. The court applied the procedure normally applied by the ordinary criminal courts with some modifications. The applicant complained that by laying down the rules of procedure itself, the Court of Cassation had disregarded the separation of powers. The ECtHR agreed that the ordinary rules of criminal procedure were applied, but “only in so far as they are compatible ‘with the provisions governing the procedure in the Court of Cassation sitting as a full court’”.³⁹ Although the possibility of creating other rules was thus never actually used, this created some uncertainty as to which rules would apply. With regard to this, the ECtHR held that:

“the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive law must likewise be established by law and is enshrined in the maxim ‘*nullum iudicium sine lege*’. It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms”.⁴⁰

The Court found that in the present case this principle had not been respected. While the ECtHR invoked the right to equality of arms, it has been pointed out that the same decision could also have been reached by applying other rights of the accused. For instance, arguably the notion of fairness requires that there be legal rules governing the proceedings. This issue also seems to be closely connected to the guarantee of a tribunal established by law. It could be argued that this guarantee should be extended also to cover the rules that govern such a tribunal and that those rules too should be laid down in law.⁴¹

³⁹ *Coëme v. Belgium*, *ibid.* para. 101.

⁴⁰ *Ibid.* para. 102.

⁴¹ See e.g., J. P. Müller, ‘*Die Garantie des verfassungsmässigen Richters in der Bundesverfassung*’, 106 *ZBJV* (1970) p. 249; as quoted by S. Trechsel, *supra* note 23, p. 111.

2.2 Applying International Human Rights to International Criminal Procedure

There are no general rules on international criminal procedure. The international courts each have their own RPE and although they have largely been modelled on each other, there are significant differences. It may be that with the gradual winding down of the *ad hoc* tribunals and the SCSL some of the practice of their successor, the ICC gains international acceptance and turns into general international norms. Still, international trials are governed by a number of general principles that can be extracted through generalisation from the Statutes and the RPE as well as the case law of the international courts and the ICC. These principles, which also give rise to basic human rights of the defendant, include amongst other things: (i) the requirement that a court be independent and impartial; (ii) the presumption of innocence; and (iii) the requirement that a trial be fair and expeditious.⁴² These rights also reflect fundamental human rights provisions on the right to a fair trial. Indeed the provisions on the rights of the accused in the Statutes of the international courts were modelled on Article 14 of the ICCPR (laying down the right to a fair trial).⁴³

Nonetheless, it is not obviously correct to apply international human rights standards as the backdrop against which to measure the protection of the rights of the accused in international criminal justice. International human rights instruments are not technically binding on non-parties. As such, the provisions therein are not directly applicable to trials before the international courts, nor are they bound by the case law of the various governing bodies. However, it would be absurd to think that a tribunal established under the UN Charter would ignore international human rights. Put differently, “it seems inconceivable that the provisions of the Universal Declaration on Human Rights and the International Covenant on

⁴² A. Cassese, *International Criminal Law*, 2nd ed. (Oxford University Press, Oxford, 2008), p. 378.

⁴³ A. Zahar, G. Sluiter, *International Criminal Law – A Critical Introduction* (Oxford University Press, Oxford, 2008), p. 276.

Civil and Political Rights are not respected by an international court”.⁴⁴ Indeed, the UN Secretary General in his Report on all Aspects of the ICTY has underlined that “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.”⁴⁵ According to the Secretary General such internationally recognised principles are in particular contained in Article 14 of the ICCPR. Initially the *ad hoc* Tribunals were reluctant to consider themselves bound by international instruments other than their respective Statutes and early on the applied divergent approaches to the interpretation of fair trial rights. Eventually a technique has been adopted that takes as a baseline the practice of national courts and regional human rights tribunals. This approach is evident in a decision by the *Delalic* Trial Chamber,⁴⁶ and further elaborated on by the Trial Chamber in *Prosecutor v. Kupreškić*.⁴⁷ The ICTY Appeals Chamber has consistently looked to the practice of national and regional courts when interpreting international fair trial rights.⁴⁸

In the process leading up to the establishment of the ICC the Ad Hoc Committee which met in 1995 insisted on respect by the court of “the highest standards of justice, integrity and due process”.⁴⁹ To avoid any uncertainty about what rules should apply, the Rome Statute contains a provision similar to Article 38 of the Statute of the International Court of

⁴⁴ S. Stapleton, ‘Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation’, 31 *New York University Journal of International Law and Politics* (Winter–Spring 1999) p. 573.

⁴⁵ *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (S/25704)*, 3 May 1993, available at: www.un.org/icty/legaldoc-e/basic/statut/s25704.htm (last visited on 29 December 2008); Judge Stephenson quotes this passage of the report in a Separate Opinion in *Tadić* as part of the reasoning that leads him to a different conclusion from that of the majority (i.e. not to allow the identity of witnesses to be concealed from the accused), *Prosecutor v. Tadić*, 10 August 1995, ICTY, IT-94-I-T, ‘Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses’, para. 2.

⁴⁶ *Prosecutor v. Delalic*, 28 April 1997, ICTY, IT-96-21-T, ‘Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through to “M”’ (Trial Chamber), p. 27.

⁴⁷ *Prosecutor v. Kupreškić et al.*, 14 January 2000, ICTY, IT-95-16, ‘Judgement’ (Trial Chamber), pp. 537-542.

⁴⁸ J. K. Cogan, ‘International Criminal Courts and Fair Trials: Difficulties and Prospects’, 27 *Yale International Law Review* (Winter 2002) p. 117.

⁴⁹ *Report of the Committee on the Establishment of a Permanent International Criminal Court*, U.N. Doc. G.A.O.R. A/50/22 (1995), para. 129, p. 29.

Justice, which details the sources of law for judges to look at when interpreting fair trial rights. Article 21 of the Statute designates the “applicable law” as, in the first hand, the Statute, the Elements of Crimes and the RPE. Secondly, “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”. And finally, failing all that, to the “general principles of law derived by the Court from national laws of legal systems of the world [...] provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”. Judges may also apply principles and rules of law as interpreted in the Courts previous decisions.⁵⁰ The Statute further imposes a duty upon the Trial Chamber to ensure that “a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.⁵¹ The United Nations Basic Principles on the Independence of the Judiciary (hereinafter: the UN Basic Principles) “entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”⁵² These provisions leave little doubt that the right to a fair trial as protected in international human rights instruments is to form the minimum level of protection afforded to accused before the ICC unless explicitly contradicted by one of the Court’s primary sources of law. The Rome Statute and the practice of the international tribunals thus require these courts to aspire to the highest standards set by human rights treaties, customary international law and general principles of law. The SCSL too has consistently referred to international as well as regional human rights treaties in its application of the right to a fair trial and gives great persuasive weight to the case law of the two *ad hoc* tribunals.

From a policy perspective, applying anything less than the highest human right standards to international criminal procedure would be unacceptable. It is inconceivable that an international court, established to

⁵⁰ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998).

⁵¹ *Ibid.* Article 64.1.

⁵² United Nations, *General Assembly Resolution 40/32, Basic Principles on the Independence of the Judiciary*, U.N. Doc. A/CONF.121/22/Rev.1, UN Doc. A/RES/40/32 (1985), adopted in the 40th plenary meeting, 29 November 1985, para. 6.

end impunity with regards to the most serious violations of human rights and humanitarian law, would be held less stringently to human rights norms than national legal systems.⁵³ The credibility of international justice thus depends on rigorous respect for the rights of the accused to a fair trial. This idea was frequently expressed during the development of the Rome Statute. Indeed, little is gained by substituting unfair national proceedings with unfair international trials. In addition, the international criminal courts provide a model to domestic justice systems throughout the world in the respect of fundamental human rights and the treatment of the accused.⁵⁴

⁵³ J. K. Cogan, *supra* note 48, p. 118.

⁵⁴ W. A. Schabas in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p 834.

3 Presumption of innocence

3.1 International Human Rights Law

The HRC considers the presumption of innocence to be of fundamental importance to the protection of human rights.⁵⁵ The idea of a right to be presumed innocent until proven guilty is deeply rooted in history and can be found for example in the ‘1789 *Déclaration*’.⁵⁶ In more recent human rights documents it appears in the UDHR⁵⁷, as well as the ICCPR.⁵⁸ During the drafting of the ICCPR the presumption of innocence was adopted with little discussion. In an earlier draft, the text referred more generally to ‘any person’⁵⁹ or everyone,⁶⁰ rather than as was later adopted ‘everyone charged with a criminal offence’.⁶¹ No motivation was given for the change. It appears to have been made to make sure that the English text mirrored the French text, which contained the word ‘*accusé*’, and it can be assumed that the drafters did not see any difference between the two versions.⁶² In the preparations a suggestion was also made to include the words ‘beyond reasonable doubt’ to set the standard of evidence required. This was rejected, however, as it was felt that this was implied by the wording “presumed innocent until proved guilty”.⁶³

3.1.1 The Two Aspects of the Guarantee

The presumption of innocence has two distinct aspects. Both are relevant in the context of an international criminal trial. The first is what can be called

⁵⁵ General Comment No. 32, *supra* note 3, para. 30.

⁵⁶ ‘1789 *Déclaration*’, *supra* note 15, Article 9.

⁵⁷ UDHR, *supra* note 16, Article 11.1.

⁵⁸ ICCPR, *supra* note 2, Article 14.2.

⁵⁹ Proposal by Mrs Roosevelt; see D. Weissbrodt, *The Right to a Fair Trial: Articles 8, 10 and 11 of the Universal Declaration of Human Rights* (Kluwer Law, The Hague, 2001), p 18.

⁶⁰ *Ibid.* p 20.

⁶¹ ICCPR, *supra* note 2, Article 14.2.

⁶² S. Trechsel, *supra* note 23, p. 154.

⁶³ D. Weissbrodt, *supra* note 59, p. 56.

the ‘outcome related’ aspect of the guarantee, as it is closely linked with the outcome of the proceedings.⁶⁴ In this respect, the presumption of innocence relates to the atmosphere in which the proceedings should be held, in that it establishes what attitude the judges and the prosecution should take to the accused and to the trial. Regardless of what they might think or believe about the question of guilt, they must remain open to a change of opinion in view of the evidence. They are prohibited from doing or saying anything that implies that the defendant has already been convicted, before the judgement has been delivered.⁶⁵ In this respect it does not matter if the evidence against the accused appears overwhelming; the question of his or her guilt or innocence must remain open.⁶⁶ The purpose of this aspect of the guarantee is essentially to avoid unjustified convictions. It is also for this reason that the guilt of the accused must be proven ‘beyond reasonable doubt’ in adversarial proceedings.⁶⁷ It is the prosecution that has the burden of proving the guilt of the accused; there can never be a requirement on anyone to prove one’s innocence.⁶⁸ If there is insufficient evidence, the accused must be acquitted. As its purpose is to prevent an unfair conviction, there can be no violation of this aspect of the guarantee if the court finds in favour of the accused.⁶⁹

The second aspect the guarantee aims to protect can be referred to as the ‘reputation related’ aspect. This concerns the image, or the reputation of the suspect as ‘innocent’ in relation to a specific offence. In this regard, a person who has not been convicted in criminal proceedings must not be treated or referred to as guilty of an offence by persons acting for the state.⁷⁰ The ECtHR has stated in many cases that the right to be

⁶⁴ For the discussion on the different aspects of the guarantee, the terminology used by Trechsel has been adopted here, S. Trechsel, *supra* note 23, p. 163.

⁶⁵ See *Austria v. Italy*, 11 January 1961, European Commission Decision Application no. 788/60; General Comment No. 32, *supra* note 3, para. 30.

⁶⁶ S. Trechsel, *supra* note 23, p. 163.

⁶⁷ *Ibid.* pp. 163, 164.

⁶⁸ Human Rights Committee, *General Comment 13, Article 14* (21st Session, 1974), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 7; replaced by General Comment No. 32, *supra* note 3, para. 30.

⁶⁹ S. Trechsel, *supra* note 23, p. 164.

⁷⁰ General Comment No. 32, *supra* note 3, para. 30.

presumed innocent “will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proven so according to law”.⁷¹ In *Alenet de Ribemont v. France* the definition was widened from only judicial decisions to include public officials, when such a statement was made on television by a high-ranking police officer. Here the Court also added that, “it suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty”.⁷²

The difference between the two aspects of the guarantee can be illustrated with the reasoning of the ECtHR in the case of *Daktaras v. Lithuania*. Here the prosecution had rejected an application to discontinue the case against the applicant stating that “it had been established from the evidence collected in the course of the pre-trial investigation that the applicant is guilty of these crimes”.⁷³ The Court accepted the notion that the presumption of innocence can be violated by the prosecution, particularly “where a prosecutor ... performs a quasi-judicial function when ruling on the applicant’s request to dismiss the charges”.⁷⁴ However, a statement of a public official must be determined in the context of the circumstances in which it was made.⁷⁵ In the present case, the statement had been made internally in a prosecution decision, rather than publicly to the press. The prosecutor had used the term ‘proved’ to answer the accused’s allegations that the facts were not proved. The term did not amount to a violation of Article 6.2.⁷⁶ However, had the statement been made to the public, it is likely that it would have been considered as a violation, not in relation to the proceedings, but to the right of the accused to maintain his reputation as innocent.⁷⁷

⁷¹ See e.g., *Daktaras v. Lithuania*, 10 October 2000, ECtHR, Application no. 42095/98, para. 41; *Böhmer v. Germany*, 3 October 2002, ECtHR, Application no. 37568/97, para. 54.

⁷² *Alenet de Ribemont v. France*, 10 February 1995, ECtHR, no. 3/1994/450/529, para. 37; see also *Minelli v. Switzerland*, 25 March 1983, ECtHR, Application no. 8660/79, para. 37.

⁷³ *Daktaras v. Lithuania*, *ibid.* para. 13.

⁷⁴ *Ibid.* para. 42.

⁷⁵ *Ibid.* para. 43.

⁷⁶ *Ibid.* paras. 44, 45.

⁷⁷ S. Trechsel, *supra* note 23, p. 179.

3.1.2 The Relationship Between the Presumption of Innocence and Other Human Rights

The outcome related aspect of the presumption of innocence also relates to the impartiality of the tribunal. For the presumption of innocence to have any effect, the judge is required to maintain an open mind. The guarantee “requires, *inter alia*, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged”.⁷⁸ In the case of *Lavents v. Latvia*, the judge set to determine the charge had stated to the press that she did not believe the accused to be innocent.⁷⁹ This was found to be a clear violation of Article 6.2. The fact that the statements had been made in an interrogative form did not sway the Court, which held that the right to be presumed innocent must be interpreted in such a way as to be a practical and effective guarantee.⁸⁰ It is not only the judges who need to maintain an open mind as to the guilt or innocence of the accused, the principle is broader and encompasses also other authorities involved in the proceedings.⁸¹ This is clearly most difficult for the prosecution. The prosecutor as an actor of the state is bound by the guarantee and is required to act in a way that does not betray a belief in the guilt of the suspect.⁸² However, it does not stretch as far as to say that the prosecutor must be impartial. Due to its role in adversarial proceedings the prosecutor is expected to argue in favour of a conviction and must, be allowed to express the belief that it considers the accused to be guilty. Considering the expectations placed on the role of the prosecutor, such statements are unlikely to affect the fairness of the proceedings and a violation of the outcome related aspect of the guarantee is

⁷⁸ *Barberà, et al. v. Spain*, *supra* note 26, para. 77; *See also Lavents v. Latvia*, 28 November 2002, ECtHR, Application no. 58442/00 (the text of the judgement is available in French only), para. 125; *X v. Germany*, 13 July 1970, European Commission Decision, Application no. 4124/69.

⁷⁹ *Lavents v. Latvia*, *ibid.* para. 124.

⁸⁰ *Ibid.* para. 126.

⁸¹ *Ibid.* para. 125.

⁸² S. Trechsel, *supra* note 23, p. 165.

thus unlikely. The prosecution must, however, keep in mind that the defendant may still be acquitted and should not be objectively regarded or treated as guilty.⁸³

As the burden of proof in a criminal trial lies entirely with the prosecution, the gathering of evidence by this authority is of paramount importance for the proceedings. There is a risk that the suspect may jeopardise the course of the proceedings by interfering with witnesses and evidence or by refusing to appear on trial. To prevent such interference and to facilitate their work, the prosecution have access to a number of measures of coercion that will inevitably interfere with the integrity of the suspect. The most intrusive of these is perhaps the possibility of detaining the suspect pending trial. Detention on remand is certainly compatible with international human rights standards, as long as it is done in accordance with Article 5.1(c) of the ECHR; it must be based on a reasonable suspicion of the person having committed an offence or; be reasonably considered necessary to prevent further offences or flight. However, there is a risk that the measures taken become so intrusive that they must be seen as anticipating the punishment.⁸⁴ This is one reason why the ICCPR in its Article 9.3 on the right to liberty and security of person sets out that the length of such detention must not last beyond a “reasonable time”.⁸⁵ The same Article also says that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody...”.⁸⁶ It follows that it is to be limited to essential reasons such as to prevent interference with evidence, repetition of the offence, or flight.⁸⁷ The Article clearly states that release

⁸³ S. Trechsel, *ibid.* p. 165.

⁸⁴ *B v. Spain*, 8 May 1987, ECtHR, Application no. 12476/86, unreported, *as quoted in* S. Trechsel, *ibid.* p. 180, *Tomasi v. France*, 27 August 1992, ECtHR, Application no. 12850/87, para. 91; *Letellier v. France*, 26 June 1991, ECtHR, Application no. 12369/86, para. 51.

⁸⁵ See ECHR, *supra* note 17, Article 5.3; and ACHR, *supra* note 18, Article 7.5; and *further*: S. Trechsel, *supra* note 23, p. 180.

⁸⁶ ICCPR, *supra* note 2, Article 9.3; the French and the Spanish versions of the text do not limit this right to pre-trial detention but extend it to the entire period of detention until sentencing (*‘personnes qui attendent de passer en jugement’*, *‘de las personas que hayan de ser juzgadas’*). According to Manfred Nowak the Committee appears to follow the English version, M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* 2nd rev. ed. (Norbert Pul Engel, Germany, 2005), p. 233, para. 45, fn. 133.

⁸⁷ *Ibid.* p. 233, para. 45.

may be subject to guarantees to appear for trial. The ECtHR has found that “[a]ny system of mandatory detention on remand is *per se* incompatible with human rights standards”.⁸⁸

3.2 International Criminal Law

The Statutes of the international courts and tribunals contain explicit recognition of the right of the accused to be presumed innocent until proven guilty.⁸⁹ Out of the two aspects of this right outlined above,⁹⁰ within international criminal procedure the outcome related aspect has mostly been dealt with in the context of the right to an impartial tribunal.⁹¹ For example in two decisions regarding the recusal of judges at the SCSL, the statements made by the judges in question might also have an impact on the accused’s right to be presumed innocent.⁹² These examples will be discussed at some length below, for now suffice it to observe that in the context of judicial bias, the international courts frequently emphasise the great importance of the presumption of innocence.⁹³

⁸⁸ *Ilijkov v. Bulgaria*, 26 July 2001, ECtHR, Application no. 33977/96, paras. 84, 85.

⁸⁹ United Nations, *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted 26 May 1993, SC Res. 827, UN Doc. S/25704, annex (1993), reprinted in 32 ILM 1192 (1993) (hereinafter: the ICTY Statute), Article 21.3; United Nations, *Statute of the International Criminal Tribunal for Rwanda*, adopted 8 November 1994, SC Res. 955, reprinted in 33 ILM 1602 (1994) (hereinafter: the ICTR Statute), Article 20.3; Statute of the Special Court for Sierra Leone, January 16, 2002, annexed to the ‘Special Court Agreement’ (hereinafter: the SCSL Statute), available at www.sc-sl.org/DOCUMENTS/ImportantCourtDocuments/tabid/200/Default.aspx (last visited 29 December 2008), Article 17.3; Rome Statute, *supra* note 50, Article 66.1.

⁹⁰ See *supra* Chapter ‘3.1.1 The Two Aspects of the Guarantee’, pp. 21 *et seq.*

⁹¹ See *infra*, Chapter ‘5.2.2 Judicial Impartiality’, p. 78.

⁹² *Prosecutor v. Sesay, Kallon and Gbao* (hereinafter: *Prosecutor v. Sesay et al.*), 6 December 2007, SCSL-04-15-T, ‘Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case’ (Trial Chamber I) (hereinafter: the Thompson Recusal Decision); and *Prosecutor v. Sesay*, 13 March 2004, SCSL-2004-15-AR15, ‘Decision on the Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber’ (Appeals Chamber) (hereinafter: the Robertson Disqualification Decision).

⁹³ See *infra*, Chapter ‘5.2 International Criminal Law’, p. 68.

3.2.1 The Presumption of Innocence as a Right not to be Treated or Referred to as Guilty

The right to be presumed innocent aims to protect the image or the reputation of the suspect as ‘innocent’ in relation to a specific offence. In the context of international criminal justice this will often be difficult, as many of the accused as well as the crimes they are alleged to have committed are well known to the public. In this atmosphere, the media is prone to use descriptions of accused persons such as the ‘butcher of Omarska’ (referring to Duško Tadić) or the ‘Balkan butcher’ (referring to Slobodan Milosevic).⁹⁴ Such statements are clearly in violation of the accused’s right to be presumed innocent until proven guilty, yet it is difficult to deal with such violations through imposing the application of human rights instruments on international tribunals.⁹⁵

In domestic law the accused could normally protect this right through civil lawsuits against the media concerned. However, an accused at one of the international tribunals, should he wish to do the same, will face several problems including trying to identify the country in which to bring the claim and what laws to apply, the practice in international criminal law to keep the accused in custody pending trial and the fact that the accused is unlikely to have neither the time nor the resources to successfully argue such a case parallel to proceedings as complex as those before an international tribunal.⁹⁶ At the same time, international proceedings operate in isolation from the national media and authorities and are in any case poorly equipped to adjudicate on issues relating to the freedom of expression in domestic jurisdictions.

Instead, increased efforts should be made to ensure that the tribunal itself and its staff strive to present a balanced image of the proceedings at every opportunity. The image that is transmitted to the public through the media as well as through the courts own channels such as the

⁹⁴ S. Zappalà, *Human Rights in international Proceedings* (Oxford University Press, Oxford, 2003), pp. 85, 86.

⁹⁵ A. Zahar and G. Sluiter, *supra* note 43, p 303.

⁹⁶ S. Zappalà, *supra* note 94, pp. 86, 87.

web page or its outreach programme should take into account that the person against whom criminal charges have been brought, has not yet been found guilty.⁹⁷ Highly problematic in this respect, is the policy of the international courts of widely distributing documents relating to the charges against persons with little or no mention of the fact that the person is still only accused or even a suspect. Zappalà points out as one example that the Internet home page of the ICTY contained all the indictments and some opening and final statements by the prosecution, but did not have motions coming from the defence.⁹⁸ However, this appears since to have been rectified as it is now possible to find a list of all the parties' motions and submissions in each ongoing case.⁹⁹ Likewise, the ICTR has an online judicial database that allows searches also for defence submissions. The SCSL however, to date has no similar function on their web page.¹⁰⁰

Another example which has attracted criticism is the fact that the otherwise highly praised outreach program at the SCSL initially toured the Sierra Leonean countryside exclusively with the Prosecutor, possibly giving rise to an impression that the persons indicted were in fact guilty.¹⁰¹ This initial dominance by the prosecution in the Court's interaction with the community largely came from the late appointment of the first Principal Defender in March 2004, which in turn was grounded in the financial constraints of the Court. By this time, nineteen months had passed since the Court's first Prosecutor David Crane first arrived in Freetown to begin investigations. He was an early proponent of increased interaction with the local population and during these months had worked in close cooperation

⁹⁷ S. Zappalà, *ibid.* p. 85.

⁹⁸ *Ibid.* p. 85, fn. 13.

⁹⁹ See e.g., in the case of *Prosecutor v. Karadžić*: www.un.org/icty/karadzic/subm518-e.htm (last visited 3 December 2008).

¹⁰⁰ trim.unict.org/ (last visited on 3 December 2008); www.sc-sl.org (last visited 3 December 2008).

¹⁰¹ A. Thompson, M Staggs, *The Defence Office at the Special Court for Sierra Leone: A Critical Perspective*, War Crimes Studies Center, University of California, Berkeley, 26 April 2007 (hereinafter: the Berkley Defence Office Report), p 17; T. Perriello, M. Wierda, *The Special Court for Sierra Leone under Scrutiny*, International Center for Transitional Justice, 5 March 2006 (hereinafter: the ICTJ Report), available at www.ictj.org/static/Prosecutions/Sierra.study.pdf (last visited on 29 December 2008), p 34; Human Rights Watch, *Bringing Justice: the Special Court for Sierra Leone, Accomplishments, Shortcomings, and Needed Support*, September 2004, Vol.16, No. 8(A) (hereinafter: HRW 2004 Report), p 33.

with the Outreach section. This forced the newly appointed Principal Defender into a reactive rather than a proactive stance towards the court's outreach programming. After her appointment, the Principal Defender reviewed outreach materials to ensure that they reflect a balanced view of how the SCSL will achieve its mandate to try those alleged to bear the greatest responsibility. In this regard, statements such as "people who caused so much suffering will be punished" have been omitted from materials to support the presumption of innocence and to avoid prejudging the outcome of the proceedings. Similarly, members of the Defence Office have contributed to shaping policies and guidelines for the court's outreach activities as well as participating in outreach activities themselves.

However, regardless if there is any defence representation present in Freetown the prosecutor must still respect the fact that the accused might be innocent, and should not make unqualified statements about his or her guilt to the public. It is highly questionable if the first Prosecutor David Crane, or his successor Desmond de Silva can be said to have lived up to this requirement. The Sesay Defence Team made a complaint in 2005 that on several occasions they made statements to the public, conclusively asserting that defendants on trial before the Court were guilty of the charges brought before them. The complaint included some quite remarkable quotes from international as well as domestic Sierra Leonean and Liberian media. For instance, Mr. Crane was quoted in the Liberian Daily Observer as saying that "[t]he RUF as a faction will not go unpunished for the reign of terror it unleashed on this country", referring to the nine defendants before the SCSL as "these war criminals".¹⁰² Mr. Crane and Mr. de Silva had also been quoted in the media as characterising one of the accused, Charles Taylor, as a "war criminal",¹⁰³ "murderer",¹⁰⁴

¹⁰² Liberian Daily Observer, *David Crane: I Am Confident That Taylor Will Be Handed Over*, 16 May 2005 (Email interview with Rodney D. Sieh conducted on 15 May 2005); as quoted in *Prosecutor v. Sesay et al.*, 22 July 2005, SCSL-2004-15-T, 'Defence Complaint Regarding Public Statements by Chief Prosecutor Desmond de Silva, Former Chief Prosecutor David Crane, and Other Office of the Prosecutor Personnel' (hereinafter: *Sesay Public Statements Complaint*), para. 8.

¹⁰³ Liberian Daily Observer, *David Crane: I Am Confident That Taylor Will Be Handed Over*, 16 May 2005 (Email interview with Rodney D. Sieh conducted on 15 May 2005), *ibid.*; Awoko, *Prosecutor Welcomes Resolution on Charles Taylor in U.S. Senate*, 16 May

“terrorist”,¹⁰⁵ and as “individually criminally responsible for the murder, rape, maiming and mutilation of over 1.2 million human beings”.¹⁰⁶ These statements constitute clear assertions that the guilt of Charles Taylor, and of the RUF, have been decisively established, even though at the time, Charles Taylor’s trial had not even commenced. In addition to being a violation of the right to be presumed innocent, the Sesay Defence complained that the statements increase public condemnation of the accused. This in turn impairs Defence Counsel’s ability to fulfil their duties by making it more difficult to convince potential Defence witnesses to testify.¹⁰⁷ There is a risk that such public statements could convince potential witnesses that the result of a trial is predetermined and that the accused are guilty beyond doubt, which in turn might well reduce or destroy the incentive to testify.

It is interesting to note that in theory, if applied fully to international criminal justice the *Alenet de Ribemont* decision by the ECtHR would mean that where a United Nations official makes statements as to the guilt of persons accused by one of the UN tribunals, this ought to be considered as a violation of the rights of the accused. Although this violation would perhaps be attributable to the UN itself, rather than to the tribunal concerned.¹⁰⁸ In this respect it is problematic when the Security Council decides to single out specific persons and their involvement in international crimes in its resolutions. This is what happened in a Security Council Resolution denouncing the atrocities in Srebrenica where the Bosnian Serb leaders Radovan Karadzic and Ratko Mladic were specifically mentioned, noting that they had been indicted by the ICTY for their responsibilities in the massacre. The word ‘alleged’ was never used in referring to their responsibilities. Instead, the resolution condemned “in the strongest possible terms the violations of international humanitarian law and

2005, *ibid.* para. 10; B. Pisik, *Power in Exile: Taylor Extends Political Reach*, The Washington Times, 2 June 2005, *ibid.* para. 14; The New Citizen, *Taylor is a Terrorist*, 28 June 2005, *ibid.* para. 17.

¹⁰⁴ *Ibid.* para. 17.

¹⁰⁵ *Ibid.* paras. 14, 17.

¹⁰⁶ T. Borbor, *Charles Taylor Murdered 1.2 Million People—Crane*, Awoko, 29 June 2005, *ibid.* para. 18.

¹⁰⁷ *Ibid.* para. 33.

¹⁰⁸ A. Zahar and G. Sluiter, *supra* note 43, p. 303, fn. 136.

of human rights by Bosnian Serbs and paramilitary forces in the area of Srebrenica”.¹⁰⁹

3.2.2 The Burden of Proof

The presumption of innocence forms the rationale behind the privilege against self-incrimination, often referred to as the ‘right to remain silent’, and to why the burden of proof rests with the prosecution. In this respect it is interesting to note that, as a rule, international criminal law and procedure often offers a wider protection of the right to remain silent than what is found in international human rights law.¹¹⁰ This said, there is however one important exception to this rule. Rule 92 of the RPEs of both *ad hoc* tribunals provides that confessions made by the accused during questioning by the Prosecutor shall be presumed to have been free and voluntary unless the contrary is proved. Rule 92 of the RPE for the SCSL contains similar language but omits the words “unless the contrary is proved”. In effect, this provision establishes an inversion of the burden of proof to the detriment of the accused. It is likely to be extremely difficult for an accused person, who is normally held in detention pending trial, to prove that a confession was obtained through the use of illegal methods.¹¹¹ It would seem more reasonable to hold the prosecution, which has access to far superior resources to the accused, responsible for proving that it does not violate the rights of accused persons during interrogation. The international courts have made attempts to avoid this potential threat to the integrity of the accused by making use of the extensive regulations, including the right to have Counsel present and to have interrogations videotaped, which serve as additional

¹⁰⁹ United Nations, *Security Council Resolution 1034* (1995), UN Doc. SC/RES/1034, adopted at the 3612th meeting, 21 December 1995, paras. 2, 7.

¹¹⁰ See, e.g., A. Zahar and G. Sluiter, *supra* note 43, pp. 303-307, who show how, apparently under the influence of American traditions, the *ad hoc* tribunals have developed a protection of the privilege against self-incrimination that goes above and beyond what is required e.g. pursuant to the case-law of the ECtHR. This tradition is likely to continue at the ICC. See e.g., Rome Statute, Article 55, *supra* note 50, which elevates the so-called ‘Miranda’ rights into a fundamental rule of ICC procedure, and; International Criminal Court, *Rules of Procedure and Evidence*, Adopted by the Assembly of States Parties, First Session, New York, 3-10 September 2002; Official Records ICC-ASP/1/3 (hereinafter: the ICC RPE) Rules 111 and 112.

¹¹¹ S. Zappalà, *supra* note 94, p. 95.

safeguards.¹¹² However, for such regulations to serve as a real protection of the rights of the accused, this requires that the staff conducting the interviews are given adequate training on international criminal investigations and that the accused is properly informed of his or her rights.

The SCSL has received severe criticism for how investigations and initial interviews with suspects and accused persons are conducted.¹¹³ In the *Sesay* case, the Trial Chamber called a *voir dire* to determine the admissibility of post-arrest statements made by the accused Sesay during custodial interviews in March and April 2003. During the *voir dire*, witnesses confirmed that for days immediately following his arrest, MR. Sesay had been isolated in Prosecution custody. He had been questioned at length without counsel present, offered the prospect of a deal to become an insider witness without fully understanding the charges against him, and subjected various forms of pressure and inducements off the record.¹¹⁴ The Chamber found that the testimony given by two prosecution investigators provided corroboration to the allegations that the manner in which the accused was approached and questioned had created some confusion in his mind as to whether he was going to be able to escape prosecution by being a witness, or at the least gave him that hope, as a reward for co-operating.¹¹⁵ One investigator testified that his role throughout the interviewing process had been to talk to the accused during the breaks and to ensure that he continued to cooperate by continually restating and reaffirming what the prosecution could do for him in exchange for his co-operation.¹¹⁶

Based on the evidence in these proceedings, Trial Chamber I ruled in favour of the defence. Over a thousand pages of custodial interrogation transcripts were thus rendered inadmissible on the grounds that

¹¹² These regulations are even stricter in the ICC RPE, *supra* note 110, Rules 111-112, which hold detailed provisions on the recording of interviews.

¹¹³ P. van Tuyl, *Effectice, Efficient, and Fair? – An Inquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone* (hereinafter: the Berkley OTP Report), War Crimes Studies Center, University of California, Berkeley, September 2008.

¹¹⁴ *Ibid.*

¹¹⁵ *Prosecutor v. Sesay et al.*, 30 June 2008, SCSL-04-15-T, ‘Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution’ (Trial Chamber I) (hereinafter: the *Sesay, Voir Dire* Decision), para 46.

¹¹⁶ *Ibid.* para 47.

they had been obtained involuntarily from the accused “by fear of prejudice and hope of advantage, held out by persons in authority”.¹¹⁷ The decision was based on Rule 95 of the SCSL RPE that “[n]o evidence shall be permitted if its admission would bring the administration of justice into serious dispute”. Referring to ICTY¹¹⁸ and ICTR¹¹⁹ case-law it stated that “[it] recognises the established principle of law which lays on the Prosecution, the burden of proving ‘convincingly and beyond a reasonable doubt’ the voluntariness of an Accused’s statement made in a custodial setting and of the waiver of this right to counsel during interrogation”.¹²⁰

The Chamber adopted the approach of the ICTY Appeals Chamber in a similar decision in *Halilovic* and found that prosecution should have recommenced the interview with a full explanation of what had occurred during the break.¹²¹ The ICTY Appeals Chamber had held that although there was no express requirement in its rules to this effect, it found that after the break the interviews continued without any clarification on the record of what those alleged agreements were.¹²² Furthermore, it stated that “[t]he Prosecution’s failure to avail itself of the opportunity to make it abundantly clear in the record of interviews affected the voluntariness of the statements which the Appellant had given to the Prosecution”.¹²³ In adopting this reasoning, the SCSL Trial Chamber concluded that this irregularity raised “a serious and reasonable doubt” as to whether the accused’s statements really were made voluntarily.¹²⁴ It described the role of the prosecution in the process as bordering on a semblance of arm twisting and holding out promises and inducements to the accused in order

¹¹⁷ *Voir Dire* Decision *ibid.* para. 52 (emphasis added).

¹¹⁸ *Prosecutor v. Delalic, et al.*, 2 September 1997, ICTY, IT-96-21, ‘Decision on Zdravko Mucic’s Motion for the Exclusion of Evidence’ (Trial Chamber), para. 42.

¹¹⁹ *Prosecutor v. Bagosora*, 14 October 2004, ICTR-98-41-T, ‘Decision on the Prosecutor’s Motion for the Admission of Certain Materials Under Rule 89(c)’ (Trial Chamber), para. 14.

¹²⁰ *Voir Dire* Decision, *supra* note 115, para. 36.

¹²¹ *Ibid.* para. 49.

¹²² *Prosecutor v. Halilović*, 19 August 2005, ICTY, IT-01-48-AR73.2, ‘Decision on Interlocutory Appeal Concerning Admission of Record of Interviews of the Accused from the Bar Table’ (Appeals Chamber), para. 40.

¹²³ *Ibid.* para. 42.

¹²⁴ *Voir Dire* Decision, *supra* note 115, para. 51.

to sustain his co-operation with the prosecution.¹²⁵ The Chamber concluded that the Prosecution had not discharged its burden of proving beyond a reasonable doubt that the statements were made voluntarily.¹²⁶

This decision appears to go a long way towards returning the burden of proof on the prosecution rather than, as the RPE seem to suggest, the accused. However, the proceedings also raised serious doubts about the investigative procedure at the SCSL. Based on the *voir dire* and interviews with SCSL personnel, the War Crimes Studies Center made an inquiry into the investigative practices of the Office of the Prosecutor (OTP) at the SCSL.¹²⁷ This study reveals many of the underlying problems that contributed to the denial of Issa Sesay's right against self-incrimination. Primarily, the report pointed to structural problems in the OTP as a whole and in the Investigations Section of the OTP in particular. These problems included a lack of adequate training for international investigators;¹²⁸ no written Standard Operating Procedures (SOP);¹²⁹ and insufficient accountability¹³⁰ within the OTP to ensure that staff respected accused's and suspect's rights.¹³¹ In addition, the frequent and necessary absence of the Chief Prosecutor had left a leadership vacuum that reinforced the difficulties caused through each of these points.¹³² The report also pointed out that it is doubtful if the threat of procedural sanctions through the exclusion of evidence is sufficient to ensure the rights of the accused. Such exclusion is already difficult to achieve in the SCSL system.¹³³ As such, the prosecution investigators responsible for the denial of Mr. Sesay's rights faced no consequences for their actions until the decision was taken by the Trial Chamber to exclude its use as evidence nearly five years later.¹³⁴

¹²⁵ *Ibid.*

¹²⁶ *Voir Dire Decision, ibid.* para. 52 (emphasis added).

¹²⁷ Berkley OTP Report, *supra* note 113.

¹²⁸ *Ibid.* pp. 42–44.

¹²⁹ *Ibid.* pp. 35, 38, 42.

¹³⁰ *Ibid.* pp. 48, 53.

¹³¹ *See further* Chapter '6.2.4.2. Delays caused by the Prosecution', *infra* p. 116.

¹³² Berkley OTP Report, *supra* note 127, pp. 49, 50.

¹³³ *See* Chapter '6.2.3.1. Procedural Sanctions', *infra* p. 96.

¹³⁴ Berkley OTP Report, *supra* note 127, p. 48.

From the Trial Chamber's Decision we can see that although the prosecution are expected to be able to show that the statements were not given involuntarily, ultimately the burden rests with the defence to prove that this was so. In this case there were several indications pointing to an improper behaviour on behalf of the prosecution that pointed to the need of a separate hearing and the defence allegation was corroborated by the prosecution testimony. It would seem that the defence must show with some degree of likelihood that a statement was not voluntary, if it however should succeed in doing so, the prosecution will be required to show beyond a reasonable doubt the voluntariness of the statements.

However, it is difficult to tell to what extent this Decision by the Trial Chamber really reflects the burden of proof in other similar instances. In addition to being denied his right to remain silent, the defence argued that Issa Sesay had also been denied the right to be represented by counsel. In the Decision, the majority of the Judges affirm that prosecution investigators had a duty "where there are indications that a witness is confused" to take additional steps "to ensure that the suspect does understand the nature of his or her rights".¹³⁵ However, as the 'Berkeley OTP Report' observes, "the decision subsequently neglects to apply this finding of law to the facts of the case".¹³⁶ The records reflects that the accused never appears to have been given an adequate explanation from investigators about what the right to counsel entails, in spite of having, on a few occasions expressed confusion and sought clarification.¹³⁷ Then Deputy-Chief of Investigations admitted that he repeatedly neglected to correct Mr. Sesay's misapprehensions about his right to counsel. In fact, as Counsel for the accused pointed out, the only time the investigators offered something resembling an explanation of the right to legal assistance, the willingness to cooperate was conflated with a willingness to waive the right to counsel.¹³⁸ This was done in a way that gave the impression that making a statement to the police and asserting one's right to counsel were mutually

¹³⁵ *Voir Dire* Decision, *supra* note 115, para. 63.

¹³⁶ Berkeley OTP Report, *supra* note 127, p. 31.

¹³⁷ *Ibid.* p. 26.

¹³⁸ *Ibid.* p. 25.

exclusive options. However, it seems the Trial Chamber majority simply ignored this evidence when reaching its decision.¹³⁹

The majority acknowledged that Rule 63 requires that “once an accused person has requested the assistance of Counsel, questioning should immediately cease and shall only resume when the Accused’s counsel is present”.¹⁴⁰ In the next sentence, it determined that Mr. Sesay made at least two such requests for counsel during the period in question.¹⁴¹ Remarkably, the majority summarily and without explanation concludes that the prosecution investigators somehow fulfilled their obligations under Rule 63. Again, it is easy to agree with the conclusion in the ‘Berkeley OTP Report’ that: “simply put, this conclusion does not follow logically from the Court’s own factual statements of law”.¹⁴²

Justice Itoe wrote a partial dissent to the decision where he held that for a waiver of the right to counsel to be considered as voluntarily given, “the Prosecution must show and prove that it fully and comprehensively explained not only the nature of the document but also the consequences that go with its signature by the suspect”.¹⁴³ In light of the Chamber’s unanimous agreement on the illegal circumstances that rendered Mr. Sesa’s waiver of his right to silence involuntary, Justice Itoe held that it was “erroneous to conclude in another breath”, that the waivers of his right to counsel that were produced under the same circumstances were voluntary and informed.¹⁴⁴

A more extensive investigation of the evidentiary rules in international criminal trials is beyond the scope of this paper. Because of its importance in relation to the presumption of innocence, some further discussion on the burden of proof may nonetheless be helpful.

¹³⁹ *Voir Dire* Decision, *supra* note 115.

¹⁴⁰ *Ibid.* 61.

¹⁴¹ *Ibid.*

¹⁴² Berkeley OTP Report, *supra* note 127, p. 31.

¹⁴³ *Voir Dire* Decision, *supra* note 115, para. 52.

¹⁴⁴ *Prosecutor v. Sesay et al.*, 30 June 2008, SCSL-04-15-T-1188 ‘Separate concurring and partially dissenting opinion of Hon. Justice Benjamin Mutanga Itoe on the decision on the admissibility of certain prior statements of the Accused given to the Prosecution’ (hereinafter: Itoe Separate Opinion), para. 52.

The Statutes of the tribunals hold no provision explicitly placing the burden of proof on the prosecution. However, this is an implicit consequence of the presumption of innocence.¹⁴⁵ In *Tadić*, the ICTY Trial Chamber considered a defence motion of no case to answer, in spite of there being no express provision for ruling on such a motion in the RPE at that time. This was done primarily out of concern for the presumption of innocence.¹⁴⁶ The motion, which was ultimately rejected on the merits, was submitted at the end of the prosecution case seeking acquittal, claiming that the defendant at that stage had no case to answer as the prosecution had failed to prove his guilt beyond reasonable doubt. As a consequence of this and a similar motion in the *Celebici* case, the RPE were amended to include a specific procedure for allowing the defence to file motions of acquittal. In fact, the new Rule 98-bis goes even further in that it allows the Trial Chamber to issue *proprio motu* a judgement of acquittal at the end of the prosecution case. The basic rationale is that as the accused is to be presumed innocent, there is no reason to continue a trial and hear exculpatory evidence if the evidence presented by the prosecution is insufficient to overcome this presumption.¹⁴⁷

The Appeals Chamber in *Jelisić* found that the test to be applied in determining a motion for acquittal is whether, “the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt”.¹⁴⁸ While the Trial Chamber had found that in light of the evidence presented it would not have come to a finding of guilt, the Appeals Chamber said the correct test was not whether or not there is sufficient evidence to support conviction. Rather, the test should be whether the evidence was sufficient that a reasonable trier of fact *could* convict as opposed to *would* convict.¹⁴⁹

¹⁴⁵ S. Zappalà, *supra* note 94, p. 91; A. Zahar and G. Sluiter, *supra* note 43, p. 303.

¹⁴⁶ *Prosecutor v. Tadić*, 13 Sep. 1996, ICTY, IT-94-1-T, ‘Decision on Defence Motion to Dismiss Charges’ (Trial Chamber II).

¹⁴⁷ S. Zappalà, *supra* note 94, pp. 91, 92.

¹⁴⁸ *Prosecutor v. Jelisić*, 5 July 2001, ICTY, IT-95-10-A, ‘Judgement’ (Appeals Chamber), para. 37.

¹⁴⁹ *Ibid.* paras. 30-40.

The distinction is made between the credibility (whether or not the witness was believable), and the reliability of the evidence given (whether or not it serves to prove the fact to which it is directed). Rule 98*bis* proceedings target the reliability of evidence or, in other words whether or not the prosecution case would stand, provided a tribunal does believe the evidence presented. The application of this standard is somewhat unfortunate as it might not afford sufficient consideration to the presumption of innocence. At this stage in the proceedings there will be no more evidence presented against the accused, yet he or she is still not convicted and to be considered innocent. There is no apparent reason why the determination of the evidence at this stage should not be made by the same trier (the Judges of the Trial Chamber) and against the same standard (reasonable doubt) as normally at the end of the trial. If the standard is whether any reasonable trier *could* find guilt beyond reasonable doubt, in essence, the requirement is that this observer is free from such doubt. Arguably, if a reasonable trier was to conclude that he or she at this point *could* reasonably doubt the guilt of the accused, this *would* cause him to feel such doubt. Vice versa, someone who finds that he or she *would* at this point doubt the guilt probably believes that he or she *could* reasonably hold such doubt. The opposite conclusion, that he think “I could reasonably doubt, but I will not”, rather seems unreasonable, and thus out of character. It is also difficult to understand why this doubt could not be the doubt of the Judges before whom the evidence has in fact been presented, at least for want of any indication that these Judges are unreasonable in holding such doubt.¹⁵⁰ The adoption of this approach to motions for acquittal is surprising before the international tribunals where the pressing reality of budgetary restraints is ever present and where the length of the proceedings in general is a well-known problem. Continuing a trial that will only ever lead to a conviction through mistakes committed by the defence does seem a bit of a waste. By addressing also the credibility of the evidence presented, and identifying areas where the prosecution has failed to prove its allegations, the courts

¹⁵⁰ See further S. Zappalà, *supra* note 94, pp. 93, 94.

could streamline the proceedings and help the defence focus its resources on rebutting the allegations for which it runs a real risk of conviction. At a minimum, courts could be expected to exclude evidence that is obviously incredible even if it should happen to address a count under the indictment.

It remains to see what impact the Rome Statute, which has more clearly defined rules on the presumption of innocence including an explicit provision in Article 67.1(i) that no reversal of the burden of proof is admissible, will have on that Court's position on these issues.¹⁵¹ The explicit provision that no reversal of proof is admissible may indeed prove to be a significant improvement in the protection of the rights of the accused. While the test applied to motions of acquittal is treading on the burden of proof by applying a standard less strict than that of reasonable doubt, there are examples where the burden is in fact placed wholly on the accused. One such example, which has already been discussed, is with proof that a confession was forced.¹⁵² Another is the rules guiding detention on remand. There is no requirement that such detention be ordered by a judge or chamber; instead, it follows automatically as a direct consequence of the RPE. Originally, Rule 65 of the RPE of both the ICTY and the ICTR stated that an accused could only be released 'in exceptional circumstances'. Naturally such circumstances had to be proved by the accused, should he wish to be released. In November 1999, the ICTY Rule was modified to exclude the reference to exceptional circumstances while the relevant Rule of the ICTR remained the same.¹⁵³ This modification is clearly an important improvement on the rights of the accused and does work to decrease the gap between the ICTY Rules and international human rights law. Still, the burden clearly rests on the accused, who has to show that "he will appear for trial and [...] will not pose a danger to any victim, witness or other

¹⁵¹ Rome Statute, *supra* note 50, Articles 66, 67.

¹⁵² See discussion *supra*, pp. 31 – 36.

¹⁵³ The provision for the ICTR has since been changed and it too no longer includes the 'exceptional circumstances' provision, International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, as amended on 14 March 2008 (hereinafter: the ICTR RPE), Rule 65.

person”.¹⁵⁴ Moreover, as the Chamber retains complete discretion over release, the amendment cannot be said to have contributed to increased certainty about the outcome of the procedure. In two decisions in February 2002, ICTY Trial Chamber I clearly held that:

“[Even] if these requirements are met, this Trial Chamber does not believe that it is obliged to release the accused. In this regard, it agrees with the interpretation that a Trial Chamber will still retain discretion not to grant provisional release even if it is satisfied that the accused will appear for trial and will not pose any danger to any victim, witness or person.”¹⁵⁵

It is thus clear that even after the amendment the Rule provides a standard very different from that of the ICCPR, that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement”.¹⁵⁶ In applying the modified Rule 65(B) an ICTY Trial Chamber observed that “[it] no longer requires an accused to demonstrate exceptional circumstances before release may be ordered”.¹⁵⁷ The Chamber, admitting the release, considered that the accused had ‘voluntarily surrendered to the custody of the International Tribunal’ and that they, on their own behalf and through the Serbian Government, had provided the necessary guarantees. The Trial Chamber also considered that they had been in detention, awaiting trial, for more than two years, and there was no prospect of an early commencement of the trial. Judgements on provisional release have also noted the complexity of the proceedings and the gravity of the offences charged, conditions that are recognised in the case law of international human rights bodies.¹⁵⁸ In fact it is difficult to see any need to deviate from

¹⁵⁴ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev. 42, as amended at the Extraordinary Plenary Session in The Hague, 4 November 2008, (hereinafter: the ICTY RPE), Rule 65.

¹⁵⁵ *Prosecutor v. Jokic*, 20 February 2002, ICTY, IT-01-42-PT, ‘Order on Miodrag Jokic’s Motion for Provisional Release’ (Trial Chamber) and; *Prosecutor v. Ademi*, 20 February 2002, ICTY, IT-01-46-PT, ‘Order on Motion for Provisional Release’ (Trial Chamber I).

¹⁵⁶ ICCPR, *supra* note 2, Article 9.3.

¹⁵⁷ *Prosecutor v. Simić et al.*, 4 April 2000, ICTY, IT-95-9-PT, ‘Decision on Miroslav Tadić’s Application for Provisional Release’ (Trial Chamber) and; 4 April 2000, ‘Decision on Simo Zarić’s Application for Provisional Release’ (Trial Chamber).

¹⁵⁸ *Prosecutor v. Ndayambaje*, 21 October 2002, ICTR-98-42-T, ‘Decision on the Defence Motion for the Provisional Release of the Accused’ (Trial Chamber II); W. A. Schabas, *The*

recognised human rights standards in this respect as people accused before the International Tribunals in general fall within the scope of the categories for which detention on remand can exceptionally be issued.¹⁵⁹

This practice, where detention is the general rule rather than the exception and where detention follows automatically from the Statutes and the RPE, cannot be understood in isolation from other rights of the accused. Besides the inherent inconsistencies with international human rights law (detention pending trial should be the exception), international trials can last many years, leading to a situation where the length of detention can be seen as anticipating a conviction. This would in itself violate the right to be presumed innocent until proven guilty.¹⁶⁰

UN International Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press, Cambridge, 2006), p 391.

¹⁵⁹ S. Zappalà, *supra* note 94, p. 88, fn. 23.

¹⁶⁰ See e.g., *B v. Spain*, *supra* note 84; *Tomasi v. France*, *supra* note 84, para. 91; *Letellier v. France*, *supra* note 84, para. 51.

4 Equality of arms

4.1 International Human Rights Law

Neither the ICCPR, nor the ECHR contain any express reference to the principle of equality of arms, yet it is commonly considered an essential element of a fair trial.¹⁶¹ The right to equality of arms applies to both civil and criminal proceedings. However, with respect to criminal proceedings the term ‘equality’ is not to be taken too literally. In the context of a criminal trial, it is impossible to achieve in practice complete equality between the two parties.¹⁶² Throughout the proceedings the prosecution and the defence will be in such completely different positions as to make any comparison or any attempt to achieve ‘equality’ seem farfetched. To begin with, the stakes are infinitely higher for the accused, whose reputation and liberty may depend on the outcome of the trial. The prosecution on the other hand should have no personal interest in the proceedings. The two parties will also from the start of the process have access to very different ‘arms’. The prosecution, as discussed, has access to a number of coercive measures, including the possibility of depriving the suspect of his liberty through arrest warrants and will also normally have significantly greater resources at its disposal when gathering evidence.¹⁶³ The accused does not have any similar coercive measures at his or her disposal but, assuming he or she was actually involved in the alleged crimes, may have precise knowledge of the facts of the case. An accused who is completely innocent however, is unlikely to have much if any knowledge of the circumstances surrounding the crime.¹⁶⁴ Due to its superior resources, it does appear rather obvious that the prosecuting authority will always have an advantage over the suspect, apart from those parts of the investigation in which the defence assists. As a

¹⁶¹ S. Trechsel, *supra* note 23, p. 94.

¹⁶² See e.g., *ibid.* p. 96; with further references.

¹⁶³ See *ibid.* pp. 25–26.

¹⁶⁴ S. Trechsel, *supra* note 23, p. 96.

counter-weight, the accused is to be presumed innocent and the burden of proof lies completely with the prosecution.¹⁶⁵ The accused can choose to remain silent throughout the proceedings.¹⁶⁶ Thus, it is not appropriate to think of equality of arms in a literal sense of two parties on an equal footing, equipped with equal arms.

While the principle of equality of arms is applicable to both criminal and civil cases, in criminal cases it is particularly important as it overlaps with, and in some respects goes further than, the specific guarantees in ECHR. In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.¹⁶⁷ The ECtHR has defined equality of arms in criminal proceedings as meaning that “each party must be afforded reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent”.¹⁶⁸ According to the HRC, this means that “the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.”¹⁶⁹ The object of the principle is to ensure that the court does not favour one party at the cost of the other. It should follow that if both parties are deprived something that might have been useful, this does not violate the principle.¹⁷⁰ In criminal proceedings the principle of equality of arms is used as a safeguard for the accused and should not be interpreted as conferring a corresponding right on the prosecution. It is a right specifically attributed to the defendant and not to *any party* to the proceedings.¹⁷¹

¹⁶⁵ S. Trechsel, *ibid.* p. 223.

¹⁶⁶ General Comment No. 32, *supra* note 3, para. 30; for a philosophical discussion on the meaning of the word ‘equality’ in the context of the principle of equality of arms *see* S. Trechsel, *supra* note 23, p. 96.

¹⁶⁷ R. Clayton and H. Tomlinson, *supra* note 8, para. 11.208.

¹⁶⁸ *Bulut v. Austria*, *supra* note 35, para. 47.

¹⁶⁹ General Comment No. 32, *supra* note 3, para. 13.

¹⁷⁰ S. Trechsel, *supra* note 23, p. 97.

¹⁷¹ May and Wierda show persuasively that “[the] principle of equality of arms is used to provide a safeguard of the accused”, R. May and M. Wierda, ‘Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha’, 37 *Columbia Journal of Transnational Law* (1999) p. 757; *as quoted in* S. Zappalà, *supra* note 94, p. 113.

The defence does not necessarily have to prove that the difference between it and the prosecution is to the detriment of the defence. The ECtHR has stated in *Lantz v. Austria* that “the principle of equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality”.¹⁷² However, there are other examples where the same court has placed great weight on the issue whether the defence suffered any prejudice.¹⁷³ Considering that the principle of equality of arms is defined as the defence having suffered ‘disadvantage’, it seems reasonable that this must be established before saying that the right has been violated.¹⁷⁴

4.1.1 Adequate Time and Facilities

The principle of equality of arms is often invoked in relation to the right of the accused to adequate time and facilities to prepare his or her defence. This right is an important aspect of the right to a fair trial. According to Article 14.3(b) of the ICCPR the defence has a right to adequate time and facilities for the preparation of their case. Before domestic courts the most frequent issue with regards to this right is to what extent the accused has a right to access the prosecution investigation underpinning the indictment. According to the HRC “adequate facilities” must include access to documents and other evidence including all evidence which the prosecution plans to rely on in court, as well as any exculpatory material. Exculpatory material includes not only evidence of the accused’s innocence, but any evidence that could assist the defence.¹⁷⁵ This is in conflict with an interest of prosecuting authorities to withhold certain material such as for example statements by and/or information about witnesses. The ECtHR considers this right to be one of the aspects of the right to adversarial proceedings, as this right includes that all material submitted to the tribunal responsible for determining the conviction and the sentence must be disclosed to the

¹⁷² *Lantz v. Austria*, 31 January 2002, ECtHR, Application no. 24430/94, para 58.

¹⁷³ *Kremzow v. Austria*, 21 September 1993, ECtHR, no. 29/1992/374/445, para. 75; *G.B. v. France*, 2 October 2001, ECtHR, Application no. 44069/98, paras. 64-70.

¹⁷⁴ S. Trechsel, *supra* note 23, p. 99.

¹⁷⁵ General Comment No. 32, *supra* note 3, paras. 32, 33.

defence. The ECtHR has formulated this as a fundamental rule: “the Court considers that it is a requirement of fairness under paragraph 1 of Article 6 ... that the prosecuting authorities disclose to the defence all material evidence for or against the accused and that the failure to do so in the present case gave rise to a defect in the trial proceedings”.¹⁷⁶ This obligation is not unlimited. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or to keep secret police methods of investigation of crime, which must be weighed against the accused.¹⁷⁷ This said, “only such measures restricting the rights of the defence which are strictly necessary are permissible”,¹⁷⁸ also, sufficient measures must be taken to counterbalance those restrictions that are made.¹⁷⁹

The ECtHR has not found a violation of the duty to disclose in cases where the domestic authorities had carefully examined the conflicting interests involved. It did find a violation in cases where the prosecution decided to withhold evidence from the judge. Prosecutors acting unilaterally in this way is not compatible with Article 6 of the ECHR. In this case it was not sufficient remedy that the applicant was informed at the beginning of the appeal proceeding because the Court of Appeal did not hear the evidence.¹⁸⁰

In exceptional cases, there may be a duty on the court itself to disclose information. In a case before the ECtHR, *Skondrianos v. Greece*, the applicant filed an appeal with the Greek Court of Cassation.¹⁸¹ The prosecutor opposed this on the basis of one single reason which led the accused to concentrate his argument on this ground. The court then rejected the appeal on the basis of an entirely different argument. The applicant

¹⁷⁶ *Edwards v. United Kingdom*, 16 December 1992, ECtHR, no. 79/1991/331/404, para. 36.

¹⁷⁷ *Jasper v. United Kingdom*, 16 February 2000, ECtHR, Application no. 27052/95, para. 52.

¹⁷⁸ *Ibid.* para. 52.

¹⁷⁹ S. Trechsel, *supra* note 23, p. 92.

¹⁸⁰ *Jasper v. United Kingdom*, *supra* note 176 paras. 55, 56; *see also Fitt v. United Kingdom*, 16 February 2000, ECtHR, Application no. 29777/96, paras. 47-49; *P.G. and J.H. v. United Kingdom*, 25 September 2001, ECtHR, Application no. 44787/98, paras. 70-73.

¹⁸¹ *Skondrianos v. Greece*, 18 December 2003, ECtHR, Application no. 63000/00, 74291/01 and 74292/01 (the text of the judgement is available in French only).

therefore complained that he had never been given any opportunity to rebut the arguments set out in the decision. The ECtHR stated that the applicant was only informed of the prosecutions arguments and thus taken by surprise when the court relied on an entirely different reason. It concluded that the right to adversarial proceedings had not been respected and found a violation of Article 6 paragraph 1 of the ECHR.¹⁸²

Finally, as a direct result from the principle of equality of arms, the defence must also be able to investigate. It must be possible to interview persons who could be presented as witnesses, to look for documents and other material evidence and to call upon experts to prepare a report. How this right is protected may vary with respect to different justice systems but at a minimum the defence must have a possibility to approach the prosecuting authority with a request for complimentary inquiries, including the use of coercive measures. In case of refusal, it must be possible to apply to a judicial body.¹⁸³ In addition, any expert appointed by the defence must be afforded the same facilities as one appointed by the prosecution.¹⁸⁴

4.2 International Criminal Law

The principle of equality of arms formed the basis of the first ground for appeal for the defence in the *Tadić* case. The defence argued that the lack of cooperation by Serbian authorities had put the defence at a disadvantage to the prosecution, whose witnesses mainly resided in more cooperative states in Western Europe and North America. In addressing the issue the ICTY Appeals Chamber made a distinction between national and international criminal courts on the basis that the latter is far more dependant on state cooperation. It argued that this should have consequences for the application

¹⁸² *Skondrianos v. Greece*, para. 31; see also S. Trechsel, *supra* note 23, pp. 93, 94 who believes the reason the Court displayed a certain brusqueness in its decision is that it did not find the argument which the national court had relied on to be especially convincing.

¹⁸³ S. Trechsel, *ibid.* p. 227.

¹⁸⁴ *Bönisch v. Austria*, 6 May 1985, ECtHR, no. 6/1984/78/122; R. Clayton and H. Tomlinson, *supra* note 8, para. 11.210.

of the principle of equality of arms.¹⁸⁵ It thus considered that “under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regards to proceedings before domestic courts”.¹⁸⁶ The Chamber holds this principle to mean that the prosecution and the defence must be equal before the Trial Chamber and that the it should give every assistance in the preparation of the case it is capable of when a request is made to this respect by either party. If it is unable to offer the necessary assistance, for example due to lack of cooperation from state authorities, this does not entail a violation of the rights of the accused. However, it is difficult to see why a more “liberal” interpretation should be necessary. As we have seen, the ECtHR too accepts that a court can only be expected to act within its capabilities. Furthermore, it has defined the principle of equality of arms as meaning that “each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent”.¹⁸⁷ Consequently there cannot be any violation of the principle of equality of arms when both sides are denied something that might have been useful.¹⁸⁸ As the prosecution arguably would have experienced the same lack of cooperation by domestic authorities, it should not be considered a violation of the right to equality of arms on this ground. This is not to say that lack of cooperation from state authorities does not give rise to any fair trial rights issues, but perhaps rather in respect of adequate time and facilities for the preparation of a defence.¹⁸⁹

The Appeals Chamber in *Tadić* also elaborated on the possibilities for the tribunal to redress any inequalities between the defence and the prosecutor.¹⁹⁰ It is a vital element to the principle of equality of

¹⁸⁵ *Prosecutor v. Tadić*, 15 July 1999, ICTY, IT-94-1-AR72, ‘Appeals Judgement’, paras. 51, 52.

¹⁸⁶ *Ibid.* para 53.

¹⁸⁷ *See supra* Chapter 4.1, pp. 29 *et seq.*

¹⁸⁸ *Ibid.*

¹⁸⁹ A. Zahar and G. Sluiter, *supra* note 43, p. 294.

¹⁹⁰ *Tadić Appeals Judgement*, *supra* note 185, paras. 53, 54.

arms that the chambers compensate the difficulties the defence may face, at least from a procedural perspective.¹⁹¹

The example of *Tadić* reveals that in the context of international criminal justice equality of arms is not only a matter of procedural but also of substantive equality between the parties. Regardless if the court *would* allow the defence to present certain evidence under the same conditions as the prosecution (and vice versa), influence from external factors might still make this impossible. In order to minimise these risks trial chambers can, and should, offer the accused any assistance within their power as necessary for the preparation of a defence. A difficult question is whether and to what extent equality of arms also requires substantive equality between the parties with regard to resources. May and Wierda have pointed out that in this respect, the Appeals Chamber's notion of a 'more liberal' interpretation of the principle of equality of arms might in fact serve as an expansion of the protection offered under the ECHR regime.¹⁹² According to *Tadić*, prosecution and defence must be equal before the Trial Chamber and the Trial Chamber should give *every assistance* in the preparation of the case it is capable of when either party makes a request to this respect. It appears natural that this should include also substantial equality. This can be contrasted however, with the approach of a Trial Chamber of the ICTR in *Kayishema and Ruzindana* to submissions by Counsel for Kayishema that a fair trial required full equality between

¹⁹¹ For example, as the defence lacks the power vested in the prosecution to issue requests for assistance that are binding on states, it may apply for such a request to the trial chamber. But in spite of the implication in the *Tadić* Appeals Judgment that trial chambers should be generous in offering assistance, this does not gain much support in subsequent practice. Both the RPE and case law contain strict admissibility criteria for the issuance of requests of assistance. These criteria apply for the prosecution as well as the defence, but the prosecution does not have the same need of the trial chamber's assistance in this respect; ICTY Statute, *supra* note 89, Article 18; ICTR Statute, *supra* note 89, Article 17; SCSL Statute, *supra* note 89, Article 15; Rule 54 of the ICTY RPE, *supra* note 154; ICTR RPE *supra* note 153, and; Special Court for Sierra Leone, *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, first adopted by the Plenary of Judges on 16 January 2002 as amended 27 May 2008 (hereinafter: the SCSL RPE), available at www.sc-sl.org/DOCUMENTS/ImportantCourtDocuments/tabid/200/Default.aspx (last visited on 29 December 2008). See further A. Zahar and G. Sluiter, *supra* note 43, p. 294.

¹⁹² R. May and M. Wierda, *International Criminal Evidence* (Transnational Publishers, United States of America, 2002), para. 8.23.

prosecution and defence in terms of means and facilities at their disposal.¹⁹³ The defence had requested that the Trial Chamber restrict the number of assistants the prosecution may use to the same number authorised for the defence. The Trial Chamber stated that “the rights of the accused to equality between the parties should not be confused with equality of means and resources” and that “the rights of the accused as laid down in Article 20 and in particular (2) and (4) (b) of the Statute shall in no way be interpreted to mean that the Defence is entitled to the same means and resources as available to the Prosecution.”¹⁹⁴ May and Wierda put it that “[a]lthough it is clear that the question of equality of arms cannot be reduced to an exact equation, there must, in the least, be an approximate equality in terms of resources.”¹⁹⁵ The alternative would be absurd. It is highly unlikely that the Statutes would provide an accused with a “right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”, purely as a procedural right yet at the same time allow the tribunals render the enjoyment of this right physically impossible due to a lack of resources.¹⁹⁶ Thus, a tribunal cannot allow any substantial inequality without calling into question the fairness of the trial. The issue is not a matter of mathematical comparison between defence and prosecution, but whether, in the light of means available to the prosecution, the accused has adequate resources to defend the particular case.¹⁹⁷ In other words, “[t]he accused’s right to have adequate time and facilities to prepare the defence should be ensured under conditions that do not place him at a disadvantage *vis-à-vis* the Prosecutor, but does not imply ensuring parity of

¹⁹³ *Prosecutor v. Kayishema and Ruzindana*, May 5, 1997, ICTR-95-1-T ‘Order on the Motion by the Defence Counsel for Application of Art. 20 (2) and 4 (b) of the Statute of the ICTR’.

¹⁹⁴ *Ibid.* See also *Prosecutor v. Kayishema and Ruzindana*, 21 May 1999, ICTR-95-1-A, ‘Judgement’, para. 60.

¹⁹⁵ R. May and M. Wierda (2002), *supra* note 192, para. 8.25.

¹⁹⁶ ICTY Statute, *supra* note 89, Art. 21.4(e), ICTR Statute, *supra* note 89, Art. 21.4(e), SCSL Statute, *supra* note 89, Art. 21.4(e).

¹⁹⁷ R. May and M. Wierda (2002), *supra* note 192, para. 8.25.

resources between the parties, such as the material equality of financial or personal resources.”¹⁹⁸

The principle of equality of arms has been invoked on various occasions by the prosecution based on the argument that there ought to be a sort of symmetry between the rights of the accused and the powers of the prosecution. While the court will be obligated under the statutes to preserve the prerogatives of the prosecution, it would not be true to suggest that there is a right of the prosecution that corresponds to the right of the accused to a hearing in full equality.¹⁹⁹ The principle of equality of arms is used to provide a safeguard for the accused, and not to any party to the proceedings.²⁰⁰ This attitude was endorsed early on by Judge Lal C. Vorah in a three-way split decision in *Tadić* where, after an extensive investigation into relevant case law sprung from the ICCPR and ECHR, she held that “the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution”.²⁰¹ Still the various chambers of the ICTY give an interpretation apparently inspired by the notion of a general symmetry between the rights of the two parties.²⁰² One such example is the passage granting a right to *each party* in the *Tadić* Appeals Chamber Judgement discussed above. As such, the position favoured by Judge Vorah has since been rejected by both Trial Chamber II and the Appeals Chamber of the ICTY.²⁰³ According to Trial Chamber II, such an approach “is tantamount to procedural inequality in favour of the Defence and against the Prosecution, and will result in

¹⁹⁸ R. Cryer, *et al.*, *International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007), p. 358; referring to *Prosecutor v. Kayishema and Ruzindana*, 1 June 2001, ICTR-95-1-A, ‘Appeals Judgement’, paras. 67–69, and *Prosecutor v. Kordic and Cerkez*, 17 December 2004, IT-95-14/2-A, ‘Judgement’ (Appeals Chamber), paras. 175, 176.

¹⁹⁹ S. Zappalà, *supra* note 94, p. 113; an ICTY Trial Chamber appeared to agree with this view in *Prosecutor v. Krajišnik and Plavsic*, 1 August 2001, ICTY, IT-00-39&40-PT, ‘Decision on Prosecution Motion for Clarification in respect of the Application or Rules 65-ter, 66(B) and 67(C)’ (Trial Chamber).

²⁰⁰ R. May and M. Wierda (1999), *supra* note 171, p. 757.

²⁰¹ *Prosecutor v. Tadić*, 27 November 1996, ICTY, IT-94-1, ‘Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements’ (Trial Chamber).

²⁰² S. Zappalà, *supra* note 94, p. 113.

²⁰³ M. A. Fairlie, ‘Rulemaking from the Bench: A Place for Minimalism at the ICTY’, 39 *Texas International Law Journal* (Winter 2004) p. 281.

inequality of arms”.²⁰⁴ The Appeals Chamber has noted that the “application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the [international] community”.²⁰⁵ It did however go on to add: “this principle of equality does not affect the fundamental protections given by the general law or Statute to the accused.”²⁰⁶

While it is true that at face value, applying equality of arms in favour of the prosecution does not necessarily affect the right of the defence to equality of arms, it is nonetheless problematic that a right afforded to the accused as compensation for the prosecution’s superior capacity is then applied as a right of the prosecution as compensation for the compensation.

In any case, these decisions highlight another inconsistency with international human rights law. International human rights law requires that the process show a certain level of predictability to be considered as fair. There is a right of the defence to know which rules will be applied to the proceedings. In international criminal law, little effort was made initially to provide precise procedural rules from the start. Instead it was left for the judges to interpret the Statutes and the RPE as the trials progress. In addition, the judges themselves are responsible for making changes in the RPE, thus establishing the rules they themselves are set to apply. This does not promote predictability and appears wholly inconsistent with the stance taken by the ECtHR in *Coëme v. Belgium* that “the principle that the rules of criminal procedure must be laid down by law is a general principle of law”.²⁰⁷ As such, the defence has been left to guess as to the applicable procedure, as it was not clear from the start if, for instance, the right of the accused to equality of arms would be applied as a right of the prosecution.

²⁰⁴ *Prosecutor v. Delalic and Delic*, 4 February 1998, ICTY, IT-96-21-T, ‘Decision on the Prosecutor’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence’ (Trial Chamber), para. 49.

²⁰⁵ *Prosecutor v. Aleksovski*, 16 February 1999, ICTY, 95-14-1-AR73, ‘Decision on Prosecutor’s Appeal on Admissibility of Evidence’ (Appeals Chamber), para. 25.

²⁰⁶ *Ibid.*

²⁰⁷ *Coëme v. Belgium*, *supra* note 38, para. 102

4.2.1 Adequate Time and Facilities

An accused before the international criminal courts has a right to such facilities as are necessary in the preparation of a defence, irrespective of what facilities are at the disposal of the prosecution. This right to adequate time and facilities includes procedural aspects such as the right to know the nature of the charges against you, and more substantial rights such as access to any exculpatory evidence that the prosecution might have in its possession. It also includes a right to adequate time and resources to be able to prepare a defence as discussed above. Ensuring that an accused is provided with adequate material and financial facilities is primarily the responsibility of the Registrar. At the SCSL this is primarily to be achieved through the establishment and maintenance of the Defence Office.²⁰⁸ However, the Trial Chamber and Appeals Chamber shall ensure that a trial is fair and expeditious and ultimately, responsibility will rest with these institutions.²⁰⁹ On this basis, trial chambers have an inherent jurisdiction, and indeed a duty, to interfere whenever circumstances are such that the right of the accused to a fair trial is at risk.

At the SCSL, the special circumstances under which that court operates has made access to sufficient resources of decisive importance to the conduction of successful trials. Accordingly, requests for increased funds by the defence have not been infrequent and the Judges have had the opportunity to decide on these issues. In the *Sesay* case, the Trial Chamber did indeed grant a defence request for logistical resources.²¹⁰ The defence had argued that it had not been provided with sufficient facilities to be able to prepare a defence in view of the size and complexity of the case. The Sesay Defence Team, at this time consisting of 2 Counsel, 3 legal assistants and one national investigator, was faced with the task of trying to locate and re-interview approximately 250 out of up to 300 persons identified as

²⁰⁸ SCSL RPE, Rules 33 (A) and 45-45bis.

²⁰⁹ *Ibid.* Rule 26 bis.

²¹⁰ *Prosecutor v. Sesay et al.*, 24 January 2007, SCSL-04-15-T, 'Decision on Sesay Defence Application I – Logistical Resources' (Trial Chamber I) (hereinafter: Logistical Resources Decision).

potential witnesses scattered all across Sierra Leone as well as West African countries and in Asia, in order to assess who was to be called to give evidence.²¹¹ To this end, it had at its disposal one office with sufficient desk space for three persons, one computer connected to the court's internal network and to the Internet.²¹² In practice the team had to share one email account as it was not possible to log on to a different account while the computer was in use without restarting the computer and logging on as a different user. The team had no vehicle for its exclusive use within Sierra Leone.²¹³ The defence contrasted this with the situation of the prosecution which it argued, in having to handle a case similarly involving over 300 witnesses and a core list of about 100 witnesses, at any given time had access to a minimum of five four wheel drive vehicles. The prosecution further had a team of 25 investigators divided over three cases and all Counsel and legal assistants for the prosecution had their own networked computer and desk.²¹⁴ Having satisfied itself that an intervention by the Trial Chamber would serve to ensure that the fundamental rights of the accused Sesay were protected by the provision of adequate time and facilities for the preparation and commencement of its defence case, the Trial Chamber partially granted the Application and ordered that the defence be provided with:

²¹¹ *Prosecutor v. Sesay*, 9 January 2007, SCSL-04-15-T, 'Application Seeking Adequate Resources Pursuant to Rule 45 and/or Pursuant to the Registrar's Duty to Ensure Equality of Arms (Application I – Logistical Resources)' (Sesay Defence Application). (hereinafter: the Logistical Resources Application), para. 7.

²¹² For some time, due to the lack of desk space, Co-Counsel for the First Accused had to resort to working in the court canteen "the Special Fork", where members of the prosecution as well as other defence teams have their lunch, *ibid*.

²¹³ At this point there had already been some improvements made as compared to the original working conditions of defence personnel. HRW expressed concerns in a report that "the extent of disproportionate allocation of [...] resources at the Special Court could contribute to a perception that trials are unfair and that equality of arms is not upheld." They described the conditions observing that: "As of March 2004, nine defense teams, including more than twenty defense attorneys, were provided with only three rooms in which to work, which limited their ability to conduct confidential meetings. [...] storage and access to fax and photocopiers remain ongoing problems, and teams must share limited access to computers and vehicles. This is contrasted with resources available to the OTP. [HRW] was told that OTP office space consists of five containers, each OTP staff member has access to a computer, and storage includes filing cabinets, along with a separate location for storing evidence. OTP staff also had availability to vehicles during crucial stages of investigations." HRW 2004 Report, *supra* note 101, pp. 6, 7.

²¹⁴ Logistical Resources Application, *supra* note 211, paras. 9, 10.

“i. A second office, at a minimum of the same size of the same office provided [approximately 15 feet by 7 feet]; ii. A second networked computer, to be located in the said second office; iii. A vehicle, to be used solely for the purpose of witness-related trips and limitedly for the remainder of the presentation of the *Sesay* Defence case; and, finally, iv. A witness management officer dedicated to finding and locating witnesses.”²¹⁵

The Chamber did not grant the defence request for additional funding for an international investigator. It noted in particular the undertaking by the Principle Defender to address the issue.²¹⁶

Parallel to the application for logistical resources, a decision by the Registrar in March 2006 denying defence requests for additional resources intended to fund, among other things, an additional counsel to help deal with the workload, had prompted the *Sesay* Defence to apply for judicial review. The Trial Chamber rejected the application because the statutory remedy of arbitration had not been exhausted.²¹⁷ However, after arbitration agreement had been reached, failure in negotiating its implementation landed the same issue again before the same chamber in September 2007.²¹⁸ The Arbitrator had found the *Sesay* case to be “sufficiently serious, complex and sizeable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract”.²¹⁹ While a consensus was reached on a number of points including an increase in the amount of funding available, disagreement persisted as to whether the allocation of additional funds for the hiring of an additional counsel until the

²¹⁵ Logistical Resources Decision, *supra* note 210, pp. 4, 5.

²¹⁶ *Ibid.* p. 5.

²¹⁷ *Prosecutor v. Sesay et al.*, 15 November 2006, SCSL-04-15-T, ‘Decision on Defence Application for Review of the Registrar’s Decision on the *Sesay* Defence “Exceptional Circumstances” Motion’ (Trial Chamber I) (hereinafter: the Exceptional Circumstances Decision), p. 6.

²¹⁸ *Prosecutor v. Sesay et al.*, 12 February 2008, SCSL-04-15-T, ‘Decision on the *Sesay* Defence Team’s Application for Judicial Review of the Registrar’s Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Agreement of the 26th of April 2007’ (Trial Chamber I) (hereinafter: the Judicial Review Decision).

²¹⁹ ‘Decision of the Arbitrator in the matter of an Arbitration Pursuant to Article 9 of the Legal Service Contract and Article 22 of the Directive on the Assignment of Counsel and in the Matter of an Arbitration between Wayne Jordash, Assigned and Lead Counsel for Issa Sesay (Claimant) and the Principal Defender of the Special Court for Sierra Leone (1st Respondent) and the Registrar of the Special Court for Sierra Leone (2nd Respondent)’ (hereinafter: the Arbitration Decision), 26 April 2007, para. 7.16; *as quoted in* Judicial Review Decision, *ibid.* note 55, p. 3.

end of the defence case was necessary to implement the Arbitration Decision, or if a right to tap into the original budget for this purpose would be sufficient.²²⁰ The defence had requested an expedited decision to be able to instruct possible additional Counsel at the earliest opportunity but the Chamber does not appear to have been swayed by this request.²²¹ Instead, a decision on this motion would come on the 12th of February 2008, little over a month before the projected end of the defence case.²²² Again, the defence had relied on the great gap between the resources available to the prosecution and the defence. In addition, it submitted that the burden of the prosecution decreased over time. Yet as the other cases before the Court reached their end, the prosecution budget remained at the same high level, meaning more and more resources could be diverted towards the RUF trial. Conversely, the defence burden would only increase as its case started and witnesses poured into Freetown.²²³ It was also submitted that the budget of the Sesay Defence Team should, at a minimum, match that allocated by the Registrar to the Taylor Defence Team, which it argued had a smaller and less complex case to handle and thus what is reasonable resources for a smaller case (*Taylor*) ought, at a minimum, be considered reasonable also for the larger case (*Sesay*).²²⁴ The Trial Chamber held that the principle of equality of arms applies more to the procedural balance between the parties to the same case with a view to the fundamental fairness to all the parties in a case, the prosecution and the defence alike, so that no party, within the context of its own case, is disadvantaged. It further stated: “In this regard, it is our considered view that the doctrine of equality of arms applies, and should only apply to Parties in the same case and in the same proceedings. It cannot be [...] that the arms in one case and scenario should be provided in a completely different case and situation such as Sesay’s.”²²⁵ Nonetheless,

²²⁰ Judicial Review Decision *ibid.* para. 6.

²²¹ *Prosecutor v. Sesay*, 7 September 2007, SCSL-2004-15-T, ‘Addendum to 5th September 2007 Sesay Application for Judicial Review’ (Sesay Defence Application), p. 2.

²²² The Sesay Defence closed its case on 13 March 2008, www.scsl.org/CASES/RevolutionaryUnitedFrontTrialRUF/tabid/105/Default.aspx (last visited 10 December 2008).

²²³ Judicial Review Decision, *supra* note 218.

²²⁴ *Ibid.*

²²⁵ *Ibid.* para. 34.

the Chamber did conduct a comparison between the two cases and found that the defence had failed to show that the Sesay case was more complex.²²⁶ With regards to the resources available to the prosecution, the Chamber considered that taken together, the defence teams of the three Accused Persons in the trial were represented by a good number of lawyers at any given time including some Legal Assistants and/or interns, just as the prosecution was at any given time, and that the prosecution was proceeding jointly against these defence teams. The allegations of a breach against the principle of equality of arms was therefore found to be without any merit.²²⁷

“In addition, the Chamber [reaffirms] the principle that the prosecutor bears the burden of proving beyond a reasonable doubt, every count and every essential element of those counts, while the Defence only needs to raise reasonable doubt in order to secure the acquittal of the Accused. This reality, we consider, might justify the attribution of more resources and more time to enable the Prosecution to accomplish this very heavy and delicate task.”²²⁸

Referring to its previous case law and to the case law of the ICTY, the Chamber argued that the prosecution has the burden of telling an entire story, of putting together a coherent narrative and providing every necessary element of the crimes charged beyond a reasonable doubt. By contrast, defence strategy often focuses on poking specifically targeted holes in the prosecution’s case, an endeavour which may require less time and fewer witnesses.

This line of argument is often repeated by the Trial Chamber, yet it is not entirely convincing.²²⁹ It is certainly true that the prosecution having superior means at its disposal will not in itself violate the principle of equality of arms. However, this does not mean that those means are irrelevant in the assessment of time and facilities provided to the defence.

²²⁶ *Ibid.* paras. 22-31.

²²⁷ *Ibid.* para. 38.

²²⁸ *Ibid.* para. 39.

²²⁹ See e.g., *Prosecutor v. Sesay et al.*, 5 March 2008, SCSL-04-15-T, ‘Written Decision on Sesay Application for a Week’s Adjournment – Insufficient Resources in Violation of Article 17(4)(b) of the Statute of the Special Court’ (Trial Chamber I) (hereinafter: the Week’s Adjournment Decision), paras. 61, 62 with further references; *Prosecutor v. Brima, Kamara and Kanu* (hereinafter: *Prosecutor v. Brima et al.*) 6 May 2004, SCSL-04-16-PT, ‘Decision on Prosecution Request for Leave to Amend the Indictment’ (Trial Chamber I), paras. 29-31, 47; *Prosecutor v. Norman, Fofana and Kondewa* (hereinafter: *Prosecutor v. Norman et al.*), 2 March 2006, SCSL-04-14-T, ‘Order to the First Accused to Re-file Summaries of Witness Testimonies’ (Trial Chamber I), p. 3.

Moreover, the right of the accused to be presumed innocent until proven guilty exists precisely because of the superior resources of the prosecutor.²³⁰ In other words, the right to be presumed innocent exists as a form of compensation for the superior resources at the hands of the prosecuting authorities and should not be used as an argument against the provision of adequate facilities for the preparation of a defence. It is essential to the fairness of the trial that it is possible for the defence to investigate and it must be possible to interview potential witnesses and to prepare them for trial.²³¹ If this possibility, which is readily available to the prosecution, is hampered for the defence as a result of inadequate time and facilities, including financial or logistical resources, this would constitute a violation of the principle of equality of arms. Therefore, it is unfortunate that the Trial Chamber in its decision appears to have focused its attention almost entirely on the difficulties facing the Prosecution and the Accused Charles Taylor respectively. The analysis of the size and complexity of the *Sesay* case appears to be limited to the observation, deigned to rebut the defence claims, that it is not necessarily the number of Counts on the indictment or the extensive number of witnesses called that determines this.²³² Further, the Chamber observed that it is not the quantity but the quality of witnesses that is important in establishing a case and that while the defence originally had indicated it was planning to call 149 “core” witnesses this number had recently been significantly reduced. It is difficult to see why it is important

²³⁰ In the words of the European Commission on Human Rights: “[I]n any criminal proceedings ... the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by ... considerable technical resources and means of coercion ... It is ... to establish ... equality that the ‘rights of the defence’ ... have been instituted”. *Guy Jaspers v. Belgium*, 15 October 1980, European Commission Decision (Plenary), Application no. 8404/78, para. 55; *see further*: S. Trechsel, *supra* note 23, p. 223.

²³¹ S. Trechsel, *supra* note 23, p. 227.

²³² Judicial Review Decision *supra* note 218, para 23; In this decision the SCSL appears to have taken a different approach to the issue of complexity of the proceedings from that of the ICTR Appeals Chamber. In *Mugiraneza* the ICTR Appeals Chamber, in listing factors to be considered in the context of the right to a trial within reasonable time, described the complexity of the proceedings as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law, *Prosecutor v. Mugiraneza* 27 February 2004 ICTR-99-50-AR73, ‘Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief’ (hereinafter: the *Mugiraneza* Interlocutory Appeal Decision).

that the number of witnesses has been recently reduced, as the Chamber does not consider the number of witnesses significant in the first place. Besides this reduction however, there is little guidance as to how the determination was reached that the resources made available to the defence were adequate. Instead, the Chamber enters into a discussion on whether or not the Registrar's offer met the requirements of the Arbitration Decision. Satisfied that this was the case, it found that:

“[T]he Registrar was exercising his discretion in his capacity as an Administrative Official in deciding that this amount was adequate to meet up with the Sesay Defence aspirations and application. In this regard, it is our view that the Courts will not interfere with the exercise of discretion by an administrative official except where it is so unreasonable that no rational authority could have arrived at a similar conclusion.”²³³

In light of all the circumstances, the Chamber found that the offer of the Registrar is not only fair, but also just and reasonable and it dismissed the motion in its entirety. The reasoning behind this finding is however somewhat unsettling. What the Chamber appears to say is that because the Registrar is acting in his capacity as an administrative official in interpreting a contractual agreement with the defence, the Chamber will not base its decision whether or not to intervene on an assessment of the fairness of the proceedings. Instead, the test is whether the Registrar's interpretation of the contract is so unreasonable that no rational authority could have arrived at a similar conclusion. This is tantamount to suggesting that the resources made available to the defence have to be exceptionally unfair for the Trial Chamber to act. A trial that is only somewhat unfair will not merit judicial intervention.

The decision needs to be read in conjunction with the parallel ‘Week’s Adjournment Decision’ which will be discussed below in chapter 6.2 on the right to be tried without undue delay.²³⁴ For now it is interesting to note that the reasoning behind the defence application was for additional resources so as to ensure that it will have sufficient witnesses ready to testify without any interruptions in the proceedings.²³⁵

²³³ Judicial Review Decision, *supra* note 218, para. 46.

²³⁴ Week’s Adjournment Decision, *supra* note 229.

²³⁵ See *eg.*, *Prosecutor v. Sesay et al.*, 5 September 2007, SCSL-04-15-T, ‘Application for Judicial Review of Registry’s Refusal to Provide Additional Funds for an Additional

It is too early to tell what interpretation the ICC will give the principle of equality of arms but some criticism has already been made against its procedure based on the design of the Rome Statute. Article 99(4) of the Statute concerns the conduct of on-site investigations by the ICC Prosecutor. This is an important procedural advantage over the defendant, yet the competent chamber will have no legal possibility to compel states to cooperate with the defence investigations as the provision is explicitly confined to the prosecutor. This means that unlike the situation in *Tadić*, here it is the Statute itself that places the defence at a substantive disadvantage *vis-à-vis* the prosecution.²³⁶ However, a significant improvement on the position of the defence is the obligation on the prosecution to investigate incriminating and exonerating circumstances equally.²³⁷

4.2.2 Specificity of the Indictment

An essential facility in the preparation of a successful defence is the right to be informed promptly and in detail of the nature and cause of the charges made against the accused. This is set out as a separate right under the Statutes followed by the right to have adequate time and facilities for the preparation of the defence.²³⁸ This right is primarily satisfied by the issuance of the indictment, which generally sets off the prosecution of an individual. Therefore, the right of the accused to know the charges made against him or her is met with a corresponding obligation on the part of the prosecutor to “prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute”.²³⁹ According to Article 19 of the ICTR Statute, the Trial Chamber has an obligation to guarantee these rights. The obligation of the prosecutor

Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007 – SCSL-04-15-T-817’ (Sesay Defence Application) (hereinafter: the Sesay Judicial Review Application).

²³⁶ A. Zahar and G. Sluiter, *supra* note 43, p. 295.

²³⁷ Rome Statute, *supra* note 50, Article 54 (a)

²³⁸ ICTR Statute, *supra* note 89, Article 20.4 (a) and (b); ICTY Statute, *supra* note 89, Article 21.4 (a) and (b).

²³⁹ ICTR Statute, *ibid.* Article 17(4).

is to clearly state in the indictment which crimes under the Statute the accused is alleged to have committed. If an accused is to be able to prepare his defence the indictment must include facts describing when, where and how the accused allegedly executed the acts constituting the crime or crimes charged. In general, material facts include the names of victims, the date and location of the alleged crime, the means by which the crime was committed and especially the nature of the participation of the accused in the commission of crimes.²⁴⁰ Because the same crime may be committed under different circumstances and every crime is different, what is a material fact should be decided on a case-by-case basis. What constitutes a material fact to one case may not necessarily be so in another case.

Knowing the particular facts will enable the accused to focus investigations on matters that will be relevant to the trial and, should he so wish, on attempting to disprove the prosecution case. A fully specified indictment will also enable the accused to enter a better informed plea of guilt or innocence prior to the commencement of the trial. It could also save time by early on identifying areas where there might not be any dispute. The specificity is extremely important to inform the defence of the case it will meet in court. If the prosecutor should lead evidence on facts that were not included in the indictment, then the defence will face “surprises”, as it will have had no indication that those facts would be part of the prosecution case. However, due to the sheer scale of many of the crimes before the international courts there are inherent difficulties in providing particulars in all cases. An ICTY Trial Chambers has found that “[t]he massive scale of the crimes with which the International Tribunal has to deal makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes.”²⁴¹ This gave rise to the sheer scale-doctrine, developed in *Kupreškić*²⁴² and

²⁴⁰ *Prosecutor v. Ntagerura et al.*, 25 February 2004, ICTR-99-46-T, ‘Judgment and Sentence’, para. 32

²⁴¹ *Prosecutor v. Kvočka et al.*, 12 April 1999, ICTY, IT-98-30-1, ‘Decision on Defence Preliminary Motions on the Form of the Indictment’ (Appeals Chamber), para. 17.

²⁴² *Prosecutor v. Kupreškić et al.*, 23 October 2001, ICTY, IT-95-16-A, ‘Appeal Judgement’.

further developed in *Ntakirutimana*.²⁴³ According to this doctrine, in cases where the accused is alleged to have participated in the killing of hundreds of men as a member of an execution squad or to have participated as a member of a military force in an extensive number of attacks on civilians that took place over a prolonged period of time and resulted in a large number of killings and forced removals, the degree of specificity otherwise required for crimes committed against a known victim will not have to be met.²⁴⁴ As this information would be very valuable to the accused in the preparation of a defence, the prosecutor is still obliged to offer such information wherever it is in a position to do so. The prosecutor will not be allowed to claim ‘opposites’. This means that where the accused is charged with a crime involving a specific victim or a specific location, the prosecutor cannot simultaneously claim that it was impracticable to include the name of the victim or location in the indictment. In other words, if the prosecutor withholds information about for instance the name of a victim in the indictment and then produces this information for the first time during trial, then he or she will not be able to argue that it would have been impracticable to include the information in the indictment. If the prosecution had those particulars in its possession, then they should have been included in the indictment and in any case before the commencement of the trial. The amount of detail that is required varies also depending on the alleged form of criminal act of the accused. If an accused is alleged to have personally committed the criminal acts, the material facts such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail.²⁴⁵ If on the other hand the allegations concern responsibility for the acts committed by persons under the accused’s authority, the degree of specificity required will be lower than in cases where the responsibility is alleged for crimes committed by the accused himself. The obligation of the prosecution to specify still remains however. In the *Ntagerura* judgement, the Trial Chamber emphasised that,

²⁴³ *Prosecutor v. Ntakirutimana*, 21 February 2003, ICTR-96-10 and ICTR-96-17-T, ‘Judgement and Sentence’.

²⁴⁴ *Kupreškić* Appeal Judgement, *supra* note 242, para. 90.

²⁴⁵ *Prosecutor v. Ntagerura et al.*, ‘Judgement and Sentence’, *supra* note 243, para. 32.

“the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged subordinates or accomplices. Thus, pleading accomplice or superior responsibility does not obviate the prosecution’s obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.”²⁴⁶

In general one can say that the closer the accused is alleged to have been involved in the commission of the crime charged, the stricter the specificity requirement should be applied to the indictment.²⁴⁷

A defective indictment will not necessarily mean that the prosecution fails to plead its case successfully. If the indictment is not specific enough the prosecutor may cure the defect by providing the accused with “*timely, clear and consistent information* detailing the factual basis underpinning the charges against him or her.”²⁴⁸ Information may be communicated to the accused in the prosecution pre-trial brief, during disclosure of evidence or throughout the proceedings at trial.²⁴⁹ Whether it is possible to cure the defects will depend on the timing of the communication of the new information, the importance of the information to the accused’s ability to prepare his defence and the impact of the newly disclosed material on the prosecution case.²⁵⁰ The Trial Chamber then has to decide whether to adjourn the proceedings to offer the defence additional time or, whether to order the prosecution to amend the indictment. Considering the importance of the ability of the accused to prepare his or her own defence to the fairness of the proceedings, the best option may be to exclude new and material evidence if it is presented after the trial has already started.

²⁴⁶ *Ibid.* para. 35.

²⁴⁷ *Prosecutor v. Krnojelac*, 11 February 2000, ICTY, IT-97-25-PT, ‘Decision on Preliminary Motion on the Form of Amended Indictment’ (Trial Chamber II), para. 89.

²⁴⁸ *Kupreškić* Appeal Judgement, *supra* note 242, para. 114 (emphasis added).

²⁴⁹ *Prosecutor v. Niyitegeka*, 9 July 2004, ICTR-96-14-A, Appeal Judgement, para. 197.

²⁵⁰ *Ibid.*

5 The Right to be Tried by an Independent and Impartial Tribunal

5.1 International Human Rights Law

The right to be tried by an independent and impartial tribunal established by law is laid out in Article 10 of the UDHR and appears with almost identical wording in the ICCPR, as well as the regional treaties.²⁵¹ It is also restated in the ‘UN Basic Principles’.²⁵² This right is of fundamental importance to the right to a fair trial and its importance is reflected in the decisions by the ECtHR, where this is always the first element to be examined under Article 6. If the Court finds that a tribunal does not meet the standards set out in Article 6, it will not make any further examination of the proceedings.²⁵³ If the tribunal is not independent and impartial, the proceedings will never be fair and there is no reason to examine whether such unfair proceedings lived up to other formal requirements.²⁵⁴ In its General Comment No. 32 the HRC declared that this right cannot be limited and that any criminal conviction by a body that does not live up to the requirements under the ICCPR, Article 14

²⁵¹ UDHR, Article 10; ICCPR, Article 14; ECHR, Article 6.

²⁵² UN Basic Principles, *supra* note 52.

²⁵³ S. Trechsel, *supra* note 23, p. 47.

²⁵⁴ See e.g., *Demicoli v. Malta*, 27 August 1991, ECtHR, no. 33/1990/224/288, para. 43; *Findlay v. United Kingdom*, 25 February 1997, ECtHR, no. 110/1995/616/706, para. 80; *Incal v. Turkey*, 9 June 1998, ECtHR, no. 41/1997/825/1031, para. 74; *Özertikoğlu v. Turkey*, 22 January 2004, ECtHR, Application no. 48438/99, para. 25; *Çiraklar v. Turkey*, 28 October 1998, ECtHR, no. 70/1997/854/1061, paras. 44, 45 *et seq.* One important exception to this rule is *Öcalan v. Turkey* where the court deals with many other points in detail. There is a strong argument for addressing the issue of excessive length of the proceedings in the context of compensation under Article 41, *Öcalan v. Turkey (GC)*, 12 May 2005, ECtHR, Application no. 46221/99; see further S. Trechsel, *supra* note 23, p. 47.

is incompatible with this provision.²⁵⁵ It considers this to be an absolute right and not subject to any exceptions.²⁵⁶

5.1.1 The Requirements for an Independent and Impartial Tribunal Established by Law

The name of a tribunal is not important, rather whether a body lives up to the requirements set out in the Articles.²⁵⁷ The ECtHR has accepted quite varying bodies as ‘tribunals’ under the Convention.²⁵⁸ It is also acceptable for a tribunal to serve other non-judicial purposes as well, provided it “enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”.²⁵⁹

According to the ECtHR, the first element that should be examined is whether the tribunal was established by law. In practice, however, the Court has often mingled this issue with that of impartiality.²⁶⁰ The phrase ‘competent’ which appears in the ICCPR but not in the ECHR is simply a more specific definition of establishment by law.²⁶¹ The scope of both of these criteria is to ensure that the jurisdictional power of a tribunal is determined generally and is independent of a given case.²⁶² The term ‘law’ is to be interpreted in the strict sense of an act of parliament or a legal norm under common law and must be accessible to all persons subject to it.²⁶³

Independence and impartiality are difficult to distinguish from one another in practice. The requirement that a tribunal must be independent

²⁵⁵ General Comment No. 32, *supra* note 3, para. 18.

²⁵⁶ *González del Río v. Peru*, HRC, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987 (1992).

²⁵⁷ General Comment No. 32, *supra* note 3, para. 18; S. Trechsel, *supra* note 23, p. 48.

²⁵⁸ E.g. ‘Regional commission’ in *Ringeisen v. Austria*, 16 July 1971, ECtHR, Application no. 2614/65, para. 95 or; ‘the Council of the Ordre’ in *H. v. Belgium*, 30 November 1987, ECtHR, 1/1986/99/147; *see also* S. Trechsel, *supra* note 23, p. 47.

²⁵⁹ General Comment No. 32, *supra* note 3, para. 18; *see also* *H. v. Belgium*, *Ibid.* para. 50.

²⁶⁰ S. Trechsel, *supra* note 23, p. 49; *see e.g.*, *Rotaru v. Romania (GC)*, 4 May 2000, ECtHR, Application no. 28341/95, para. 62 *and*; *Oberschlick v. Austria*, 23 May 1991, ECtHR, no. 6/1990/197/257, paras. 49 *et seq.*

²⁶¹ M. Nowak, *supra* note 86, p. 319, para. 24.

²⁶² *Ibid.*

²⁶³ *Ibid.*; S. Trechsel, *supra* note 23, p. 50.

means that it should be free from influence from other branches of government.²⁶⁴ The provision mainly targets the executive and legislative, but a tribunal must also be free from influence from other state authorities, for example a higher judicial authority. While a court may certainly be bound by the precedent of a higher instance, it would not be acceptable if the higher court could order a court on how it should rule in a specific case.²⁶⁵ The HRC stated in *Bahamonde v. Equatorial Guinea* “that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal within the meaning of article 14, paragraph 1 of the Covenant”.²⁶⁶

To guarantee judicial independence, judges must be appointed or elected for a relatively long period of time up to at least several years. They may also not be subject to or dependant on other state organs in the exercise of their office.²⁶⁷ According to the ‘UN Basic Principles’, judicial independence must be established in the Constitution or in the law of the country and conditions of service shall be adequately secured by law.²⁶⁸ Furthermore, judges shall have guaranteed tenure for their full stay in office and shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.²⁶⁹ A charge or complaint against a judge shall be processed expeditiously and fairly under an appropriate procedure and the judge has a right to a fair hearing.²⁷⁰

The requirement of impartiality relates to the specific case at issue and has two aspects. First, it means that the judges must not allow themselves to be influenced by personal bias against either party.²⁷¹ The

²⁶⁴ General Comment No. 32, *supra* note 3, para. 18; M. Nowak, *supra* note 86, p. 319, para. 25.

²⁶⁵ S. Trechsel, *supra* note 23, pp. 49, 50.

²⁶⁶ *Oló Bahamonde v. Equatorial Guinea*, HRC, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991 (1993), para. 9.4.

²⁶⁷ M. Nowak, *supra* note 86, p. 320, para. 25.

²⁶⁸ UN Basic Principles, *supra* note 52, paras. 1, 11.

²⁶⁹ *Ibid.* paras. 12 and 18.

²⁷⁰ *Ibid.* para. 17.

²⁷¹ General Comment No. 32, *supra* note 3, para. 21; S. Trechsel, *supra* note 23, p. 49.

judge is also required not to let himself be excessively guided by emotions or to be misled by media justice.²⁷² The HRC has put it that: “‘Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.²⁷³ As it is impossible to prove what thoughts an individual judge may have as to the guilt or innocence of the accused, it will be his or her behaviour that determines whether or not he or she can be considered biased. Specifically, the issue is whether the behaviour of a judge causes him or her to appear to be biased. This brings us to the second aspect of the requirement: the tribunal must also *appear* to be impartial to a reasonable observer.²⁷⁴ The ECtHR has made a distinction between two different aspects of impartiality, labelling them the ‘subjective’ and the ‘objective’ test. Of these tests, “the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.”²⁷⁵ While the names given to these two tests by the Court are somewhat confusing, the distinction helps identify the issues at hand.

The central issue is the requirement that the judge have an impartial state of mind. It is doubtful whether this can ever be proven. Further investigation is likely to be required. This brings us to the question of appearance or what the ECtHR calls the objective test: Can the judge be regarded as biased in the eyes of a reasonable observer?²⁷⁶ This is based on the notion that justice must not only be done, but it should “manifestly and undoubtedly be seen to be done”.²⁷⁷ The ECtHR has often said that “appearances may be of a certain importance”.²⁷⁸ Trechsel makes a

²⁷² M. Nowak, *supra* note 86, p. 321, para. 26.

²⁷³ *Karttunen v. Finland*, HRC, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992), para. 7.2; *see also* General Comment No. 32, *supra* note 3, para. 21, which refers to this decision.

²⁷⁴ General Comment No. 32, *supra* note 3, para. 21.

²⁷⁵ *Incal v. Turkey*, para. 65, *supra* note 254.

²⁷⁶ *Belilos v. Switzerland*, 29 April 1988, ECtHR, no. 20/1986/118/167, para. 67; HRC General Comment No. 32, para. 21; S. Trechsel, *supra* note 23, p. 93.

²⁷⁷ *R. v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259.

²⁷⁸ *See e.g., Hauschildt v. Denmark*, 24 May 1989, ECtHR, no. 11/1987/134/188, para. 48.

compelling argument that appearances are in fact of fundamental importance. A trial before a tribunal which appears to be biased will be unfair in the meaning of Article 6 of the ECHR, regardless of whether the judges are in fact impartial or not. If, on the other hand, a judge appears to be impartial, but he really is not, there will be no way of knowing and the proceedings will be fair until such a time that he reveals his bias, in which case the appearance will vanish as well.²⁷⁹

5.2 International Criminal Law

The fair trial provisions in the Statutes of the international criminal courts, which are otherwise modelled on Article 14 of the ICCPR, omit the right of the accused under the latter to be tried before “a competent, independent and impartial tribunal established by law”.²⁸⁰ There is no explanation given why this provision was excluded in the Secretary General’s reports on the two ad hoc tribunals, although it is understandable that the structure and establishment of the tribunals as expressed in the Statutes was deemed to fulfil these conditions. The requirement that a tribunal be established by law does however pose some obvious difficulties in an international criminal setting. As has been observed above, international human rights law requires this requisite to be interpreted in the literal sense of an act of parliament or a legal norm under common law, which must be accessible to all persons subject to it.²⁸¹ As there is no obvious parallel to this on the international level this requirement appears impossible to fulfil. This has made for an obvious target for challenges of the tribunals’ jurisdiction. In considering a challenge to this respect in *Tadić*, the ICTY Appeals Chamber found that the Tribunal fulfils the requirement of establishment by law because it offers all the protections associated with the rule of law.²⁸² While

²⁷⁹ S. Trechsel, *supra* note 23, p. 63.

²⁸⁰ See e.g., ICTY Statute *supra* note 89, Articles 21, 13; SCSL Statute, *supra* note 89, Article 17.

²⁸¹ *Supra* p. 64; M. Nowak, *supra* note 86, p. 319; S. Trechsel, *supra* note 23, p. 50.

²⁸² *Prosecutor v. Tadić*, 2 October 1995, ICTY, IT-94-1-AR72, ‘Appeals Chamber Decision on Defence Motion of Lack of Jurisdiction’ (hereinafter: the *Tadić* Jurisdiction Appeals Judgement), para. 45.

this is obviously inconsistent with the literal interpretation offered under international human rights law, it seems likely that strict adherence to that body of law in this case would have had unacceptable results from the perspective of international justice. Still, one might ask if the *Tadić* decision offers sufficient protection for the values underlying the requirement of establishment by law, that is, to ensure that the jurisdictional power of a tribunal is determined generally and is independent of a given case.²⁸³

5.2.1 Judicial Independence

The provisions on the independence and impartiality of the judges in the Statutes of the ICTY and ICTR as well as the SCSL and ICC are not designed to attribute rights to the accused.²⁸⁴ It may be argued however, that a *de facto* protection is offered as a structural guarantee through the provision of norms that require independence and equality in the appointment of judges.²⁸⁵ The ICTY Statute Article 12.1 says that “[t]he Chambers shall be composed of sixteen independent judges... and a maximum at any time of twelve *ad litem* independent judges...” Article 13 further specifies that judges “shall be persons of high moral character, impartiality and integrity”. Essentially the same language can be found in the Statutes of the SCSL and the ICTR.²⁸⁶ Even though there is no express provision conferring a right on the accused to be tried by an impartial and independent tribunal, there is thus a guarantee that the *judges* shall be independent and impartial.

The *ad hoc* tribunals as institutions enjoy a great deal of independence although it is naturally limited by the fact that the Security Council created them. However the ICTY, in its decision on jurisdiction of 2 October 1995 in *Tadić*, showed great independence in that it affirmed a

²⁸³ See e.g., M. Nowak, *supra* note 86.

²⁸⁴ The Statute of the ICC does provide a right with regards to impartiality but not independence; Rome Statute, *supra* note 50, Articles 40, 67.

²⁸⁵ S. Zappalà, *supra* note 94, p. 101.

²⁸⁶ SCSL Statute, *supra* note 89, Articles 12, 13; ICTR Statute, *supra* note 89, Articles 11, 12.

power, if limited, of judicial review over the acts of the Security Council.²⁸⁷ The ICTR has later adopted the same approach in *Kanyabashi*.²⁸⁸ Another factor that can be expected to affect the independence of the tribunals is the approval of their budgets by the UN General Assembly. It is however difficult to see how this could have been solved in any other way for a body created under the UN system.²⁸⁹

The solution found for the Special Court, with funding entirely dependent on voluntary contributions of states and other actors, has effectively shielded it from influence by the General Assembly. At the same time this solution meant that the Court would not have the same diplomatic backing by the UN and the Security Council. To prevent substantially weakening the Court's position internationally and to make it less vulnerable to external pressure the Management Committee was established. Originally the intention was to compose the Committee of "important contributors" including the United States, the UK, Canada and the Netherlands, but it was interpreted broadly to include Lesoto and Nigeria. Eventually the government of Sierra Leone too was allowed into the Committee and so was the UN Secretariat. The intention was that the Committee should: (i) assist the Secretary General in ensuring that adequate funds were made available for the functioning of the Court, (ii) assist in the establishment of the Court, including the identification of nominees for key positions such as Registrar and Prosecutor, (iii) consider reports and advice on all non-judicial aspects of the Court's activities, (iv) oversee the annual budget and advise the Secretary General on financial matters, (v) encourage all states to cooperate, and (vi) report to the Group of Interested States.²⁹⁰ However, its work has been dominated by the biggest donor countries and it

²⁸⁷ 'Tadić Jurisdiction Appeals Decision', *supra* note 282.

²⁸⁸ *Prosecutor v. Kanyabashi*, 18 June 1997, ICTR-96-15-PT, 'Trial Chamber Decision on the Defence Motion on Jurisdiction' (Trial Chamber II).

²⁸⁹ S. Zappalà, *supra* note 94, p. 102.

²⁹⁰ *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, January 16, 2002 (hereinafter: the Special Court Agreement), available at www.sc-sl.org/DOCUMENTS/ImportantCourtDocuments/tabid/200/Default.aspx (last visited on 29 December 2008), Article 7; ICTJ Report, *supra* note 101, p. 33.

has come to be seen as a mere oversight mechanism.²⁹¹ Instead, rallying political and financial support has mostly been left to the court itself with the backing of the UN Secretary General. In the end, the independence from the UN may have come at the cost of increased dependency on a few large donor countries.

Although the mandate of the Management Committee is limited to non-judicial aspects of the Court's activities it is clear that the judges are sensitive to interference. Trial Chamber I has on one occasion gone so far as to accuse the Management Committee of interfering with the independence of the judges and of trying to exercise control over the judicial proceedings. The basis of this allegation was a report submitted by Antonio Cassese as Independent Expert at the request of the Management Committee and the UN Secretary General (hereinafter: the Cassese Report).²⁹² The mandate of the Independent Expert as set forth by the Secretary General, was to review the efficiency of the Special Court. In particular, he was to scrutinize the operation and functioning of the Court "with the objective of ensuring the most efficient use of the Court's resources and the completion of the Court's work in a timely manner while at the same time maintaining the highest standards of fairness, due process and respect for human rights." The tasks of the Independent Expert also included conducting "an assessment of judicial output and productivity, the efficient use of courtroom space and resources and factors influencing the duration of judicial proceedings."²⁹³ In his report, Cassese pointed to several areas of concern in terms of 'judicial output', notably that the Judges of Trial Chamber I had a tendency to arrive late to court proceedings and the extraordinarily long time required for deciding on motions by the parties. He also made suggestions on possible changes to the Court Rules to enhance the expeditiousness of the proceedings and advocated for a more active and inquisitorial style of courtroom management. Justice Thompson,

²⁹¹ ICTJ Report, *ibid.*

²⁹² A. Cassese, *Report on the Special Court for Sierra Leone*, 12 December 2006, available at www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyHasLc=&tabid=176 (last visited on 29 December 2008).

²⁹³ *Ibid.* para. 14.

the then Presiding Judge of Trial Chamber I, wrote a comment on behalf of the Judges of the Chamber which was annexed to the Report. There he expressed the opinion of the judges that:

“the portion of the Mandate of the Independent Expert relating to judicial productivity and related aspects was a veiled attempt by the Management Committee to exercise control over the Judicial functions of the Court, contrary to Article 13(1) of the Statute of the Court, thereby interfering with the independence of the judges in the performance of their judicial functions”.²⁹⁴

They also criticised the execution by Mr. Cassese of his mandate claiming that it does, “in respect of certain salient and relevant matters touching and concerning the performance of the judicial functions, amount to a complete lack of respect for and sensitivity to, the doctrine of judicial independence.”²⁹⁵

These comments clearly demonstrate a determination of the judges at the Special Court to retain their independence, or at least the appearance thereof, in relation to the Management Committee. The level of hostility in the Judges’ Comment might also indicate that they do feel exposed to outside pressure. On the other hand, it cannot be taken for granted that the accusations made against the Management Committee or the Independent Expert are correct. If we were to make a comparison to a similar situation in the domestic arena, few would accuse a State for improper interference with judicial independence for simply urging judges to be on time for work or making suggestions on how to streamline procedural regulations. It is a wholly unique feature of international criminal justice that the judges design the rules of procedure and evidence that guide the proceedings. In most jurisdictions this would be the prerogative of the legislative and, possibly, the executive branches of government. This said, the judges are right to be apprehensive of any interference and to resist jumping to conclusions or rushing the proceedings at the expense of the general fairness of the trial. It is also important that the judges keep their distance from other authorities so as to not give rise to an appearance that

²⁹⁴ *Ibid.* Annex C, ‘Comments on the Independent Expert Draft Report by the Judges of Trial Chamber I, Special Court for Sierra Leone’, para. 2.

²⁹⁵ *Ibid.* para. 4.

they are not independent. In sum, international courts do enjoy great independence and have proven themselves capable to resist outside pressure.

With regards to the personal independence of individual judges, their position is somewhat less secure. As has been observed, there is no explicit right of the accused with regard to the independence and impartiality of the judges under the statutes of the ICTY and the ICTR. Instead, control of the quality of judges is built into the process of selecting them for appointment. For the ICTR this involves approval of a list by the Security Council and then election in the General Assembly. The candidates are scrutinised and Member States and Non-Governmental Organisations assess their experience. In this process, nominating an inappropriate candidate would supposedly be highly embarrassing for any state. Still, when states vote in the General Assembly it is not unlikely that political considerations, which are irrelevant to the qualities of the bench, affect their decisions.

One example from the ICTY in 2008 illustrates how this may be the case. In November 2008, the International Bar Association's Human Rights Institute (IBAHRI) expressed serious concerns about the appointment of Zimbabwean Judge Elizabeth Gwaunza as an *ad litem* judge sitting in the trial of General Gotovina.²⁹⁶ According to the IBAHRI, media and other reports indicated that Judge Gwaunza had received a farm as a gift from the government of Robert Mugabe, as had many other judges appointed by him in recent years.²⁹⁷ The fact that the farm may be taken away from the judge by the government without reason or compensation was held out as an aggravating element as this creates a clear dependency of the judge on the government for the right to retain the gift.²⁹⁸

The Co-Chair of the IBAHRI, Former Prosecutor of the ICTY Justice Richard J. Goldstone, stated that “the acceptance of a farm in these circumstances constitutes grossly improper conduct by the judges and

²⁹⁶ International Bar Association, *IBAHRI expresses concern at the presence of Judge Gwaunza on the bench of the ICTY*, 3 November 2008, available at <www.ibanet.org/Article/Detail.aspx?ArticleUid=811B4E19-8A01-4455-AE0B-1DB9DCB24D47> (last visited on 15 January 2009).

²⁹⁷ *Ibid.* para. 2.

²⁹⁸ *Ibid.*

strikes at the heart of judicial independence. It makes the appointment of Judge Gwanza to an international criminal court highly inappropriate”.²⁹⁹ Yet when the IBAHRI approached the then ICTY President Fausto Pocar with requests that he investigate the allegation nothing was done. Instead, he informed the IBAHRI that the allegation was inappropriate in that it relied on unsubstantiated media reports.³⁰⁰ He also held out the fact that Judge Gwaunza’s name had been included by the UN General Assembly in the list of approved *ad litem* judges as proving that she was a fit and proper person for appointment. However the IBAHRI points out that the Judge’s ownership of the farm is widely known in Zimbabwe and the region and that the Judge herself acknowledged receiving the farm at a public meeting of the law society in Zimbabwe in 2003.³⁰¹ In any case, even media reports ought to be of some relevance at least as regards the question of *appearance* of independence, especially where the allegations concern interference by the Robert Mugabe government, known for its notorious relationship with the Zimbabwean bench. In any case it is clear that the nomination process through the UN General Assembly has failed to prevent the appointment of a judge apparently dependent on the government of Zimbabwe.

Furthermore, the judges are only elected for a relatively short period of time, four years, and are eligible for re-election.³⁰² This process has been criticised for the influence the possibility of re-election might have on a judge who considers that an accused should be acquitted in a high profile case involving war crimes. As expressed by Judge Theodor Meron, former President of the ICTY: “Judges driven by career concerns rather than by a desire to reach the right result might be tempted to shade their rulings regarding such a defendant so as to convict him and make their constituencies happy”.³⁰³

²⁹⁹ *Ibid.* para. 3.

³⁰⁰ *Ibid.* para. 4.

³⁰¹ *Ibid.* para. 5.

³⁰² ICTY Statute, *supra* note 89, Article 13 *bis* (3); ICTR Statute, *supra* note 89, Article 12 *bis* (3).

³⁰³ T. Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’, 99 *American Journal of International Law* (2005), p 368; *see also*, W. A. Schabas, ‘Independence and Impartiality of the International Criminal Judiciary’, in E. Decaux, *et al.*, (eds.) *From Human Rights to International Criminal Law – Studies in Honour of an*

For the Special Court, the hybrid model chosen for its establishment necessarily poses difficulties with regards to judicial independence. Under the Special Court Agreement, each Trial Chamber shall be composed of three judges, one of whom shall be appointed by the government of Sierra Leone and the other two by the Secretary General.³⁰⁴ The Appeals Chamber shall similarly be composed of two judges appointed by the government and three judges appointed by the Secretary General.³⁰⁵ The judges are elected for of three years and are eligible for re-election. In appointing judges, the Secretary General should invite states, in particular the member States of the Economic Community of West African States and the Commonwealth to nominate candidates from which to choose. A minority of the judges in each chamber were thus appointed by the same government as was directly involved in the war. The First Accused in the CDF trial, late Hinga Norman, was the minister of the interior for Sierra Leone at the time of his indictment.³⁰⁶ During the war he had been deputy defence minister and he was indicted for his actions as National Coordinator of the CDF.³⁰⁷ His superior, President Kabbah escaped indictment even though he, in his capacity of president also held the post of defence minister. The Majority of the accused before the SCSL however, belong to the AFRC and the RUF fractions who opposed Kabbah's rule. Naturally this situation gives cause for concern and perhaps it was in response to this that President Kabbah opted to fill several of the seats at his disposal (including that of Deputy Prosecutor), with non-Sierra Leonean citizens. He did still appoint some Sierra Leoneans as judges however, one of whom, Justice Thompson, wrote a partially dissenting opinion to the judgement in the CDF trial.³⁰⁸ Here he held that the atrocities committed by the CDF were excusable in

African Jurist, the Late Laïty Kama / Des droits de l'homme au droit international penal – Etudes en l'honneur d'un juriste africain, feu le juge Laïty Kama (Martinus Nijhoff Publishers, Leiden, 2007) p. 575.

³⁰⁴ Special Court Agreement, *supra* note 290, Article 2; SCSL Statute, *supra* note 89, Article 12.1.

³⁰⁵ *Ibid.*

³⁰⁶ *Prosecutor v. Norman et al.*, 5 February 2004, SCSL-2004-14-PT, 'Indictment', para. 1.

³⁰⁷ *Ibid.* para. 13.

³⁰⁸ *Prosecutor v. Fofana and Kondewa*, 2 August 2007, SCSL-04-14-T, 'Annex C – Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Thompson' (Trial Chamber I) (hereinafter: Thompson Separate Opinion)

light of its good cause, fighting in defence of the democratically elected government of President Kabbah.³⁰⁹ It is naturally expected of a judge at an international tribunal to be in favour of democracy and nothing in the separate opinion reveals that he in any way would have been subjected to outside pressure. When seen in the context of his appointment it is nonetheless problematic as it is likely to affect the appearance of the Court as independent.

There are examples where a tribunal has indeed experienced significant and outspoken political pressure. One such time was the case of *Barayagwiza* where the ICTR Appeals Chamber had delivered a decision stating that due to very serious breaches of the rights of the accused the case against him must be dismissed and the accused released.³¹⁰ This was met with outright hostility by the government of Rwanda which threatened to cease all cooperation with the tribunal and refuse court staff any access to its territory.³¹¹ As a result the Prosecutor felt prompted to file a motion for revision,³¹² which was granted by the Appeals Chamber overturning its previous decision.³¹³ This decision was made under delicate political circumstances and after the Rwandan government had “openly threatened the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review”.³¹⁴ It could be argued that the application for revision by the prosecution and the subsequent decision were the result of external pressure.³¹⁵ At the time of the decision the trust of the Rwandan people and the international community was at stake in that one of the alleged architects behind the Rwandan genocide could be released without a trial. On the other hand, there had been very serious violations committed by the tribunal itself

³⁰⁹ *Ibid.* para. 69.

³¹⁰ *Prosecutor v. Barayagwiza*, 3 November 1999, ICTR-99-52-T, ‘Decision’ (Appeals Chamber).

³¹¹ S. Zappalà, *supra* note 94, p. 103; A. Zahar and G. Sluiter, *supra* note 43, p. 284.

³¹² It is uncertain if revision against this kind of decision is actually possible under the Statute and RPE; *see* S. Zappalà, *supra* note 94, p. 103.

³¹³ *Prosecutor v. Barayagwiza*, 31 March 2000, ICTR-97-19 -AR72, ‘Decision on the Prosecutor’s Request for Review and Reconsideration’ (Appeals Chamber).

³¹⁴ J. K. Cogan, *supra* note 48, p. 135, fn. 136.

³¹⁵ *See e.g.*, S. Zappalà, *supra* note 94, p. 104.

putting the fairness of the entire proceedings at risk. The words of Chief Prosecutor Carla Del Ponte in an oral argument in the rehearing of Barayagwiza show how precarious the situation was when she told the Appeals Chamber that:

“Whether we want it or not, we must come to terms with the fact that our ability to continue with our prosecution and investigations depend on the government of Rwanda. That is the reality that we face. [Either Barayagwiza is tried by the Tribunal or sent to Rwanda to be tried there.] Otherwise I am afraid . . . [that we can] open [the door] of the prison [and let everyone go]”.³¹⁶

To its credit, the Appeals Chamber resisted her conclusions. Trying someone suspected of involvement in genocide goes to the core of the tribunals mission and to reverse the decision and proceed with the trial is not in itself necessarily wrong or unfair. But the case does provide good illustration of the importance of judicial independence and how a situation might well occur where insufficient protection of the independence of a tribunal could affect its impartiality with respect to an individual accused.

5.2.2 Judicial Impartiality

As has already been discussed, the statutes of the tribunals do not offer impartiality as an enforceable right of the accused. To ensure that this right is nonetheless respected, Rule 15 paragraph A of the RPE of the ICTY, the ICTR and the SCSL includes rules regarding disqualification of a judge. The RPE of the two *ad hoc* tribunals provide that “[a] judge may not sit in any case in which he has a personal interest or concerning which he has had any association which might affect his impartiality.” In the case of the SCSL the corresponding rule appears to have a slightly wider scope, stating that “[a] judge may not sit in any case in which his impartiality might reasonably be doubted on any substantial ground.” Common to all three is that paragraph B of the rule says that any party may apply for the disqualification of the judge in question.

³¹⁶ *Prosecutor v. Barayagwiza*, 31 March 2000, ICTR-97-19-AR72, ‘Declaration of Judge Rafael Nieto-Navia, Decision on Prosecutor’s Request for Review or Reconsideration’ (Appeals Chamber), p. 2 (quoting Chief Prosecutor Del Ponte).

There have been a number of cases where the international criminal courts were faced with defence requests that a judge withdraw based on allegations of bias or an appearance of bias. In relation to such cases the tribunals have adopted an approach similar to that of the ECtHR. The ICTY Appeals Chamber has recognised two different types of bias, ‘actual bias’, and an ‘unacceptable appearance of bias’.³¹⁷ Actual bias exists when it is proved that there is an association which involves the judge’s personal interest in the outcome of the case. There is an unacceptable appearance of bias when a ‘hypothetical fair-minded observer’ would hold that the presence of a particular judge would challenge the public sense of justice.³¹⁸

The particular circumstances surrounding international criminal procedure make these tribunals more prone to being perceived as biased than national criminal proceedings. There are only a limited number of judges at international criminal courts, which means a greater risk that judges will be faced with issues they have already pronounced on in different trials. Furthermore, appointments of new judges to the tribunals are made on the basis of previous experience in international criminal law and international law including human rights law. This is a relatively small group of jurists and it is not unlikely that, during a career in human rights, a judge may have adopted positions that could be perceived as affecting their impartiality.³¹⁹ Because the statutes include previous experience in human rights as one of the eligibility requirements for judges to be appointed to the tribunals, these have been reluctant to accept such previous engagements as grounds for recusal. In the *Furundžija* appeals judgement, the Appeals Chamber held that it “does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements”.³²⁰ Thus, the Chamber found that Judge Mumba’s membership, prior to her appointment

³¹⁷ See e.g., *Prosecutor v. Furundžija*, 21 July 2000, ICTY, IT-95-17/1-A, ‘Appeal Judgement’, para. 189.

³¹⁸ *Prosecutor v. Krajišnik*, 22 January 2003, ICTY, IT-00-39-PT, ‘Decision on the Defence Application for Withdrawal of a Judge from the Trial’ (Trial Chamber I).

³¹⁹ A. Zahar and G. Sluiter, *supra* note 43, p. 298.

³²⁰ *Furundžija*, Appeal Judgement, *supra* note 317, para. 205.

as a judge, in a UN Commission that advocated an expanded definition of rape during armed conflict did not affect her impartiality.³²¹ This case is very similar to that of Judge Winter at the SCSL in the CDF case. Before becoming a judge at the SCSL, Judge Winter participated in a UNICEF report titled ‘International Criminal Justice and Children’ which was published in September 2002. As the prosecution in question dealt with the recruitment of child soldiers the defence filed a motion that she be recused from deliberations on this issue. And, similar to the case of Judge Mumba, the Appeals Chamber of the SCSL also found that the grounds relied upon by the defence “are evidence of the internationally recognised qualifications of Justice Winter in the field of Juvenile Justice”, and dismissed the motion.³²²

There has been one case before the SCSL where an accused successfully argued for the recusal of a judge. Justice Robertson, then president of the SCSL, was disqualified from adjudicating on any matters concerning the RUF or alleged members of that organisation on account of statements he had made in his book *Crimes against Humanity – The Struggle for Global Justice* (2002).³²³ The comments revealed strong views

³²¹ As a member of the UN Commission on the Status of Women, Judge Mumba participated in an Expert Group Meeting, which advocated an expanded definition of rape during armed conflict. When the Trial Chamber accepted a similar definition to the detriment of the accused, the defence tried to argue that Judge Mumba was not impartial. The Appeals Chamber found no evidence that she had in fact been influenced by the definition put forward by the Commission and dismissed this ground of appeal. This has been criticised as not entirely convincing. Rather than investigating if she had actually been influenced, the test to be applied ought to have been whether the ‘hypothetical observer’ could reasonably have apprehended bias. As the definition of rape in international criminal law was still unclear, such an observer might have had difficulty, trying to reconcile Judge Mumba’s participation in the trial with the requirement of impartiality. *See e.g.*, A. Zahar and G. Sluiter, *supra* note 43, p. 299; *Furundžija*, Appeal Judgement, *supra* note 317.

³²² *Prosecutor v. Norman*, 28 May 2004, SCSL-2004-14, ‘Decision on the Motion to Recuse Judge Winter from Deliberation in the Preliminary Motion on the Recruitment of Child Soldiers’ (Appeals Chamber), para. 30.

³²³ Robertson Disqualification Decision, *supra* note 92, para. 2(iii). In his book Justice Robertson commented on a number of issues directly relating to the accusations made against the defendants in the RUF trial. Here is one sample offered by the Chamber: “Styled the Revolutionary United Front (RUF) it recruited gangs of violent, dispossessed youths and armed them with AK47s for their mission of pillage, rape and diamond-heisting. The RUF had no political agenda: its sponsor was Charles Taylor, Liberia’s vicious warlord [...] Mutilation worked, as a means of terrifying the population, and so the RUF devised more devilish tortures, such as lopping off a leg as well as an arm, sewing up vaginas with fishing lines, and padlocking mouths. Given their barbarism, how could Foday Sankoh and the RUF leadership ever have been invited by Western diplomats to share power.”

about the guilt of RUF members and the Appeals Chamber held that it had no doubt a reasonable man would apprehend bias, let alone an accused person.³²⁴

In a recent decision in the same trial, the Appeals Chamber denied a request made by the defence for the disqualification of Justice Thompson from the Trial Chamber. The defence had argued that in his separate opinion to the Judgement in the CDF trial Judge Thompson had made statements that made him appear biased against the accused in the RUF trial. In the CDF Judgment, the Trial Chamber had found the two accused guilty of war crimes of murder, cruel treatment, pillage and collective punishment, and in the case of Kondewa, additionally of enlisting children under the age of 15 into the armed groups and/or using them to participate actively in hostilities. To this, Thompson had filed a separate opinion in which he stated that, although he agreed with the majority in the finding of factual guilt, the accused had committed these acts for the preservation of democracy, “a vital interest worth protecting in the face of rebellion, anarchy and tyranny”.³²⁵ Therefore he found the accused not guilty on the basis of a defence of necessity. The Trial Chamber found that expressions and terms used by Thompson

“could be perceived or understood as aggressive, offensive and injurious to the interests of the three aggrieved RUF Defendants and *could have created*, even if the Learned Judge did not intend those consequences, an appearance of bias against their cause and their interests as accused persons.”³²⁶

It then proceeded to investigate whether these expressions did in fact create such an appearance. It found it reasonable to conclude that Judge Thompson was actually referring to both the AFRC and the RUF when speaking of “tyranny, anarchy and rebellion, the intensely conflictual situation and the fear, utter chaos, widespread violence of immense dimensions that he has identified.”³²⁷ They did find however, that he had not referred to those two organisations as ‘evil’.³²⁸ They observed that in the CDF judgement the

³²⁴ *Ibid.* para. 15.

³²⁵ Thompson Separate Opinion, *supra* note 308, para. 69.

³²⁶ Thompson Recusal Decision, *supra* note 92, para. 72 (emphasis added).

³²⁷ *Ibid.* para. 75.

³²⁸ *Ibid.* para. 76.

Trial Chamber had found the two accused guilty of extremely serious crimes and at that, that these crimes had been committed in extremely heinous ways.³²⁹ Further, “[d]espite the extremely heinous nature of the crimes they were excusable according to Justice Thompson in the face of a larger evil due to necessity. An evil which can only be actions by the AFRC and RUF”.³³⁰ Using the standard adopted in the *Furundžija*, and *Celebici* decisions, the Chamber considered that a reasonable and informed observer would not expect a Judge to find that the commission of war crimes was excusable because considering the state of the law, it could amount to condoning the commission of very serious crimes. Thus, the Chamber did find that “some indicia of an appearance of bias had been established having regard to all the circumstances...”³³¹ However, it considered that this finding should be viewed in the light of the standard applicable to disqualification contained in Rule 15 of the RPE and in case law of the tribunals, that there is a presumption that a judge is impartial and that the defence must adduce sufficient evidence to meet a high threshold in order to rebut this presumption.³³² Finally the Chamber concludes that:

“even though it has found some *indicia* of an apprehension of bias, this is insufficient to overcome the high threshold standard that has been established by the jurisprudence of international criminal tribunals on the recusal or the disqualification of a judge in an

³²⁹ *Ibid.* paras. 78, 79; a few examples are offered by the Chamber: “the CDF removed organs from people they had killed or people who were not yet dead, burned civilians to death and they shot and killed civilians, including young children”.

³³⁰ *Ibid.* para. 79; the fact that the Trial Chamber first finds he did not refer to the RUF as evil only to then establish that the greater evil that needed to be fought could only be that organisation three paragraphs later is somewhat confusing. Especially in light of a statement made by the Presiding Judge Justice Itoe, in reply to Counsel of the Third Accused Augustine Gbao, clarifying that the enemy referred to by Justice Thompson did comprise of both the AFRC and the RUF: “I mean, we just – we just had to, you know, dissipate the cloud that surrounded, you know, the issue of identifying who the enemy was, who the evil was. We put that – we put those comments as against the submissions of the Prosecution in that issue and we thought that there was no scintilla of a doubt, you know, that that was it.” *Prosecutor v. Sesay et al.*, 6 December 2007, SCSL-2004-15-T, ‘Official Court Transcripts’ (Open Session), p. 46, lines. 21-26.

³³¹ Thompson Recusal Decision, *supra* note 92, para. 79.

³³² It also took into consideration a number of other circumstances, some of which have little or no relevance to the impartiality of a judge such as the importance of the judicial oath and the fact that the Trial Chamber sits as a panel of three judges. More relevant perhaps, Judge Thompson in his separate opinion had made no comments, nor expressed views or opinions with respect to the accused themselves or their alleged criminality, nor has he made any findings about issues in the RUF trial. *Ibid.* paras. 81-92.

International Criminal Tribunal and therefore, does not rebut the presumption of impartiality and nor does it firmly establish a reasonable appearance.”³³³

The Appeals Chamber upheld the Trial Chamber’s decision based on two apparently contradictory findings: Firstly, it found that the Trial Chamber had erred in law in claiming that an indicia of an appearance of bias would be an insufficient basis for disqualification. Referring to case-law on the issue it concludes that “[i]t necessarily follows that where a Trial Chamber finds ‘some indicia of bias,’ the logical and reasonable conclusion must be that the judge must be disqualified.”³³⁴ Secondly, it found that no objective appearance of bias could reasonably be ascertained from Justice Thompson’s separate opinion. “The Separate Opinion was issued in the exercise of Justice Thompson’s function as a judge in a separate case. It contains no explicit or implied reference to the Appellants or any reference to the RUF as a group.”³³⁵ The Chamber also observed that no legal authority had been cited by the defence to indicate that a Judge’s legal and factual analysis could give rise to an appearance of bias. A reasonable and informed observer reading Justice Thompson’s opinion would thus not apprehend bias against the appellants.

While the first conclusion reached by the Appeals Chamber seems to be well in line with both international human rights standards and international criminal jurisprudence, the decision as a whole gives some cause for concern. It is difficult for the reader to reconcile the fact that the indicia found by the Trial Chamber was in fact the same thing as a reasonable apprehension of bias, with the finding that a reasonable observer would not apprehend such indicia. The test of the reasonable observer was not intended as a protection of judges against overzealous colleagues but rather as an aid to the judges to imagine how the tribunal might appear from the outside. It is geared towards situations where the judges themselves might be convinced of the impartiality of their colleague based on their own

³³³ Thompson Recusal Decision, *supra* note 92, para. 94.

³³⁴ *Prosecutor v. Sesay et al.*, 24 January 2008, SCSL-04-15-T, ‘Decision on Sesay, Kallon and Gbao Appeal against Decision on Sesay and Gbao Motion for Voluntary Withdrawal or Disqualification of Hon. Justice Bankole Thompson from the RUF Case’ (Appeals Chamber) (hereinafter: the Thompson Recusal Appeal), para 13.

³³⁵ *Ibid.* para. 14.

personal experience and knowledge about his character, but the judge might still appear biased to an outside observer. When in the present case even the Judge's two colleagues in the same Trial Chamber perceive a reasonable apprehension of bias, this ought to go above and beyond what is required by the test.

6 The Right to be Tried Without Undue Delay

6.1 International Human Rights Law

6.1.1 Period to be Taken into Consideration

The right to be tried without undue delay in Article 14. 3(c) of the ICCPR is not simply a guarantee that the trial should commence within a certain timeframe, but relates also to the time of the trial until the pronouncement of a definitive judgement.³³⁶ The relevant period of time begins when the suspect is informed that the authorities are taking specific steps to prosecute them.³³⁷ If the accused is kept in detention pending trial, this guarantee will overlap the right laid down in Article 9.3, according to which, pre-trial detainees have a right to be tried within “a reasonable time”. In this case, he or she must be tried as expeditiously as possible.³³⁸ The right to be tried without undue delay, however, does not depend on whether the accused is still in detention or not. Excessive periods of pre-trial detention have often lead the HRC to find a violation of both guarantees.³³⁹

It is not possible to give a specific time that could be considered reasonable for all trials. The nature of criminal law ensures that each case will be unlike the other and to set out such a limit would have unacceptable consequences. Instead what constitutes an undue delay depends on the complexity of the case and on the behaviour of the parties involved.³⁴⁰ The specific importance of the case for the accused may also

³³⁶ General Comment No. 32, *supra* note 3, para. 35; M. Nowak, *supra* note 86, p. 334, para. 52.

³³⁷ *Ibid.* p. 334, para. 53.

³³⁸ General Comment No. 32, *supra* note 3, para. 35.

³³⁹ M. Nowak, *supra* note 86, p. 334, para. 52.

³⁴⁰ General Comment No. 32, *supra* note 3, para. 35.

call for special efforts to speed up the proceedings.³⁴¹ The ECtHR in *Philis (No. 2)*, describes its assessment of the length of criminal proceedings:

“The Court reiterates at the outset that the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is necessary among other things to take account of the importance of what is at stake for the applicant in the litigation.”³⁴²

6.1.2 Conduct of the Accused

Out of the factors that affect the length of the proceedings, the first object of investigation should be the conduct of the accused and/or the defence. Any delay attributable to the defence will not be considered undue and cannot be included when determining the reasonableness of the time period. The ECtHR has been reluctant to attribute responsibility for delays to the accused, as they stress that the defence has a right to use procedural remedies. As a general principle, it is not for the authorities to determine if the actions of the defence were reasonable or not, regardless of whether these actions have contributed to the length of the proceedings, and the accused is under no obligation to assist in the investigation. However, there are two ways in which an accused can be held responsible for causing delays. Should the defence make excessive use of procedural remedies in a way that contributes to the delay of the trial, such as repeatedly asking for hearings to be postponed, delays that can be attributed to such requests will not be held against the state authorities. It is also possible that the conduct of the defence casts doubt over the accused’s interest to have the proceedings concluded speedily.³⁴³ Any delays that stem from the accused exercising his rights under the convention can never be held against him or her, but they can not lead to a violation of the convention either.

³⁴¹ S. Trechsel, *supra* note 23, p. 142.

³⁴² *Philis v. Greece (No. 2)*, 26 June 1997, ECtHR, no. 65/1996/684/874, para. 35.

³⁴³ *Salapa v. Poland*, 19 December 2002, ECtHR, Application no. 35489/97, para. 88.

6.1.3 Complexity of the Case

When it comes to the complexity of the case, contrary to what one might expect, it has no direct legal impact on the question of reasonable time. It is naturally so that more complex cases will take more time than simpler ones and, as such, this means the trials must be allowed more time. The complexity must lie within the facts of the case. Where a succession of legislative amendments led to a repeated change of venue of the trial causing a delay of the proceedings, this was held by the ECtHR to be entirely the states responsibility.³⁴⁴ In fact, it can be said that in this case it is not the complexity of the case that is at issue, but rather the actions of the state. This can also be seen from a closer look at the Court's case law in general. As such, the complexity of the case is irrelevant; instead, the essential question becomes how the state dealt with the case. A violation will only be found when there have been periods during the proceedings where no action was taken, although something should have been done.³⁴⁵

6.1.4 Conduct of the Authorities

This brings us to the conduct of the state authorities. The question is whether there were any unexplained delays or periods of inactivity.³⁴⁶ Even if such delays are not the only reason for the excessive length of the proceedings this will still be sufficient for a violation.³⁴⁷ There are a variety of potential explanations for lengthy proceedings and many of these have been assessed by the ECtHR. The reason most commonly offered by states in proceedings before the Court is that the prosecuting authorities and/or judicial authorities are unable to work any faster because of an excessive caseload. To this, the Court has generally replied that:

³⁴⁴ *Dobbertin v. France*, 25 February 1993, ECtHR, no. 88/1991/340/413, paras. 10 *et seq.*

³⁴⁵ S. Trechsel, *supra* note 23, p. 145.

³⁴⁶ S. Trechsel, *supra* note 23, p. 146.

³⁴⁷ See *e.g.*, *Djaid v. France*, 29 September 1999, ECtHR, Application no. 38687/97 (the text of the judgement is available in French only), paras 32, 33; *Panek v. Poland*, 8 January 2004, ECtHR, Application no. 38663/97, para 35.

“the Convention places the Contracting Parties under a duty to organise their judicial system so as to enable the courts to comply with the requirements of Article 6., including that of trial within a ‘reasonable time’; nonetheless, a temporary backlog does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind”.³⁴⁸

It has only happened once that the ECtHR has found remedial actions of the State to be sufficient and this was in a civil case.³⁴⁹ This possibility to redeem a violation of the guarantee should not be exaggerated; after all it is intended as a right of the individual and should not depend on the risk of future violations. As a general rule, “[a] violation ought to be found if the proceedings against an accused have lasted longer than a reasonable time, irrespective of whether the state has taken steps to improve the situation”.³⁵⁰

There can also be circumstances that do excuse delays in the proceedings. Example of cases where the ECtHR has accepted that the state could not be held responsible have been where there has been a lawyer’s strike,³⁵¹ and where there has been public unrest in the region where proceedings were being held.³⁵² Where a trial is dependent on actors outside the court’s jurisdiction, again whether the delay is reasonable depends on whether the investigating authorities have taken an active role to speed up the procedure or if they have remained passive.³⁵³ In one case, it was found to be sufficient that the prosecution had repeatedly requested the aid of the competent Polish authorities to communicate with the United States in an effort to speed up the gathering of evidence.³⁵⁴

³⁴⁸ *Baggetta v. Italy*, 25 June 1987, ECtHR, no. 13/1986/111/159, para. 23.

³⁴⁹ *Buchholz v. Germany*, 6 May 1981, ECtHR, Application no. 7759/77, paras. 51, 61, 63.

³⁵⁰ S. Trechsel, *supra* note 23, p. 147.

³⁵¹ *Ledonne v. Italy (No. 2)*, 12 May 1999, ECtHR, Application no. 38414/97, para. 22; however, in this case the Court nevertheless found a violation because of delays which could not be justified by the strike.

³⁵² *Foti and others v. Italy*, 10 December 1982, ECtHR, Application nos. 7604/76, 7719/76, 7781/77 and 7913/77, para. 61.

³⁵³ S. Trechsel, *supra* note 23, p. 148.

³⁵⁴ *Włoch v. Poland*, 19 October 2000, ECtHR, Application no. 27785/95, para. 150.

6.2 International Criminal Law

The right to be tried without undue delay is protected in the statutes of all the international criminal courts.³⁵⁵ In addition, the rules state that upon transfer to the tribunal the initial appearance of the accused shall take place “without delay,”³⁵⁶ and strict deadlines are provided for disclosure and the filing of preliminary motions.³⁵⁷ In light of the practice of virtually automatic detention pending trial it is interesting to note that the companion right in article 9(3) of the Covenant, for people detained on a criminal charge to be tried ‘within a reasonable time’ is not recognised. From a human rights perspective, the sometimes excessive length of pre-trial detention and trials could be said to be one of the weakest points in the administration of international criminal justice.³⁵⁸ Some of the trials before the international tribunals have been very lengthy indeed. An often cited example are the proceedings against Théoneste Bagosora before the ICTR.³⁵⁹ Bagosora was arrested on 9 March 1996, and transferred to the ICTR detention facility on 23 January 1997.³⁶⁰ His trial began five years later and finally closed on 1 June 2007 after 408 trial days.³⁶¹ The Trial Chamber Judgement was delivered orally on 18 December 2008 sentencing him to life imprisonment.³⁶² Should the case go to appeal, the length of the trial can be expected to increase further.

While a period of well over twelve years is obviously excessive, the relevant question here is whether the way in which these trials are conducted conforms to international human rights law. Before applying this test, designed to assess criminal proceedings in general, it is important

³⁵⁵ ICTY Statute, *supra* note 89, Article 21.4(c); ICTR Statute, *supra* note 89, Article 20.4(c); Rome Statute, *supra* note 50, Article 67.1(c) and; SCSL Statute, *supra* note 89, Article 17.4(c).

³⁵⁶ *See e.g.*, ICTY RPE, Rule 62.

³⁵⁷ R. May and M. Wierda (2002), *supra* note 192, para. 8.42.

³⁵⁸ A. Zahar and G. Sluiter, *supra* note 43, p. 300.

³⁵⁹ *See e.g.*, A. Zahar and G. Sluiter, *ibid.* p 300; W. A. Schabas (2006), *supra* note 158, p. 522.

³⁶⁰ ICTR website, <http://69.94.11.53/default.htm>, (last visited on 29 December 2008).

³⁶¹ *Ibid.*

³⁶² *Prosecutor v. Bagosora et al.*, 18 December 2008, ICTR-98-41-T ‘Oral Summary of Judgement’.

to observe that there are a number of different factors unique to international criminal justice that contribute to the duration of trials. Critics might argue that those factors would justify deviation from the standards applicable to national jurisdictions. However, when examined more closely parallels to all these criteria can be found in a domestic setting. Notwithstanding this, these are all established criteria under international human rights law.

Three factors that have been identified are the complexity of the case, the choice of the adversarial style proceedings and a lack of resources to try all of the accused at short notice.³⁶³ Due to the nature of the charges and the scale of alleged criminal activity, the vast majority of cases before international criminal courts will be very complex and this is a strong argument in favour of longer trials. This does not, however, make them any different from more complicated trials in normal criminal proceedings where this principle is well established.³⁶⁴ Adversarial proceedings in themselves constitute a right of the accused and vital element of the right to a fair trial. It is reasonable to assume that the time consumed by such proceedings is indeed taken into consideration in an assessment of the length of proceedings under the international human rights regime.³⁶⁵ Lack of resources is somewhat more complex in an international setting where the courts' dependency on the UN or, in the case of the SCSL on voluntary contributions of States, imposes additional constraints. Still, it is in no way unique to this setting. The argument that the courts are under an excessive workload has been assessed and always dismissed in the national framework.³⁶⁶ There is no reason why budgetary constraints should be accepted as an argument for not applying the standards of fair trial, standards which themselves exclude their use as an excuse for lengthy trials.³⁶⁷ They certainly do not warrant a balancing exercise between the rights of the accused on the one hand, and the mandate of the tribunal on the other, as was proposed by the Trial Chamber (and subsequently rejected by

³⁶³ A. Zahar and G. Sluiter, *supra* note 43, p. 301.

³⁶⁴ *See supra*, Chapter '6.1.3, Complexity of the Proceedings, p. 85.

³⁶⁵ *See supra*, Chapter '2.1.1 The Right to Adversarial Proceedings', pp. 13, 14.

³⁶⁶ *See e.g.*, *Baggetta v. Italy*, *supra* note 348, para. 23.

³⁶⁷ *Contra*, R. May and M. Wierda (2002), *supra* note 192.

the Appeals Chamber) in *Mugiraneza* before the ICTR.³⁶⁸ The importance of the tribunals' mandate and the urgency of issuing arrest warrants deserve to be recognised, but there is no reason why they should be different from their national counterparts.

Naturally, the actual speed of the trial is determined by a great number of different factors, including the scope of the indictment, the breadth of the dispute between the parties and the complexity of the facts.³⁶⁹ If we turn to the right as it is protected under international criminal justice, the right to an expeditious trial applies at all stages of the proceedings including the appeal.³⁷⁰ The relevant time period begins to run when the suspect learns that he or she is being investigated with a view to prosecution, normally with the arrest at the request of an international criminal court.³⁷¹ It has not been considered unreasonable that complex trials at the international tribunals can take many years in preparation and to complete. The tribunals have adopted the approach of the ECtHR that “[t]he reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider.”³⁷² In correcting the Trial Chamber in *Mugiraneza*, the Appeals Chamber of the ICTR stated that it had erred in taking into account “the fundamental purpose of the Tribunal”. It had also been mistaken in holding that “there is no reason to inquire into any role that the Prosecutor might have played about the alleged delay”.³⁷³ Instead, the Appeals Chamber listed five factors to be considered when determining whether there has been a violation: (1) the length of the delay; (2) the complexity of

³⁶⁸ *Prosecutor v. Mugiraneza*, 2 October 2003, ICTR-99-50-I, ‘Decision on Prosper Mugiraneza’s Motion to Dismiss the Indictment for Violation of Article 20(4)(C) of the Statute, Demand for Speedy Trial and for Appropriate Relief’ (Trial Chamber II), paras. 11–13; A. Zahar and G. Sluiter, *supra* note 43, p. 301.

³⁶⁹ R. May and M. Wierda (2002), *supra* note 192, para. 8.42.

³⁷⁰ *Ibid.*

³⁷¹ W. A. Schabas (2006), *supra* note 158, p. 521; A. Zahar and G. Sluiter, *supra* note 43, pp. 300, 301.

³⁷² *Prosecutor v. Kanyabashi*, 23 May 2000, ICTR-96-15-I, ‘Decision on the Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings’ (Trial Chamber II); as quoted in, W. A. Schabas (2006), *supra* note 158, p. 521.

³⁷³ *Prosecution v. Mugiraneza*, 2 October 2003, ICTR-99-50-I, ‘Decision on Prosper Mugiraneza’s Request Pursuant to Rule 73 for Certification to Appeal Denial of his Motion to Dismiss for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and Appropriate Relief’ (Trial Chamber II).

the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law; (3) the conduct of the parties; (4) the conduct of the relevant authorities; and (5) the prejudice to the accused, if any.³⁷⁴

6.2.1 Conduct of the Accused

In *Dragan Nikolic*, an ICTY Trial Chamber dealt with the question of lengthy proceedings at the sentencing stage. The accused had known about the indictment against him since 1994 or early 1995, yet he was not apprehended until 2000. He pleaded guilty and the sentencing judgement was delivered in December 2003. Referring to ECtHR case law, the Trial Chamber observed that “it has been held that the violation of the accused’s basic right to a fair trial should only be remedied and compensated if the perpetrator is not himself responsible for the delay of the proceedings”.³⁷⁵ Although he did plead guilty, he also filed motions challenging the Tribunal’s jurisdiction. The Chamber thus concluded that, “[t]aking into account, *inter alia*, the lengthy period of time necessary for preparing and deciding his motions on jurisdiction, the time spent in the United Nations Detention Unit cannot be regarded as disproportional.”³⁷⁶

For the purposes of this study it is interesting to note that in this judgement, the Trial Chamber makes no effort to investigate whether the Tribunal itself, be it the Chamber or any other authority, has contributed in any way to the delays. It is true that under international human rights law the first object of investigation should be the actions of the accused and the Trial Chamber is indeed correct in its assertion that no delay caused by the accused deserves any remedy. It is not sufficient however to observe that the actions of the accused have contributed to the length of a trial. Great importance is also attributed to the conduct of the authorities and it might prove useful if the Chamber was not so easily satisfied that the blame rests

³⁷⁴ *Mugiraneza* Interlocutory Appeal Decision, *supra* note 232.

³⁷⁵ *Prosecutor v Dragan Nikolic*, 18 December 2003, ICTY, IT-94-2-S, ‘Sentencing Judgement’ (Trial Chamber II), para. 270; (footnotes omitted).

³⁷⁶ *Prosecutor v Dragan Nikolic*, 18 December 2003, ICTY, IT-94-2-S, ‘Sentencing Judgement’ (Trial Chamber II), para. 271; (footnotes omitted).

with the accused. While the time consumed in processing the accused's motions certainly point in favour of a conclusion that the time was not unreasonable, it does not absolve the Tribunal of its duty to try the accused with expediency.

6.2.2 Complexity of the Case

As has already been noted, the impact of the complexity of the case on the length of the proceedings is accorded great importance when evaluating the reasonableness of the time consumed in international criminal trials. In a decision in the *Sesay* case the SCSL Trial Chamber took on a different view on the definition of complexity from that expressed in the *Mugiraneza* Interlocutory Appeals Decision above.³⁷⁷ The Trial Chamber held that “it is not necessarily the number of Counts on the indictment or the extensive number of witnesses called that determines this”.³⁷⁸ While this decision was concerned with the right to adequate resources and not the right to a speedy trial, it is reasonable to assume that what makes a case complex will be the same in relation to both rights. To conclude otherwise would mean adopting two contrary definitions of complexity to narrow the scope of both rights of the accused and is difficult to reconcile with the general requirement of fairness of the proceedings. The wider ‘*Mugiraneza*’ definition of complexity restricts the scope of the right to a trial within a reasonable time by allowing for longer proceedings where the trial is concerned with many charges and involves many witnesses. By contrast, the more narrow ‘*Sesay*’ definition restricts the scope of the right to adequate resources by allowing the Court to refuse the defence additional resources even if the case involves more counts or an extensive number of witnesses.

³⁷⁷ *Mugiraneza* Interlocutory Appeal Decision *supra* note 232; *supra* pp. 89, 90.

³⁷⁸ Judicial Review Decision, *supra* note 218, para .23.

6.2.3 Conduct of the Authorities

The Appeals Chamber in *Mugiraneza* considered that the conduct of authorities is important in the determination of whether or not there has been an undue delay.³⁷⁹ In *Jelisić*, the Appeals Chamber observed:

“[I]n long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings. That control may well need to be vigorous, provided of course that it does not encroach on the right of the party to a fair hearing.”³⁸⁰

In order to cut the length of trials the judges of the *ad hoc* Tribunals have adopted a number of amendments to the Rules of Procedure and Evidence to enable them to take a more active role in managing the proceedings. For example, the ICTY Rules direct the Trial Chambers to set the number of witnesses allowed and the amount of time available to the parties for presenting evidence, although a party may ask that a witness be reinstated or ask for more time if in the interest of justice. The Chamber is also to exercise control over the interrogation of witnesses to ascertain the truth and avoid needless consumption of time. Through additional amendments combined with decisions of the Trial Chambers, it has been admitted that judges may have access to supporting materials such as witness statements, as well as transcripts of other proceedings. The possibility of taking depositions and resorting to evidence other than oral testimony has also been extended.³⁸¹ Additional amendments have been made to allow the Trial Chamber to admit written or other forms of evidence and to exclude evidence on the basis of relevance or that it is cumulative.³⁸² The pre-trial procedure has been substantially improved with the introduction of the ‘Pre-Trial Judge’, as well as ‘Pre-Trial’ and ‘Pre-Defence Conferences’.³⁸³ All these mechanisms are intended to help the judges to better organise the conduct of trials, and to be more aware of the needs of the parties. The hope

³⁷⁹ *Mugiraneza* Interlocutory Appeal Decision *supra* note 232; *supra* pp. 89, 90.

³⁸⁰ *Prosecutor v. Jelisić*, 5 July 2001, ICTY, IT-95-10-A, ‘Judgement’ (Appeals Chamber), para. 16.

³⁸¹ S. Zappalà, *supra* note 94, p. 253.

³⁸² R. May and M. Wierda (2002), *supra* note 192, p. 280, para. 8.46.

³⁸³ ICTY RPE, Rules 65ter, 73bis, 73ter; *see also* the corresponding rules for the other international courts, ICTR RPE, Rules 73bis, 73ter; SCSL RPE Rules 73bis, 73ter.

is that they will be more able to control how the proceedings unfold, particularly with regard to the discovery process. The modifications enable the judges of the Trial Chamber to have more detailed knowledge of the facts of the case before the opening of trial, or at least prior to hearing witnesses in court. This should be of significant assistance to the judges in shortening the proceedings. For instance, with greater knowledge at the outset of the proceedings, they would more easily be able to limit the examination of witnesses to relevant issues or shorten the list of witnesses submitted by the parties.³⁸⁴ Arguably the single most important step to speed up the proceedings was a substantial increase in the number of judges employed by the courts and, in the case of the *ad hoc* tribunals, the introduction of *ad litem* judges (that is, non-permanent judges, or not fulltime judges, who only sit in one or two cases).³⁸⁵ This required an amendment to the ICTY and ICTR Statutes, primarily by a Security Council Resolution on 30 November 2000.³⁸⁶ No amendment was required for the introduction of a second trial chamber at the SCSL, yet by the time Trial Chamber II became operational, the excessive workload of the original chamber had already lead to unnecessary delays.³⁸⁷

These efforts go a long way towards securing a more streamlined process more capable of delivering fair trials within a reasonable time. It is also encouraging that the courts, as the ICTR Appeals Chamber did in *Muriganeza*, have been willing to accept that the Prosecution too carries some responsibility in relation to the expeditiousness of the trials. However, after the *Muriganeza* Appeals Chamber sent the issue back to the Trial Chamber for consideration, the latter simply concluded, “on the basis of the facts put forward by the Prosecutor that the delay in this case, if any, is not attributable to the OTP”.³⁸⁸ Although it may be difficult

³⁸⁴ S. Zappalà, *supra* note 94, p. 253.

³⁸⁵ Cassese Report, *supra* note 292, p. 387.

³⁸⁶ United Nations, *Security Council Resolution 1329* (2000), UN Doc. SC/RES/1329, adopted at the 4240th meeting, 30 November 2000.

³⁸⁷ See e.g., the Cassese Report, suggesting that the delay in appointing a second trial chamber “significantly delayed the progress of the Court”, *supra* note 292, para. 84

³⁸⁸ *Prosecutor v. Bizimungu et al.*, 3 November 2004, ICTR-99-50-T, ‘Decision on Prosper Mugiraneza’s Application for a Hearing or Other Relief on his Motion for Dismissal for

to attribute delay directly to the prosecutor, a more critical and progressive approach would be warranted. The prosecutor does bear significant responsibility for delays by submitting indictments in a system that is incapable of handling them within a reasonable period of time. If a court is already overloaded with work, additional prosecutions will inevitably lead to lengthy trials. Furthermore, the complexity of prosecutions, which is an important factor for causing delay, is in part the result of prosecutorial choices as to the selection of charges.³⁸⁹ Finally and importantly, as was established in *Barayagwiza*, “it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights” as the sharing of fault between organs of the tribunal should not affect the application of fundamental rights.³⁹⁰

6.2.3.1 Procedural Sanctions

Even though efforts have been made to speed up the proceedings, a few broader areas of concern remain that need to be resolved. One such area is the lack of any sanctions for procedural violations. The pre-trial phase is still too long, and this can often be put down to delay in the mutual communication of documents between the parties. The threat of procedural sanctions, such as the exclusion of witnesses or exhibits when no notice has been given to the other party, would compel the parties to respect time limits and disclosure obligations. This method is used successfully in many national jurisdictions to ensure compliance of the parties with the rules of procedure and evidence.³⁹¹ The absence of procedural sanctions at the

Violation of his Right to a Trial Without Undue Delay’ (Trial Chamber II), para. 32.

‘Office of the Prosecutor’ hereinafter: OTP.

³⁸⁹ See e.g., A. Zahar and G. Sluiter, *supra* note 43, p. 302, who call for more emphasis on the responsibility of court authorities: “Especially if the conduct of authorities is seen as the most important criterion for assessing the reasonableness of length of pre-trial detention and trials, the ad hoc tribunals fall short of protecting this right.”

³⁹⁰ *Prosecutor v. Barayagwiza*, 3 November 1999, ICTR-99-52-T, ‘Decision’ (Appeals Chamber), para 73.

³⁹¹ See e.g., in the jurisdiction of England and Wales, sanctions included in section 81(1) of the Police and Criminal Evidence Act 1984 c. 60 (as amended by section 109(1) of and paragraph 286 of Schedule 8 to the Courts Act 2003 c. 39) and section 20(3) of the Criminal Procedure and Investigations Act 1996 (as amended by section 109(1) of, and paragraph 378 of Schedule 8 to, the Courts Act 2003 c. 39) (advance disclosure of expert evidence). See also section 132(5) of the Criminal Justice Act 2003 c. 44 (failure to give notice of hearsay evidence).

international courts forces the judges to address violations of procedural rules on a case-by-case basis and to find innovative and imaginative solutions in each individual case. This approach may give rise to criticisms and ultimately lead to a reduction of the international criminal courts' credibility.³⁹² The lack of sanctions also exposes the parties to uncertainty about the course of the proceedings. This is unacceptable from the point of view of the rights of defendants, who are left without true protection against violations of, for example, disclosure obligations on the part of the prosecutor. In addition, the accused has a right to a certain level of predictability as to what rules will apply to the process.³⁹³ Zappalà predicts that "[t]he introduction of procedural sanctions, coupled with a strong commitment by the Prosecutor to respect fundamental rights, would help accelerate proceedings, since it would considerably reduce delay in the process of discovery."³⁹⁴

The flexible approach adopted by the judges of the international criminal courts does not ensure certainty and uniformity of judgement. This may in turn lead to inequalities of treatment. It may also help explain why requests for disciplinary sanctions for misconduct do not seem very effective. In *Furundžija* the Trial Chamber issued a formal complaint to the Prosecutor concerning the conduct of the prosecution. It complained that the case, on the part of the Office of the Prosecutor, had been

"...marked by a consistent pattern of non-compliance with the orders of the Trial Chamber, failure to comply with obligations imposed by the Rules of Procedure and Evidence of the International Tribunal [...], late and/or last minute filing of substantial motions and failure to provide the Trial Chamber with reasons for such conduct."³⁹⁵

The Trial Chamber had "in a series of orders, expressed its increasing concern over the handling of this matter by the Prosecution".³⁹⁶ Thus, the

³⁹² For example, in *Barayagwiza* discussed *supra*, explicit rules could have made the Tribunal less vulnerable to pressure from the Government of Rwanda as it would have merely been a case of applying pre-existing regulations, *supra* note 310.

³⁹³ *Supra* Chapter '2.1.3 Predictability' p. 15, 16.

³⁹⁴ S. Zappalà, *supra* note 94, p. 255.

³⁹⁵ *Prosecutor v. Furundžija*, 5 June 1998, ICTY, IT-95-17/1-PT, 'The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution', para. 2.

³⁹⁶ *Ibid.*

only consequence of these serious accusations was a formal complaint issued “in the hope that no Trial Chamber of the International Tribunal will again be faced with a similar situation”.³⁹⁷

6.2.3.2 Admissibility of Evidence

The international criminal courts practise a very broad admission of evidence. There are virtually no exclusionary rules in international criminal justice. Although this may give rise to concerns with many domestic lawyers, especially those accustomed to systems involving jury-trials and strict admissibility criteria, several safeguards are put in place for the fairness of the trial. Trials are held before professional judges fully capable of correctly assessing the evidence before them; all judgements must give detailed reasons for conviction and trial chamber judgements can be challenged through appeal proceedings. These aspects of international criminal justice lead to a reasonable compromise that all evidence is in principle admissible unless the judge decides otherwise.³⁹⁸ However, this does not address the implications such broad evidentiary rules might have on the length of the proceedings. Moreover, there has been a tendency at least before the SCSL, to be increasingly strict in the adoption of new materials over time as pressure to speed up the proceedings has grown during the course of the trials. This may in turn give rise to problems with regards to equality of arms as it could amount to stricter admissibility criteria for the defence, in some cases presenting its case years after the beginning of the prosecution case. To launch a full investigation into potential discrepancy between the level of urgency with which judges manage cases and admission of evidence over time, and what, if any, impact this might have on the right of the accused, would require more time and space than it can be given in the present paper. It is nonetheless worth noting that at the SCSL, several years have been devoted in relative calm to investigating and presenting evidence on behalf of the prosecution. By the

³⁹⁷ *Ibid.* para. 12.

³⁹⁸ S. Zappalà, *supra* note 94, p. 252.

time defence cases started however, the Court was behind schedule, which had severe budgetary implications.³⁹⁹

A more specific problem is the tradition in international criminal justice to admit evidence intended to show ‘a consistent pattern of conduct’.⁴⁰⁰ Rule 93 of the RPE of the international courts states that “[e]vidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.” Any such acts must be disclosed to the defence prior to trial.⁴⁰¹ This rule is facilitative in international proceedings given the nature of the offences that fall within international criminal law, where focus on individual culpability for each alleged act has been found inadequate. Proof of systematic and widespread patterns of behaviours is often a required element of the prosecution’s case. The rationale behind the rule is that it does not violate the need to prove individual action in connection with each charge but rather it allows the prosecution to prove those very charges. The prosecution must be allowed to prove not only specific conduct on a particular occasion, but also to include evidence of the accused’s general behavioural pattern consistent with alleged violations. This opportunity is supposed to aid the tribunal in more accurately assessing the accused’s comprehensive liability.⁴⁰²

This rule poses some serious difficulties when confronted with the rights of the accused to a fair trial. Firstly, the adoption of evidence relating to alleged crimes or actions not included in the indictment threatens the accused’s right to be presumed innocent. It borders on character

³⁹⁹ For an idea of the outside pressure during the defence case, *see e.g.* the comments made by Justice Bouté trying to encourage the defence teams to decrease the number of witnesses during an RUF Status Conference: “[I]t is no secret that there is a lot of pressure by the Management Committee, as far as this Court is concerned, and the Management Committee which is speaking on behalf of the donor countries, as such. Finances for this Court are not unlimited; the funds are not unlimited. And we had to make some prognosis as to the timing...”, *Prosecutor v. Sesay et al.*, 27 November 2007, SCSL-2004-15-T, ‘Status Conference Transcript’, p. 8.

⁴⁰⁰ This tradition may have contributed to some of the tension that surfaced in the *Sesay* case with the Week’s Adjournment Decision and other related decisions, *supra* note 229.

⁴⁰¹ ICTY RPE, Rule 93(B); ICTR RPE, Rule 93(B). *See also*, ICTY RPE, Rule 66, and; ICTR RPE, Rule 66.

⁴⁰² K. D. Ruttledge, “‘Spoiling Everything’ – But for Whom? Rules of Evidence and International Criminal Proceedings”, 16 *Regent University Law Review* (2003-2004), p. 14.

evidence; that is, evidence relating to past criminal conduct, propensity or disposition do certain acts, and general reputation in the accused's community. Such evidence is highly prejudicial and should not be admitted to prove that the accused committed a particular offence.⁴⁰³ It may lead the court to the conclusion that the accused is a bad person who because of past conduct is likely to be guilty of the offence charged. Evidence on character is irrelevant to the question of guilt. The fact that the accused has shown a propensity to commit similar acts in the past does not mean that he did so again on the occasion in question. Proof of guilt must be based on proven facts, and should not be influenced by prior conduct that does not form part of the charge.⁴⁰⁴ Secondly, there is a risk the court may be deflected from determining guilt and punishment on the basis of the pending charge to examining past conduct. Although the international courts do fulfil a function as truth finding and history recording institutions, there ought to be a limit as to the extent this is allowed to influence particular trials. The subject of the trial is not to be the defendant's attitude, but his or her actions.

The practice of allowing evidence of a consistent pattern of conduct also has a different effect on the rights of the accused. International courts already struggle to provide expeditious trials, hearing cases necessarily involving enormous amounts of evidence. In this context it seems inevitable that any additional evidence will mean longer trials. Furthermore, if the prosecutor is allowed to, and does, provide evidence intended to prove a consistent pattern of conduct, in fairness the same opportunity should be provided to the defence. Such a procedure runs the risk of an ever expanding trial where the prosecution seeks to prove say, a consistently cruel behaviour towards civilians, while the defence would see itself forced to call as many witnesses as possible to give evidence of benevolent behaviour towards the same group. The situation is even more complicated where the accused is charged with participating in a joint criminal enterprise (JCE). It may be in the interest of justice that the accused

⁴⁰³ D. D. Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', 5 *Criminal Law Forum* (1994), p. 17.

⁴⁰⁴ *Ibid.*

be allowed to call evidence to prove not just that he or she personally was consistently acting in a manner inconsistent with the alleged criminal enterprise, but that the enterprise in itself (which, depending on the prosecution case, might include one or several factions involved in the conflict) behaved in a way and/or was based on a philosophy that is inconsistent with the alleged criminal behaviour.⁴⁰⁵ If the enterprise involved helping and protecting civilians, it may not have been a foreseeable consequence thereof that its members would also terrorise said civilian population.

This model, with very open ended rules of evidence that attribute great freedom to the judges to determine admissibility of evidence on a case-by-case basis, requires extremely competent judges who take an active part in managing the trial from the outset of the proceedings. With regards to the more complicated cases, the prospect of proving or disproving indictments involving crimes committed on a massive scale, in areas covering an entire country and spanning upwards a decade of conflict is almost guaranteed to induce the parties to presenting new evidence until explicitly stopped by the bench. Judges who offer guidance as to what the important issues are to lead into evidence and clear indications when sufficient evidence has been heard on a specific topic are essential if one is to minimise the time it takes to present each case.

An example of where more decisive behaviour on the part of the judges from the start of the trial might have served to create a more streamlined process can be found in the RUF trial at the SCSL. As has been discussed above there was much disagreement between the Registry at the Court and the defence for the First Accused Issa Sesay on what level of

⁴⁰⁵ For an explanation of the JCE doctrine, see A Cassese, who seems to acknowledge the potential for overbroad liability due to JCE but argues that this is outweighed by other 'important interests'. He explains the need for JCE in international criminal law with the fact that when international crimes are committed pinpointing the specific contribution made by each individual participant as, (i) not all participants acted in the same manner, and (ii) the *evidence* relating to each individual's conduct may prove difficult if not impossible to find, *Prosecutor v. Kaing*, 27 October 2008, Extraordinary Chambers in the Courts of Cambodia (ECCC), 001/18-07-2007/OCIJ, 'Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine' (Pre-Trial Chamber 02), pp. 13, 14, 35–39.

resources would be necessary for the preparation and presentation of the defence case. This disagreement culminated on the 4th of February 2008 with a defence motion for a week's adjournment to enable it to prepare additional witnesses. Lead Defence Counsel argued that, while his request for additional funds had gone unheard he had now reached a point where he was unable to produce the next witness. The Trial Chamber, clearly displeased with the situation,⁴⁰⁶ granted the motion orally, with a written decision to follow at a later date, and agreed to adjourn the proceedings for one week.⁴⁰⁷ It also ordered that the defence, notwithstanding the adjournment, keep its previous deadline to close its case by 13 March 2008 and that it further decrease the number of witnesses it had intended to call. The written reasons for the decision were issued on 5 March. Here the Chamber touched on several issues of interest to the right to an expeditious trial as well as the right to adequate resources. The Chamber indicated that its decision was predicated on the long involvement in the case by the Lead Counsel of the first Accused and on the apparent repetitiveness of some facts in the testimony of witnesses who had so far testified for the first Accused.⁴⁰⁸ It stated that it had urged the defence to reduce the number of witnesses once on 27 November 2007, and then again, in connection with the application for a week's adjournment on February 4, 2008.⁴⁰⁹ In February it had ordered the Counsel

“to reduce to a minimum, his long list of witnesses and to avoid calling those who are not only repetitive of each other, but also contribute largely to unnecessarily delaying the proceedings and increasing the size of the Sesay case. This duplication of the evidence, in the Chamber's view, has, to a large extent, occasioned the heavy workload that Mr. Jordash is now complaining about.”⁴¹⁰

Interestingly, what the Chamber is saying aims more at bolstering its decision denying the defence application for judicial review than at

⁴⁰⁶ *Prosecutor v. Sesay et al.*, 4 February 2008, SCSL-2004-15-T, ‘Official Court Transcript’, (Open Session), pp. 46, 47.

⁴⁰⁷ *Prosecutor v. Sesay et al.*, 4 February 2008, SCSL-2004-15-T, ‘Official Court Transcript’, (Open Session), pp. 65 *et seq.*

⁴⁰⁸ Week's Adjournment Decision, *supra* note 229, para. 40.

⁴⁰⁹ In fact, at the 27 November 2007 Status Conference Lead Counsel did agree to reduce his core witness list previously counting 135 witnesses to a new total of 65, including 22 written witness statements to be filed under Rules 92bis or 92ter, *Prosecutor v. Sesay et al.*, 27 November 2007, SCSL-2004-15-T, ‘Status Conference Transcript’, pp. 16 *et seq.*

⁴¹⁰ Week's Adjournment Decision, *supra* note 229, paras. 42 and 43.

motivating its decision to adjourn the proceedings. The Judicial Review Decision was issued after the 4 February oral decision but before the written reasons thereof. Here they effectively denied the defence extra resources for an additional counsel to cope with the workload.⁴¹¹ According to the Trial Chamber, the case is not in fact so large or complex as to require greater resources. If the case appears large this is not because of its actual complexity but simply because the defence has chosen a strategy of calling unnecessary and repetitive evidence. The Chamber went so far as to explicitly hold counsel responsible for violating his client's rights:

“This Defence strategy which consists of leading evidence of Defence witnesses who are unnecessarily numerous and repetitive of each other on the same or similar facts, contributes to delaying the proceedings and to violating the very statutory rights of his Client to a fair and expeditious trial ... [I]f the Sesay Defence Team has characterised its case as big and complex, it would appear to be more because of their strategy of multiplying its own burden by ... calling ... witnesses who have turned out to be manifestly repetitive of each other in their testimony on certain facts and issues.”⁴¹²

The Chamber observed that it is an established principle in international criminal law that there is no requirement that the evidence of a single witness as to a particular fact be corroborated before it can be accepted. It quoted the Judgement in *Akayesu* Case as saying “the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion relevant and credible”⁴¹³ and the ICTY Appeals Chamber which has held that “the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration”⁴¹⁴.

As regards the defence claim of a violation of the right to adequate time and facilities under Article 17.4(b), the Chamber was of the view that

⁴¹¹ Judicial Review Decision, *supra* note 218, decided on 12 February 2008; the motion was originally filed on 5 September 2007, *Prosecutor v. Sesay et al.*, 5 September 2007, SCSL-04-15-T, ‘Application for Judicial Review of Registry’s Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007 – SCSL-04-15-T-817’ (Sesay Defence Application) (hereinafter: the Sesay Judicial Review Application).

⁴¹² Week’s Adjournment Decision, *supra* note 229, paras. 47, 50.

⁴¹³ *Prosecutor v. Akayesu*, 2 September 1998, ICTR-96-4-T, ‘Judgement’, para. 135; as quoted in *Prosecutor v. Sesay*, ‘Week’s Adjournment Decision’, para. 52.

⁴¹⁴ *Prosecutor v. Aleksovski*, 24 March 2000, ICTY, IT-95-14-1/A, ‘Judgement’ (Appeals Chamber), para. 62; quoted in *Prosecutor v. Sesay*, ‘Week’s Adjournment Decision’, para. 52.

“...if the breach of that provision is entirely or contributively occasioned by the conduct of the Accused’s Defence Team as we hold, in the light of the preceding analysis, it is indeed the case here, Mr. Sesay would be, and is in fact estopped from complaining of or seeking a redress for such a breach on the grounds of the legal maxim of *volenti non fit injuria*.”⁴¹⁵

The Chamber held that the case in itself was ordinarily not as complex as the defence would have it and that the defence strategy had delayed the proceedings by unnecessarily increasing the size and duration of its case. It was thus held to be “largely contributive to any claims or allegations that are made, of a breach of Sesay’s rights under Article 17(4)(b) of the Statute.”⁴¹⁶

The Trial Chamber also addressed the issue of equality of arms and reiterated its view that in criminal proceedings, the prosecution bears the greater burden of proof than the defence does. The Chamber emphasised that it is the prosecution that has to prove the case against the accused persons beyond reasonable doubt, whereas the defence only bears the lighter burden to “poke specifically targeted holes” into, or generally to raise a reasonable doubt in the prosecution’s case.⁴¹⁷

This Decision gives rise to a number of questions concerning the right to an expeditious trial. It is issued in early February 2008 after nearly five years of trial. At the time of the Decision the Sesay defence case, which began on the 3rd of May 2007, had been going on for nine months during which time 28 witnesses had been heard in addition to the accused. It was scheduled to close only little over one month later.⁴¹⁸ The Chamber appears to recognise that prejudice may have been caused to the rights of the accused: The trial has been unduly delayed and resources which it considers “reasonably adequate in the context of the real and objective dimensions of the case” have been spent in the preparation and presentation of evidence which in the end has turned out to be unnecessary.⁴¹⁹ Ultimately this was at the expense of the rights of the accused. The Chamber states that this

⁴¹⁵ Week’s Adjournment Decision, *supra* note 229, para. 56.

⁴¹⁶ *Ibid.* paras. 56, 57.

⁴¹⁷ *Ibid.* para. 61; with reference to *Prosecutor v. Norman et al.*, 2 March 2006, SCSL-04-14-T, ‘Order to the First Accused to Re-file Summaries of Witness Testimonies’ (Trial Chamber I) at p. 3, quoting *Prosecutor v. Orić*, 20 July 2005, ICTY, IT-03-68-AR73.2, ‘Interlocutory Decision on Length of the Defence Case’ (Appeals Chamber), para. 7.

⁴¹⁸ Week’s Adjournment Decision, *ibid.* paras. 1, 2, 6 and 36.

⁴¹⁹ *Ibid.* para. 57.

prejudice was caused “entirely or contributively” by the defence, which would therefore be precluded from complaining or seeking redress.⁴²⁰ It is difficult to see however, how the Trial Chamber is not itself at least partly responsible for the situation. First of all, the position of the Sesay Defence Team that they will need additional funds to be able to prepare the defence in time was not new to the Chamber. The defence applied twice for judicial review for the purpose of securing adequate funds, first in March 2006 and then again in September 2007, yet the process was not complete until 12 February 2008, about a month before the defence case was scheduled to close.⁴²¹ The time taken by the Chamber in deciding the two motions (approximately eight and five months respectively) does not give the impression of any sense of urgency.⁴²² One must question if the defence can reasonably be blamed for deficiencies in the planning and presentation of its case, when it has been kept in the dark as to what resources it will be allowed until the case has already been presented. Secondly, according to the SCSL RPE, the Trial Chamber shall ensure that a trial is fair and expeditious.⁴²³ The Rules also place an obligation on the Trial Chamber to “exercise control over the mode and order of interrogating witnesses and presenting evidence so as to [...] avoid wasting time”⁴²⁴ and allows it to cut short examination-in-chief of certain witnesses or to reduce the number of witnesses, “if it considers that an excessive number of witnesses are being called to prove the same facts”.⁴²⁵ Arguably, months into the defence case and after following the trial for several years, the Trial Chamber was in a position to intervene long before the situation reached this point.

In the human rights regime, the actions of the accused have normally only been considered to be the cause of a delay in relation to accused persons who prolong the trial by excessively relying on procedural measures. The Trial Chamber’s assertion that this applies also to the right to

⁴²⁰ *Ibid.* para. 56.

⁴²¹ For a discussion on the issue of defence resources and the Judicial Review Decision *see supra*, pp. 52–59.

⁴²² Exceptional Circumstances Decision, *supra* note 217; Judicial Review Decision, *supra* note 218.

⁴²³ SCSL RPE, Rule 26*bis*.

⁴²⁴ SCSL RPE, Rule 90 (f).

⁴²⁵ SCSL RPE, Rule 73*ter* (c and d).

adequate time and facilities is something of a novelty. If taken to its extreme this principle, as pronounced by the Trial Chamber, would mean that even if the accused has been refused adequate resources for the preparation of a defence, he or she is nonetheless “estopped from complaining of or seeking a redress” if he or she did not spend what resources were in fact received wisely. It is doubtful if this principle is at all applicable in relation to accused persons who rely on an excessive amount of evidence. Under normal circumstances there should be no need for such a rule. Unlike procedural motions, which have to be dealt with in the course of the proceedings, the courts are always free to limit the evidence heard to the essential issues at hand and in theory ought never to find themselves in a situation where unnecessary evidence is allowed to delay the proceedings. Even if it were correct that the accused Issa Sesay is in this way responsible for the delays in his own trial, this does not relieve the Court of its responsibilities towards his two Co-accused, who have suffered the same delays. This impression is strengthened when one looks at the examples offered by the Chamber of the testimony it finds excessive:

“[In addition to] an unnecessarily detailed emphasis and consistently repetitive testimony relating to the pre – 30th November 1996 events that have a connection only to the pre-indictment era of the conflict [repetitive evidence includes] mainly the following amongst others:

- a. That civilians who were working on Sesay’s and in other farms or on RUF projects were well treated and well fed by Sesay;
- b. That Sesay was generous and kind to the civilians;
- c. That the RUF provided free Schools and free Education to all civilian children as well as to those of the combatants;
- d. That there were RUF hospitals with RUF Medic Staff and that free consultation, treatment and drugs were provided to civilians by RUF staff in those hospitals;
- e. That civilians who cultivated farms for RUF Commanders did so wilfully, happily, singing and dancing in the process, were very well fed, and were never forced, least still, at gunpoint, to do the work;
- f. That civilians who were involved in diamond mining were not forced by the combatants to perform this task but rather, did so voluntarily and not at gun point and that they did it in their interests because they took a share in the proceeds on a conventional quota – 2 pile system that was agreed upon with their ‘Supporters’ who employed, supported and took care of them.”⁴²⁶

When looking at the list it seems apparent that if indeed repetitive and unnecessary evidence has been heard, the Trial Chamber has allowed an awful lot of it before intervening. The list is adopted here as it also offers

⁴²⁶ Week’s Adjournment Decision, *supra* note 229, paras. 45, 46.

some insight to the difficulties that may arise both to judges and to the parties when trying to navigate open ended evidentiary rules in large and complex trials. A common theme to the testimony included on the list is that much of it is evidence relating to the general conduct of the accused or forces allegedly under his control. In addition, paragraphs a., e. and f. relate directly to allegations of forced labour or slavery.

The Indictment against Issa Sesay argues that all acts and omissions charged as crimes against humanity were committed as part of a widespread and systematic attack directed against the civilian population of Sierra Leone.⁴²⁷ The Accused Persons are also charged with participation in a JCE where:

“[t]he crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonable foreseeable consequence of the joint criminal enterprise.”⁴²⁸

The list of evidence offered by the judges as examples of unnecessary repetition could, if accepted as credible, lead to the conclusion that the accused was attempting to set up a rudimentary system of welfare normally provided by the state. This would indicate a pattern of conduct wholly inconsistent with systematic attacks on the civilian population. If accepted as a goal of the RUF as an organisation, it would also go against the allegation that crimes committed by the RUF/AFRC were a foreseeable consequence and against the allegation of a JCE as such. None of this would excuse unnecessary repetition. However, a closer look at the Indictment might explain why the defence would feel inclined to rely on more rather than less evidence. For example, under Count 13 “Abductions and Forced Labour” it is alleged that “[a]t all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour and use as diamond miners.”⁴²⁹ These abductions and forced labour supposedly took place at different times in

⁴²⁷ *Prosecutor v. Sesay et al.*, 2 August 2006, SCSL-2004-15-T, ‘Corrected Amended Consolidated Indictment’ (hereinafter: the RUF Indictment), para. 17.

⁴²⁸ *Ibid.* para. 37.

⁴²⁹ *Ibid.* para 69.

various locations in six of the districts that make up Sierra Leone. Some of these times and locations are detailed with greater precision than others. The most extreme example is offered regarding the district of Kailahun, which formed the core of RUF controlled territory: "At all times relevant to this Indictment [approximately 30 November 1996 until 15 September 2000], captured civilian men, women and children were brought to various locations within the District and used as forced labour".⁴³⁰ The Indictment does not identify any individual victim of forced labour, or indeed of any of the alleged crimes. No alleged perpetrators are identified in the indictment, nor are the material facts underpinning the various forms of responsibility pleaded. From a defence perspective, both the number of locations and the time span would warrant several witnesses to repeat the same message. Presenting a witness who gives testimony that he or she did not experience any forced labour in one of these locations in say 1997, does not offer any guarantees for that testimony in 1999. Even if the witness is believed, the accused could still be convicted for the use of forced labour at that same farm at a separate occasion, or at a different farm in the same material time. This is especially so when the Indictment is framed in such loose terms as 'various locations' and 'at all times relevant to the indictment'. Fewer witnesses in a position to give evidence that covers a large part of the indictment in one go are clearly preferable. Yet a witness can only testify to what he or she has actually observed. If no witness can be found who is able and willing to give evidence that covers an entire episode, it may be that two or three witnesses are necessary, not to corroborate each other's testimony, but to fully rebut the charges made against the accused.

Under international human rights law the general rule is that it is not for the authorities to determine whether the actions of the defence were reasonable and the ECtHR has been reluctant to attribute responsibility for delays to the accused.⁴³¹ Any decision as to strategy and choice of defence must be entirely up to the defence itself to make. The SCSL Trial Chamber has repeatedly pointed out that the prosecution carries the greater

⁴³⁰ *Ibid.* para 74.

⁴³¹ *Supra*, p. 84.

burden of proof and the defence “only bears the lighter burden to ‘poke specifically targeted holes’ into, or generally to raise a reasonable doubt in the Prosecution’s case.”⁴³² However, in a fair trial with full respect to the right of the accused to present a defence, the defence ought still to be allowed, within reason, to present its own alternative theory as to what might have happened. If the accused is on trial for participating in a criminal enterprise, he or she must be entitled to put forward a theory, however farfetched it may initially appear, that the enterprise was in fact inherently good. If the evidence against him is bolstered by allegations of a ‘consistent pattern of conduct’, he should be allowed to bring evidence not only questioning this pattern but also to establish a pattern that calls into question the evidence the prosecution tries to bolster.

Based on the *Sesay* case, we can identify two possible explanations to the abundance of repetitive evidence before a Trial Chamber. First, it may be, as the Trial Chamber held in the present case, that the evidence is largely unnecessary for disproving the allegations made against the accused. In this case, some blame may nonetheless rest with the Chamber for allowing the situation to take on such proportions and escalate to a point where the defence has exhausted its resources with only a few weeks left at its disposal for the presentation of its case. Alternatively, it may be a result of an overly generous attitude towards the prosecution at the outset of the trial. The practice of allowing for vague indictments and much evidence of a purely probative value may have paved the way for a situation where the defence feels obliged to cover every possible angle, as it is unsure what might lead to a conviction.⁴³³ This alternative would explain why the

⁴³² *E.g.*, in *Prosecutor v. Sesay*, Week’s Adjournment Decision, *supra* note, 229, para. 61.

⁴³³ Counsel for the Defence have repeatedly brought to the attention of the Court their insecurity as to what the prosecution’s case is on a number of issues. *See e.g.* the following extract from court transcripts on 25 October 2007 relating to the prosecution’s position on trade under RUF control: “Mr. Jordash [Counsel of the 1st Accused Mr. Sesay]: ... I am ... just saying that we don’t know what the Prosecution’s case is on this. Presiding Judge [Hon. Justice Itoé]: That you will tell us in your final submissions. They also will have the right to reply on this at the appropriate time. Mr. Jordash: I suppose also I was asking in a different way the Prosecution, inviting them to say what it is their case is but -- Presiding Judge: It is their business. If they don’t prove, if they don’t establish their case, well, the consequences are there. We will be telling them.” *Prosecutor v. Sesay et al.*, 25 October 2007, SCSL-2004-15-T, ‘Official Court Transcript’, (Open Session), p. 53, lines 2-14.

Sesay Trial Chamber allowed the evidence in the first place, as it would have felt obliged to retain the same attitude towards defence witnesses as it had towards those of the prosecution. Either way, the defence is put in a difficult position where it needs to bring probative evidence repeatedly on similar issues without any guidance as to when is enough. As we know, the courts will not make any evaluation on the credibility of evidence following a motion for acquittal at the end of the prosecution case.⁴³⁴ All that remains to assist in narrowing the scope of the defence case is any guidance the Judges can offer on what issues they consider important, and indications from the prosecution as to what evidence they intend to rely on.

Finally, there appears to be a contradiction between the Trial Chamber's position in the *Week's* Adjournment Decision, and the Rule that evidence showing a 'consistent pattern of conduct' should be admissible 'in the interest of justice'. According to the SCSL Statute the accused shall be entitled as a minimum guarantee: "To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."⁴³⁵ The same right exists under international human rights law. To allow the prosecution but not the defence to present evidence of a consistent pattern of conduct can hardly be reconciled with this right. It cannot be 'in the interest of justice' to set aside a minimum guarantee under the Statute and international human rights to allow for evidence that is of doubtful legal relevance in the first place.⁴³⁶ Notwithstanding this, a pattern of conduct inconsistent with the alleged crimes must be of equal interest from a justice perspective as one that is consistent, as they are equally indicative of the guilt or not of the accused.

⁴³⁴ *Supra*, pp. 37, 38

⁴³⁵ SCSL Statute, *supra* note 89, Article 17.4(e).

⁴³⁶ *See supra* discussion on 'consistent pattern of conduct' *vis-à-vis* character evidence, pp. 97, 98.

6.2.4 Conduct of Authorities – The Example of the SCSL

Fully evaluating the conduct of the authorities in relation to the length of international proceedings would be a colossal task beyond the scope of the present paper. Rather than attempting a full review of all the factors that may have influenced the length of specific trials, examples will be taken from key areas of the work of the SCSL so as to help illustrate potential problems from a fair trial perspective. Three such areas can be identified: judicial management, both of the proceedings in the courtroom and of the trial as a whole; delays caused by the prosecution such as late disclosure of incriminating evidence; and, external factors that cannot be directly related to the work of the judges or that are outside the control of the court.

6.2.4.1 Judicial Management

Where proceedings fail to live up to expectations of expediency, this may stem from deficiencies in courtroom management. The importance of proactive management is especially prominent in complex cases where both judges and the parties have access to limited resources.⁴³⁷ In the context of the SCSL, it is also important to look at some of the early scheduling decisions made by the Trial Chamber. Antonio Cassese highlighted this as one area of concern in his report in December 2006.⁴³⁸ He illustrates the importance of advance planning of key trial steps by referring to the scheduling of the decision in the AFRC trial on motions for judgement of acquittal.⁴³⁹ When the final prosecution witness finished its testimony on 17 October 2005, the prosecutor was not in a position to close its case because it was still waiting for a number of other outstanding decisions from the Trial Chamber. These decisions resulted in the prosecution recalling one witness to be heard on 7 November 2005 and the prosecution rested its case on 21 November 2005. From this date, the defence was given three weeks to

⁴³⁷ Cassese Report, *supra* note 292, paras. 85–87.

⁴³⁸ *Ibid.*

⁴³⁹ *Prosecutor v. Brima et al.*, 31 March 2006, SCSL-04-16-T, ‘Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98’ (Trial Chamber II); Cassese Report, *ibid.* paras. 157–160.

file a motion for acquittal. The prosecution was allowed three weeks to respond to the motion and the defence had one further week to reply. This scheduling meant that even though the case was essentially concluded on 17 October, the filings under Rule 98 were not complete until 31 January 2006, after the intervening judicial recess. The decision on the motion was rendered on 31 March 2006. The Trial Chamber and the parties then began to prepare for the defence cases, the first of which eventually started on 5 June 2006. Motions of acquittal are not easily decided and the time taken by the Judges to consider and draft the decision, 31 January to 21 March 2006, is not extraordinary. However, the overall pause in the proceedings is much more significant. Cassese made a suggestion that when approaching these key steps in the proceedings, such as the close of the Prosecution case, the Trial Chamber could schedule the filing dates for significant motions well in advance, requiring the parties to file their motion, responses, and replies very shortly after the closing of the case.⁴⁴⁰ The Trial Chamber had attempted to do this in the AFRC case by issuing an advanced scheduling order on 30 September 2005. The written filings nevertheless took ten weeks. Since then, the Judges have adopted an oral Rule 98 procedure in an effort to speed up the procedure. Cassese also suggested that the Chamber could have commenced the pre-defence process without prejudice to the eventual outcome of their decision. While the Chamber was drafting the decision, the parties could have been working on preparing the pre-defence materials and getting ready for the presentation of the defence witnesses. The Chamber could have requested the defence to file all necessary documents immediately after the decision was issued. Should the decision result in a reduced prosecution case, the defence could have been granted an extension to adjust particular parts of their materials. The defence case could have started very shortly thereafter. This proactive practice as suggested by Cassese, could have significantly reduced the period between the delivery of the decision and the commencement of the case that now lasted from 31 March until 5 June 2006.

⁴⁴⁰ Cassese Report, *ibid.* para. 160.

It is not obvious that delays in the proceedings caused by poor scheduling would lead to a violation of the right to a speedy trial. After all the delay was ultimately the result of a procedural motion by the defence. In retrospect a delay of between six and seven months does seem difficult to explain for a procedure that was originally intended to slim down and hopefully speed up the proceedings, however. Either way, the court is certainly required to plan the proceedings efficiently and to speed things up where it sees such potential. In this respect, the subsequent efforts to speed up the Rule 98 process through oral proceedings is encouraging. Even so, the RUF trial has suffered similar delays. The prosecution closed its case on 2 August 2006. After hearing oral arguments on acquittal based on the new Rule 98 on 12 October 2006 Trial Chamber I rendered its decision on 25 October 2006.⁴⁴¹ In spite of this significantly shorter procedure, the RUF defence case did not start until 3 May 2007. This was largely the result of the Chambers decision to adjourn the RUF trial to allow it time to focus on drafting the CDF judgement. The defence case was further delayed after Counsel for the First Accused expressed concerns that insufficient resources had left him unable to prepare witnesses for trial in time and asked for the commencement of the defence case to be rescheduled for April.⁴⁴² Although the Trial Chamber deserves recognition for its effort to afford the defence adequate time for the preparation of its case, Cassese has questioned whether it was necessary to pause the RUF trial during the bulk of the CDF drafting period.⁴⁴³ Again, it is the totality of the time consumed – 2 August 2006 to 3 May 2007 – which is worrying.

The CDF and the RUF cases, both handled before Trial Chamber I and generally considered the two most complex cases at the SCSL, have often influenced each other in this way.⁴⁴⁴ Nonetheless, it

⁴⁴¹ *Prosecutor v. Sesay et al.*, 2 March 2007, SCSL-04-15-T, ‘Decision on Defence Request for Clarification on Rule 98 Decision’ (Trial Chamber I), paras. 1, 2.

⁴⁴² Indeed the Trial Chamber found that the defence had not been given sufficient logistical resources for the preparation of its defence, Logistical Resources Decision, *supra* note 210; *see further supra*, pp. 52 *et seq.*

⁴⁴³ *See e.g.*, ‘Cassese Report’, *supra* note 292, paras. 163, 164.

⁴⁴⁴ This has been used also to excuse impingement on other rights of the accused. *See e.g.* Justice Itoé on the length of detention in the RUF trial: “[O]f course, we are all here to ensure that ... the accused persons don't remain in custody for an indefinite length of time.

cannot be denied that the decision to hear these two cases on an alternate basis approximately every six weeks has contributed to the overall length of both cases.⁴⁴⁵ Another way in which the trials were affected is that decisions on motions filed in one session in either trial would generally not be rendered until after a full session of the other trial had passed.⁴⁴⁶

The long time required for deciding on party motions is another major area where one might question the priorities of the SCSL. HRW has repeatedly expressed its concerns for significant delays in the rendering of decisions.⁴⁴⁷ Particularly worrying are the long delays in some decisions concerning fundamental rights of the accused. For example, decisions denying bail to defendants have been marked by protracted delays.⁴⁴⁸ In one case, a decision on an application for bail by one of the accused in the CDF trial designated for disposition by one judge in Trial Chamber I was not issued until more than four months after all submissions had been filed.⁴⁴⁹ The Appeals Chamber then took another three months to render a decision on a motion appealing the denial of bail.⁴⁵⁰ In the RUF trial, the Appeals Chamber again took over three months to issue a decision on an appeal against denial of bail to an accused.⁴⁵¹ Thus, the length of time required for decisions in the Appeals Chamber has also been a point of concern,⁴⁵² as have the lengthy adjournments needed for judges' decisions.⁴⁵³ Some decisions, while not relating directly to the rights of the accused, may have an effect in prolonging the proceedings in that the parties

They have been in custody for long. We all understand this. We have been doing two cases simultaneously and this is what has been responsible for the delay." RUF Status Conference Transcript, 27 November 2007, p. 13.

⁴⁴⁵ Cassese Report, *supra* note 292, para. 87.

⁴⁴⁶ Human Rights Watch, *Justice in Motion – The Trial Phase of the Special Court for Sierra Leone*, Sierra Leone, November 2005 Volume 17, No. 14 (A), (hereinafter: the HRW 2005 Report), p. 10, fn. 22.

⁴⁴⁷ *Ibid.* p. 10; HRW 2004 Report, *supra* note 101, p. 13.

⁴⁴⁸ HRW 2005 Report, *ibid.* p. 11.

⁴⁴⁹ *Prosecutor v. Norman et al.*, 5 August 2004, SCSL-04-14-T, 'Fofana – Decision on Application for Bail Pursuant to Rule 65' (Trial Chamber I).

⁴⁵⁰ *Prosecutor v. Norman et al.*, 'Fofana – Appeal against Decision Refusing Bail', March 11, 2005, SCSL-04-14-AR65 (Appeals Chamber).

⁴⁵¹ *Prosecutor v. Sesay et al.*, 14 December 2004, SCSL-04-15-AR65, 'Sesay – Decision on Appeal Against Refusal of Bail' (Appeals Chamber).

⁴⁵² See e.g., HRW 2005 Report, *supra* note 446, p. 11; Cassese Report, *supra* note 292, Annex D.

⁴⁵³ ICTJ Report, *supra* note 101, p. 29.

await a decision before they can proceed with the preparation of their cases. Decisions on the Court's jurisdiction have regularly suffered from protracted delays, having a domino effect pushing back other rulings that cannot be issued without the decision, and slowing down proceedings overall. In the Appeals Chamber, the judges took between eight and nine months from June 2003 to March 2004 to rule on three motions challenging the court's jurisdiction on the basis of the Lomé Accord, lack of judicial independence, and lack of constitutionality.⁴⁵⁴

Tom Perriello and Marieke Wierda wrote a report on the Special Court in March 2006 on behalf of the International Center for Transitional Justice (hereinafter: the ICTJ Report). Here they voiced concerns that the judges initially did not display sufficient experience in controlling the courtroom, some of the judges gave too much leeway to the parties or individual defendants or were not adequately sensitive to witnesses.⁴⁵⁵ Other observers have made similar reports.⁴⁵⁶ The main problem in relation to courtroom management, which is fairly consistently reported on by all independent observers, is the relatively lax attitude towards the courts schedule, particularly at Trial Chamber I.⁴⁵⁷ A review made by Cassese of court transcripts for the Independent Expert Report revealed that between 5 July and 2 August 2006, Trial Chamber I would usually start 15 – 30 minutes late in the morning. Other breaks during the day were similarly extended. In total, the Judges started court 14 hours and 27 minutes after their scheduled court time during this period, which

⁴⁵⁴ *Prosecutor v. Kallon, Norman and Kamara*, '13 March 2004, SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E) and SCSL-2004-16-AR72(E), 'Decision on Constitutionality and Lack of Jurisdiction', (Appeals Chamber); *Prosecutor v. Kallon and Kamara*, 'Lomé Amnesty Decision' *supra* note XXXXXXXXXXXXXXXXXXXX; *Prosecutor v. Norman*, 13 March 2004, SCSL-04-14-PT-034-I, SCSL-04-14-PT-034-II, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)' (Appeals Chamber).

⁴⁵⁵ ICTJ Report, *supra* note 101, p. 20.

⁴⁵⁶ *See e.g.*, HRW 2004 Report, *supra* note 101; Cassese Report, *supra* note 292.

⁴⁵⁷ *See e.g.*, S. Kendall and M. Staggs, *Interim Report on the Special Court for Sierra Leone*, War Crimes Studies Center, University of California, Berkeley, April 2005 (hereinafter: Berkeley Interim Report), p. 27: "Long breaks and late start times have also become standard practice in Trial Chamber I. The 9:30 start time is not always adhered to, and the court usually starts ten to thirty minutes late. [...] The Presiding Judge often announces a break "for some minutes," a vague indicator which has lasted for up to 40 minutes"; *see also*: Cassese Report, *ibid.* paras. 167–169; ICTJ Report, *supra* note 101, p. 20; HRW 2005 Report, *supra* note 446, p. 13.

averaged approximately 41 minutes per day.⁴⁵⁸ While the Judges may have been working on other matters outside of the courtroom for part of this time, the parties spent it waiting in the courtroom for the judges to arrive.⁴⁵⁹ Other observers have noted also the relatively long breaks and low average of sitting hours per day as other problems.⁴⁶⁰ In addition, the Chamber generally decided not to take on an additional witness if there was half an hour or less of trial time remaining on a given day, and it has made the decision to wait until the following day to call a witness even when a full hour of potential trial time remained.⁴⁶¹

6.2.4.2 Delays Caused by the Prosecution

Disclosure of witness statements by the prosecution to the defence is an important aspect of ensuring a fair trial. When such disclosure is made, it is also necessary to offer the defence sufficient time to adapt to additional allegations. Against this background, it is worrying that disclosure of substantial additional information from witnesses by the prosecution to the defence has occurred shortly before witnesses are scheduled to testify. Especially in some instances where it contained new and incriminating evidence.⁴⁶² Some new information will inevitably surface shortly prior to trial as witnesses gain trust in the court and/or are more likely to remember additional facts or willing to provide certain evidence. However the prosecution at the SCSL may have missed opportunities to obtain and disclose additional evidence earlier.⁴⁶³ The OTP conducted a process known as a the ‘confirmation process’ approximately one year after initial statements were taken whereby witnesses were asked to confirm the accuracy of their statements. According to HRW, the quality of initial statement taking had left some witness statements with gaps which where

⁴⁵⁸ Cassese Report, *supra* note 492, Annex D, ‘Summary of Judicial Tardiness from 5 July to 2 August 2006’.

⁴⁵⁹ These figures are consistent with the author’s personal experience of Court proceedings in Trial Chamber I between November 2007 and March 2008.

⁴⁶⁰ *See e.g.*, Berkeley Defence Office Report, *supra* note 101, p. 27; ICTJ Report, *supra* note 101, p. 20.

⁴⁶¹ Berkeley Defence Office Report, *ibid.*

⁴⁶² HRW Report 2005, *supra* note 446, p. 19.

⁴⁶³ *Ibid.* pp. 19, 20.

known prior to the confirmation process.⁴⁶⁴ In spite of this knowledge witnesses were not asked about such gaps during the process, nor were they asked to provide a full re-accounting of the events they had experienced. In interviews with HRW, SCSL staff indicated that witnesses were simply asked if they agreed with their witness statement. This confirmation process did not yield additional evidence from witnesses.⁴⁶⁵ In at least two instances the prosecution was found to have breached its disclosure obligations to the defence by failing to disclose certain evidence in its possession at any point in advance of a witness testifying.⁴⁶⁶

The *voir dire* proceedings that were held to determine the admissibility of interviews with the accused Issa Sesay immediately following his arrest offered an unique opportunity to understand how the prosecution investigations and helps explain the difficulties.⁴⁶⁷ The Berkeley OTP Report revealed serious flaws in the initial investigations undertaken by the prosecution investigators. As outlined above, insufficient training, no written rules guiding the investigators work and an absence of accountability mechanisms had led to inadequate protection of the rights of the accused.⁴⁶⁸ In addition, it appears also to have had an adverse effect on the quality of the investigations. One senior investigator is quoted in the report saying that the Investigations Section within the OTP at times seemed to be operating “like a ship without rudder. You know it was just sort of sailing away”.⁴⁶⁹ He opined that the OTP suffered a “lack of strategic vision” for the process of investigation that hindered their ability to follow leads, gather the strongest evidence and to put together indictments accordingly.⁴⁷⁰

The way investigations were conducted may have had an effect on both the form of the indictments and on the ability of the

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Prosecutor v. Sesay et al.*, 28 January 2005, SCSL-04-15-T ‘Ruling on Disclosure Regarding Witness TF1-015’ (Trial Chamber I); *Prosecutor v. Sesay*, 4 February 2005, ‘Ruling on Disclosure Regarding Witness TF1-195’ (Trial Chamber I).

⁴⁶⁷ *Voir Dire* Decision, *supra* note 115.

⁴⁶⁸ *Supra* p. 34; Berkeley OTP Report, *supra* note 127.

⁴⁶⁹ Berkeley OTP Report, *ibid.* p. 50.

⁴⁷⁰ *Ibid.*

prosecution to prepare for trial and to comply with disclosure obligations. According to Kevin Tavener, Senior Trial Attorney in charge of the prosecutions in the CDF trial, the quality of the witness statements was so poor, the CDF trial team had to conduct wholesale re-interviews of nearly every witness they led into evidence.⁴⁷¹ This led them to, in effect, re-investigate the entire case themselves. According to Tavener, the OTP failed to observe even the most basic investigative practices.⁴⁷² Investigators working during the pre-indictment phase had almost uniformly produced witness statements with little or no corroboration.⁴⁷³ There was no cross referencing between witness statements and police diaries, no photographs of scenes or the individuals who had been interviewed, no cross-referencing investigations with maps, and extremely scarce forensic evidence.⁴⁷⁴

The extensive re-investigation meant that impeachment of witnesses was a major problem at trial as there would often remain huge gaps between the content of initial statements and what the witness ended up actually saying in court. Prosecution witnesses would often find it difficult or impossible to verify that a particular statement was theirs.

The form and extent of witness re-interviewing has raised fairness issues also in the RUF trial where they have given rise to allegations of procedural abuse and material prejudice. The manner in which the OTP “proofs” its witnesses before trial have led to numerous complaints from defence teams. It is not the practice of re-interviewing as such, which both defence and prosecution agree is normal and acceptable, that gives rise to such objections. However, what the OTP has reported doing with its witnesses in RUF proofing sessions goes beyond mere clarification. Prosecution proofing briefs in the RUF trial reveal that interviews are designed to cover “not only issues that are dealt with in the witness’

⁴⁷¹ *Ibid.* p. 44.

⁴⁷² *Ibid.*

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

previous statements, but also other issues that may be within the witness' knowledge and which are pertinent to the case".⁴⁷⁵

The extensive OTP re-interviewing process has enabled the prosecution to introduce new corroboration for evidence after it has been led in court and generated more specific allegations that the prosecution then discloses to the defence in supplemental witness statements. The Sesay Defence Team argues this is prejudicial because it allows the prosecution to "mould its case to suit the evidence as it unfolds" and thereby requires the Defence to "hit a moving target".⁴⁷⁶ Trial Chamber I has repeatedly denied such motions by the defence without inquiring into the merits of the issue.⁴⁷⁷

The power to design the indictments makes the prosecution the most influential authority in determining the scope of the proceedings from the outset of the trial. Again the indictment against the accused in the RUF trial can serve as an example. Of course the form of the indictment will depend on the evidence available to the prosecutor at the time. Nevertheless, a look at the indictment gives the impression that its authors wanted to avoid putting their foot down on any one issue for fear of shutting the door on whatever evidence they might come across during trial. The Amended Indictment does not identify a single victim individually;⁴⁷⁸ identify any alleged perpetrators;⁴⁷⁹ plead any material facts supporting specific crimes; or plead the material facts underpinning the various responsibilities.⁴⁸⁰ It cursorily pleads the statutory language of all forms of responsibility and is often vague on the time and place where crimes are alleged to have been

⁴⁷⁵ *Prosecutor v. Sesay et al.*, 23 August 2006, SCSL-04-15-T-635, 'Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006' para. 7.

⁴⁷⁶ See *Prosecutor v. Sesay et al.*, 24 April 2007, SCSL-04-15-T-765, 'Defence Motion Seeking a Stay of the Indictment and a Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently)'.

⁴⁷⁷ Berkeley OTP Report, *supra* note 127, p. 45.

⁴⁷⁸ Notwithstanding that case law clearly shows that they should do so, as such information is essential to the preparation of the defence case. *E.g. Prosecutor v. Kurpreskic*, IT-95-16-A, 'Judgement', 23 October 2001, at paras. 89, 90; *Prosecutor v. Brima et al.*, 20 June 2007, SCSL-04-16-T, 'Judgement' (Trial Chamber II), at para. 36.

⁴⁷⁹ Notwithstanding case law holding this as necessary to constitute a properly plead indictment. *E.g. Prosecutor v. Gatete*, 29 March 2004, ICTR-00-61-1, 'Decision on the Defence Preliminary Motion' (Trial Chamber I), paras. 12, 13.

⁴⁸⁰ Notwithstanding case law denouncing such omissions. *E.g., Prosecutor v. Ntagerura et al.*, 7 July 2006, ICTR-99-46-A, 'Appeals Judgement'.

committed.⁴⁸¹ This lack of precision needs to be remedied during the course of the trial which might contribute to the length both of the prosecution case and of the time needed by the defence in the preparation of their case. Especially when combined with the poor quality of initial investigations and the practice of extensive last minute re-interviewing in search for new evidence to be introduced into the trial.

The proceedings are prolonged even further by a practice on the part of the prosecution, to never state its case on individual allegations, nor on what evidence it intends to rely on. There are several examples where the defence complains that due to a lack of clarity they are unsure of what evidence the prosecution intends to rely on and what allegations they need to rebut. In one instance a prosecution witness who goes by the pseudonym TFI-108 claimed that his wife had been raped and killed by RUF fighters. This allegation was disputed by the defence, which indeed did manage to locate a woman by the same name who had in fact been married to the witness at this time. The prosecution was given time to investigate before the woman was put on the stand as a defence witness. Other defence witnesses also had parts of their testimony adjourned so that the prosecution could investigate their relationship to the woman before the defence was allowed to present them with a picture of the woman for identification purposes. The woman testified on the 29th January 2008 that she was the ex-wife of TFI-108, that she had not been raped, and that she had left Sierra Leone after her relationship with TFI-108 had ended.⁴⁸² The prosecution failed to put any substantive challenge to her testimony and failed to suggest

⁴⁸¹ Count 12 on the use of child soldiers can illustrate this vagueness: “*At all times relevant to this indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters. By their acts and omissions in relation to these events, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes [of conscripting or enlisting children under the age of 15 years into armed forced or groups, or using them to participate actively in hostilities]*”, RUF Indictment, para. 68 (emphasis added).

⁴⁸² In fact, she said, TFI-108 had left her for another woman. After she then took another man TFI-108 had her stripped naked and beaten in public. She said she left Sierra Leone after that to go to Liberia as she was afraid of TFI-108. *Prosecutor v. Sesay et al.*, 1 February 2008, SCSL-2004-15-T, ‘Official Court Transcript’, (Open Session), pp. 39, 42–44.

that she was not the wife of TFI-108 that was raped and killed at the hands of the RUF.⁴⁸³ After the woman had testified Counsel for the first Accused argued that the prosecution's approach to the witness indicated that it either was in possession of proof that the evidence of TFI-108 was unreliable; and/or had independently arrived at this conclusion and no longer sought to rely upon the allegation. It was submitted that any such material should be disclosed and that the prosecution should state its case in relation to the allegations of rape and murder of the wife of TFI-108. The prosecution declined to comment. On the 5th February 2008, four days after the end of the woman's testimony, the prosecution did indeed disclose such materials. On 25th January 2008 the prosecution had taken another statement from TFI-108 who now claimed that the woman who had died was not the defence witness but was in fact another wife of his by the same name.⁴⁸⁴ However, the same day another prosecution witness had revealed in a statement that TFI-108 attempted to persuade him into fabricating evidence concerning the death of his wife.⁴⁸⁵ The two statements clearly cast doubt over the credibility of TFI-108 and/or are exculpatory in nature and ought to have been immediately disclosed to the defence. The actions by the prosecution are difficult to understand. Either they do believe that the woman is who she says she is, in which the allegation of murder is impossible; or they think she is a fraud, in which case they are expected to make use of the cross-examination question her testimony. The situation illustrates how late disclosure of materials serve to prolong the trial and exhaust defence resources. Presuming the prosecution believes in the result of its own investigations, they knew that the woman was in fact alive. Yet they allowed her to be called to testify as a defence witness (with all the risks that entails) and allowed the issue to take up several days of court time

⁴⁸³ See Transcript, 1 February 2008, pp. 50–60.

⁴⁸⁴ *Prosecutor v. Sesay et al.*, 6 February 2008, SCSL-2004-15-T, 'Defence Motion Requesting the Trial Chamber to (i) Sanction the Prosecution for Deliberately Concealing Rule 68 material and Abusing the Court's Process; (ii) Order the Prosecution to state their case with particularity; (iii) Recall to Testify Prosecution Witnesses TF1-108; and (iv) To admit the written statement of TF1-330 as evidence in lieu of oral testimony, pursuant to Rule 92bis' (Sesay Defence Motion – Public with Redactions and Confidential Annexes), para. 9.

⁴⁸⁵ *Ibid.* para. 27.

when it could have been disposed of by simply disclosing the materials and accepting that she is in fact alive. As such, the defence still does not know, even after the disclosure and the testimony, if the prosecution does in fact intend to rely on this and other parts of TFI-108's evidence. It is still in a difficult position, trying to assess the need of calling additional evidence in rebuttal of a witness who most likely is lying.⁴⁸⁶ The effect of this behaviour on the length of the trial becomes apparent when one considers that it is on 1 February 2008, the day she testified and brought the episode to its conclusion, that the defence for the first time asks for an adjournment to catch up with the preparation of witnesses. The request was denied by the Trial Chamber but on the next court day, 4 February 2008, it was nonetheless forced to adjourn the proceedings for one week. It is of course impossible to know, but had the defence and the prosecution been able to reach an agreement regarding the allegations of witness TFI-108, on the basis of the prosecution investigations, this might have released enough resources to keep the defence case afloat for another week, thus rendering unnecessary the week-long adjournment.

Another implication of this episode is even more alarming. If the lack of any challenge to the testimony of the defence witnesses on this point is due, not to a mere oversight, but to the fact that they believe the woman really is the same person TFI-108 alleges was killed, this means the defendants are accused of a killing the prosecution believes never took place. In such a situation it has an absolute duty to drop the charges. The alternative, to allow someone to run the risk of conviction for a crime that never happened is completely incompatible with the interests of justice and shocking to any notion of fairness. A prosecutor is expected to act as an officer of justice and to assist the court in its search for the truth. It is important that the prosecution makes efforts, not only to ensure it lives up to

⁴⁸⁶ As put by Wayne Jordash, Counsel for Issa Sesay, in response to the Judges Thompson and Itoé on 4 February 2008: "If an allegation is made by the Prosecution, and yet they seem not to pursue it, the Defence still have to deal with it through evidence which appears to, on one view, Mr Sesay's view, place the burden on him to fight allegations which may or may not be made in the final stage ... do we, the Defence, continue to expend energy and resources to rebut the allegation or do we take a guess?" *Prosecutor v. Sesay et al.*, 4 February 2008, SCSL-2004-15-T, 'Official Court Transcript', (Open Session).

disclosure obligations, but that it is in a broader sense acting in good faith and is candid in its behaviour towards the defence and chamber. The responsibility of the prosecution to act in good faith becomes all the more important when it is given great latitude, as has been the case at the SCSL.

6.2.4.3 External Factors

There are a number of factors that contribute to the length of the proceedings at the SCSL that cannot be directly related to the conduct of the Court itself. Mainly this can be related to the constant shortage of funds. For example, in certain instances the Management Committee and the parties to the Special Court Agreement (the UN and the Government of Sierra Leone) have taken a long time in appointing relevant Court officials. These delays may have had a considerable impact on the functioning of the Court, as they cause uncertainty and slow down the efficient conduct of business.⁴⁸⁷ The long delay in appointing a second trial chamber significantly delayed the progress of the Court. This delay was, in part responsible for the decision by Trial Chamber I to start two cases at the same time. Had two trial chambers been set up right away, the handling of the various cases would no doubt have been more rapid and efficient. Another example where the eagerness to save funds is likely to have slowed the work of Chambers is the reluctance to employ sufficient legal officers to support the judges.⁴⁸⁸ Even though efforts have been made to rectify this situation, it is likely to have had an impact on the length of proceedings. Primarily, the lack of sufficient legal support may have increased the time needed to prepare decisions on motions by the parties when judges have to perform even the basic legal research by themselves. Many of the problems within the OTP might have been prevented if less emphasis had been placed on speed initially, and more attention given to ensuring staff appropriate training and to the development of written OTP to guide international investigators in their work.

The decision to conduct the proceedings on site in Sierra Leone, while one of the most positive and unique innovations to come out of the Special Court, has also meant several difficulties that had to be

⁴⁸⁷ Cassese Report, *supra* note 492, p. 22.

⁴⁸⁸ *Ibid.* p. 66; ICTJ Report, *supra* note 101, p. 20.

overcome. Some of these caused initial delays, although they did not necessarily affect the length of trials, such as the construction of new court facilities in a country that has suffered almost total destruction during the war and prior to that due to poverty and mismanagement. Others are likely to continue to have a negative influence on the proceedings throughout the lifespan of the Court. In this category are health problems which plague the staff and technical disruptions for a court which is dependant on satellites for internet access and which has been forced to establish its own infrastructure including generating its own electricity.

7 Conclusions and Recommendations

Through the establishment of the international criminal courts, the international community took a leap step towards ending impunity for international crimes and bringing justice where it is needed the most. An important aspect of international criminal justice is the hope that strengthening the rule of law, where it has long been denied, might in turn strengthen the peace and prevent future atrocities. From the start, the international criminal courts have proclaimed their commitment to maintaining the highest human rights standards in their proceedings and to the full respect for the rights of the accused. Indeed, the Statutes of the courts include minimum guarantees based on international human rights instruments and the courts have looked to the interpretation of these instruments when determining the scope of their application.

There is a strong public interest in seeing the perpetrators of international crimes brought to justice. In practice, the international criminal courts have often found themselves trying to balance this interest with the rights of the accused. However, fair trial rights are already designed with this balance in mind. Under human rights law, the rights of accused persons form minimum guarantees that must be respected. The needs of the authorities, including the use of coercive measures or withholding of information for the protection of important interests, are already provided for in the very definition of those rights.

International human rights law does not only require respect for a number of specific guarantees; it is also necessary to look at the entire proceedings and determine whether, as a whole, the trial can be considered to have been fair.

Notwithstanding a clear ambition to maintain the highest human rights standards, this study has shown how the international criminal courts often fall short of providing full protection of specific rights of the

accused. The most obvious example of this is perhaps the extraordinary length of international criminal trials. Even after due consideration for the specific conditions for international criminal justice, many of the trials still suffer from unnecessary or unexplained delays and/or periods of inactivity. A look at the SCSL has revealed several examples where an action by the Court had a direct negative impact on the length of the proceedings.⁴⁸⁹ There are also less direct ways in which the actions of the Trial Chamber may have prolonged the proceedings.⁴⁹⁰

The right to a trial within a reasonable time is doubly vulnerable in international criminal law, as violations of other rights of the accused often end up prolonging the trial as a negative side effect. For example, the initial failure of the SCSL to protect the presumption of innocence in Outreach events has slowed down the preparation of defence cases, as work to identify potential witnesses has been made more difficult.

The right to adequate time and facilities has a direct impact on the length of trials insofar as it prevents the courts from rushing the proceedings at the expense of the accused's ability to prepare and present a defence. Furthermore, whenever the necessary facilities have not been provided in time, or are unavailable, additional time is often used as a means of compensating the accused for any differences this may have incurred. The result is longer trials.

Prompt provision of substantial resources directly impacts on the length of the trial. This is illustrated by the RUF trial before the SCSL where the Sesay Defence Team was only granted necessary resources in January 2007, the same month they were scheduled to start the presentation of their case.⁴⁹¹ This, in turn, forced an adjournment of the proceedings to give the defence adequate time for the preparations. Although this may have been an appropriate remedy for the initial lack of resources, it is still detrimental to the accused as it prolonged the trial by several months.

⁴⁸⁹ For example the long time required by the Chambers decide on party motions, failure to plan ahead in scheduling decisions.

⁴⁹⁰ For example the lack of efficiency in prosecution investigations has caused the prosecution case to expand as the trials progress.

⁴⁹¹ Logistical Resources Decision, *supra* note 210.

The most fundamental facility for the accused is being entitled to know the exact nature of the charges, primarily upheld in the requirement that charges be articulated in detail in the indictment. However, examples taken from the SCSL illustrate how that court has allowed very vague indictments, only referring in general terms to all forms of responsibility. This lack of clarity as to the exact scope of the trial has incurred further delays in the proceedings. Furthermore, this encourages very wide defence cases covering all possible allegations, which in turn prolongs the trial.

The effect of vague indictments on the length of the trial has been further increased by the poor quality of initial prosecution investigations. At worst, this could force the prosecution to re-investigate entire cases shortly prior to trial.⁴⁹² Besides taking a toll on efficiency, this has also served as an incitement to make use of the vagueness in the indictment to introduce new allegations that may not have been originally intended by the indictments.⁴⁹³

Notwithstanding clear human rights provisions to the contrary, it has been the general rule in international criminal justice to keep the accused in detention throughout the length of the proceedings. This in turn raises further human rights concerns, as the length of international trials means the accused often has to spend a considerable amount of time in detention pending trial. This could be construed as anticipating a conviction, which would amount to a violation of the right to be presumed innocent.⁴⁹⁴

The independence of the international judges enjoys relatively weak protection and there is a risk that this might undermine the trust of the accused in the fairness of the proceedings. This risk is further enhanced by the practice of requiring a higher threshold for the disqualification of international judges. For a tribunal to be considered impartial, judges are required to maintain an appearance of impartiality. Yet in practice, the courts tend to reject motions for withdrawal of judges with reference to the lack of evidence of *actual* influence on a judge from previous affiliations.

⁴⁹² See e.g., the situation in the CDF Trial, *supra* p. 122; Berkeley OTP Report, *supra* note 127, p. 44.

⁴⁹³ *Ibid.* p. 46; Cassese Report, *supra* note 492, para. 72.

⁴⁹⁴ *Supra* pp. 25, 41.

They have done so, apparently without acknowledging that such an affiliation might nonetheless affect the *impression* of impartiality, as can be seen in the SCSL Appeal Chamber's handling of the recusal motion of Justice Thompson. Despite the Trial Chambers' conclusion that there was an indicia of bias, in rejecting the motion the Appeal Chamber did not offer any explanation how no reasonable observer would be able to apprehend the same indicia of bias as the Trial Chamber.⁴⁹⁵

Finally, the courts are dependant on access to sufficient financial resources to be able to function. Although the total cost of the SCSL has indeed been by far the lowest of the three international courts, a closer look reveals that attempts to reduce costs have not always had the desired effects.

Besides contributing considerably to the overall costs by increasing the courts lifespan, the combined result of these factors has had a general negative impact on the rights of the accused.

Based on the findings in this paper a number of can be drawn that might merit consideration at future international criminal courts. The adoption of these suggestions is likely to reduce the length of trials and, as a direct consequence, the overall costs of international courts.

- Analysis of the long-term effects on spending as balanced against short-term benefits should routinely be made in all budgetary decisions.
- As such, initial budget should contemplate the need of robust institutions able to function efficiently. Decisions on the initial number of judges should contemplate the risk of unnecessary delays due to understaffing.
- A Defence Office should be established at the earliest opportunity and be equipped to protect defence interests following initial arrests.
- The prosecution should be guided by written standard operations procedures and all prosecution staff should undergo relevant training. Prosecution operations ought to be subject to the scrutiny of external oversight mechanisms.

⁴⁹⁵ Thompson Recusal Decision, *supra* note 92; Thompson Recusal Appeal *supra* note 334.

- Thorough background checks of judges should be carried out prior to their appointment to secure independence and minimise the risk of bias.
- Judges need to be supported by sufficient legal staff and office supplies to speedier decisions and more consistent case law.
- Tenure of judges ought to be substantially increased and the possibility of re-election removed to strengthen judicial independence.
- The system for adoption of RPE ought to be reformed in order to enhance predictability and to further shield the judges from outside pressure by removing them from the process.
- To avoid ever expanding cases, the strictest possible rules should be applied to the form of indictments and to the introduction of new allegations and additional evidence after the start of the trial.
- Great care should be taken in scheduling to avoid unnecessary delays at key points of the proceedings.
- The Defence should be provided with adequate facilities at the earliest possible opportunity to avoid unnecessary delays in the preparation of the defence case. Disagreement on defence resources should be brought before a trial chamber for settlement as soon as possible to avoid delays.
- The use of detention ought to be limited to instances where the prosecution can prove it is strictly necessary.
- Rules of procedural sanctions should be adopted to ensure clarity in the process and to encourage the parties to adhere to the RPE.

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